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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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In Re:  
ERIC MWANGI and PAULINE  
MWICHARO,

Debtors.

ERIC MWANGI and PAULINE  
MWICHARO,

Plaintiffs,

v.

WELLS FARGO BANK, N.A.,

Defendant.

2:11-CV-01753-PMP-GWF

BK-S-09-24057-BAM  
Adv. No. 11-1022

OPINION

Presently before the Court is Appellants Eric Mwangi and Pauline Mwacharo’s appeal of the bankruptcy court’s order dismissing with prejudice their adversary proceeding against Appellant Wells Fargo Bank, N.A.

**I. BACKGROUND**

The following factual background is derived largely from the statement of facts as recited by the United States Bankruptcy Appellate Panel of the Ninth Circuit (“BAP”) in In re Mwangi, 432 B.R. 812 (9th Cir. BAP 2010). On August 3, 2009, Appellants Eric Mwangi and Pauline Mwacharo filed a voluntary chapter 7 petition. At that time, Appellants held four accounts at Appellee Wells Fargo Bank, N.A. (“Wells Fargo”) with an aggregate balance of \$17,075.06. Appellants’ original Schedule B did not list two of the four accounts, and Appellants’ original Schedule C did not claim an exemption for any of

1 the funds on deposit in the accounts. Appellants listed Wells Fargo as an unsecured creditor  
2 for two debts totaling \$52,000.

3           When Wells Fargo learned of Appellants' bankruptcy filing, Wells Fargo placed  
4 a "temporary administrative pledge" on all four of Appellants' accounts. Wells Fargo  
5 placed the hold on the accounts pursuant to an internal standard procedure. Wells Fargo  
6 expressly disclaimed that it placed the hold on the accounts to protect any setoff rights it  
7 may have as an unsecured creditor.

8           After placing the hold on Appellants' accounts, Wells Fargo sent a letter dated  
9 August 6, 2009, to the chapter 7 trustee requesting instructions as to whom Wells Fargo  
10 should distribute the account funds. In the letter to the trustee, Wells Fargo stated that upon  
11 the filing of the bankruptcy petition, the account funds became property of the estate and  
12 thus were payable only to the trustee or upon the trustee's order. Wells Fargo informed the  
13 trustee that Wells Fargo would maintain a hold on the funds until it received direction from  
14 the trustee regarding the funds' disposition or until October 12, 2009, which was thirty-one  
15 days after the scheduled first meeting of creditors.

16           That same date, Wells Fargo sent letters to Appellants' counsel advising that the  
17 accounts no longer were available to Appellants because the funds were property of the  
18 estate and that Wells Fargo had an obligation to preserve estate property and to follow the  
19 trustee's directions with respect to estate property. The letters stated Wells Fargo had  
20 requested instruction from the trustee and suggested Appellants potentially could expedite  
21 matters by contacting the trustee.

22           On August 11, 2009, Appellants filed an amended Schedule B in which they  
23 included all four accounts at Wells Fargo. Appellants also filed an amended Schedule C in  
24 which they claimed an exemption in seventy-five percent of the value of each of the Wells  
25 Fargo accounts, relying on Nevada Revised Statutes § 21.090(1)(g), which provides an  
26 exemption for seventy-five percent of the debtor's disposable earnings. Neither the trustee

1 nor any other party, including Wells Fargo, ever objected to Appellants' claimed  
2 exemptions in the accounts. On August 18, 2009, Appellants' counsel contacted Wells  
3 Fargo to request that the hold be lifted because Appellants claimed an exemption in a  
4 portion of the funds. Wells Fargo refused absent the trustee's agreement.

5 On August 27, 2009, Appellants filed a motion in the bankruptcy court seeking  
6 sanctions pursuant to 11 U.S.C. § 362(k) against Wells Fargo based upon Wells Fargo's  
7 alleged intentional violation of the automatic stay provisions in §§ 362(a)(3) and (a)(6).  
8 The bankruptcy court denied this motion, concluding that exempt property never becomes  
9 property of the bankruptcy estate, and Wells Fargo thus could not have violated the stay  
10 because the stay applies only to property of the estate. The bankruptcy court also concluded  
11 that Wells Fargo did not violate the stay because it took no action to collect, assess, or  
12 recover a prepetition claim it had against Appellants.

13 Appellants appealed to the BAP and the BAP reversed. In re Mwangi, 432 B.R.  
14 at 816. First, the BAP rejected Wells Fargo's argument that Wells Fargo's administrative  
15 hold policy is authorized by the Supreme Court's decision in Citizens Bank of Maryland v.  
16 Strumpf, 516 U.S. 16 (1995). 432 B.R. at 819. Second, the BAP concluded that property  
17 remains property of the estate even if the debtor claims an exemption and even if no one  
18 objects to the exemption. Id. at 821. However, the BAP concluded that a debtor who  
19 claims an exemption has "an inchoate interest in the property." Id. The BAP thus rejected  
20 the bankruptcy court's conclusion that Wells Fargo could not violate the automatic stay  
21 with respect to the exempt funds. Id.

22 Next, the BAP rejected Wells Fargo's argument that by placing a hold on the  
23 funds and requesting instructions from the trustee, Wells Fargo complied with its obligation  
24 to turn over property of the estate to the trustee. Id. at 821-22. The BAP also rejected  
25 Wells Fargo's argument that because the accounts belonged to the trustee, Appellants could  
26 not compel Wells Fargo to turn over the funds to Appellants. Id. at 822. On this point, the

1 BAP stated that:

2 the failure to return property of the estate with knowledge of the  
3 bankruptcy is a violation of both the automatic stay and of the turnover  
4 requirements of the Bankruptcy Code. For that reason, we believe it is  
5 irrelevant whether Wells Fargo’s national policy of holding the account  
6 funds until requested by the trustee to release them might have been in  
7 technical compliance with § 542(b), an issue which we do not decide.

8 Id. at 822 (internal citation and quotation marks omitted). The BAP reasoned that because  
9 any individual harmed by a willful violation of the automatic stay may recover actual  
10 damages, and because Appellants had an inchoate interest in property of the estate,  
11 Appellants “had standing to pursue sanctions for a stay violation.” Id. at 822-23.

12 Next, the BAP concluded that Wells Fargo exercised control over estate property  
13 because it “chose to hold the funds until a demand was made for payment that it alone  
14 deemed appropriate.” Id. at 823-24. According to the BAP, Appellants did not need to  
15 “seek a determination from the bankruptcy court that they were eligible for the protection of  
16 the automatic stay, that the trustee had abandoned the account funds to them, or that their  
17 claim of exemption in a portion of the account funds was valid.” Id. at 824. The BAP  
18 concluded that Wells Fargo’s policy improperly and in contravention of controlling legal  
19 authority placed the burden on Appellants to obtain the return of property of the estate in  
20 which they claimed an exemption. The BAP stated the following:

21 “[I]f persons who could make no substantial adverse claim to a  
22 debtor’s property in their possession could, without cost to themselves,  
23 compel the debtor or his trustee to bring suit as a prerequisite to  
24 returning the property, the powers of a bankruptcy court and its  
25 officers to collect the estate for the benefit of creditors would be vastly  
26 reduced.” . . .

The impact of Wells Fargo’s national policy is to turn on its  
head the balance between rights of parties legislatively created. As a  
result of the policy, every party, except Wells Fargo, whose rights are  
impacted by the administrative freeze will need to take action.

25 Id. at 824 (quoting In re Del Mission Ltd., 98 F.3d 1147, 1151 (9th Cir. 1996)). Finally, the  
26 BAP remanded to the bankruptcy court for a determination of whether Wells Fargo

1 willfully violated the stay, and if so, what, if any, damages to award Appellants.<sup>1</sup> Id. at 824-  
2 25.

3           Upon remand, Appellants filed an adversary class action against Wells Fargo.  
4 (ER 1.) The bankruptcy court granted Wells Fargo’s motion to dismiss, with leave to  
5 amend. (ER 7-24, 45-48.) Appellants filed an amended adversary class action complaint  
6 alleging Wells Fargo violated the automatic stay in 11 U.S.C. § 362(a)(3), which Wells  
7 Fargo again moved to dismiss. (ER 49-59, 102-121.) This time, the bankruptcy court  
8 dismissed the adversary action with prejudice. (ER 196-206, 207-14.)

9           The bankruptcy court concluded that Appellants had no standing to pursue any  
10 alleged stay violation with respect to the account funds because only the trustee has  
11 standing to protect estate property. (ER 197.) The bankruptcy court further concluded that  
12 Appellants could not allege an injury to any inchoate rights they had in the account funds  
13 because Appellants had no basis to demand possession of the account funds from Wells  
14 Fargo absent the trustee’s agreement or approval unless and until the funds revested in  
15 Appellants. (ER 198-99.) Because Appellants did not seek a court order confirming the  
16 funds revested nor moved to compel the trustee to abandon the funds in the accounts, the  
17 funds remained property of the estate to which Appellants had no right to possess superior  
18 to that of the trustee. (ER 212.) In short, because Appellants had no right to possess the  
19 account funds, Appellants could not allege an injury caused by Wells Fargo’s refusal to  
20 release the funds to Appellants. (ER 212-14.) The bankruptcy court therefore dismissed  
21 the adversary complaint with prejudice. (ER 214.)

22           Appellants now appeal. Appellants contend the bankruptcy court erred because it  
23 failed to acknowledge that Wells Fargo’s conduct violated both the turnover provision,  
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25           <sup>1</sup> While the present appeal was pending, the bankruptcy court denied Appellants’ motion for  
26 sanctions. (Request for Judicial Notice (Doc. #15).) Appellants have appealed that decision.  
(Response to Request for Judicial Notice (Doc. #16).)

1 which the trustee may enforce, and the automatic stay, which Appellants may enforce.  
2 Appellants contend that while the trustee has greater rights than Appellants to compel Wells  
3 Fargo to turn over the funds, Appellants have greater than, or at least equal rights as, the  
4 trustee to pursue Wells Fargo for violating the automatic stay. Appellants also contend the  
5 bankruptcy court's decision is contrary to controlling legal authority which places the  
6 burden on third party possessors to turn over property to the estate, not on the trustee or the  
7 debtor to pursue those assets. Alternatively, Appellants argue that even if the trustee's  
8 rights are superior, Appellants have standing to assert the trustee's rights. Moreover,  
9 Appellants assert that even if the bankruptcy court's decision is correct at the outset of the  
10 bankruptcy, once thirty days passed from the first meeting of creditors and no objections to  
11 the exemptions were filed, the funds revested in Appellants and they, not the trustee,  
12 therefore had the right to possess the funds. Finally, Appellants contend that even if they  
13 cannot pursue a claim under § 362(k), they may pursue damages under 11 U.S.C. § 105(a).

14 Wells Fargo responds that because Appellants had no right to possess the funds,  
15 they suffered no injury from Wells Fargo's hold on the funds. Wells Fargo argues that  
16 where a debtor claims an exemption in a particular dollar amount, the actual asset remains  
17 property of the estate and the debtor has only a guarantee of payment in the dollar amount  
18 of the claimed exemption. Wells Fargo contends this is particularly the case where the  
19 exemption relates to a deposit account at a bank because a bank account is not a tangible  
20 asset, it is the bank's promise to pay the party authorized to receive the benefit of the  
21 promise. According to Wells Fargo, because Appellants did not take any action to get  
22 either the trustee or the bankruptcy court to order the funds be distributed to Appellants, the  
23 trustee retained control of the estate property and Appellants had no right to possess the  
24 funds. Wells Fargo contends that if it had complied with Appellants' demands, it would  
25 have violated its obligation to turn over all estate property to the trustee. Wells Fargo  
26 further contends that while a party sometimes may pursue another party's rights, in the

1 bankruptcy context, the debtor does not have standing to bring claims belonging to the  
2 trustee. Alternatively, Wells Fargo argues it complied with the turnover provisions and thus  
3 did not violate the automatic stay as a matter of law.

## 4 **II. STANDARD OF REVIEW**

5 The Court reviews de novo the Bankruptcy Court's conclusions of law,  
6 "including its interpretation of the Bankruptcy Code." In re Rains, 428 F.3d 893, 900 (9th  
7 Cir. 2005). The Court reviews de novo whether a complaint fails to state a claim.  
8 Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1030 (9th Cir. 2008).  
9 Whether property is property of the estate is a question of law the Court reviews de novo.  
10 White v. Brown (In re White), 389 B.R. 693, 698 (9th Cir. BAP 2008). The Court also  
11 reviews de novo whether the automatic stay has been violated. In re Del Mission Ltd., 98  
12 F.3d at 1150. The Court may affirm the bankruptcy court's decision "on any ground fairly  
13 supported by the record." In re Warren, 568 F.3d 1113, 1116 (9th Cir. 2009).

14 This Court is not bound by the BAP's decision. In re Silverman, 616 F.3d 1001,  
15 1005 (9th Cir. 2010). However, the BAP's decision constitutes "persuasive authority given  
16 its special expertise in bankruptcy issues and to promote uniformity of bankruptcy law  
17 throughout the Ninth Circuit." Id. at 1005 n.1.

## 18 **III. DISCUSSION**

19 In considering a motion to dismiss, "all well-pleaded allegations of material fact  
20 are taken as true and construed in a light most favorable to the non-moving party." Wylor  
21 Summit P'ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998). However,  
22 the Court does not necessarily assume the truth of legal conclusions merely because they are  
23 cast in the form of factual allegations in the plaintiff's complaint. See Clegg v. Cult  
24 Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994). There is a strong presumption  
25 against dismissing an action for failure to state a claim. Ileto v. Glock Inc., 349 F.3d 1191,  
26 1200 (9th Cir. 2003). A plaintiff must make sufficient factual allegations to establish a

1 plausible entitlement to relief. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).

2 Such allegations must amount to “more than labels and conclusions, [or] a formulaic  
3 recitation of the elements of a cause of action.” Id. at 555.

4 The filing of a bankruptcy petition creates an estate, and the bankruptcy trustee is  
5 required to marshal all of the estate’s property for the estate’s benefit. 11 U.S.C. §§ 541(a),  
6 704. Property of the bankruptcy estate includes “all legal or equitable interests of the debtor  
7 in property as of the commencement of the case.” Id. § 541(a)(1). The trustee becomes the  
8 representative of the estate, and the debtor has an obligation to surrender all property to the  
9 trustee. Id. §§ 323, 521(a)(4).

10 Upon filing for bankruptcy, the debtor immediately obtains the protection of an  
11 automatic stay pursuant to § 362(a). Section 362(a)’s automatic stay is aimed at preserving  
12 the status quo “by precluding and nullifying post-petition actions, judicial or nonjudicial, in  
13 nonbankruptcy fora against the debtor or affecting the property of the estate.” In re  
14 Chugach Forest Products, Inc., 23 F.3d 241, 243 (9th Cir. 1994) (quotation omitted). “The  
15 stay protects the debtor by allowing it breathing space and also protects creditors as a class  
16 from the possibility that one creditor will obtain payment on its claims to the detriment of  
17 all others.” Id. (quotation omitted). For example, § 362(a)(3) imposes an automatic stay on  
18 “any act to obtain possession of property of the estate or of property from the estate or to  
19 exercise control over property of the estate.” Pursuant to § 362(k), “an individual injured  
20 by any willful violation of a stay provided by this section shall recover actual damages,  
21 including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive  
22 damages.”

23 In addition to the breathing space provided by the automatic stay provision, the  
24 trustee’s effort at gathering property of the estate is aided by the turnover provisions in  
25 § 542. Specifically as relevant to this case, § 542(b) provides that “an entity that owes a  
26 debt that is property of the estate and that is matured, payable on demand, or payable on



1 order, shall pay such debt to, or on the order of, the trustee, except to the extent that such  
2 debt may be offset under section 553 of this title against a claim against the debtor.”

3 Although the debtor is required to turn over all property to the trustee, the debtor  
4 may claim some estate property as exempt from distribution to creditors. 11 U.S.C. § 522.  
5 To do so, the debtor must file a list of property that the debtor claims is exempt. Id.  
6 § 522(l). Creditors and the trustee must object to any claimed exemption within thirty days  
7 of the first meeting of creditors. Otherwise, the property claimed to be exempt “is exempt,”  
8 even if the debtor had no colorable basis for claiming the exemption or the claimed  
9 exemption exceeds what the relevant provision permits. Fed. R. Bankr. P. 4003; see also 11  
10 U.S.C. § 522(l); Schwab v. Reilly, 130 S. Ct. 2652, 2658 (2010); Taylor v. Freeland &  
11 Kronz, 503 U.S. 638, 643-44 (1992).

12 The estate does not relinquish property until it is administered in the bankruptcy  
13 proceeding, the bankruptcy case is closed, or the estate abandons the property under 11  
14 U.S.C. § 554. In re Gebhart, 621 F.3d 1206, 1212 (9th Cir. 2010); In re McLain, 516 F.3d  
15 301, 315 (5th Cir. 2008) (“[P]roperty that is entitled to be exempted is initially regarded as  
16 estate property until it is claimed and distributed as exempt.” (quotation omitted)).  
17 However, the statute does not unambiguously set forth when exempt property passes out of  
18 the estate and becomes the debtor’s separate property. There are several possibilities,  
19 including upon the filing of the claim for exemption, upon the passage of thirty days after  
20 the first meeting of creditors if no objection is filed, upon resolution of any objection if one  
21 is filed, upon the trustee’s abandonment of property under § 554, upon court order that the  
22 claimed property is the debtor’s property, upon discharge, or upon the closing of the  
23 bankruptcy case.

24 The Court rejects the proposition that a debtor’s mere claim of an exemption  
25 removes that property from the estate. Under § 522(l), the debtor files a list of property the  
26 debtor “claims as exempt,” and “[u]nless a party in interest objects, the property claimed as

1 exempt on such list is exempt.” Consequently, the debtor only “claims” an exemption and  
2 other interested parties are given an opportunity to object. This is reflected in Federal Rule  
3 of Bankruptcy Procedure 4003(b)(1), which provides that an interested party must file an  
4 objection within thirty days after the first meeting of creditors, or thirty days after the debtor  
5 files an amended list of claimed exemptions, whichever is later. If an interested party  
6 objects, the bankruptcy court “shall determine the issues presented by the objections.” Fed.  
7 R. Bankr. P. 4003(c). However, if no one objects, under § 522(l) the property “is exempt.”  
8 Based on this statutory language and Rule 4003, the Court concludes that if no one timely  
9 objects to a debtor’s claimed exemption, then the property is exempt from property of the  
10 estate and passes to the debtor upon expiration of the time to object.

11 This construction prevents confusion and potential unwarranted liability on the  
12 part of third party possessors of estate property. A third party possessor of estate property  
13 would face the untenable position of deciding whether (1) to comply with the turnover  
14 obligations in § 542 and face potential liability to the debtor claiming an exemption if it  
15 turns out the property is exempt, or (2) accede to the debtor’s demands to control the  
16 property and face liability to the trustee for violating its turnover obligation if any objection  
17 to the claimed exemption is upheld. Once the debtor’s right to the exemption is established,  
18 this tension between potential competing claims to ownership no longer exists.

19 However, where the statute permitting the debtor to claim a particular exemption  
20 does not allow the debtor to exempt the entire property interest, but instead permits  
21 exemption of an interest in the property up to a particular dollar amount, “what is removed  
22 from the estate is an ‘interest’ in the property equal to the value of the exemption claimed at  
23 filing.” In re Gebhart, 621 F.3d at 1210. In such cases, the underlying asset remains  
24 property of the estate, and the estate does not relinquish the property until it is administered  
25 in the bankruptcy, the trustee abandons the property, or the bankruptcy case is closed. Id. at  
26 1210, 1212; Schwab, 130 S. Ct. at 2667 (“Where a debtor intends to exempt nothing more

1 than an interest worth a specified dollar amount in an asset that is not subject to an  
2 unlimited or in-kind exemption under the Code . . . [and] an interested party does not object  
3 to the claimed interest by the time the Rule 4003 period expires, title to the asset will remain  
4 with the estate pursuant to § 541, and the debtor will be guaranteed a payment in the dollar  
5 amount of the exemption.”).

6 Here, even assuming Appellants had an inchoate right to the account funds as the  
7 BAP held, Appellants cannot allege a plausible injury from Wells Fargo’s hold on the funds  
8 between the date Appellants filed the amended Schedule C and thirty days following the  
9 first meeting of creditors. Appellants had no right to possess the funds, as the funds were  
10 property of the estate during this period and thus subject to the trustee’s sole control.  
11 Because Appellants had no right to possess the funds, Appellants could not be injured by  
12 Wells Fargo’s refusal to turn the funds over to Appellants. Moreover, Appellants have no  
13 standing to pursue the trustee’s turnover rights under § 542 during this, or any other, period  
14 of time because the “bankruptcy code endows the bankruptcy trustee with the exclusive  
15 right to sue on behalf of the estate.” Estate of Spirtos v. One San Bernardino Cnty. Superior  
16 Ct. Case Numbered SPR 02211, 443 F.3d 1172, 1176 (9th Cir. 2006); see also In re Eisen,  
17 31 F.3d 1447, 1451 n.2 (9th Cir. 1994).

18 Appellants also cannot state a plausible entitlement to relief under 11 U.S.C.  
19 § 362(k) for a violation of § 362(a)(3) after thirty days following the first meeting of  
20 creditors because at that point, the property Appellants claimed as exempt passed out of the  
21 estate and became Appellants’ separate property. Section 362(k) provides a cause of action  
22 for an individual injured by a willful violation of the automatic stay, and the automatic stay  
23 in § 362(a)(3) applies only to property of the estate. Because the exempt property reverted  
24 in Appellants, it no longer was property of the estate subject to the automatic stay. See 11  
25 U.S.C. § 362(c); In re Kretzer, 48 B.R. 585, 587-88 (Bankr. D. Nev. 1985) (holding  
26 repossession of a truck did not violate the automatic stay because the truck was no longer

1 estate property where debtors claimed it as exempt, no party in interest objected, and truck  
2 therefore reverted in the debtors).

3           Although Wells Fargo contends the bank accounts remained in the estate and  
4 Appellants had a claim only to an interest in the accounts, the Court disagrees. Schwab and  
5 Gebhart analyzed exemptions which, by their plain terms, allowed the debtor to claim only  
6 an “interest” in property. Schwab, 130 S. Ct. at 2657, 2662-63 (debtor claimed an  
7 exemption under § 522(d)(6) for an “aggregate interest, not to exceed” a certain dollar  
8 amount in value of business equipment); Gebhart, 621 F.3d at 1208, 1210 (one debtor  
9 claimed the exemption pursuant to an Arizona statute allowing a homestead exemption for  
10 “[t]he person’s interest in real property” not to exceed \$100,000 and the other claimed a  
11 similar exemption under § 522(d)(1) for “[t]he debtor’s aggregate interest, not to exceed  
12 [\$36,900] in value, in real property”).

13           In contrast, Appellants here claimed an exemption under Nevada Revised  
14 Statutes § 21.090,<sup>2</sup> which provides:

15           The following property is exempt from execution, except as otherwise  
16 specifically provided in this section or required by federal law:

16           . . .

17                   (g) For any workweek, 75 percent of the disposable  
18 earnings of a judgment debtor during that week, or 50  
19 times the minimum hourly wage prescribed by section  
20 6(a)(1) of the federal Fair Labor Standards Act of 1938,  
21 29 U.S.C. § 206(a)(1), and in effect at the time the  
22 earnings are payable, whichever is greater. . . . As used  
23 in this paragraph:

20                           (1) “Disposable earnings” means that part  
21 of the earnings of a judgment debtor  
22 remaining after the deduction from those  
23 earnings of any amounts required by law to  
24 be withheld.

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24           <sup>2</sup> Section 522(b) “provides three alternatives for defining exempt property: (1) the federal  
25 ‘laundry list’ of exempt property that is contained in subsection (d); (2) the federal list as expressly  
26 modified by State law; or (3) the list of exemptions as defined by the State without reference to the  
federal list.” In re Breen, 123 B.R. 357, 359 (9th Cir. BAP 1991). Nevada has defined its own  
exemptions without reference to the federal exemptions. Nev. Rev. Stat. §§ 21.090(1), 21.090(3).

1 (2) “Earnings” means compensation paid  
2 or payable for personal services performed  
3 by a judgment debtor in the regular course  
4 of business, including, without limitation,  
5 compensation designated as income,  
6 wages, tips, a salary, a commission or a  
7 bonus. The term includes compensation  
8 received by a judgment debtor that is in the  
9 possession of the judgment debtor,  
10 compensation held in accounts maintained  
11 in a bank or any other financial institution  
12 or, in the case of a receivable,  
13 compensation that is due the judgment  
14 debtor.

15 Nev. Rev. Stat. § 21.090(1)(g). The particular Nevada exemption at issue here does not  
16 define the exempt property as an “interest” in disposable earnings up to a certain dollar  
17 amount. Rather, the exemption provides that seventy-five percent of the disposable  
18 earnings are exempt. Appellants claimed those earnings as exempt and no one timely  
19 objected. At that point, seventy-five percent of the compensation maintained in the bank  
20 accounts passed out of the estate to Appellants. Appellants therefore cannot state a claim  
21 under § 362(k) for a violation of the automatic stay under § 362(a)(3) for Wells Fargo  
22 exercising control over something that no longer was estate property.

23 Even if the Court is incorrect and Schwab and Gebhart control, Appellants cannot  
24 state a plausible injury. If Appellants had an interest in estate property, they had no right to  
25 possess or control the actual assets in the estate until their interest was administered and  
26 distributed to them in some fashion, either through the trustee’s agreement, abandonment,  
order of the court, or the closing of the case. Appellants do not allege any of these things  
occurred which would have entitled them to an enforceable right to the funds such that  
Wells Fargo violated the automatic stay. Appellants had no immediate right to possess the  
funds or access the accounts absent the trustee’s agreement and Appellants thus could not  
have been injured by Wells Fargo’s hold on the funds, as discussed above.

///

1 Finally, even if the Court is incorrect about all of its above conclusions, the Court  
2 may affirm the bankruptcy court on any basis supported by the record. Even if Appellants  
3 could allege a plausible injury, Wells Fargo did not violate the automatic stay under  
4 § 362(a)(3) as a matter of law. A bank does not exercise control over property of the estate  
5 within the meaning of § 362(a)(3) when it refuses or fails to perform on its contractual  
6 obligation to pay the owner of the account.<sup>3</sup> Strumpf, 516 U.S. at 21. The contention that a  
7 bank exercises control over estate property--

8 might be arguable if a bank account consisted of money belonging to  
9 the depositor and held by the bank. In fact, however, it consists of  
10 nothing more or less than a promise to pay, from the bank to the  
11 depositor, and [the bank's] temporary refusal to pay was neither a  
12 taking of possession of [the debtor's] property nor an exercising of  
13 control over it, but merely a refusal to perform its promise.

14 Id. (internal citations omitted).<sup>4</sup> Wells Fargo therefore did not violate § 363(a)(3) by  
15 refusing to perform on its promise.

16 For all of the reasons expressed above, Appellants also cannot state a plausible  
17 entitlement to relief under 11 U.S.C. § 105(a). Pursuant to § 105(a), the bankruptcy court  
18 “may issue any order, process, or judgment that is necessary or appropriate to carry out the  
19 provisions of this title.” Because Appellants cannot allege an injury, or, alternatively,

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20 <sup>3</sup> The Court expresses no opinion on whether Wells Fargo violated its turnover obligations  
21 under § 542(b).

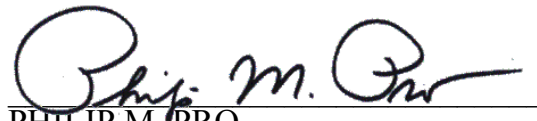
22 <sup>4</sup> See also Bank of Marin v. England, 385 U.S. 99, 101 (1966) (“The relationship of bank and  
23 depositor is that of debtor and creditor, founded upon contract.”); In re Bakersfield Westar Ambulance,  
24 Inc., 123 F.3d 1243, 1246 (9th Cir. 1997) (“By depositing money into a bank account, the depositor  
25 enters a debtor-creditor relationship with the bank. Title to the funds passes to the bank, and the  
26 depositor receives a contract claim against the bank for an amount equal to the account balance.”  
(internal citation omitted)); In re Bernard, 96 F.3d 1279, 1282 (9th Cir. 1996) (“As between the bank  
and the depositor such money becomes the property of the bank and the bank becomes the debtor of  
the depositor for the amount deposited.” (quotation omitted)); In re Randolph Towers Coop., Inc., 458  
B.R. 1, 3 (Bankr. D. Col. 2011) (“If a party to a contract with a debtor refuses to perform the contract  
because the debtor is in bankruptcy, that may be a breach of contract but it is not an exercise of control  
over property of the estate.”).

1 because Wells Fargo did not violate any provision of the bankruptcy code for which  
2 Appellants have standing to sue, Appellants also cannot state a claim under § 105(a).

3 **IV. CONCLUSION**

4 Appellants either cannot allege an injury or cannot allege Wells Fargo violated  
5 the automatic stay in 11 U.S.C. § 362(a)(3). The decision of the bankruptcy court  
6 dismissing their adversary action with prejudice is therefore AFFIRMED.

7  
8 DATED: April 6, 2012

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10 PHILIP M. PRO  
11 United States District Judge  
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