No. 22- 21-1321

IN THE

SUPREME COURT OF THE UNITED STATES

YAN SUI
Petitioner
v.
RICHARD A. MARSHACK
CHAPTER 7 TRUSTEE, ET AL
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit
Ninth Circuit Case No.: 20-55892
District Court Case No.: 8:20-cv-00864-JAK

PETITION FOR A WRIT OF CERTIORARI BEFORE JUSTICE ELENA KAGAN

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PREFACE STATEMENT

Admission of Respondent, Richard A. Marshack, Chapter 7 Trustee ("Trustee") of Yan Sui ("Sui") on May 2, 2019 to California Supreme Court in *In re: Clifford Allen Brace, Jr. v. Steven Speier, Chapter 7 Trustee* Case No. S252473 that "Property of a bankruptcy estate does not include the separate property of a non-debtor spouse" undermined the prior rulings of Bankruptcy, District Courts and Ninth Circuit.

Accordingly, Sui filed an adversary with Bankruptcy Court against Trustee, Wells Fargo Bank, N.A. et al to recover the real property. Bankruptcy Court clerk office filed the adversary. Shortly after, it noticed a dismissal w/o an order by a judge. Sui appealed to District Court. Assigned District Judge Josephine L. Staton issued the scheduling order. Sui filed the OB and attached the EL. Wells Fargo requested appeal be transferred to Judge John A. Kronstadt without serving Sui. Sui missed the 5-day statutory limit to oppose. As a result, appeal was transferred. Wells Fargo moved to strike the NOA and dismiss the appeal based on the pre-filing order of Judge Kronstadt. He ordered the NOA striken and the appeal dismissed.

Sui appealed to Ninth Circuit. It stayed the appeal since Aug. 2020 based on its pre-filing order. That order was under Sui's petition of 17-831. In proceeding before Ninth Circuit, Trustee, Wells Fargo and Krusey, had no viable opposition. They judicially

admitted the stealing of Sui/Yang residence under California law. Sui requested summary reversal. Again, there is no viable opposition. Ninth Circuit dismissed the appeal based on "appeal is so insubstantial as to not warrant further review."

QUESTIONS PRESENTED

Layperson Yan Sui is not legally trained to correctly raise the question for Court to decide. Sui has thought about these questions: (1) whether lower courts were lawless; (2) whether lower courts improperly barred remedies available under California laws; (3) whether Sui/Yang's residence was stolen; (4) whether lower courts' prior rulings retroactively facilitated the stealing of the residence by Trustee, Wells Fargo and Krusey.

Petitioner Sui respectfully prays to Court to *sua sponte* define a question from the facts and laws.

STATEMENT OF RELATED PETITIONS

Petitioners would inform Court that the following petitions are related to this petition:

• 17-1630 Re: Ninth Circuit's summary affirming district court striking Petitioners' request that district court impose sanctions against Wells Fargo Bank, N.A. et al for violating the discharge injunction based on "issue insubstantial" in its decision of 17-56232.

• 17-831: Re: Ninth Circuit's Pre-Filing Order that a future appeal or petition be accompanied by a

certificate of non-frivolity by district court.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in this Court whose judgment is the subject of this petition is as follows:

1. Marshack Hays LLP – law firm owned by Richard A. Marshack & Edward D. Hays;
2 Wells Fargo Bank, N.A.; mortgagee of Sui/ Yang residence;
3. Paul M. Krusey; current inhabitant in Sui/Yang residence;
4. County of Orange; recorder of Trustee Deed;
5. Clarence Yoshikane; real estate agent of Trustee;
6. 2176 Pacific Homeowners Association; claimant of contingent attorneys fees against Sui.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Yan Sui ("Sui") respectfully petitions this Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, or in the alternative, issue and order commanding Ninth Circuit to grant the summary reversal of the appealed order.

OPINIONS BELOW

The Order of the Ninth Circuit (hereafter - "Order") of Jan. 21,2022 is unpublished (App.1-2). Pre-filing order of Judge Kronstadt of March 9, 2018 is unpublished (App. 3-22). The amended pre-filing order of Bankruptcy Court of June 30, 2016 is unpublished (App. 23 – 31). Notice of Dismissal of Bankruptcy Court clerk office of April 21, 2020 is unpublished (App 32). Docket entry by clerk office is attached (App 33). District Court Order Dismissing Appeal of July 1, 2020 is unpublished (App. 34-36). District Court Order Reinstating Dismissal of July 9, 2020 is unpublished (App. 37). District Court Orders Pre-Filing Reviews by Judge Kronstadt are unpublished (App. 39-42).

JURISDICTION

The Order was entered on Jan. 22, 2022. This Court has jurisdiction to review the Order of the Ninth Circuit pursuant 28 *U.S. Code* § 1254.

STANDARD OF REVIEW

Ninth Circuit laid down the standard in *In re*

Brace No. 17-60032 (9th Cir. 2020) "we review decisions of the BAP *de novo*, and we apply the same standard of review that the BAP applied to the bankruptcy court's ruling. *In re Jacobson*, 676 F.3d 1193, 1198 (9th Cir. 2012). In doing so, we review conclusions of law *de novo* and findings of fact for clear error. *Id.* Because the bankruptcy court interpreted California state law, we review *de novo* the bankruptcy court's interpretation of state law. *See In re Rucker*, 570 F.3d 1155, 1159 (9th Cir. 2009)."

Due process is a question of law that is reviewed de novo. *Miller v. Cardinale (In re De Ville)*, 280 B.R. 483, 492 (B.A.P. 9th Cir. 2002), aff'd, 361 F.3d 539 (9th Cir. 2004). Issue of jurisdiction can be reviewed de novo at any stage of litigation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment provides:

> "Courts have come to recognize that two aspects of due process exist: procedural due process and substantive due process. The procedural due process aims to ensure fundamental fairness by guaranteeing a party the right to be heard, ensuring that the parties receive proper notification throughout the litigation, and ensures that the adjudicating court has the appropriate jurisdiction to render a judgment.

> Meanwhile, substantive due process has developed during the 20th century as protecting those substantive rights so fundamental as to be "implicit in the concept of ordered liberty."

Federal Rule of Bankruptcy Procedure 7065 provides:

> "Injunctions. [Rule 65 *F. R. Civ. P.* applies in adversary proceedings, except that a temporary restraining order or preliminary injunction may be issued on application of a a debtor, trustee, or debtor in possession without compliance with Rule 65(c)."

Bankruptcy Local Rule 7065-1 provides:

> "(a) Adversary Proceeding Required. A temporary restraining order or preliminary injunction may be sought as a provisional remedy only in a pending adversary proceeding, not in the bankruptcy case itself. An adversary complaint must be filed either prior to, or contemporaneously with, a request for issuance of a temporary restraining order (TRO) or preliminary injunction."

F. R. Civ. Proc. Rule 64(a) provides:

> Remedies under State Law – In General. At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or

property to secure satisfaction of the potential judgment, but a federal statute governs to the extent it applies.

18 *U. S. Code* § 3771 (a) provides:

> "Rights of Crime Victims - a crime victim has the following rights: (6) the right to full and timely restitution as provided in law; (7) The right to proceedings free from unreasonable delay; (8) The right to be treated with fairness and with respect for the victim's dignity and privacy."

18 *U. S. Code* § 3771 (d) provides:

> "Enforcement and Limitations – (1) Rights The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter."

California Civil Code §1712 provides:

> "One who obtains a thing without the consent of its owner, or by a consent afterwards rescinded, or by an unlawful exaction which the owner could not at the time prudently refuse, must restore it to the person from whom it was thus obtained, unless he has acquired a title thereto superior to that of such other person, or unless the transaction was corrupt and unlawful on both sides."

California Civil Code §1713 provides:

> The restoration required by the last section must be made without demand, except where a thing is obtained by mutual mistake, in which case the party obtaining the thing is not bound to return it until he has notice of the mistake."

STATEMENT

Sui respectfully prays to Court that Court takes judicial notice of factual allegation in 17-831, where Sui petitioned Court to review the pre-filing order of Ninth Circuit. Sui also prays to Court to takes judicial notice of App's of 17-1630 over Ninth Circuit summary affirmance of district court based on "insubstantial."

A. Statutory Background and Interpretation

(1) Bankruptcy Court

First and foremost, amended pre-filing order is not a pre-filing order. It is a disguised injunction (App. 23-31).

Federal Rule of Bankruptcy Procedure 7065 guides the application of an injunction: an adversary must be present. *Bankruptcy Local Rule* 7065-1 hits on the point that such injunction may not be filed in a bankruptcy case itself.

Bankruptcy judges from several circuits ruled to the same effect.

Hon. Robert Kwan, who was the first Bankruptcy Judge that heard Sui/Yang case denied issuance

of an injunction in *In re Ohana* Case No. 2:14-bk-20333-RK (Bankr. Ct. C. Cal 2014) [injunctive relief may only be sought by an adversary proceeding]. Trustee had two adversary actions against non-debtor Pei-yu Yang. He didn't request injunctive relief there. He requested such be issued in Sui's Chapter 7. Issuance is clear error both factually and legally.

Hon. Alan Koschik interpreted the standards on issuing injunction in *In re FirstEnergy Solutions Corp. et al v. Fed. Energy Regulation Commission, et al* Case No. 18-50757 (Bankr. Ct. E. OH 2018) based on four prongs. He cited *F. R. Bankr. Proc.* 7065 as ground.

Issuing Judge Catherine E. Bauer didn't consider these prongs and issued it in Sui's Chapter 7 case. [1]

Hon. Sean H. Lane denied an injunction in *In re Roman Sledziejowski,* 13-22050 (RDD); Adv. No. 3-08317 (SHL) (Bankr. Ct.S.NY 2015), and opined [It is well established that a court "cannot lawfully enjoin the world at large." *New York v. Operation Rescue Nat'l,* 80 F.3d 64, 70 (2d Cir. 1996)].

On its face, the order repeated failed *res judicata.* Subsequent court rulings supported Sui/ Yang position on those five arguments. On March 3,

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1. Catherine E. Bauer prematurely retired four years Before her terms wound end in 2024. Current Bankruptcy Judge is Hon. Mark S. Wallace.

2020, District Court Michael W. Fitzgerald ruled [no Bankruptcy Code turns Trustee and his attorneys post-petition creditors].On Aug. 19, 2020, Bankruptcy Judge, Hon. Wallace denied Trustee's motion for setoff based on Trustee's failure to prove community property. Judge Bauer didn't rule that Sui owed any debt; she didn't rule that the house is the community property against non-debtor Yang; she didn't rule that there was creditor unpaid. She just authorized sale of Sui/Yang residence. Now, she came back to bar Sui/Yang claims against the Trustee. She ruled in excess of authority. Her amended pre-filing order directly conflicts with rulings of Bankruptcy Judges of 9th and other circuits.

Hon. Richard Neither opined *In re Kathleen Kellogg-Taxe* Case No.: 2:12-bk-51208-RN; Adv. No.: 2:13-ap- 02019-RN (Bankr. Ct. C. Cal 2014) that:

> "A preliminary injunction imposed according to the procedures outlined in *FRCP* 65 has a limited lifespan, dissolving *ipso facto* when a final judgment is entered in the case. *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1093 (9th Cir. 2010) (citing *Sweeney v. Hanley*, 126 F. 97, 99 (9th Cir. 1903))."

This ruling reasonably conclude that an injunction automatically dissolves when a final judgment is entered in the adversary. Trustee's adversary actions had final judgment back in 2016. Any injunction, if any, would have been dissolved. In other words,

injunctive relief should not survive in Sui's Chapter 7 case. To that effect, amended pre-filing order was issued in excess of authority of Judge Bauer.

Apparently, that order has no authority to bar Sui's adversary against Trustee, Wells Fargo Bank, N.A. et al. Clerk office erred factually and legally.

Requiring an adversary action for injunctive relief be used has been articulated by other Bank-ruptcy Judges. Those cases, include, but not limited to: (1) *In re Larry Gene Cupp* Case No. 04-35800; Adv. Proc. No. 05-3014 (Bankr.Ct. E. Tn. 2006); (2) *In re Arlington* BK No. 12-70435-JHH13; A.P. No.17-70029-JHH (Bankr. Ct. N. AL 2017); (3) *In re Puntas Associates* Case No. 18-03123 (ESL); Adv. Proc. 18-0127 (Bankr. Ct. PR (2021). All of them required an adversary proceeding for injunction be applied.

(2) District Court

Sui appealed to District Court for Central Dist. of California. Assigned Judge is Josephine L. Staton. She issued the scheduling order. Trustee moved to dismiss the appeal. Sui learned from Trustee opp. that Wells Fargo moved to transfer appeal to Judge John A. Kronstadt on June 4, 2020. Sui opposed Trustee opposition and moved to strike Trustee opp. Trustee opposed Sui strike motion. In the reply, Sui attached Trustee's admission to California Supreme Court. These papers were filed before Hon. Staton. Pursuant to scheduling order, Sui filed the OB and EL. In the OB, Sui stated to Hon. Staton that the

sale is a steal under California authority of *Bell v. Feibush* (2013) 212 Cal. App. 4th 1014, among others.

As against the Bankruptcy Court clerk office, Sui argues that Bankruptcy Court is not an All Writs Court; rejecting filing is clear error; it lacks authority to dispose adversary action; it violated LBR 7041-1; violated due process right of Sui; it usurped a judge's power, among others.

On June 11, 2020, appeal was transferred to Judge Kronstadt. Sui requested Wells Fargo to serve the transfer request. It was not served until June 16, 2020. On June 19, 2020, Sui opposed Wells Fargo's transfer request. On July 1, 2020, Judge Kronstadt issue order of dismissal (App. 34-36). On July 2, 2020, Sui requested Judge Kronstadt to reopen appeal; review complete appeal record; discharge the order of dismissal; decide appeal on merit. On July 10, 2020, Judge Kronstadt ordered it not be filed (App. 39-40). On July 16, 2020, Sui requests set-aside transfer caused by fraud of Wells Fargo. Judge Kronstadt ordered it not filed (App. 41-42). In both orders, Judge Kronstadt didn't identify the Magistrate Judge like in the past.

(3) Ninth Circuit

Sui appealed from the dismissal of appeal. Sui filed a declaration of non-frivolity of appeal to satisfy Ninth Circuit's pre-filing order substance. Ninth Circuit stayed it since Aug. 10, 2020. On Aug. 22, 2021, Sui moved Circuit Judge, Hon. Nguyen for an

order to allow the appeal to proceed. Wells Fargo opposed. Sui replied and moved to strike. Wells Fargo failed to reply to strike. Sui filed the declaration of non-opposition pursuant to circuit rule.

Sui moved for finding of moral turpitude of Trustee in lieu of stealing of Sui/Yang residence. Trustee opposed. Sui replied and moved to strike his opposition. Trustee failed to respond. Sui filed a declaration of non-opposition pursuant to circuit rule.

Sui moved for replevin relief pursuant *F.R.Civ. Proc.* 64(a). Trustee opposed. Sui replied and move to strike. Krusey joined Trustee. Sui moved to strike Krusey joinder. They failed to respond to the strikes. Sui filed declaration of non-opposition pursuant to circuit rule. Sui moved for order to find Trustee and his attorneys having moral turpitude in lieu of stealing of Sui/Yang residence. Trustee opposed. Sui replied and moved to strike. Trustee failed to respond. Sui filed declaration of non-opposition pursuant to circuit rule. Sui moved for summary reversal of the appealed order. Trustee opposed. Sui replied and moved to strike his opposition. Trustee failed to respond to the strike. Sui filed a declaration of non-opposition pursuant to circuit rule. [2]

In proceedings before Ninth Circuit, none of the Appellees denied the stealing of Sui/Yang residence,

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2. Circuit Rule refers to Ninth Circuit Rule 27 derived under *F. R. A. Proc. Rule* 27 (a) (3) (A) .

commonly known as 2176 Pacific Ave., #C, Costa Mesa, CA92627.

REASONS FOR GRANTING THE WRIT

This petition raised the important federal question of limitation on bankruptcy which has been breached by Trustee. Based on his admission four years after he sold the separate estate of non-debtor Pei-yu Yang, et ux of Sui, he over reached into the non-bankrupt mortgage loan, governed by California and not bankruptcy laws. *Lane v. The Bank of New York Mellon (In re Lane)* 18-60059 (9th Cir. 2020) [secured creditor...its lien will pass through bankruptcy unaffected]. Wells Fargo admitted that its POC "became null and void for Chapter 7 purpose," Trustee collected void POC of Wells Fargo before he closed the case. As a result, both Trustee and Wells Fargo violated the discharge injunction under analysis of *In the Matter of: Blendheim* WL 5730015 (9th Cir 2015) [the Bankruptcy Code authorizes debtors to receive a discharge of ....secured debt (such as a mortgage on a home)]. Trustee subjects to a lawsuit at district court without leave under the *ultra vires* exception of *Barton Doctrine.* District court dismissed NOA incorrectly. On the standard of violating discharge injunction, Court ruled in *Taggart v. Lorenzen,* 587 U.S (2019) that:

> "We conclude that neither a standard akin to strict liability nor a purely subjective standard is appropriate.

> Rather, in our view, a court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct. In other words, civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful."

Petition raises the important federal question that Trustee violated some constitutional provisions when he acted beyond scope of his statutory duty *In the Matter of: Marshall* 721 F.3d 1032, 1048 (9th Cir. 2013) [Fifth Amendment is a limitation on the scope of bankruptcy...if fall outside the Bankruptcy Code... assume that the law would violate some constitutional provision].

Under the existing law, Sui/Yang mortgage rides through Chapter 7 unaffected *Lane v. The Bank of New York Mellon (In re Lane)* 18- 60059 (9th Cir. 2020). Wells Fargo's POC is objectionable and not enforceable under 11 U.S.C. 502 (b)(1) [such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured].

These laws have been cited to lower courts in multiple proceedings. None of them was considered by them, except current Bankruptcy Judge, Hon. Wallace. On Jan. 7, 2022, Judge denied Trustee's

motion for leave to sue him and his professionals in a district court.

Trustee's admission conclusively told everyone that he was not administering bankruptcy estate. He had sold the separate estate of non-debtor Yang. As such, sale of Sui/Yang residence is retroactively a steal under California case law. As a result, courts have affirmative duty to restore the stolen house back to Sui/ Yang under California laws of *Naftzger v. American Numismatic Society* (1996), 42 Cal. App. 4th 421; *California Civil Codes* §1712 & §1713. These authorities were cited in Sui's adversary, to District Court in OB in 8:20-cv-00864-JAK and to Ninth Circuit in motion for summary reversal. They were ignored. To that effect, lower courts were lawless. When federal rule holds that a layperson's pleading is not held to the stringent standard, Ninth Circuit's statement of "appeal is so insubstantial" is lawless under the circumstance. When Sui's property right is subject to California and not federal law *Dumont v. Ford Motor Credit Co. (In the Matter of Dumont)* 581 F.3d 1104 (9th Cir. 2009) *citing: Butner v. United States*, 440 U.S. 48, 54 (1979), Ninth Circuit's dismissal of appeal is lawless.

Court's intervention is warranted.

ARGUMENT

ORDER IS FUNDAMENTALLY WRONG

a. Appeal Involves Important Issues

Underlying appeal involves important issues.

They include, but not limited to: (1) Trustee sold non-debtor, Yang's separate estate in Sui's Chapter 7; (2) Bankruptcy Court clerk office usurped the judicial power of a judge; (3) Sui's due process right has been violated by a fraudulent transfer of appeal to Judge Kronstadt without notice; (4) Sui's due process right has been violated by the dismissal pursuant to his pre-filing order, which has no provision to bar bankruptcy appeal; (5) Ninth Circuit provides no notice on why the appeal should not be dismissed. Order is erroneous in concluding "appeal is so insubstantial." "Appeal being insubstantial" is unintelligible."Appeal is a process where appellate court reviews a ruling of a lower court. An appellant's claim, defense, issue could be "insubstantial," but, not the appeal itself. *United States v. Clement* 12-50189 (9th Cir. 2013) [a review of the record indicates that the questions raised in this appeal are so insubstantial as not to require further argument. See *United States v. Hooton*, 693 F.2d 857, 858(9th Cir.1982)].

b. Ninth Circuit Fails to Review Clerk Office Dismissal De Novo

Clerk office just performed the ministerial duty to file pleading. It is up to a judge to dispose an adversary action. No federal code authorizes clerk office to dispose it. An order of dismissal is required. The notice of dismissal and docket entry has shown an improper usurpation of judicial power of a judge by clerk office. This is clear factual and legal error.

Ninth Circuit failed to review clerk office dismissal de novo *In re Brace* No. 17-60032 (9th Cir. 2020).

c. Clerk Office Usurpation is Improper

There is no shortage of cases disapproving usurpation. In OB of 8:20-cv-00864-JAK, Sui cited these authorities: (1) *Roseberry v. Ryan*, et al CV-15-01507-PHX-NVW (D.C. AZ 2019) [Roseberry alleges that the trial court unconstitutionally "usurp[ed] the jury's role to make the *Enmund/Tison* finding]; (2) *Ricardo v. M. Martel* 2:08-cv-02342-JKS (D.C. E. Cal 2011) [In making this determination, this Court may not usurp the role of the finder of fact by considering how it would have resolved any conflicts in the evidence, made the inferences, or considered the evidence at trial]; (3) *Rainwater v. King* 2:14-cv-02567-JKS (D.C. E. Cal 2017) [In making this determination, this Court may not usurp the role of the finder of fact by considering how it would have resolved any conflicts in the evidence, made the inferences, or considered the evidence at trial]; (4) *Xiong v. Biter* 2:11-cv-01314-JKS (D.C. E. Cal 2012) [In making this determination, this Court may not usurp the role of the finder of fact by considering how it would have resolved any conflicts in the evidence, made the inferences, or considered the evidence at trial]; (5) *Zizza v. Harrington, U. S. Trustee (In re: Zizza)* 16-cv-40102-IT (D.C. MA 2017) [Two principles guide this analysis: first, that mere conjectures or technicalities ought not to usurp the equitable

purposes of bankruptcy; but second, that debtors cannot eschew the fundamental responsibility of candor on which the architecture of the bankruptcy code relies. See *In re Tully*, 818 F.2d 106, 110-12 (1st Cir. 1987) (analyzing 11 *U.S.C.*§ 727 (a) (4)(A))]; (6) *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005)]. Courts must be ever vigilant in the context of [Rule 29] not to usurp the role of the jury by . . . substituting its judgment for that of the jury].

d. Sale of Sui/Yang Residence is a Steal

Trustee's admission retroactively shows that he didn't sell Sui/Yang residence as part of bankruptcy estate, but separate estate of non-debtor Pei-yu Yang, et ux of Sui. Separate estate has been articulated by Ninth Circuit after it certified the question to California Supreme Court in afore-mentioned case, where Trustee made the admission.

On July 23, 2020, California Supreme Court issued its decision in *In re Brace* S252473 (2020). It ruled in pertinent part:

> "Although California has always been a community property state, "for most of the state's history California's marital property law has contained strong elements of a separate property system." (Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975* (1976) 24 UCLA L.Rev. 1, 81.)

On Nov. 9, 2020, Ninth Circuit followed state

high court and ruled [the panel held that if a debtor holds property in joint tenancy, only his one-half joint interest becomes part of the bankruptcy estate]. Ninth Circuit reversed bankruptcy court because funds to obtain the Brace's San Bernardino property is uncertain as community property.

These recent authorities, coupled with Trustee admission, Sui/Yang residence is the separate estate. Under the circumstances of Sui's Chapter 7, Trustee and his attorneys are not entitled to fees except for statutory $1,250 based on $5,000 recovery by Settlement with Sui/Yang Defendant of state court actions. Sui has surplus estate. Trustee didn't dispute. Therefore, he sold Sui's surplus estate of the residence. The sale is a steal under *Bell v. Feibush* (2013) 212 Cal. App. 4th 1014, providing:

> "Section 496(a) extends to property "that has been obtained in any manner constituting theft." *Penal Code* section 484 describes acts constituting theft "*Every person* who shall knowingly and designnedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property is guilty of theft."

In proceeding before Ninth Circuit, Sui presents Trustee's pretenses of: (1) his invalid complaint is valid; (2) his discharge barred second adversary is not barred; (3) treated Sui's mooted Chapter 7 as a live case; (4) pretends that Chapter 7 needs be kept

open after discharge order; (5) there were unpaid creditors after discharge order; (6) objectionable, objected, discharged claims are collectible; (7) he had authority to liquidate surplus estate; (8) pretended that he is eligible for interim fees after monished by BAP that such fees are unlawful; (9) pretends that bankruptcy trustee equates a trustee in mortgage.

In proceeding before Ninth Circuit, Sui presents Wells Fargo's pretenses of: (1) right to file a proof of claim when it had been timely paid; (2) right to be paid through foreclosure.

Sui/Yang residence was unlawfully sold by concerted acts of Trustee and Wells Fargo. They didn't deny the facts. They didn't dispute the stealing.

It is noteworthy for Court to observe that *Bell, supra* was followed by federal judge in case of *Allure Labs, Inc. v. Markushevska, et al* Case No. 19-cv-00066 -LHK (D.C. N.Cal. 2019).

In moving for summary reversal before Ninth Circuit, Sui alleged that the amended pre-filing order is void for unlawful purpose to harbor a stealing. Sui also alleged that amended pre-filing order is void under California authority of *311 South Spring Street Co. v. Department of General Services* (2009) 178 Cal. App. 4th 1009, providing in pertinent part:

> "Obviously a judgment, though final and on the merits, has no binding force and is subject to collateral attack if it is wholly void for lack of jurisdiction of the subject matter or person, and perhaps for excess of jurisdiction, or where

> it is obtained by extrinsic fraud. [Citations.]' (7 Witkin, Cal. Procedure [(4th ed. 1997)] Judgment, § 286, p. 828.)"(*Rochin v. Pat Johnson Manufacturing Co.*,(1998) 67 Cal. App. 4th 1228, 1239-1240.) And the affirmance of a judgment on appeal does not insulate it from a subsequent collateral attack on the ground that it is void. (*Hager v. Hager* (1962) 199 Cal. App. 2d 259, 261 ["The affirmance of a void judgment upon appeal imparts no validity to the judgment, but is in itself void by reason of the nullity of the judgment appealed from."].)"

There should be no dispute that bankruptcy court looks to California laws to determine Sui's property rights.

In moving for summary reversal, Sui also alleged that Bankruptcy Court must not be permitted to create own remedy. Bankruptcy court runs on principle of equity. It must consider the equal rights of all claimants listed or not listed. It must determine claims filed in the bankruptcy case. It must allow or disallow a claim. It must not create its own remedy to certain party. Because Sui/Yang case is unique, there is no similar ruling on that issue in 9th Circuit. Ruling from Tenth Circuit can be borrowed. *Scrivner & Pisano v. Mashburn (In re Scrivner & Pisano)* 370 B.R. 346 (10th Cir. BAP 2007) [equity court must follow the law and must not be permitted the luxury of creating their own remedies in the name of equity].

Clerk office and deputy James Le improperly

created their own remedy in favor of defendants and Appellees. They must not be allowed to have that luxury.

ORDER VIOLATED SUI'S RIGHT TO BE HEARD

"Notice is "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality . . . ." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).Order places cart-before-horse and stated "because the appeal is so insubstantial as to not warrant further review, it shall not be permitted to proceed." Order violated Sui's right to be heard on exactly what is "so insubstantial" before dismissal. It bars Sui's future right to be heard through reconsideration (App. 1).

In the past, Ninth Circuit let Sui to show cause why a pre-filing order shall not be issued. Sui stated the cause. Ninth Circuit issued the order in regardless. Sui appealed to Court in 17-831. In the past, Ninth Circuit let Sui to show cause why the appealed order shall not be summarily affirmed because it was "insubstantial." Sui stated the cause. Ninth Circuit summarily affirmed. Sui appealed to Court in 17-1630. Even after Sui showed compelling reason that summary reversal should have been granted, Ninth Circuit dismissed the appeal based on "appeal is so insubstantial." It didn't state an intent to dismiss and let Sui to show cause why appeal is not insubs-

tantial. To that effect, Ninth Circuit violated Sui's due process right to be heard. Order violated Sui's substantive Fifth Amendment right to be heard on getting remedies warranted under both California and federal laws. It bars Sui to recover stolen house.

Seventh Circuit ruled in *Khan v. Gallitano,* 180 F.3d, 829 (7th Cir. 1999) that:

> "The fact that [substantive due process] is a doctrine owing its existence to constitutional structure rather than a clear grant of power to the judiciary has led the Supreme Court to be cautious in its use."). Synthesizing its prior precedent, the Court set out the two "features" of the substantive-due-process analysis: First.. . . the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest."

Sui has these substantive due process rights: (1) to recover the stolen house through bankruptcy court; (2) to appeal the order of District Judge Kronstadt striking the NOA; (3) moved Ninth Circuit to lift its pre-filing order and grants Sui's motion for summary

reversal. Lower courts disregarded authorities Sui cited before them.

DISMISSAL IS TOO HARSH A PUNISHMENT UNDER EIGHTH AMENDMENT

If Order finds any claim, issue raised by Sui is "insubstantial," Ninth Circuit should have pointed them out, ordered them striken. Ninth Circuit could even sanction Sui and requested Sui to pay Respondents their attorneys fees. Dismissing the appeal without a lesser punishment is too harsh a punishment under Eighth Amendment. In the context of this case that the house has been sold after all debts were paid and discharge order was issued, dismissal evinces an act depriving Sui/Yang residence, a harsh punishment disapproved by Eighth Amendment simply because Sui was entrapped in Chapter 7 by Trustee and Wells Fargo and his request to dismiss Chapter 7 repeatedly denied.

ORDER DEPARTS FROM OTHER CIRCUITS ON STATING "INSUBSTANTIAL"

To the extent that Order fails to state or decide any claim, issue, fact, evidence, allegation of Sui being "insubstantial," Order departs from other circuits. "Insubstantial" has different meanings based on the context of a case. It can be used on a case-by-case. "Insubstantial" encompasses the following categories, including, but not limited to:

(1) Allegation

(1) *Kopec v. Tate* 361 F. 3d 772 (3rd Cir. 2004); (2)

Bituminous Materials, Inc. v. Rice County, Minnesota 96-4202 (8thCir. 1997); (3) *Perry v. Merit Sys. Protection Bd.* 582 U.S. (2017).

(2) Amount

(1) *Lepage's Inc. v. 3M* 324 F.3d, 141 (3rd Cir. 2002); (2) *Sofco Erectors Inc. v. Trustee of the Ohio Operating Engineers Pension Fund* 20-3639 /3671 (6th Cir 2021).

(3) Argument

(1) *Holder v. Martinez Gutierrez* 566 U.S. (2012); (2) *General Motors Corp. v. The New A.C. Chevrolet, Inc.* 263 F.3d 296 (3rd Cir. 2001); (3) *In re: Pressman-Gutman Co.,Inc. v. First Union Nat'l Bank,* 05-1012/1026 (4th Cir. 2006).

(4) Claim

(1) *Nat'l Ass. for the Advancement of Colored People v. Merrill* 19-576 (2nd Cir. 2019); (2) *Mirabeaux v. Att'y General of United States,* 19-3224 (3rd Cir. 2020); (3) *Treasurer of State of New Jersey v. U.S. Department of Treasury* 10-1963 (3rd Cir. 2012); (4) *Owens v. Stirling* 18-8 (4th Cir. 2020); (5) *Crosby v. City of Gastonia* 635 F.3d 634 (4th Cir. 2011); (6) *Atakapa Indian De Creole Nation v. State of Louisiana* 19-30032 (5th Cir.2019); (7) *Cheney v. United States District Ct.* 542 U.S. (2004).

(5) Constitutional Claims

(1) *Shapiro v. McManus* 577 U.S. (2015) [Accordingly, the District Judge should not have dismissed the claim as "constitutionally insubstantial" under

Goosby]; (2) *Johnson v. Williams* 568 U.S. (2013) [Third, there are instances in which a state court may simply regard a claim as too insubstantial to merit discussion];(3) *State of N. Dakota v. Lange* 16-4186 (8th Cir. 2018) [In other words, "constitutional insubstantiality" for this purpose means "obviously frivolous." *Id.* at 537. The plaintiffs' fee-generating dormant Commerce Clause claim prevailed with the district court and with one judge of this court; the claim was "substantial" under the governing definition].

(6) Contacts

(1) *Esab Group, Inc. v. Centricut Inc.* 96-2504 (4th Cir. 1997); (2) *Lakin et al v. Prudential Securities Inc.* 02-2477 (4th Cir. 2003).

(7) Evidence

(1) *Checkpoint Sys. Inc. v. Check Point Software Tech. Inc.* Case No.00-2373 (3rd Cir. 2001); (2) *Houck v. Stickman* Case No. 05-5480 (3rd Cir. 2001); (3) *Jenkins v. Kenneth S. Apfeli* Case No. 99-1270 (8th Cir. 1999); (4) *Vermont v. Brillon* 556 U.S. (2009).

(8) Facts

(1) *Dia v. Ashcroft* Case No. 02-2460 (3rd Cir. 2003); (2) *Prater v. John Dahm* 95-3725 (8th Cir. 1996).

(9) Issue

(1) *Virginia v. LeBlanc* 582 U.S. (2017); (2) *United States v. Mabry* 06-2867 (3rd Cir. 2008).

(10) Summary Judgment

(1) *O'Neil v. City of Iowa* 06-3671 (8th Cir. 2007);

> "However, this does not mean that the court should "deny summary judgment any time a material issue of fact remains on the [constitutional violation] claim [because to do so] could undermine the goal of qualified immunity to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.'" *Saucier*, 533 U.S. at 202 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Rather, the court must take a careful look at the record, determine which facts are genuinely disputed, and then view those facts in a light most favorable to the non-moving party as long as those facts are not so "blatantly contradicted by the record . . . that no reasonable jury could believe [them]." *Scott,* 127 S. Ct. at 1776.

(2) *Crawford-El v. Britton* 523 U.S. 574 (1998), providing:

> "The objective standard, in contrast, raises questions concerning the state of the law at the time of the challenged conduct—questions that normally can be resolved on summary judgment. Social costs that adequately justified the elimination of the subjective component of an affirmative defense do not

necessarily justify serious limitations upon "the only realistic" remedy for the violation of constitutional guarantees."

(3) *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986):

"A party opposing summary judgment must "come forward with 'specific facts showing that there is a genuine issue for trial.'"

(4) *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511 (1986):

"When reviewing the record in connection with a pending motion for summary judgment, the court may not weigh the evidence, determine credibility, or decide the truth of any factual matter in dispute. However, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party."

***In re Thomas* Case is Misused**

In the Order, case of *In re Thomas,* 508 F. 3d 1225 (9th Cir. 2007) has been mis-used. It has been mis-used because none of Sui's prior appeals before it has been stated, decided by Ninth Circuit to be "baseless," "frivolous." Ninth Circuit didn't say so in its pre-filing order which was brought to Court's attention in 17-1630. Order neglected material fact that Trustee admitted three years after the sale that he sold the separate estate of Yang. Based on prior rulings of BAP of Ninth Circuit, what was left in

Chapter 7 is the surplus estate of Sui. The residence constitute surplus estate because Sui has over $6,600 funds in the trust account. Trustee is only entitled to the statutory fees of $1,250 based on the $5,000 recovery. Sui has surplus of $6,600 - $1,250 = $5,350.

Based on these facts, Sui's adversary against Trustee and Wells Fargo Bank at Bankruptcy Court is warranted. Sui's appeal from striking the NOA and dismissal of appeal has sound legal and factual support before Ninth Circuit. Lack of any accusation of Sui claim in the adversary action, in the OB before District Court being "baseless" or "frivolous" is an *ipso facto* proof that *In re Thomas* has been mis-used. To the extent that the case being mis-used to bar Sui remedy through appeal, a manifest of injustice has been invoked. Court intervention is necessary.

NINTH CIRCUIT NEGLECTED CONTRACT CLAIMS PROTECTED BY CONSTITUTION

Sui's adversary involves contractual claims against Trustee and Wells Fargo, who improperly brought in Chapter 7 Sui/Yang mortgage agreement, which had been timely paid. On Feb. 2, 2022, current Bankruptcy Judge, Hon. Mark S. Wallace found to the effect that Wells Fargo mistakenly filed a motion to lift stay in Sui's Chapter 7 and Wells Fargo has caught its mistake.

To the effect that Sui had paid off all Chapter 7 debts and obtained a discharge order, Trustee's acts were not relevant to bankruptcy because a mortgage

ride through bankruptcy unaffected *Lane v. The Bank of New York Mellon (In re Lane)* 18-60059 (9th Cir. 2020).

Trustee's paying out unmatured mortgaged debt to Wells Fargo clearly intruded into the Sui/Yang contract with Wells Fargo under the mortgage. Trustee reached over the line and "violates the Contracts Clause by rendering unenforceable certain personal guaranties of commercial lease obligations. *See* U.S. Const. art. I, § 10 cl. 1. U.S. Const. art. I, § 10 cl. 1" *Melendez v. City of New York* No. 20-4238-CV (2nd Cir. 2021) [We, therefore, further conclude that plaintiffs' contracts clause claim should not have been dismissed nor should their motion for preliminary injunctive and declaratory relief have been denied without review]. Mortgage wouldn't mature until June 30, 2033. On Feb. 17, 2016. Trustee and Wells Fargo violated contract clause of its maturity date. Contract interpretation is a matter of law which is reviewed *de novo. Bender v. Newell Window Furnishings, Inc.*, 681 F.3d 253, 259 (6th Cir. 2012); *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

ORDER DEPARTS FROM OTHER CIRCUITS ON FIFTH AMENDMENT PROVISIONS

In the Matter of: Marshall 721 F.3d 1032, 1048 (9th Cir. 2013) has patently ruled that if Trustee acted beyond scope of bankruptcy, constitutional

provisions would have been violated. Sui knows of no other circuits holding to the verbatim. Facts in Sui/Yang case has clearly shown violation of Fifth Amendment. Subsequent rulings by courts pointed to that direction. Judicial admissions of Trustee, Wells Fargo and Krusey, the current withholder and habitant of Sui/Yang resident point to that direction.

On Aug. 19, 2020, current Bankruptcy Judge, Hon. Mark S. Wallace denied Trustee's motion for setoff of $93,000 as against non-debtor Yang. In the tentative of Aug. 19, 2020, Hon. Wallace found: "The Motion nowhere discusses the date on which Yan Sui and Pei-yu Yang acquired the Property or whether they used community funds to acquire it."

In proceedings before district court and Ninth Circuit, Trustee, Wells Fargo and Krusey failed to deny or dispute the stealing of Sui/Yang residence. Stealing is certainly an act of taking real property without due process of law. Stealing deprived Sui/Yang of the right to argue why the separate and surplus estate of the residence should not be sold. Substantive argument has been raised in Sui motion for summary reversal. Order neglected and chose to dismiss the appeal. Order departs from Eighth Circuit in *O'Neil v. City of Iowa* 06-3671 (8th Cir. 2007); Court's decision in *Crawford-El v. Britton* 523 U.S. 574 (1998); in *Crawford-El v. Britton* 523 U.S. 574 (1998) and finally in *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511 (1986). There couldn't

possibly be anything "insubstantial" when Sui is entitled to a summary reversal. It is even truer after Respondents failed to rebuttal. After Respondents failed to rebuttal, Ninth Circuit didn't provide Sui with opportunity to seek summary reversal; didn't provide Sui with opportunity to secured a consented summary reversal; didn't provide Sui with opportunity to obtain the relief pursuant *F. R. Civ. Proc.* Rule 64(a) under California laws.

To the effect that Trustee works under the supervision of Office of United States Trustee ("UST"), his acts equates the acts of UST. Sale of Sui/Yang residence equates a taking w/o just compensation and w/o due process of law. UST violated the Fifth Amendment. Under federal law, Fifth Amendment is strictly enforced against United States.

ORDER FAILS TO RESPECT RIGHTS OF CRIME VICTIMS

After the steal being admitted by Respondents, [3] Sui/Yang became crime victims, who are entitled to remedy pursuant to 18 *U. S. Code* § 3771 (a). Ninth

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3. In proceeding before District Judge, Hon. Michael W. Fitzgerald, Trustee and Krusey didn't deny that the sale is a steal. In proceeding before Ninth Circuit, Trustee, Wells Fargo and Krusey didn't deny that the sale is a steal. As a result, judicial admission is established *Myers v. Trendwest Resorts, Inc.*,(2009) 178 Cal. App. 4th 735 [undisputed facts constitute judicial admission; judicial admission can be found through pleading].

Circuit neglected. Order departs from: (1) *In re Rendon Galvis*, 564 F.3d 170, 174 (2d Cir. 2009) cited by *United States v. C.S.* Nos. 19-1254, 19-2770 (3rd Cir. 2020) [the CVRA: (1) obliges courts, "[i]n any court proceeding involving an offense against a crime victim," to "ensure that the crime victim is afforded the rights described in subsection (a)," § 3771(b)(1); and (2) requires the Government "make [its] best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)," § 3771(c)(1). The rights are enforceable by motion of the crime victim or the Government. § 3771(d)(1)]; (2) *In re Dean,* 527 F. 3d 391(5th Cir. 2008) [also on that date, a panel of this court, in compliance with the requirement of 18 U.S.C. § 3771 (d)(3) that we act within seventy-two hours, entered an order granting the mandamus petition in part:]; (3) *In re Allen* 701 F.3d 734 [IT IS ORDERED that the petition for writ of mandamus pursuant to the Crime Victims' Act is GRANTED to the extent that the district court must hear all new victim status arguments being submitted pre-sentencing by pro bono counsel]. Holdings in these cases affirmed remedy to crime victims. To the extent that Ninth Circuit dismissed the appeal, Order departs from other circuits.

ORDER DEPARTS FROM OTHER CIRCUITS WITH "APPEAL IS SO INSUBSTANTIAL"

Federal case inventory shows that Ninth Circuit is the only one stating "appeal is so insubs-

tantial." To the effect that other circuits stated something being "insubstantial" and Ninth Circuit didn't, Order departs from other circuits in ruling an appeal. For reasons discussed *ante,* other circuits identified certain subject being "insubstantial" first, then ruled in an appeal with dismissal, affirmance or reversal. As a result, Ninth Circuit is one disposing an appeal with "appeal is so insubstantial." Ninth Circuit is the only one dismissal an appeal after Sui proves entitlement to summary reversal.

Based on the facts and laws in the petition, Order presents for the first time that Sui's remedy was improperly denied on a vague statement of "appeal is so insubstantial."

Order contravenes its own Circuit Rule 3-6 Summary Disposition of Civil Appeals [at any time prior to the completion of briefing in a civil appeal or petition for review, if the Court determines: At any time prior to the disposition of a civil appeal if the Court determines that the appeal is not within its jurisdiction, the Court may issue an order dismissing the appeal without notice or further proceedings. (Eff. 7/95; Rev. 12/1/19). Order didn't state that Sui's appeal is not within its jurisdiction.

A look at its original rule, it moved toward the wrong direction of depriving appellant a due process right of being heard. The pre-revision version states [(2) that it is manifest that the questions on which the decision in the appeal or petition for

review depends are so insubstantial as not to justify further proceedings; the Court may, upon motion of a party, or after affording the parties an opportunity to show cause, issue an appropriate dispositive order].

Order violated Sui's right to proceed with the appeal, to be heard and to be provided with remedy under the laws. Order violated Sui's rights for restitution under 18 U.S.C. 3771 (a) (6) (7) and other federal and California laws.

ORDER EVINCES LAWLESSNESS TOWARD LAYPERSON PETITIONER SUI

To the effect that Ninth Circuit actually has cases on something "insubstantial" and didn't apply them to Sui's appeal, Order evinces lawlessness to Sui. Ninth Circuit did have cases on "insubstantial." They included but not limited to: (1) *France v. Johnson* 13-15534 (9th Cir. 2015) [age difference is insubstantial]; (2) *In re complaint of judicial misconduct* 17-90119; 17-90120; 17-90122 (9th Cir. 2018) [complaints are so insubstantial]; (3) *United States v. Strobehn* 04-50167 (9thCir. 2005) [asportation was insubstantial]; (4) *First Amendment Coalition v. USDOJ* 15-15117 (9th Cir. 2017) [if the complainant's claim is not insubstantial]; (5) *MLPERS v. Wynn* 14-15695 (9th Cir. 2016) [Wynn's contributions to Miller son's campaigns, are too insubstantial and are likewise devoid of allegations as to materiality], etc.

Order didn't state or decide any claim in Sui's appeal being insubstantial as Ninth Circuit stated in

other cases, It dismissed the appeal unnoticed. Order also evinces disrespect of layperson petitioner. Sui is unsure whether Court has seen other lay-person debtor catching a trustee stealing in bankruptcy. If Court has not, this unique case involves important federal questions for the first time: bankruptcy Trustee acted beyond scope of his authorities and lower courts didn't enjoin his acts, which were retro-actively proven criminal stealing. Not only that, they aided the stealing one way or the other.

Courts are teachers of law. Sui expects Ninth Circuit to teach every party so that they abide by the laws. Evidently, Ninth Circuit does not want to do that. When layperson Sui caught attorney Trustee stealing in Chapter 7, Ninth Circuit's dismissal of appeal based "appeal is so insubstantial" evinces unwarranted disrespect toward layperson Sui.

CONCLUSION

Based on the fore-going reasons, petitioner Yan Sui respectfully requests that Court grants the petition. In the event that Court denies, Sui prays Court to order the Order be vacated.

DATED: 3/20/2022 Respectfully submitted,

By: / s / Yan Sui

YAN SUI, petitioner in pro se