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2 Empire Wholesale Lumber Co. v. Meyers, et al. 99-6079-fra  
3 In re Benjamin Meyers 697-63375-fra7

4 8/20/99 FRA Unpublished

5 Plaintiff filed an action in U.S. District Court, setting out  
6 the circumstances of an alleged commercial dispute. Defendant filed  
7 an answer and counterclaim and, shortly thereafter, filed for relief  
8 under Chapter 7 of the Bankruptcy Code on 6/10/97. Plaintiff then  
9 commenced an adversary proceeding in Bankruptcy Court seeking a  
10 determination that the claims against Defendant should be excepted  
11 from discharge under § 523 of the Code.

12 Plaintiff filed a motion in the District Court seeking summary  
13 judgment in its favor on Defendant's counterclaim. The District  
14 Court allowed its motion, finding that the claim, as alleged, arose  
15 prior to the petition date and was therefore property of the estate.  
16 Accordingly, only the trustee had standing to bring the claim. The  
17 order dismissing the counterclaim was entered by the District Court  
18 and the case was remanded to the Bankruptcy Court for further  
19 proceedings. The Defendant filed a motion to reinstate the  
20 counterclaim in Bankruptcy Court prior to trial with the only change  
21 being the allegation that the alleged injury occurred on 5/28/97 and  
22 continued "through the present" (the Defendant originally alleged  
23 the date of injury was August 1995).

24 The court denied Defendant's motion on multiple grounds.  
25 First, the District Court had already ruled that the Defendant had  
26 no standing to maintain the counterclaim and there was nothing to  
support a finding that the Defendant should be relieved of the order  
under FRCP 60. Second, the court did not view the counterclaim as a  
new claim in any way distinguishable from the earlier alleged  
counterclaim. Defendant was estopped from claiming a different date  
of injury. Finally, to the extent that the counterclaim may  
constitute a post-petition claim in favor of the Defendant, the  
court held that it should not be litigated in Bankruptcy Court.  
Defendant has had and continues to have access to state court to  
litigate his post-petition claims. It would be prejudicial to the  
Plaintiff and to the administration of justice to reinstate a non-  
compulsory counterclaim on the eve of trial.

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re:	)	Bankruptcy Case No.
	)	697-63375-fra7
BENJAMIN R. MEYERS,	)	
	)	
<u>Debtor.</u>	)	
	)	
EMPIRE WHOLESALE LUMBER CO.,	)	
	)	
Plaintiff,	)	
vs.	)	Adversary Proceeding No.
	)	99-6079-fra
BENJAMIN R. MEYERS; BENJAMIN	)	
MEYERS, SR.; KAREN MEYERS;	)	
DARRELL WHITSELL; MEYERS WOOD	)	
PRODUCTS, CO.; EUGENE FOREST	)	
PRODUCTS, INC.; W.L. BOYLES;	)	
NORTHWEST RELOAD; KENMAR MOULDING,	)	
INC.; RAINIER WOOD PRODUCTS, INC.,	)	
<u>Defendants.</u>	)	MEMORANDUM OPINION

Defendant has filed a motion seeking to "reinstate" a counterclaim previously dismissed by the District Court. Depending on whether the counterclaims now advanced are new matter or reiterations of the original claim, the motion amounts to a motion for leave to amend Defendant's pleadings, Fed.R.Bankr.P. 7015, incorporating Fed.R.Civ.P. 15, or a motion for relief from the

1 District Court's order under Fed.R.Bankr.P. 9024, which incorporates  
2 Fed R. Civ. P.60. Under either theory the motion should be denied.

3 I. BACKGROUND

4 On May 29, 1997 Plaintiff commenced an action against  
5 Defendant in the District Court under Case No. 97-6146-TC  
6 (hereinafter the "District Court Case"). The complaint set out the  
7 circumstances of an alleged commercial dispute, and claimed that  
8 Defendant was liable to Plaintiff under various tort, contract and  
9 equitable theories. An amended complaint was filed on February 18,  
10 1998. On May 8 Defendant filed an answer and counterclaim. The  
11 Counterclaim alleged that

12 Beginning in or about August, 1995, and continuing  
13 through the present, Plaintiff Empire Wholesale  
14 Lumber, Co., through its authorized employees and  
15 agents, including Harvey Graves and Greg Veralrud,  
16 represented to lumber suppliers, manufacturers and  
17 customers that Defendant Benjamin R. Meyers is a  
dishonest individual who should not be trusted, and  
that Meyers stole product or money from Plaintiff  
Empire, and should be prosecuted for criminal  
activity.

18 On June 10, 1997 Defendant, as debtor, filed a petition for  
19 relief under Chapter 7 of Bankruptcy Code. (Case No. 697-63375-  
20 fra7, hereinafter the "Bankruptcy case"). Plaintiff then commenced  
21 an adversary proceeding (697-6273-fra, the "Adversary Proceeding")  
22 in this Court seeking a determination that its claims against  
23 Defendant should be excepted from discharge under 11 U.S.C. § 523.

24 Plaintiff filed a motion in the District Court seeking  
25 summary judgment in its favor on Defendant's counterclaims. The  
26 District Court allowed the motion. The Court found that the claims,

1 as alleged, arose prior to the date of the petition in bankruptcy,  
2 and was therefore property of the estate. Accordingly, only the  
3 trustee in bankruptcy had standing to bring the claims. The order  
4 dismissing he counterclaims was entered on February 5, 1999.  
5 Thereafter the case was remanded to this Court for further  
6 proceedings.

## 7 II. DISCUSSION

8 Defendant seeks to reinstate the counterclaims prior to  
9 trial, which is currently scheduled for September 29, 1999. In his  
10 motion he has restated the counterclaim in virtually identical  
11 language as the original, with one change: the date of the alleged  
12 injury is now said to be "On or about May 28, 1997, and continuing  
13 through the present...." The motion must be denied for each of the  
14 following reasons.

### 15 1. *Fed R. Bankr. P. 9024*

16 The District Court, where the case originated, has already  
17 ruled that the Defendant has no standing to maintain the  
18 counterclaim. That ruling may not be disregarded simply because the  
19 case has been assigned to a new trial judge. Relief from the order  
20 may only be granted at this juncture pursuant to Fed.R.Bankr.P.  
21 9024, which incorporates Fed.R.Civ.P. 60:

22 (b) *Mistakes; Inadvertence; Excusable Neglect; Newly*  
23 *Discovered Evidence; Fraud, etc.* On motion and upon  
24 such terms as are just, the court may relieve a party  
25 or a party's legal representative from a final  
26 judgment, order, or proceeding for the following  
reasons:

(1) mistake, inadvertence, surprise, or excusable  
neglect;

1 (2) newly discovered evidence which by due  
2 diligence could not have been discovered in time  
to move for a new trial under Rule 59(b);

3 (3) fraud (whether heretofore denominated  
4 intrinsic or extrinsic), misrepresentation, or  
other misconduct of an adverse party;

5 (4) the judgment is void;

6 (5) the judgment has been satisfied, released, or  
7 discharged, or a prior judgment upon which it is based  
8 has been reversed or otherwise vacated, or it is no  
longer equitable that the judgment should have  
prospective application; or

9 (6) any other reason justifying relief from the  
10 operation of the judgment.

11 Nothing in Defendant's submission to this Court supports a  
12 finding that he qualifies for relief under this section.

13 *2. New claim*

14 This Court does not view Defendant's proposed counterclaim as  
15 a new claim, or distinguishable from the claim dismissed by the  
16 District Court. The original claim was described in the Defendant's  
17 first pleading as accruing on or about August, 1995. He is estopped  
18 from claiming differently at this point.<sup>1</sup>

19 To the extent a post-petition claim exists in favor of  
20 Defendant, it should not be included in this case, or litigated in  
21 this Court. While the events are related, the claim does not  
22 "arise out of the transaction or occurrence that is the subject  
23 matter of the opposing party's claim", and is not a compulsory  
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25 <sup>1</sup> Defendant maintains that he was unaware of the alleged defamation until  
26 after his bankruptcy petition was filed. This is immaterial: to the extent the  
defamation actually occurred before the petition it is property of the estate.

1 counterclaim under Fed.R.Civ.P. 13. It would be prejudicial to  
2 Plaintiff to reinstate a non-compulsory counterclaim this close to  
3 trial, and prejudicial to the administration of justice in this  
4 Court to allow the counterclaim and postpone the trial. Defendant  
5 is not entitled to amend his answer as a matter of right under  
6 Fed.R.Bankr.P. 7015. As noted, it would not be in the interest of  
7 justice to allow a permissive amendment at this late date.

8 Any claim Defendant may now hold is a matter of state law,  
9 unrelated to the administration of Defendant/debtor's bankruptcy  
10 case. Defendant has (and has had) access to the State Courts to  
11 pursue his post-petition claims. This Court should abstain from  
12 entertaining them. 28 U.S.C. § 1334(c)(1).<sup>2</sup>

13 This memorandum constitutes the Court's findings of fact and  
14 conclusions of law. An order consistent with this memorandum shall  
15 be entered contemporaneously.

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19 FRANK R. ALLEY, III  
20 Bankruptcy Judge  
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<sup>2</sup> 28 U.S.C. § 1334(c)(1) provides:

25 Nothing in this section prevents a District Court in the interest of  
26 justice, or in the interest of comity with State courts or respect for State law,  
from abstaining from hearing a particular proceeding arising under Title 11 or  
arising in or related to a case under Title 11.