



1 From the onset of the case, Norton recognized that California  
2 law did not permit a wrongful termination claim to be asserted  
3 against someone other than the employer: i.e., Diamond. See Phillips  
4 v. Gemini Moving Specialists, 63 Cal. App. 4<sup>th</sup> 563, 575-576 (1998).  
5 However, Norton postponed moving to dismiss the Debtor from the  
6 action, purportedly intending to do so at the time of trial so as to  
7 avoid the expense of a separate motion. Trial was scheduled for June  
8 10, 2000.

9 A few months prior to the scheduled trial date, the Debtor  
10 informed Norton that Diamond had ceased operations and that he was  
11 considering filing bankruptcy for both himself and Diamond. However,  
12 the Debtor did not file for bankruptcy at this time. The Debtor and  
13 Norton had no further communications until shortly before the trial  
14 date. In the mean time, Norton left the Sullivan firm, a fact that  
15 neither he nor Sullivan disclosed to the Debtor at that time.

16 According to the Debtor,<sup>1</sup> shortly before the scheduled trial,  
17 Norton's associate called the Debtor to confirm that Norton no longer  
18 represented him and Diamond in the wrongful termination action. The  
19 Debtor asserted his contrary understanding. He had a subsequent  
20 conversation with Norton which left him with the impression that  
21 Norton planned to seek a continuance of the trial date. Instead,  
22 without disclosing his intention to do so to the Debtor, Norton filed  
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24 <sup>1</sup>These facts go to the heart of the malpractice action and may  
25 be disputed by the Moving Parties. By reciting the Debtor's  
26 factual allegations in this context, the Court is not purporting to  
determine that these allegations are true. The Court's decisions  
to deny the motion to annul and to reconsider this decision are  
based on the undisputed facts.

1 a motion to withdraw as counsel for the Debtor and Diamond. Norton  
2 served the motion on the Debtor by fax at an obsolete fax number.  
3 The Debtor never received the motion. The state court granted the  
4 motion to withdraw only on the condition that the proof of service be  
5 corrected. This was never done, and Norton and Sullivan continued as  
6 attorneys of record in the state court action.

7 No one appeared on the Debtor's behalf at the June 10, 1999  
8 trial. Jorge did appear, presented evidence, and obtained a judgment  
9 in excess of \$500,000 against both the Debtor and Diamond. The  
10 judgment against the Debtor included for \$50,000 in punitive damages.  
11 Notice of the entry of the judgment was served on Sullivan which did  
12 not forward the document to the Debtor. The Debtor did not learn  
13 about the judgment until October 1999 when he received notice from  
14 the County Recorder's Office that Jorge had recorded an abstract of  
15 judgment.

16 In April 2000, the Debtor filed a chapter 7 bankruptcy petition.  
17 The Debtor scheduled both Jorge and Sullivan as creditors. However,  
18 he did not schedule as an asset a claim for malpractice or breach of  
19 fiduciary duty against Sullivan, Norton, or Asher. Jorge filed a  
20 timely nondischargeability action against the Debtor in the  
21 bankruptcy case and in February of 2001 was granted summary judgment  
22 as a matter of collateral estoppel based on the state court judgment.  
23 The bankruptcy case was closed in April 2001.

24 In the mean time, in June 2000, the Debtor filed a complaint in  
25 state court against the Moving Parties for legal malpractice and  
26 breach of fiduciary duty (the "Debtor's state court action"). He did

1 not inform his bankruptcy trustee (the "Trustee") that he had filed  
2 this action. The Moving Parties knew of Debtor's bankruptcy case but  
3 took no steps to inform the Trustee that the Debtor was prosecuting  
4 these claims until nearly two years later. The Debtor claimed that  
5 the Trustee had authorized him to prosecute the claims. In any  
6 event, the Debtor contended, the claims were postpetition assets and  
7 thus not property of the estate.

8 In February 2002, the Moving Parties filed a motion for summary  
9 judgment on various grounds. The motion was heard on March 26, 2002.  
10 The Moving Parties based their motion in part on the Debtor's lack of  
11 standing to assert the claims due to his bankruptcy filing. Just  
12 prior to the hearing date, the Moving Parties informed the Trustee of  
13 the Debtor's state court action and the pending motion. The Trustee  
14 signed a declaration for the Moving Parties' benefit, stating that he  
15 had not authorized the Debtor to prosecute the action. However, the  
16 Trustee did not seek a stay of the Debtor's state court action nor  
17 did he seek leave to intervene in it. The state court granted the  
18 motion, based in part on the Debtor's lack of standing.<sup>2</sup> The Debtor  
19 filed a timely notice of appeal.

20 Either just after or just before the state court granted the  
21 motion for summary judgment, the Debtor filed a motion to reopen his  
22 bankruptcy case to disclose the legal malpractice claims. However,  
23 in the motion, he continued to contend that the claims were not  
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25 <sup>2</sup>The primary ground for the state court's decision was that  
26 the Debtor's assertion of his attorney-client privilege to avoid  
answering certain questions posed by the Moving Parties prevented  
the Moving Parties from effectively defending the action.

1 property of the estate because they did not arise until after the  
2 chapter 7 petition was filed. On April 24, 2002, just prior to the  
3 running of the statute of limitations on the claims, the Trustee  
4 filed his own complaint asserting claims for legal malpractice and  
5 breach of fiduciary duty against the Moving Parties (the "Trustee's  
6 state court action").

7 On September 11, 2002, the Trustee filed a motion for approval  
8 of a settlement with the Moving Parties. The settlement proposed  
9 that the Moving Parties would pay the Trustee \$35,000 and that the  
10 two state court actions, both the Debtor's and the Trustee's, would  
11 be dismissed with prejudice. Objections were filed to the proposed  
12 settlement by both the Debtor and Jorge, the principal creditor of  
13 the estate. The motion was noticed for hearing on February 6, 2003  
14 and was continued to March 6, 2003 to permit additional briefing.  
15 The Moving Parties filed and noticed for hearing at the same time a  
16 motion to annul the automatic stay, purportedly to validate the  
17 Debtor's state court action.

18 At the conclusion of the hearing on March 6, 2003, the Court  
19 denied the motion to annul the stay. The Court continued the hearing  
20 on the motion to approve the settlement to April 17, 2003 to give the  
21 Trustee time to attempt to find litigation counsel willing to  
22 prosecute the claims against the Moving Parties on a contingent fee  
23 basis. On April 17, 2003, the Trustee informed the Court that he had  
24 found litigation counsel and wished to withdraw the motion to approve  
25 the proposed settlement. On May 5, 2003, the Court signed an order  
26 denying the motion to annul the stay. On May 15, 2003, the Moving

1 Parties filed a timely motion to reconsider the Court's denial of  
2 their motion to annul.

### 3 DISCUSSION

#### 4 A. APPLICABLE LAW

5 The claims for legal malpractice and breach of fiduciary duty  
6 are property of the Debtor's bankruptcy estate. 11 U.S.C. § 541. By  
7 filing and prosecuting his state court action, the Debtor violated  
8 the automatic stay by exercising control over property of the estate.  
9 11 U.S.C. § 362(a)(3). Section 362(d)(1) of the Bankruptcy Code  
10 permits the Court to annul the automatic stay "for cause." 11 U.S.C.  
11 § 362(d)(1). The standards for granting an annulment of the stay  
12 were recently summarized as follows:

13 in deciding whether to grant relief from stay  
14 retroactively, many courts focus on two factors:  
15 "(1) whether the creditor was aware of the  
16 bankruptcy petition; and (2) whether the debtor  
17 engaged in unreasonable or inequitable conduct,  
18 or prejudice would result to the creditor."  
19 However, in addition to considering these two  
20 factors, a court must "balance [] the equities  
21 in order to determine whether retroactive  
22 annulment is justified." Such a determination  
23 necessarily involves a "case by case analysis."

24 Palm v. Klapperman (In re Cady), 266 B.R.  
25 172, 179 (9<sup>th</sup> Cir. BAP 2001), aff'd 315 F.3d 1121  
26 (9<sup>th</sup> Cir. 2003) (internal citations omitted).

27 In re Stinson, \_\_ B.R. \_\_ (Bankr. 9<sup>th</sup> Cir. 2003), 2003 WL 21537066, \*5,

28 Normally, the party seeking annulment of the automatic stay is  
29 a creditor that, either intentionally or more often inadvertently,  
30 violated the stay. Thus, the first two factors cited above do not  
31 fit well into the present scenario. Thus, the Court must balance the  
32 equities based on the totality of circumstances, keeping in mind

1 factors such as the parties' knowledge of the bankruptcy case,  
2 inequitable conduct, and prejudice to the interested parties.

3 A motion for reconsideration may be properly brought only to  
4 present new facts or new law that were not reasonably available to  
5 the moving party at the time the motion was originally briefed and  
6 argued. Additionally, those new facts or law must be sufficient to  
7 cause the court to alter its prior decision. See Garber v. Embry  
8 Riddle Aeronautical Univ., 259 F. Supp. 2d 979, 981 (D. Ariz. 2003),  
9 citing All Hawaii Tours Corp. V. Polynesian Cultural Center, 116  
10 F.R.D. 645, 648-649 (D. Haw. 1987), aff'd in part, rev'd in part on  
11 other grds., 855 F.2d 860 (9<sup>th</sup> Cir. 1988) and In re Agricultural  
12 Research & Tech. Group, Inc., 916 F.2d 528, 542 (9<sup>th</sup> Cir. 1990). A  
13 motion to reconsider should not be used "to ask the court 'to rethink  
14 what the court had already thought through--rightly or wrongly'--or  
15 to reiterate arguments previously raised." Id., citing from In re  
16 Agricultural Research & Tech. Group, Inc., 916 F.2d at 542.

17 **B. MERITS OF MOTION**

18 When the Court denied the motion to annul the stay at the March  
19 6, 2003, it stated its reasons on the record as follows: First, the  
20 Court observed that annulling the stay would be futile because it  
21 would not give the Debtor standing to prosecute the claims against  
22 the Moving Parties. Those claims would still be property of the  
23 bankruptcy estate which only the Trustee has standing to prosecute.  
24 Second, the Court observed that, while the Moving Parties would be  
25 prejudiced by having to defend the Trustee's state court action after  
26 having already litigated the Debtor's state court action, their own

1 inaction had contributed to this prejudice. The Moving Parties knew  
2 of the Debtor's bankruptcy case from the beginning of the Debtor's  
3 state court action and could have advised the Trustee sooner that the  
4 Debtor was prosecuting claims that were property of his bankruptcy  
5 estate. Had they done so, he might well have moved to intervene in  
6 that action.

7       Clearly, the Debtor behaved improperly in failing to schedule  
8 the claims as an asset in his bankruptcy schedules and in prosecuting  
9 them for his own benefit. However, it would be unfair to penalize  
10 the creditors of his estate for the Debtor's misconduct. The Court  
11 recognized the irony that Jorge, who by rights should never have been  
12 able to obtain a judgment against the Debtor, was the Debtor's  
13 largest unsecured creditor and thus would be the primary beneficiary  
14 of any recovery on these claims. However, the Court observed that  
15 the schedules listed \$1.5 million in unsecured claims of which Jorge  
16 represented only approximately one-third.

17       In their motion for reconsideration, the Moving Parties contend  
18 that the Court's denial of their motion to annul is based on errors  
19 of both fact and law. The error of law, according to the Moving  
20 Parties, was that annulment of the stay would be futile. They  
21 contend that the annulment would validate the discovery taken in the  
22 Debtor's lawsuit. Absent an annulment, they contend, the Debtor  
23 would be free to change his testimony, and it might not be possible  
24 to use his prior inconsistent testimony under oath to impeach him.  
25 They cite no authority in support of this proposition. In any event,  
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1 the Trustee has mooted this argument by stipulating that the prior  
2 discovery could be used in the Trustee's state court action.<sup>3</sup>

3 The Moving Parties contend that the Trustee's only options at  
4 this time are to intervene in the Debtor's state court action, to  
5 abandon it to the Debtor, or to consent to its prosecution by the  
6 Debtor on behalf of the estate. In support of this contention, they  
7 cite Detrick v. Panalpina, Inc. 108 F.3d 529, 535-536 (4<sup>th</sup> Cir.  
8 1997).<sup>4</sup> Detrick does contain such a statement. The Detrick court  
9 took this proposition from a leading bankruptcy treatise: 1 Robert  
10 E. Ginsburg & Robert D. Martin, Ginsburg & Martin on Bankruptcy §  
11 12.06[G] (4<sup>th</sup> ed. 1996). However, it took the statement out of  
12 context. The proposition was clearly intended to apply to actions  
13 pending when the bankruptcy is filed (and disclosed on the debtor's  
14 schedules), not those concealed by the debtor and prosecuted unwisely  
15 by the debtor without authorization from the trustee.

16 Moreover, the statement is mere dicta. In Detrick, the trustee  
17 was not seeking to exercise some option other than these three. The  
18 trustee was seeking to intervene in an action brought improperly by  
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21 <sup>3</sup>The Debtor has also agreed to dismiss the appeal in the  
22 Debtor's state court action and to waive his attorney-client  
23 privilege as to the other attorneys with whom he consulted. These  
24 concessions would not justify giving the Debtor a second chance to  
prosecute these claims on his own behalf. However, they do make  
the Trustee's state court action viable and support denial of the  
proposed settlement of those claims for only \$35,000.

25 <sup>4</sup>They also cite Little v. U.S., 41 Fed. Appx. 446, 448 (Fed.  
26 Cir. 2002). Little is an unpublished decision and may not properly  
be cited. In any event, Little merely cites to Detrick; it  
contains no independent analysis.

1 the debtor. The Detrick court overruled an objection to the  
2 trustee's motion and granted leave to intervene. Id.

3 As noted above, the Moving Parties also contend that the Court  
4 based its denial of the motion to annul on an error of fact: i.e.,  
5 that the unsecured claims against the estate total \$1.5 million.  
6 This was the amount of the scheduled claims. However, the claims  
7 filed totaled only approximately \$700,000, of which Jorge's claim  
8 represented approximately five-sevenths, rather than one-third.

9 The fact remains that there are still approximately \$200,000  
10 worth of claims against the estate other than Jorge's judgment claim.  
11 These other creditors would also benefit from a recovery on a  
12 judgment against the Moving Parties. Moreover, even if the Trustee's  
13 state court action against the Moving Parties is successful, given  
14 the existence of these other creditors, the recovery will not be  
15 sufficient to pay all claims in full. Thus, the Debtor will still be  
16 left with a substantial nondischargeable debt to Jorge, to whom,  
17 under law, he should have owed nothing.

18 Granted, Jorge will receive a windfall if this occurs. However,  
19 since the Jorge judgment is a final, nondischargeable judgment, the  
20 enforceability of that judgment cannot be avoided. The only question  
21 at this time is who should bear the burden of paying it. If a court  
22 determines that Jorge's judgment was the result of the Moving  
23 Parties' malpractice or breach of fiduciary duty, it does not seem  
24 unfair to place most of that burden on the Moving Parties.

25 Finally, the Moving Parties contend that the Trustee is to blame  
26 for not stopping the Debtor from prosecuting the state court action

1 in September 2000 or, at the latest, prior to the hearing on the  
2 motion for summary judgment. In support of this contention, the  
3 Moving Parties cite to two declarations which they contend  
4 demonstrate the Trustee's knowledge of the Debtor's state court  
5 action: (1) the Declaration of Jack Mannie Jr. in Support of Response  
6 to Defendants' Reply in Motion for Summary Judgment (filed in the  
7 Debtor's state court action) (the "Debtor's Declaration") and (2) the  
8 Declaration of Lawrence Fallon in Support of Motion for Annulment of  
9 the Automatic Stay (filed in this bankruptcy case) (the "Fallon  
10 Declaration").

11 The Debtor's Declaration states that, on September 6, 2000, the  
12 Debtor sent the Trustee a copy of his fee agreement with his state  
13 court counsel with a question about whether he should deduct his  
14 legal fees from his tax return. The Debtor notes that the fee  
15 agreement describes the state court action. The Debtor states that,  
16 after sending the letter, he received no objection from the Trustee  
17 to his pursuing the litigation. Thus, in his view, he was authorized  
18 to prosecute it.

19 The Debtor attaches copies of the letter to the Trustee and the  
20 fee agreement to his declaration. The first paragraph of the letter  
21 indicates that it is being sent in response to the Trustee's request  
22 for federal and state tax returns. The letter promises to comply  
23 with this request within two weeks. The second paragraph refers "an  
24 Adversary Hearing pertaining to our case taking place on Thursday,  
25 September 21, 2000, for which we have had to retain the services of  
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1 two separate attorneys." The Debtor then asks for tax advice in  
2 connection with his attorneys' fees.

3 The reference to the pending litigation is simply too ambiguous  
4 to have put the Trustee on notice that the Debtor was prosecuting a  
5 claim belonging to the estate. Moreover, the Trustee is not  
6 responsible for giving tax advice to the Debtor and presumably did  
7 not bother to review the fee agreements enclosed for the purpose of  
8 permitting him to give such advice. Even if he had, the agreement  
9 did not clearly identify the subject matter of the litigation as a  
10 prepetition claim.

11 The Fallon Declaration states that, on March 20, 2002, Fallon  
12 wrote to the Trustee: (1) advising him that the Debtor had initiated  
13 a malpractice action against his former counsel, that there was a  
14 hearing on a motion for summary judgment scheduled for March 26,  
15 2002, and a trial scheduled for April 22, 2002, and (2) asking him  
16 whether he had authorized the Debtor to pursue the claim or had  
17 abandoned the claim to the debtor.

18 The Trustee did take action in response to this letter. He  
19 executed a declaration to be filed in the Debtor's state court  
20 action, stating that he had not authorized the Debtor to prosecute  
21 the claims. Presumably, the state court relied on this declaration  
22 in ruling in the Moving Parties' favor that the Debtor lacked  
23 standing to assert the claims. The Trustee had no obligation to do  
24 more. He was certainly not obligated to intervene into a lawsuit  
25 that the Debtor's conduct had already seriously compromised.  
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**CONCLUSION**

The Court concludes that the motion for reconsideration should be denied. No error of law has been established. Although the Court did make an error of fact in finding that the unsecured claims against the estate totaled \$1.5 million, when the claims filed totaled only \$700,000. However, the Court's decision to annul the stay is not altered by this correction of fact. Counsel for the Trustee is directed to submit a proposed form of order in accordance with this decision.

Dated: July 21, 2003

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United States Bankruptcy Judge

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PROOF OF SERVICE

I, the undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Northern District of California at Oakland, hereby certify:

That I, in the performance of my duties as such clerk, served a copy of the foregoing document by depositing it in the regular United States mail at Oakland, California, on the date shown below, in a sealed envelope bearing the lawful frank of the Bankruptcy Court, addressed as listed below.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: July \_\_, 2003

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