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CLERK U.S. BANKRUPTCY COURT
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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:

AYERS BATH (U.S.A.), CO., LTD.,

Debtor.

Case No. 2:13-bk-17409-RK

Chapter 7

District Court Case No. 2:14-cv-00188-SVW-RZ [Foremost Groups, Inc. v. Tangshan Ayers Bath Equipment Co., Ltd.]

**REPORT AND RECOMMENDATION OF THE
UNITED STATES BANKRUPTCY COURT
TO UNITED STATES DISTRICT COURT
REGARDING THE RENEWED MOTION OF
FOREMOST GROUPS, INC., TO AMEND
JUDGMENT OF THE UNITED STATES
BANKRUPTCY COURT**

Date: June 7, 2021

Time: 1:15 p.m.

Place: Courtroom 1675

Roybal Federal Building

255 East Temple Street

Los Angeles, California 90012

Hearing Conducted Remotely on Zoom for
Government

TO THE HONORABLE STEPHEN V. WILSON, UNITED STATES DISTRICT JUDGE:

This Report and Recommendation is submitted by the undersigned United States
Bankruptcy Judge to the Honorable Stephen V. Wilson, Judge, United States District

1 Court for the Central District of California, pursuant to 28 U.S.C. § 157(c)(1) and Federal
2 Rule of Bankruptcy Procedure 9033 in response to the District Court's referral of
3 proceedings to this United States Bankruptcy Court.

4 I. REFERRAL ORDERS FROM THE DISTRICT COURT

5 On March 8, 2016, the District Court issued an In Chambers Order Staying
6 Proceedings (the "Stay Order"), staying the proceedings before it in *Foremost Groups,*
7 *Inc. v. Tangshan Ayers Bath Equipment Co., Ltd.*, No. 2:14-cv-00188-SVW-RZ (C.D.
8 Cal.).¹ In Chambers Order Staying Proceedings, dated March 8, 2016, Supplemental
9 Request for Judicial Notice in Support of Motion of Foremost Groups, Inc. to Amend the
10 Judgment of the Bankruptcy Court to Add Tangshan Ayers Bath Equipment Co. Ltd as
11 Judgment Debtor ("Supplemental RJN"), filed on June 21, 2021, Electronic Case Filing
12 No. ("ECF") 263, Exhibit U. In the Stay Order, the District Court stated that it "concludes
13 that, as a first measure, Foremost should seek an amended judgment through the
14 bankruptcy court. Whichever way Foremost has portrayed its case, ultimately, it is an
15 effort to amend the judgment of the bankruptcy court. In that regard, the action is
16 STAYED in order to give Foremost the opportunity to seek an amended judgment
17 through the bankruptcy court. See *In re Levander*, 180 F.3d 1114 (9th Cir. 1999)." *Id.*

18 Subsequently, the District Court issued an In Chambers Order Lifting Stay (the
19 "Referral Order"), which expressly referred proceedings to this bankruptcy court. In
20 Chambers Order Lifting Stay, dated November 1, 2017, Supplemental RJN, ECF 263,
21 Exhibit Y. In the Referral Order, the District Court stated that Foremost requested it to
22 issue an order lifting the stay imposed by the Stay Order in order to allow for: (1) the
23 filing by Foremost of a motion pursuant to Federal Rule of Civil Procedure 69(a)
24 amending the judgment against Ayers Bath (U.S.A.) Co., Ltd. ("Ayers Bath"), to add
25

26
27 ¹ Foremost Groups, Inc., the plaintiff in the case before the District Court in *Foremost Groups, Inc. v.*
28 *Tangshan Ayers Bath Equipment Co., Ltd.*, No. 2:14-cv-00188-SVW-RZ (C.D. Cal.) is referred to herein
as "Foremost," and Tangshan Ayers Bath Equipment Co., Ltd., the defendant in that case, is referred to
herein as "Tangshan Ayers." The case before the District Court is referred to herein as the "Tangshan
Ayers Litigation."

1 Tangshan Ayers as a judgment debtor and (2) the referral of this motion to amend
2 judgment to the United States Bankruptcy Court for proposed findings of fact and
3 conclusions of law. *Id.* In the Referral Order, the District Court noted that Foremost
4 obtained a final judgment against Ayers Bath in the form of an allowed proof of claim in
5 the amount of \$5,265,000 in this bankruptcy case, *In re Ayers Bath (U.S.A.) Co., Ltd.*,
6 Case No. 2:13-bk-17409-RK (Bankr. C.D. Cal.); that in an effort to collect on this
7 judgment, on January 9, 2014, Foremost had filed a complaint against Tangshan Ayers
8 in the Tangshan Ayers Litigation before the District Court, wherein Foremost sought a
9 determination that Tangshan Ayers, through its alleged alter ego, Ayers Bath, tortiously
10 interfered with Foremost's prospective economic advantage and contractual relations
11 and unjustly competed, and that the District Court on March 8, 2016 had entered its
12 Stay Order. *Id.*

13 In the Referral Order, the District Court stated that Foremost had argued before
14 the District Court that it interpreted the Stay Order to be a referral to the Bankruptcy
15 Court and requested that the District Court issue an order clarifying that the Stay Order
16 be treated as such, and that it agreed, stating that in issuing the Stay Order, the District
17 Court intended that the alter ego issue go to the Bankruptcy Court for proposed findings
18 of fact and conclusions of law under 28 U.S.C. § 157. *Id.* The District Court noted the
19 classification under 28 U.S.C. § 157 between "core" proceedings in which the
20 bankruptcy court "may enter appropriate orders and judgments" and "noncore"
21 proceedings which the bankruptcy court may hear but for which it may only submit
22 proposed findings of fact and conclusions of law to the District Court for *de novo* review.
23 *Id.* The District Court stated that "Foremost's alter-ego claim is a non-core proceeding
24 because it relates to Foremost's ability to collect the final judgment from Ayers Bath
25 parent company." *Id.* Accordingly, the District Court stated that it "hereby refers this
26 matter to the Bankruptcy Court for proposed findings of fact and conclusions of law." *Id.*

27 Pursuant to the referral of proceedings from the District Court as described
28 above, this United States Bankruptcy Court hereby submits to the United States District

1 Court this Report and Recommendation which constitutes its proposed findings of fact
2 and conclusions of law under 28 U.S.C. § 157.

3 II. MOVANT'S CONTENTIONS

4 Pending before this United States Bankruptcy Court is the Renewed Motion of
5 Foremost Groups, Inc., to Amend the Judgment of the Bankruptcy Court to Add
6 Tangshan Ayers Bath Equipment Co., Ltd., as Judgment Debtor ("Renewed Motion"),
7 filed on December 14, 2017. ECF 118. According to the Renewed Motion, Foremost
8 seeks entry of an order pursuant to Federal Rule of Civil Procedure 69(a), made
9 applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7069, amending
10 the judgment against Ayers Bath (U.S.A.) Co., Ltd., to add Tangshan Ayers Bath
11 Equipment Co., Ltd., as a judgment debtor. Renewed Motion, Memorandum of Points
12 and Authorities, ECF 118-1 at 2. ² Foremost's renewed motion to amend judgment is a
13 contested matter within the meaning of Federal Rule of Bankruptcy Procedure 9014 as
14 it is opposed by the respondent Tangshan Ayers.

15 The judgment of this court that Foremost seeks to amend is the allowed claim
16 that it has in this bankruptcy case against the debtor, Ayers Bath, based on the proof of
17 claim that it filed on December 12, 2013, in the amount of \$5,265,000. Claim No. 1-1,
18 Claims Register. ³ Foremost contends that its proof of claim filed in this Chapter 7
19 bankruptcy case as deemed allowed in the amount of \$5,265,000 constitutes a final
20 judgment pursuant to Ninth Circuit precedent under *Siegel v. Federal Home Loan*
21

22
23 ² After Foremost filed its motion to reopen this bankruptcy case on November 4, 2016, which the court
24 granted by order entered on November 15, 2016, Foremost filed its original motion to amend judgment to
25 judgment of the Bankruptcy Court to add Tangshan Ayers Bath Equipment Co., Ltd., as a judgment
26 debtor on January 13, 2017. ECF 60, 63 and 66. Tangshan Ayers filed motions to dismiss the motion to
27 amend judgment on January 24, 2017 and February 14, 2017. ECF 68 and 73. The court denied
Tangshan Ayers's motions to dismiss Foremost's original motion to amend judgment as moot on
December 13, 2017 after Foremost represented in open court that it was filing an amended motion to
amend judgment, which is the renewed motion filed on December 14, 2017 now pending before the court.
ECF 114 and 118.

28 ³ Foremost's proof of claim filed on December 12, 2021 is docketed on the Claims Register in this
bankruptcy case as Claim No. 1-1. A copy of the proof of claim is attached as Exhibit G to the
Declaration of Frank F. Velocci in support of the Renewed Motion. ECF 66-2 at 2 and ECF 66-9 at 1-55.

1 *Mortgage Corp.*, 143 F.3d 525 (9th Cir. 1998). Renewed Motion, Memorandum of
2 Points and Authorities, ECF 118-1 at 7-15 (internal citation pages 3-11), *citing* Chapter
3 7 Trustee's Final Account, Certification that the Estate has been Fully Administered and
4 Application of Trustee to be Discharged, ECF 58 at 5, filed on July 24, 2015. In this
5 Chapter 7 bankruptcy case, the Chapter 7 trustee made a distribution from Ayers Bath's
6 bankruptcy estate to Foremost on its allowed claim in the amount of \$7,757.24. *Id.* at
7 12-13 (internal citation pages 8-9).

8 Foremost seeks to collect the uncollected portion on its allowed claim of
9 \$5,265,000 against the bankruptcy debtor, Ayers Bath, in this bankruptcy case as a
10 money judgment, and thus, seeks to collect this money judgment against the debtor's
11 parent, Tangshan Ayers, ⁴ a nondebtor party, by amending the allowed proof of claim
12 against Ayers Bath, to add the parent, Tangshan Ayers, as another party liable for the
13 claim as an additional judgment debtor pursuant to Federal Rule of Civil Procedure
14 69(a), made applicable to this bankruptcy case by Federal Rules of Bankruptcy
15 Procedure 7069 and 9014, and California Code of Civil Procedure § 187. See
16 Renewed Motion, Memorandum of Points and Authorities, ECF 118-1 at 17 (internal
17 citation page 13) ("... in the event the Court finds that Tangshan Ayers is the alter ego
18 of Ayers Bath and controlled the Ayers Bath bankruptcy case, it is liable for all the
19 judgments (or, in this case, allowed proofs of claim) entered against Ayers Bath."). ⁵

21 ⁴ There is no dispute that Tangshan Ayers is the parent company of Ayers Bath as the parties have
22 stipulated to the fact that Tangshan Ayers owned 100 percent of the shares of Ayers Bath. Pretrial
23 Stipulation Pursuant to Local Bankruptcy Rule 7016-1(b)(1)(B), ECF 208, filed on January 5, 2021,
24 Stipulated Fact No. 8.

25 ⁵ According to Foremost in its renewed motion to amend judgment, "[t]he facts giving rise to Foremost's
26 claims are straightforward":

27 The claims arise from Tangshan Ayers's attempt, through its alter ego, Ayers Bath, to usurp
28 Foremost's exclusive right to distribute Tangshan Huida Ceramic Group Co., Ltd. ('Huida')
products in the United States and Canada. Despite having actual knowledge of Foremost's
exclusive right of distribution, Tangshan Ayers formed Ayers Bath in order to facilitate its import
and sale of such products to Foremost's customers. Such conduct cost Foremost sales
opportunities to which Foremost was otherwise entitled while simultaneously undermining
Foremost's relationship with Huida.

ECF 118-1 at 5 (internal citation page 1). In its opposition to the motion, Tangshan Ayers disputed

1 Thus, Foremost brings the renewed motion to amend the bankruptcy court's judgment
2 in the form of the allowed claim against the debtor, Ayers Bath, to collect on this claim
3 against the debtor's parent, Tangshan Ayers, as an enforceable money judgment.

4 Foremost states that Federal Rule of Civil Procedure 69(a) "empowers federal
5 courts to rely upon state law to add judgment-debtors." Renewed Motion, Memorandum
6 of Points and Authorities, ECF 118-1 at 16 (internal citation page 12), *citing, In re*
7 *Levander*, 180 F.3d 1114, 1120-1121 (9th Cir. 1999). Foremost contends, "where a
8 state law such as California's allow a judgment creditor to a judgment on an alter ego
9 theory, it is appropriate to do so under Rule 69(a)." *Id.*, citing and quoting, *Calvin Brian*
10 *Int'l Co. v. Gustto, Inc.*, No. 13-cv-0218, 2014 WL 3548143, at *2 (S.D. Cal. July 17,
11 2014). Foremost then identifies such California law: "California Code of Civil Procedure
12 section 187 allows the amendment of a judgment to add 'additional judgment debtors on
13 grounds that the person or entity is the alter ego of the original judgment debtor.'" *Id.*,
14 *citing and quoting, NEC Electronics Inc. v. Hurt*, 208 Cal.App.3d 772, 778. 256 Cal.Rptr.
15 441 (1989). Then Foremost cites the legal standard under California Code of Civil
16 Procedure § 187: "The judgment creditor must show that: (1) 'the party to be added
17 satisfies the alter ego criteria,' and (2) 'the new party had control of the litigation and
18 occasion to conduct it with a diligence corresponding to the risk of personal liability
19 involved.'" *Id.*, *citing and quoting inter alia, Bank of Montreal v. SK Foods, LLC*, 476
20 B.R. 588, 601 (N.D. Cal. 2012).

21 In support of the renewed motion to amend judgment, Foremost has offered
22

23 Foremost's contentions, asserting that "Foremost is merely an 'unsatisfied creditor' asserting a meritless
24 alter ego claim in an effort to recover from an innocent third party." Tangshan Ayers Bath Equipment
25 Co.'s Opposition to the Renewed Motion of Foremost Groups, Inc. to Amend the Judgment of the
26 Bankruptcy Court to Add Tangshan Ayers Bath Equipment Co., Ltd., as Judgment Debtor, filed on
27 January 10, 2018, ECF 122 at 8:1-2 (internal citation page 3). Tangshan Ayers further asserted that
28 Foremost's claim is really against its parent, Huida, but such claim is not asserted due to Foremost's
contractual agreement with Huida that any contractual dispute between Foremost and Huida requires
arbitration before a tribunal in China. *Id.* at 8:24-28, n. 9 (internal citation page 3); *see also*, Pretrial
Stipulation Pursuant to Local Bankruptcy Rule 7016-1(b)(1)(B), ECF 208, filed on January 5, 2021,
Stipulated Facts Nos. 1 and 2 (the parties agree that Foremost and Huida had entered into their exclusive
distribution agreement in 2000, which included a dispute resolution provision for mandatory arbitration of
certain disputes between them relating to the distribution agreement, but they disagree on the proper
translation and scope of such arbitration provision).

evidence which it contends establishes the alter ego claims against Tangshan Ayers with respect to its subsidiary, Ayers Bath, and Tangshan Ayers has offered evidence in opposition to the renewed motion which it contends shows that Foremost has not established its alter ego claims against it. However, the court does not reach the merits of Foremost's alter ego claims because as discussed below, the court determines that Foremost may not properly rely upon Federal Rule of Civil Procedure 69(a) to amend its judgment in the form of the allowed proof of claim in this bankruptcy case because relief under Rule 69(a) is available only for a money judgment and Foremost's allowed claim in this bankruptcy case is not a money judgment for purposes of the rule.

III. BANKRUPTCY COURT'S RECOMMENDATION

The ruling of this United States Bankruptcy Court is that it recommends to the United States District Court that Foremost's renewed motion to amend the judgment of the bankruptcy court in the form of the allowed proof of claim in this bankruptcy case should be denied because: (1) Foremost's allowed proof of claim is not a money judgment within the meaning of Federal Rule of Civil Procedure 69(a) to support the application of California Code of Civil Procedure § 187; and (2) alternatively, Foremost's evidentiary showing does not meet the due process standard of California Code of Civil Procedure § 187.

On April 19, 2021, this court issued a tentative ruling on Foremost's renewed motion to amend judgment. ECF 245. In its tentative ruling, the court raised concerns and authorities regarding the applicability of Federal Rule of Civil Procedure 69(a) to Foremost's allowed proof of claim, which issue was not discussed in the original moving and opposing papers, and the court continued the final hearing on the motion so that the parties had an opportunity to consider and address the concerns and authorities in the issued tentative ruling. Pursuant to the tentative ruling, parties could file supplemental briefs to address the court's tentative ruling. Having reviewed the supplemental pleadings filed by parties, including post-hearing briefs on June 21, 2021,

1 and heard their oral arguments in response to the court's tentative ruling at the final
2 hearing on June 7, 2021, the United States Bankruptcy Court now rules as follows.

3 IV. MOVANT'S PRELIMINARY OBJECTIONS TO BANKRUPTCY COURT'S
4 RECOMMENDATION BASED ON THE DOCTRINE OF THE LAW OF
5 THE CASE

6 In its supplemental brief, Foremost contends that the only issue before this court
7 is alter ego. Foremost argues, "The District Court did not ask this Court to opine on, in
8 the first instance, the applicability of Rule 69(a) of the Federal Rules of Civil Procedure,
9 which was not disputed in the Tangshan Ayers Litigation." Foremost Groups, Inc.'s
10 Supplemental Brief in Response to the Court's Tentative Ruling on Foremost's
11 Renewed Motion and Judgment, ECF 255 at 6:1-3 (internal citation page 2). Although
12 the District Court referred this matter to this bankruptcy court to make findings on
13 Foremost's alter ego claim, this court cannot ignore the applicability of Federal Rule of
14 Civil Procedure 69(a) and the applicable legal precedent because the District Court
15 referred to this court Foremost's motion to amend the judgment of this court for this
16 court to rule on the motion in the first instance, and in doing so, this court must consider
17 the applicability of Rule 69(a) as to whether Foremost may amend this court's prior
18 judgment.

19 Federal Rule of Civil Procedure 69(a) requires a money judgment enforceable by
20 a writ of execution by its express terms which provide as follows:

21 **A money judgment is enforced by a writ of execution, unless the court**
22 **directs otherwise.** The procedures on execution---and in proceedings
23 supplementary to and in aid of judgment or execution---must accord with the
24 procedure of the state where the court is located, but a federal statute governs to
the extent it applies.

25 Federal Rule of Civil Procedure 69(a) (emphasis in bold added).

26 As discussed in greater detail below, in this bankruptcy case, Foremost holds an
27 allowed proof of claim, which constitutes a final judgment for *res judicata* purposes, but
28 the allowed proof of claim is not a money judgment for purposes of Rule 69(a) as held

1 by the Eleventh Circuit in *Ziino v. Baker*, 613 F.3d 1326 (11th Cir. 2010). While a
2 number of courts have followed the Eleventh Circuit's decision in *Ziino v. Baker* as
3 discussed below and there is no contrary authority based on this court's research, there
4 is no controlling case in the Ninth Circuit on the issue. Based on the plain language of
5 Rule 69(a) and the applicable case law, the court concludes that it may not allow
6 Foremost to amend the allowed proof of claim filed in this bankruptcy case against the
7 bankruptcy estate of debtor Ayers Bath (U.S.A.) Co., Ltd., to include Tangshan Ayers, a
8 nondebtor third party, because the allowed claim is not an executable money judgment
9 within the meaning of Rule 69(a).

10 In its supplemental brief, Foremost argues that this court must apply Rule 69(a)
11 to allow it to amend its proof of claim under the doctrine of the law of the case without
12 questioning its applicability. Specifically, Foremost contends that the doctrine of the law
13 of the case precludes this court "from reconsidering an issue already decided by the
14 same or a higher court in the same case." Foremost Groups, Inc.'s Post-Hearing
15 Supplemental Brief, ECF 264 at 4:6-7 (internal citation page 1), citing to *Lucas*
16 *Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 766 (9th Cir.
17 2001).

18 In considering Foremost's argument that the doctrine of the law of the case
19 precludes this court from deciding the issue of the applicability of Rule 69(a) to
20 Foremost's motion to amend the judgment of this court in the form of its allowed proof of
21 claim to add Tangshan Ayers as a judgment debtor, the court first reviews the
22 applicable law governing the doctrine of the law of the case and then the proceedings
23 before the District Court upon which Foremost's argument is based.

24 "For the doctrine [of law of the case] to apply, the issue in question must have
25 been 'decided explicitly or by necessary implication in [the] previous disposition.'"
26 *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000) (citation
27 omitted). Moreover, "[a]pplication of the doctrine is discretionary." *Id.* (citation omitted).
28 "The 'law of the case acts as a bar only when the issue in question was actually

1 considered and decided by the first court.” *United Steelworkers of America v.*
2 *Retirement Income Plan for Hourly-Rated Employees of ASARCO, Inc.*, 512 F.3d 555,
3 564 (9th Cir. 2008) (citation omitted); *see also, Mirchandani v. United States*, 836 F.2d
4 1223, 1225 (9th Cir. 1988) (the law-of-the-case doctrine does not apply where the court
5 did not previously reach a decision based on the merits).

6 Foremost argues the applicability of Rule 69(a) was raised in the Tangshan
7 Ayers Litigation and “necessarily decided” by the District Court prior to the referral of the
8 matter to this court “for a determination of alter ego.” Foremost Groups, Inc.’s Post-
9 Hearing Supplemental Brief, ECF 264 at 4:14-16 (internal citation page 1). As such,
10 according to Foremost, “the District Court’s decision constitutes the law of the case and
11 should not be reconsidered.” *Id.* at 4:16-18 (internal citation page 1).

12 Foremost argues that it “first invoked Rule 69(a) in its First Amended Complaint,
13 filed on November 17, 2015, after the District Court held that, while Foremost could not
14 bring standalone claims for tortious interference and unjust enrichment against
15 Tangshan Ayers due to the res judicata effect of the Proof of Claim, claims based on
16 alter ego or action upon the judgment could be pursued.” *Id.* at 4-5 (internal citation
17 pages 1-2) (citations omitted). Then, Foremost argues that “[i]n the two motions to
18 dismiss that followed, Tangshan Ayers did not argue that the Proof of Claim cannot, as
19 a matter of law, be amended under Rule 69(a).” *Id.* at 5 (internal citation page 2)
20 (citations omitted). In support of this assertion, Foremost argues:

21 To the contrary, Tangshan Ayers expressly acknowledged that:

22 It is true Bankruptcy courts are allowed to amend their orders to add third-party
23 judgment debtors under certain circumstances. It is equally true that under Rule
24 69(a) federal courts are authorized to rely on state law which permits “permits
25 judgment creditors to use any execution method consistent with the practice and
26 procedure of the state in which the district court sits” and, “Under California Code
27 of Civil Procedure § 187, a court has authority to amend a judgment to add
28 additional judgment debtors, *In re Levander*, 180 F.3d 1114, 1121 (9th Cir.
1999).

Id. at 5:6-18 (internal citation page 2), *citing and quoting*, Tangshan’s Reply to
Foremost’s Opposition to Rule 12(b)(6) Motion to Dismiss.

1 According to Foremost, “In ruling on Tangshan Ayers’s Motion to Dismiss the
2 First Amended Complaint, the District Court held only that Rule 69(a) is a procedural
3 device and does not provide a cause of action.” *Id.* at 5:19-23 (internal citation page 2),
4 *citing, In Chambers Order Granting In Part and Denying In Part Defendant’s Motion to*
5 *Dismiss*, dated January 6, 2016, Exhibit P to Foremost’s Supplemental Request for
6 Judicial Notice, ECF 263. In so ruling, according to Foremost, “The District Court did
7 not hold that the Proof of Claim, which it had previously determined was a final
8 judgment under *Siegel v. Federal Home Loan Mortg. Corp.*, 143 F.3d 525 (9th Cir.
9 1998), was not a ‘money judgment’ within the meaning of Rule 69(a).” *Id.* at 5:23-6:1
10 (internal citation pages 2-3) (citations omitted).⁶ Foremost then argues: “Had it believed
11 that to be the case, it would have ruled and ended the litigation which, at that point, had
12 been going on for nearly four-and-a-half years across multiple forums.” *Id.* at 6:1-3
13 (internal citation page 3). According to Foremost, “Instead, the District Court allowed
14 Foremost to file an amended pleading which preserved its claim to enforce the
15 judgment on the basis of alter ego, without asserting the standalone causes of action for
16 alter ego or execution under Rule 69(a).” *Id.* at 6:3-6 (internal citation page 3).

17 Foremost explains that it did file the amended pleading, its Second Amended
18 Complaint in the Tangshan Ayers Litigation, which asserts a single cause of action for
19 “Action on Judgment.” *Id.* at 6 (internal citation page 3). Foremost notes that in
20 response to the Second Amended Complaint:

21 Tangshan Ayers again moved to dismiss. In its motion papers, Tangshan Ayers

22 ⁶ Foremost does recognize in a footnote in its post-hearing brief that in ruling on Tangshan Ayers’s
23 motion to dismiss Foremost’s first amended complaint: “The District Court acknowledged that it was not
24 making a finding as to the procedural manner in which Rule 69(a) would apply to the Ayers Bath
25 Bankruptcy Case, i.e., through Rule 7069 of the Federal Rules of Bankruptcy Procedure.” Foremost
26 Groups, Inc.’s Post-Hearing Supplemental Brief, ECF 264 at 3:27-28, n. 4. In footnote 3 of the order on
27 Tangshan Ayers’s motion to dismiss Foremost’s first amended complaint, the District Court stated: “The
28 Court makes no finding regarding whether Federal Rule of Civil Procedure 69 would apply to the In re
Ayers Bath (USA) Co., Ltd., Case No. 2:13-bk-17409-RK action itself through the Federal Rules
Bankruptcy Procedure Rule 7069 or another rule of bankruptcy procedure and what effect if any would
have on this Court’s jurisdiction.” In Chambers Order Granting in Part and Denying in Part Defendant’s
Motion to Dismiss [52], dated January 6, 2016, at 2-3 and nn. 2 and 3, Supplemental RJN, ECF 263,
Exhibit P. It appears to this court that the District Court was not just stating that it was not making a
finding as to the procedural manner in which Rule 69(a) would apply to the Ayers Bath Bankruptcy Case
as Foremost characterizes it, but rather as to whether the rule applied at all.

1 did not deviate from its previous acknowledgment that Rule 69(a) was available,
2 but argued that due process concerns cautioned against the amendment of an
3 uncontested proof of claim. See Supp. RJN, Ex. T (Tangshan's Reply to
4 Foremost's Opposition to its Motion to Dismiss the SAC Pursuant to FRCP
5 12(b)(1) and 12(b)(6)), at 11-13. Tangshan Ayers also argued that the Second
6 Amended Complaint should be dismissed for lack of subject matter jurisdiction
7 and an equitable estoppel and issue and claims preclusion grounds. See *id.*, Ex.
8 B (Defendant Tangshan Ayers Bath Equipment Co. Ltd.'s Memorandum of Law
9 Submitted in Support of Motion to Dismiss the Second Amended Complaint
10 Pursuant to FRCP Rule 12(b)(1) and Rule 12(b)(6)).

11 *Id.* at 6:8-18 (internal citation page 3). As Foremost states, "In response, the District
12 Court issued the Stay Order, which states that the Tangshan Ayers Litigation 'is
13 STAYED in order to give Foremost the opportunity to seek an amended judgment
14 through the bankruptcy court. See *In re Levander*, 180 F.3d 1114 (9th Cir. 1999)." *Id.*
15 at 6:19-22 (internal citation page 3), citing *In re Levander*, 180 F.3d 1114 (9th Cir.
16 1999). Foremost further contends:

17 In *Levander*, the only case cited by the District Court, the Ninth Circuit expressly
18 held that the bankruptcy court was authorized to amend an order awarding
19 attorneys' fees to add an additional judgment debtor under Rule 69(a) if the
20 requirements of California law (specifically, California Code of Civil Procedure
21 section 187) are met. 180 F.3d at 1120-1121. **The Stay Order necessarily**
22 **assumes that amendment under Rule 69(a) is possible (which had never**
23 **been disputed)**, but leaves to this Court to determine, in the first instance, whether
24 the elements of California Code of Civil Procedure section 187---alter ego and
25 control of the litigation---are satisfied.

26 *Id.* at 6:23 - 7:6 (internal citation pages 3-4) (emphasis in bold added).

27 Foremost argues: "If there was any question as to the District Court's intent, it
28 was resolved when the District Court issued the Referral Order in November 2017." *Id.*
at 7:7-8 (internal citation page 4). According to Foremost,

In that Order [i.e., the Referral Order], which was the result of Tangshan Ayers's
frivolous argument that Foremost was required to re-serve Tangshan Ayers
under the Hague Convention before proceedings in the Bankruptcy Court could
resume, the District Court confirmed that, in issuing the Stay Order, it "**intended**
29 **that the alter-ego issue [be referred] to the Bankruptcy Court for proposed**
30 **findings of fact and conclusions of law under 28 U.S.C. § 157.**" Supp. RJN ,
31 Ex. Y (In Chambers Order Lifting Stay, dated November 1, 2017) (emphasis
32 added). The Referral Order does not contemplate this Court opining on any
issue in the Tangshan Ayers Litigation (which had been pending with the District

1 Court for nearly four years) other than alter ego.

2 *Id.* at 7:7-17 (internal citation page 4) (emphasis in original).

3 In Foremost's view, "The Stay Order and Referral Order reflect the District
4 Court's assumption that the Proof of Claim is capable of being amended; the only
5 question for this Court is whether the alter ego test is met, as the District Court stated."
6 *Id.* at 7:18-20 (internal citation page 4). Thus, Foremost "respectfully submits that this
7 Court lacks discretion to opine on the applicability of Rule 69(a) or decline to make
8 proposed findings of fact and conclusions of law with respect to alter ego." *Id.* at 7:21-
9 23 (internal citation page 4). Foremost then goes on to argue that "If the District Court's
10 holding that the Proof of Claim is a final judgment subject to enforcement against
11 Tangshan Ayers was in error, Tangshan Ayers may appeal the District Court's ultimate
12 decision with respect to this Court's proposed findings of fact and conclusions on the
13 issue of alter ego." *Id.* at 7:23-27 (internal citation page 4). Nevertheless, as Foremost
14 finally argues, "[b]ut this Court should not second-guess the District Court with respect
15 to whether the Proof of Claim is capable of amendment; it should simply determine
16 whether amendment is proper on the basis of alter ego." *Id.* at 7:27 - 8:2 (internal
17 citation pages 4-5).

18 This bankruptcy court has considered Foremost's argument that the law of the
19 case precludes it from considering whether Rule 69(a) applies to Foremost's proof of
20 claim based on the District Court's prior rulings, and the court has reviewed the various
21 pleadings and orders in the Tangshan Ayers Litigation relating to Tangshan Ayers's
22 motions to dismiss, including the District Court's Stay Order and Referral Order. Based
23 on such consideration and review, the court determines that Foremost's argument lacks
24 merit. In its post-hearing briefing, Foremost cited the applicable Ninth Circuit law
25 regarding the doctrine of the law of the case that under the doctrine, a court is
26 precluded from reconsidering an issue already decided by the same or a higher court in
27 the same case; for the doctrine to apply, the issue must have been "decided explicitly or
28 by necessary implication in [the] prior disposition"; and failure to apply the doctrine,

1 unless one or more exception is met, constitutes an abuse of discretion.⁷ *Id.* at 4:6-13
2 (internal citation page 1) (citing case law), *citing and quoting, Lucas Automotive*
3 *Engineering, Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 766 (9th Cir. 2001);
4 *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000); and *United*
5 *States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997). However, Foremost has not
6 shown how under this case law that the doctrine applies here. *Id.* at 4:14 - 8:2 (internal
7 citation pages 1-5) (Foremost's analysis).

8 In order for the doctrine of the law of the case to apply, the issue must have been
9 decided explicitly or by necessary implication in the prior disposition. *United States v.*
10 *Lummi Indian Tribe*, 235 F.3d at 452. Foremost in its analysis has not shown that the
11 issue of whether Rule 69(a) allows it to amend its proof of claim to add another party as
12 a judgment debtor was explicitly decided by the District Court. To the contrary, the
13 District Court expressly stated in the Tangshan Ayers Litigation in granting Tangshan
14 Ayers's motion to dismiss Foremost's first amended complaint as follows: "The Court
15 makes no finding regarding whether Federal Rule of Civil Procedure 69 would apply to
16 the *In re Ayers Bath (USA) Co., Ltd.*, Case No. 2:13-bk-17409-RK action itself through
17 the Federal Rules Bankruptcy Procedure Rule 7069 or another rule of bankruptcy
18 procedure and what effect if any that would have on this Court's jurisdiction." In
19 Chambers Order Granting in Part and Denying in Part Defendant's Motion to Dismiss
20 [52], dated January 6, 2016, at 2-3 and n. 3, Supplemental RJN, ECF 263, Exhibit P, In
21 granting Tangshan Ayers's motions to dismiss Foremost's original complaint in part,⁸

22
23 ⁷ If the doctrine of the law of the case applies, the court may have discretion to depart from it under
24 specific circumstances: "[A] court may have discretion to depart from the law of the case if: 1) the first
25 decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on
26 remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would
otherwise result." *United States v. Cuddy*, 147 F.3d 1111, 1114 (9th Cir. 1998) (citation omitted). The
court's failure to apply one of these requisite conditions is an abuse of discretion. *Id.* The court does not
have to exercise any discretion to depart from the law of the case because the doctrine does not apply.

27 ⁸ Tangshan Ayers filed two separate motions to dismiss Foremost's original complaint, the first one being
28 under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(7) on grounds that Foremost failed to join an
indispensable party, Tangshan Huida Ceramic Group Co., Ltd., and that any dispute arising out of
Foremost's agreement with Huida was committed to mandatory arbitration, and the second one with
leave of court under Federal Rule of Civil Procedure 12(b)(6) for Tangshan Ayers to address Foremost's

1 the District Court earlier stated, “The Court does not consider whether Plaintiff has a
2 viable common law alter ego claim or action upon the judgment because the Complaint
3 does not allege standalone claims to enforce the proof of claim against Tangshan.” In
4 Chambers Order Granting Defendant’s Motion to Dismiss [40] Denying Defendant’s
5 Motion to Dismiss as Moot [26] and Denying Plaintiff’s Motion for Leave to File Surreply
6 [47], dated October 28, 2015, at 9, n. 8, Supplemental RJN, ECF 263, Exhibit K. These
7 statements of the District Court in the Tangshan Ayers Litigation indicate that it had not
8 explicitly decided whether Rule 69 would apply to Foremost’s proof of claim in this
9 bankruptcy case. Foremost in its supplemental or other papers has not shown
10 otherwise that there was an explicit holding of the District Court that Rule 69(a) applies
11 to its proof of claim.

12 In reviewing the pleadings in the Tangshan Ayers Litigation relating to Tangshan
13 Ayers’s motions to dismiss Foremost’s original complaint against it, the court notes that
14 the original complaint alleged four standalone claims against Tangshan Ayers: (1)
15 intentional interference with prospective economic advantage; (2) tortious interference
16 with commercial relations; (3) statutory unfair competition under California Business &
17 Professions Code §§ 17200 17203; and (4) common law unfair competition. Complaint,
18 Tangshan Ayers Litigation, filed on January 9, 2014, Supplemental RJN, ECF 263,
19 Exhibit A; In Chambers Order Granting Defendant’s Motion to Dismiss [40] Denying
20 Defendant’s Motion to Dismiss as Moot [26] and Denying Plaintiff’s Motion for Leave to
21 File Surreply [47], dated October 28, 2015, at 8 and n. 5, Supplemental RJN, ECF 263,
22 Exhibit K. In its original complaint in the Tangshan Ayers Litigation, Foremost alleged
23 that Tangshan Ayers was Ayers Bath’s alter ego and asserted its claims for tortious
24 interference and unfair competition based on conduct at issue in Foremost’s prior civil
25 action against Ayers Bath in *Foremost Groups, Inc., f/k/a Foremost International*

26
27
28 theory of the case that its proof of claim in the Ayers Bath bankruptcy case had preclusive effect. See In
Chambers Order Granting Defendant’s Motion to Dismiss [40] Denying Defendant’s Motion to Dismiss as
Moot [26] and Denying Plaintiff’s Motion for Leave to File Surreply [47], dated October 28, 2015, at 1-2,
Supplemental RJN, ECF 263, Exhibit K.

1 *Trading Co., Inc. v. Ayers Bath (USA) Corp.*, Civil Action No. CV11-7473 GAF (Ex)
2 (C.D. Cal., complaint filed on September 12, 2011).⁹ Pretrial Stipulation Pursuant to
3 Local Bankruptcy Rule 7016-1(b)(1)(B), ECF 208, filed on January 5, 2021, Stipulated
4 Facts Nos. 15, 16, 17, 18, 19, 36 and 37.

5 In the original complaint in the Tangshan Ayers Litigation, Foremost referred to
6 this bankruptcy case in paragraph 80 in alleging as follows:

7 80. On March 22, 2013, Ayers filed a voluntary petition under chapter 7 of title
8 11 of the United States Code in the United States Bankruptcy Court for the
9 Central District of California, *In re Ayers Bath (USA) Co., Ltd.*, Case No. 2:13-bk-
10 17409-RK (the "Ayers Bankruptcy"). As a result, the Ayers Litigation is stayed
11 pursuant to section 362 of the Bankruptcy Code.

12 Complaint, Tangshan Ayers Litigation, filed on January 9, 2014, Supplemental RJN,
13 ECF 263, Exhibit A; *see also*, Pretrial Stipulation Pursuant to Local Bankruptcy Rule
14 7016-1(b)(1)(B), ECF 208, filed on January 5, 2021, Stipulated Fact No. 38. The
15 complaint did not refer to Foremost's proof of claim filed in this bankruptcy case on
16 December 12, 2013. *Id.* That is, while the original complaint mentions the Ayers Bath
17 bankruptcy case, it does not refer to the proof of claim that Foremost filed in this case,
18 nor does the original complaint allege that Tangshan Ayers would be potentially liable
19 for the proof of claim. *Id.*

20 After Foremost filed its original complaint in the Tangshan Ayers Litigation on
21 January 14, 2015, the Chapter 7 trustee filed his final report in this case on April 14,
22 2015. ECF 50. The Chapter 7 trustee's notice of proposed payments, also filed on
23 April 14, 2015, showed Foremost had an allowed claim against the Ayers Bath
24 bankruptcy estate in the amount of \$5,265,000 with a proposed payment of \$7,757.24.
25 ECF 51; Pretrial Stipulation Pursuant to Local Bankruptcy Rule 7016-1(b)(1)(B), ECF
26 208, filed on January 5, 2021, Stipulated Fact No. 35. On April 14, 2015, Foremost's
27 uncontested proof of claim was deemed allowed in the amount of \$5,265,000. Pretrial

28 ⁹ In the Ayers Bath civil action, Foremost alleged that Ayers Bath was distributing Huida products and interfering with Foremost's exclusive distribution rights under its agreement with Huida, which allegations Ayers Bath denied. Pretrial Stipulation Pursuant to Local Bankruptcy Rule 7016-1(b)(1)(B), ECF 208, filed on January 5, 2021, Stipulated Facts Nos. 15 and 16.

1 Stipulation Pursuant to Local Bankruptcy Rule 7016-1(b)(1)(B), ECF 208, filed on
2 January 5, 2021, Stipulated Fact No. 34. The bankruptcy court closed the Ayers Bath
3 bankruptcy case on July 27, 2015. ECF 59; Pretrial Stipulation Pursuant to Local
4 Bankruptcy Rule 7016-1(b)(1)(B), ECF 208, filed on January 5, 2021, Stipulated Fact
5 No. 39.

6 Foremost first asserted its theory of Tangshan Ayers's liability for its allowed
7 claim in this bankruptcy case in its opposition to Tangshan Ayers's initial motion to
8 dismiss Foremost's original complaint in the Tangshan Ayers Litigation, filed on or about
9 July 13, 2015. Plaintiff Foremost Groups, Inc.'s Opposition to Defendant Tangshan
10 Ayers Bath Equipment Co., Ltd.'s Motion to Dismiss the Complaint Pursuant to FRCP
11 12(b)(1), 12(b)(7) and 19, Tangshan Ayers Litigation, filed on or about July 13, 2015,
12 Supplemental RJN, ECF 263, Exhibit D. In this opposition to Tangshan Ayers's motion
13 to dismiss, Foremost described the proceedings of this bankruptcy case as follows:

14 On March 22, 2013, Ayers filed a voluntary petition under chapter 7 of title 11 of
15 the United States Code in the United States Bankruptcy Court for the Central
16 District of California, *In re Ayers Bath (USA) Co., Ltd.*, Case No. 2:13-bk-17409-
RK (the "Ayers Bankruptcy").

17 In the Ayers Bankruptcy, Foremost sought to examine Ayers under Rule 2004 of
18 the Federal Rules of Bankruptcy Procedure and Local Bankruptcy Rule 2004-1.
19 Ayers ultimately consented to an Bankruptcy Rule 2004 examination, though only
20 after confronted with yet another motion to compel. The testimony elicited during
21 the Bankruptcy Rule 2004 examination left little doubt that Ayers is the alter ego
of Tangshan Ayers, formed for the sole purpose of subverting Foremost's rights
under the Exclusive Distribution Agreement.

22 On December 12, 2013, Foremost filed a proof of claim in the Ayers Bankruptcy
23 in an amount not less than \$5,265,000 (the "Proof of Claim"). See Velocci Decl.,
24 Ex. B. The Addendum to the Proof of Claim states that the Proof of Claim is for
25 damages incurred by Foremost "as a result of Ayers' interference with
26 Foremost's contractual relationship with Huida and Foremost's pursuit of
27 prospective economic business advantage by Ayers' importation of Huida
products and sale of those products to retail stores, wholesale channels and
regional dealers in the United States." *Id.* The Ayers Complaint was attached to
the Proof of Claim as Exhibit A. See *id.*

28 Neither Ayers, the chapter 7 trustee or any other party in interest, including
Tangshan Ayers, objected to Foremost's Proof of Claim. Accordingly,

1 Foremost's Proof of Claim was deemed allowed in the amount of \$5,265,000.
2 See Ayers Bath (USA) Co., Ltd., Case No. 2:13-bk-17409-RK, Chapter 7
3 Trustee's Final Report, Application for Compensation and Application(s) for
4 Compensation of Professionals (Dkt. No. 50). Despite having gross revenues of
5 \$424,71 in 2010, \$2,011,663 in 2011 and \$158,625 in 2013, the total assets of
6 Ayers' bankruptcy case were approximately \$50,000. As a result, Foremost
7 received a distribution of \$7,757.24, or approximately .15% of its allowed claim.
8 *See id.*

9 *Id.* at 8-9.

10 After alleging these facts about the proceedings in this bankruptcy case,
11 Foremost stated its lead argument in opposition to Tangshan Ayers's motion to dismiss
12 the original complaint with the heading, "**The Scope of this Action Is Now Limited to
13 Whether Ayers is an Alter Ego of Tangshan Ayers.**" *Id.* at 9 (emphasis in bold
14 added). According to Foremost, the allowance of its proof of claim in this bankruptcy
15 case changed the scope of the Tangshan Ayers Litigation because as Foremost put it,
16 "Because the allowance of the Proof of Claim constitutes a final judgment, Tangshan
17 Ayers may be bound by judgment under well-established principles of res judicata, or
18 claim preclusion." *Id.*

19 The circumstances that Foremost says were changed by the allowance of its
20 proof of claim in this bankruptcy case were described in its opposition to Tangshan
21 Ayers's motion to dismiss as follows:

22 Tangshan Ayers fails to appreciate that the scope of this suit has dramatically
23 narrowed following the allowance of Foremost's Proof of Claim in the Ayers
24 Bankruptcy. In the Ayers Bankruptcy, Foremost filed the Proof of Claim seeking
25 to recover the damages caused by the same tortious conduct alleged in the
26 Complaint---namely, Ayers' unlawful distribution of Huida products. As neither
27 Ayers, the chapter 7 trustee or any other party in interest objected to the Proof of
28 Claim, it was deemed allowed. Because the allowance of the Proof of Claim
constitutes a final judgment, Tangshan Ayers may be bound by judgment under
well-established principles of res judicata, or claim preclusion.

Id. In this opposition, Foremost further argued that all but one of the elements of claim
preclusion under Ninth Circuit precedent in *Siegel v. Federal Home Loan Mortgage
Corp.*, 134 F.3d 525, 529 (9th Cir. 1998) were met here: (1) the first element of

preclusion that there is a final judgment is met by the allowance of the proof of claim by the bankruptcy court in this bankruptcy case; (2) the second element of preclusion that the judgment is by a court of competent jurisdiction is also met by the allowance of the proof of claim by the bankruptcy court in this bankruptcy case; (3) the third element that the same cause of action is involved in both cases is met by the fact that the claims in the Tangshan Ayers Litigation formed the basis of, and was attached to, the proof of claim in this bankruptcy case; and (4) the fourth and final element, the identity of the parties was yet to be determined, and Foremost alleged in the complaint that there existed a unity of interest and ownership between Tangshan Ayers and Ayers Bath that the individuality and separateness of those entities ceased to exist, and Ayers Bath was Tangshan Ayers's alter ego. *Id.* at 10. In the opposition, Foremost posited that if it "establishes Ayers is Tangshan Ayers' alter ego, Tangshan Ayers is bound by the judgment under claim preclusion principles." *Id.* As stated in the opposition, in Foremost's view, "Such a finding would bar Tangshan Ayers from litigating whether the alleged conduct was tortious and eliminate any need to consider Foremost and Huida's respective rights and obligations under the Exclusive Distribution Agreement." *Id.* at 11.

In other words, Foremost was asserting its view that it would no longer have to prove up the merits of the substantive claims in its complaint in the Tangshan Ayers Litigation, but rather, based on its allowed claim in this bankruptcy case, which has preclusive effect, it need only establish that Ayers Bath, the debtor in this bankruptcy case, was Tangshan Ayers's alter ego to prove Tangshan Ayers's liability for the claims alleged in the complaint. As reflected in its decision of October 28, 2015 on Tangshan Ayers's motions to dismiss Foremost's complaint, the District Court queried counsel for Foremost about its new theory of recovery at the hearing on the motions as described by the District Court as follows:

At the hearing, Counsel for Plaintiff stated: "And we believe that under the *Siegel* case, the Ninth Circuit opinion that's cited in our papers, in which no response from the defendant is included in their papers addressing that opinion, that, in fact, that proof of claim serves as a judgment not only against the debtor but against Tangshan Ayers as the alter ego. And we believe that this case should

1 only be about whether, in fact, Tangshan Ayers is the alter ego of Ayers USA.
2 And if it is, then it should be liable under that claim which was not objected to.”
3 Dkt. 44, 6:5-13. The Court asked whether Plaintiff was “basically executing on a
judgment” and Counsel answered “Correct.” *Id.*, 6:14-16.

4 In Chambers Order Granting Defendant’s Motion to Dismiss [40] Denying Defendant’s
5 Motion to Dismiss as Moot [26] and Denying Plaintiff’s Motion for Leave to File Surreply
6 [47], dated October 28, 2015, at 7 and n. 4, Supplemental RJN, ECF 263, Exhibit K.

7 Having heard the arguments of the parties on Tangshan Ayers’s motion to
8 dismiss Foremost’s original complaint in the Tangshan Ayers Litigation, the District
9 Court stated:

10 Though the parties’ arguments are somewhat convoluted, both parties attempt to
11 dispose of the case on the basis of res judicata. The Defendant asks the Court
12 to bar the Plaintiff’s claim on the basis of the Ayers Litigation and the Plaintiff
13 argues that its claims are conclusively established through the proof of claim
14 accepted in the Ayers Bankruptcy. After considering the arguments for each
party, the Court finds that the Plaintiff’s claims, as currently characterized, must
be dismissed.

15 Defendant argues that Plaintiff’s claim is foreclosed by the Ayers Litigation. See
16 Dkt. 40-1, 9-15. To the extent that Plaintiff relies upon the same claims that were
17 at issue in the Ayers Litigation and accepted by the bankruptcy court in the proof
18 of claim, the Court agrees that the principle of res judicata bars relitigation of the
same claims. But, for the reasons stated below, the Court reaches this decision
by a different logic.

19 Plaintiff rightly directs the Court to the Ninth Circuit’s opinion in *Siegel v. Fed.*
20 *Home Loan Mortgage Corp.*, 131 F.3d 525 (9th Cir. 1998), but does not follow
the opinion to its logical conclusion

21 *****

22
23 The Ninth Circuit held that the plaintiff was barred from bringing the action under
24 the doctrine of res judicata. “The ‘doctrine of res judicata bars a party from
25 bringing a claim if a court of competent jurisdiction has rendered a final judgment
26 on the merits of the claim in a previous action involving the same parties or
27 privies.’” *Id.* (quoting *In re Int’l Nutronics, Inc.*, 28 F.3d 965 (9th Cir. 1994).
28 Significantly, the court held that a proof of claim acts as a final judgment
regardless of whether it was contested. See *id.* at 529-30. “In short, the validity
of the claim has been determined on the merits, and attacks upon it that ‘could
have been asserted’ cannot be raised in later proceedings.” *Id.* at 530.

Here, because the proof of claim was based on the Ayers Litigation, the

1 Complaint, as styled, must be dismissed. The Complaint alleges four claims
2 against Defendant, but under Plaintiff's theory of the case, these claims merged
3 with its judgment in the Ayers Bankruptcy action. See *Nat'l Union Fire Ins. Co. of*
4 *Pittsburgh v. Owenby*, 42 F. App'x 59, 63 (9th Cir. 2002); see also Restatement
5 (Second) of Judgments § 18(1) (1982) ("The plaintiff cannot thereafter maintain
6 an action on the original claim or any part thereof, although he may be able to
7 maintain an action upon the judgment.") Plaintiff cannot relitigate the claims that
8 are the basis of the Ayers Bankruptcy proof of claim.

9 Put simply, Plaintiff cannot have it both ways. The doctrine of res judicata will not
10 allow a plaintiff to both vindicate its underlying claims and seek to enforce a
11 judgment. Plaintiff's attempt to do both in the same action fails as a matter of
12 law.

13 *Id.* at 7-9. The District Court granted Tangshan Ayers's motions to dismiss pursuant to
14 Federal Rule of Civil Procedure 12(b)(6), but not pursuant to Federal Rule of Civil
15 Procedure 12(b)(1) or (7) as moot, and with leave to amend the complaint within 21
16 days of the order. *Id.* at 9.

17 On or about November 17, 2015, Foremost served and filed its First Amended
18 Complaint in the Tangshan Ayers Litigation. First Amended Complaint, Tangshan
19 Ayers Litigation, filed on or about November 17, 2015, Supplemental RJN, ECF 263,
20 Exhibit L. The First Amended Complaint alleged three causes of action: (1) for alter ego
21 liability of Tangshan Ayers as to Ayers Bath; (2) for action on the judgment based on the
22 allowed claim in the Ayers Bath bankruptcy case; and (3) for execution of judgment in
23 form of the allowed claim in the Ayers Bath bankruptcy case pursuant to Federal Rule of
24 Civil Procedure 69. *Id.* On or about December 8, 2015, Tangshan Ayers filed and
25 served a motion to dismiss Foremost's first amended complaint pursuant to Federal
26 Rules of Civil Procedure 4(m), 12(b)(1) and 12(b)(6). See Defendant Tangshan Ayers's
27 Memorandum of Law Submitted in Support of Its Motion to Dismiss the FAC Pursuant to
28 FRCP Rule 4(m), Rule 12(b)(1) and Rule 12(b)(6), Tangshan Ayers Litigation, filed on
or about December 8, 2015, Supplemental RJN, ECF 263, Exhibit M.

On January 6, 2016, the District Court issued its order granting Tangshan
Ayers's motion to dismiss Foremost's first amended complaint, which dismissed the first

1 and third causes of action for alter ego liability and execution on the judgment under
2 Rule 69, but with leave to amend within 21 days of the order. In Chambers Order
3 Granting in Part and Denying in Part Defendant's Motion to Dismiss [52], dated January
4 6, 2016, at 2-3 and nn. 2 and 3, Supplemental RJN, ECF 263, Exhibit P. The District
5 Court stated:

6 Tangshan argues that Foremost's FAC is simply a "procedural vehicle through
7 which Foremost seeks to impose liability on Tangshan for its \$5,265,000 Proof of
8 Claim." Dkt. 52, 2. The Court finds that several of Foremost's purported causes
9 of action cannot act as appropriate vehicles to state a claim upon which relief
10 may be granted.

11 *Id.* at 2. As to Foremost's first cause of action for alter ego liability against Tangshan
12 Ayers, the District Court stated:

13 California law does not recognize a substantive alter ego claim. *Shaoxing Cty.*
14 *Huayue Imp. & Exp. v. Blaumi*, 120 Cal.Rptr.3d 303, 310 (Cal. Ct. App. 2011);
15 *see also, Alcom, Ltd. v. Smeding*, 623 F.3d 1248, 1250 (9th Cir 2010) (finding the
16 alter ego doctrine is a procedural rather than substantive claim). Instead, the
17 alter ego doctrine is a theory of liability that must be alleged in the complaint.
18 *Leek v. Cooper*, 125 Cal.Rptr.3d 56, 68 (Cal. Ct. App. 2011). Accordingly,
19 Plaintiff's first cause of action is dismissed with prejudice.

20 *Id.*¹⁰

21 As to Foremost's third cause of action for execution on the judgment under
22 Federal Rule of Civil Procedure 69, the District Court stated in its order:

23 Likewise, Federal Rules of Civil Procedure Rule 69(a) is procedural and does not
24 provide a substantive claim. Rule 69(a) provides: "[a] money judgment is
25 enforced by a writ of execution, unless the court directs otherwise. The
26 procedure on execution---and in proceedings supplementary to and in aid of
27 judgment or execution---must accord with the procedure of the state where the
28 court is located, but a federal statute governs to the extent it applies." Fed. R.
Civ. P. 69(a). In the opposition, Plaintiff argues that Rule 69(a) authorizes the
Court to add additional judgment debtors to an amended judgment. See Dkt. 54,
13. Through the Court harbors serious concerns about whether it would have
jurisdiction to amend the judgment of another court, for purposes of this motion
the Court only finds that Rule 69(a) does not provide an independent cause of
action. Accordingly, Plaintiff's third cause of action is dismissed with prejudice.

¹⁰ In footnote 2 of the order relating to this text, the District Court stated: "In an amended complaint, Plaintiff need not remove the allegation of alter ego liability, but Plaintiff should not style the allegation as a cause of action." *Id.* at 2, n. 2.

1 *Id.* at 2-3. In footnote 3 of the order relating to the above text, the District Court stated:
2 “The Court makes no finding regarding whether Federal Rule of Civil Procedure 69
3 would apply to the *In re Ayers Bath (USA) Co., Ltd.*, Case No. 2:13-bk-17409-RK action
4 itself through the Federal Rules Bankruptcy Procedure Rule 7069 or another rule of
5 bankruptcy procedure and what effect if any would have on this Court’s jurisdiction.” *Id.*
6 at 2-3, n. 3.

7 On or about January 25, 2016, Foremost served and filed its Second Amended
8 Complaint in the Tangshan Ayers Litigation. Second Amended Complaint, Tangshan
9 Ayers Litigation, filed on or about January 25, 2016, Supplemental RJN, ECF 263,
10 Exhibit Q. The First Amended Complaint alleged one cause of action for action on the
11 judgment based on the allowed claim in the Ayers Bath bankruptcy case, but alleged in
12 the complaint that Ayers Bath was the alter ego of Tangshan Ayers. *Id.* In the prayer
13 for relief in the second amended complaint, Foremost prayed for judgment that the
14 District Court issue an order finding that Tangshan Ayers to be the alter ego of Ayers
15 Bath, amending the judgment against Ayers Bath to add Tangshan Ayers as a judgment
16 debtor and for a writ of execution against Tangshan Ayers. *Id.* at 11.

17 On or about February 7, 2016, Tangshan Ayers filed and served a motion to
18 dismiss Foremost’s second amended complaint pursuant to Federal Rules of Civil
19 Procedure 12(b)(1) and 12(b)(6). See Defendant Tangshan Ayers’s Memorandum of
20 Law Submitted in Support of Its Motion to Dismiss the Second Amended Complaint
21 Pursuant to FRCP Rule 12(b)(1) and Rule 12(b)(6), Tangshan Ayers Litigation, filed on
22 or about February 7, 2016, Supplemental RJN, ECF 263, Exhibit R. On or about
23 February 16, 2016, Foremost filed its opposition to Tangshan Ayers’s motion to dismiss
24 the second amended complaint. Plaintiff Foremost Groups, Inc.’s Opposition to
25 Defendant Tangshan Ayers’s Motion to Dismiss the Second Amended Complaint
26 Pursuant to FRCP Rule 12(b)(1) and Rule 12(b)(6), Tangshan Ayers Litigation, filed on
27 or about February 16, 2016, Supplemental RJN, ECF 263, Exhibit S. On or about
28 February 22, 2016, Tangshan Ayers filed its reply to Foremost’s opposition to its motion

1 to dismiss the second amended complaint. Tangshan's Reply to Foremost's Opposition
2 to its Motion to Dismiss the Second Amended Complaint Pursuant to FRCP 12(b)(1)
3 and 12(b)(6), Tangshan Ayers Litigation, filed on or about February 22, 2016,
4 Supplemental RJN, ECF 263, Exhibit T.

5 Having considered the parties' papers relating to Tangshan Ayers's motion to
6 dismiss Foremost's second amended complaint, the District Court issued its "In
7 Chambers Order Staying Proceedings," dated March 8, 2016. In Chambers Order
8 Staying Proceedings, dated March 8, 2016, Supplemental RJN, ECF 263, Exhibit U
9 This order, which has been previously referred to as the Stay Order, stated as follows:

10 The Court has extensively considered the tangled procedural context of the
11 present motion and concludes that, as a first measure, Foremost should seek an
12 amended judgment through the bankruptcy court. Whichever way Foremost has
13 portrayed its case, ultimately, it is an effort to amend the judgment of the
14 bankruptcy court. In that regard, the action is STAYED in order to give Foremost
the opportunity to seek an amended judgment through the bankruptcy court. See
In re Levander, 180 F.3d 1114 (9th Cir. 1999).

15 The hearing scheduled to take place on March 14, 2016 is VACATED and OFF-
16 CALENDAR.

17 *Id.* at 1.

18 On or about September 18, 2017, Foremost filed its motion to lift stay in the
19 Tangshan Ayers Litigation. See Memorandum of Points and Authorities in Support of
20 Motion of Foremost Groups, Inc., f/k/a Foremost International Trading Co., Inc., to Lift
21 Stay, Tangshan Ayers Litigation, filed on or about September 18, 2017, Supplemental
22 RJN, ECF 263, Exhibit V. In this motion, Foremost moved for the District Court to issue
23 an order lifting the stay imposed by its Stay Order in order to allow: (1) the filing of a
24 motion pursuant to Federal Rule of Civil Procedure 69(a) amending the judgment
25 against Ayers Bath to add Tangshan Ayers as a judgment debtor; and (2) the
26 subsequent referral of the motion to amend to the United States Bankruptcy Court for
27 proposed findings of fact and conclusions of law. *Id.* at 2. By that time, Foremost had
28 filed its motion to reopen the bankruptcy case and its motion to amend the judgment in

1 the bankruptcy case to add Tangshan Ayers as an additional judgment debtor, but
2 Tangshan Ayers filed an opposition to the motion to amend the judgment on grounds
3 that Foremost had not served process on Tangshan Ayers in the bankruptcy case in
4 accordance with the Hague Convention. *Id.* at 2-3. Foremost had argued in the
5 bankruptcy court that additional service was not required when a matter is referred from
6 the district court to the bankruptcy court as held in *In re Chase & Sanborn Corp.*, 58
7 B.R. 721 (Bankr. S.D. Fla. 1986). *Id.* at 7. Foremost argued in its motion:

8 Tangshan Ayers argued, and the Bankruptcy Court apparently agreed, that
9 *Chase & Sanborn* is distinguishable because, in that matter, the district court
10 directly referred the litigation to the bankruptcy court. Because this Court did not
11 formally refer or transfer this action to the Bankruptcy Court pursuant to 28
12 U.S.C. § 157(a), Tangshan Ayers contended, additional service is required.
13 Foremost disagreed, as it seems implausible that this Court, in directing
14 Foremost to the Bankruptcy Court for the sole purpose of determining whether
15 Foremost is entitled to an amended judgment, intended for Foremost to re-serve
16 Tangshan Ayers under the Hague Convention before that limited issue could be
17 decided. Notwithstanding, if the lack of a formal referral order is what is
18 preventing this matter from moving forward, the solution is simple---this Court
19 should grant Foremost leave to file the Motion to Amend in this action and then
20 refer the matter to the Bankruptcy Court pursuant to 28 U.S.C. § 157.

21 *Id.* at 8.

22 On or about October 10, 2017, Tangshan Ayers filed its opposition to Foremost's
23 motion to lift stay, arguing that the bankruptcy court lacked personal jurisdiction over it
24 because it had not been served in accordance with the Hague Convention and that
25 there was no formal referral of proceedings from the District Court to the bankruptcy
26 court. See Defendant's Memorandum of Points and Authorities in Opposition to
27 Plaintiff's Motion to Lift Stay, Tangshan Ayers Litigation, filed on or about October 10,
28 2017, Supplemental RJN, ECF 263, Exhibit W.

On or about October 16, 2017, Foremost filed its reply to Tangshan Ayers's
opposition to its motion to lift stay in the Tangshan Ayers Litigation. See Reply in
Support of Motion of Foremost Groups, Inc., f/k/a Foremost International Trading Co.,
Inc., to Lift Stay, Tangshan Ayers Litigation, filed on or about October 16, 2017,

1 Supplemental RJN, ECF 263, Exhibit X. In its reply to Tangshan Ayers's opposition,
2 Foremost pointed out that there was no dispute that service on Tangshan Ayers was
3 perfected in the Tangshan Ayers Litigation and the District Court had personal
4 jurisdiction over Tangshan Ayers and stated that all that it was asking was for the
5 District Court to grant it leave to file the motion to amend in the Tangshan Ayers
6 Litigation and then formally refer the matter to the bankruptcy court as the parties were
7 in agreement that additional service on Tangshan Ayers under the Hague Convention
8 would not be required. *Id.* at 4. In this way, Foremost argued that "this outcome would
9 further this Court's prior determination that the Bankruptcy Court should consider, in the
10 first instance, whether Foremost is entitled to an amended judgment from the
11 Bankruptcy Court while simultaneously serving judicial economy, facilitating the efficient
12 resolution of this case, and promoting timeliness and fairness." *Id.*

13 Having considered the parties' papers relating to Foremost's motion to lift stay,
14 the District Court issued its "In Chambers Order Lifting Stay," dated November 1, 2017.
15 In Chambers Order Lifting Stay, dated November 1, 2017, Supplemental RJN, ECF
16 263, Exhibit Y. This District Court in this order, which has been previously referred to as
17 the Referral Order, summarized the prior proceedings, and the District Court cited and
18 quoted the Stay Order verbatim as follows:

19 The Court has extensively considered the tangled procedural context of the
20 present motion and concludes that, as a first measure, Foremost should seek an
21 amended judgment through the bankruptcy court. Whichever way Foremost has
22 portrayed its case, ultimately, it is an effort to amend the judgment of the
23 bankruptcy court. In that regard, the action is STAYED in order to give Foremost
the opportunity to seek an amended judgment through the bankruptcy court. See
In re Levander, 180 F.3d 1114 (9th Cir. 1999).

24 *Id.* at 1-2. Then the District Court stated its ruling in the Referral Order as follows:

25 On October 24, 2017, Foremost argued before the Court that it interpreted the
26 Stay Order to be a referral to the Bankruptcy Court, and requested this Court
27 issue an Order clarifying that the Stay Order be treated as such. The Court
28 agrees. In issuing the Stay Order, the Court intended that the alter ego issue to
the Bankruptcy Court for proposed findings of fact and conclusions of law under
28 U.S.C. § 157.

1 Under 28 U.S.C. § 157 classifies matters as either “core proceedings,” in which
2 the bankruptcy court “may enter appropriate orders and judgments,” or “non-core
3 proceedings,” which the bankruptcy court may hear but for which it may only
4 submit proposed findings of fact and conclusions of law to the district court for de
5 novo review. 28 U.S.C. § 157 (1994). *Sec. Farms v. Int’l Bhd. of Teamsters,*
6 *Chauffers, Warehousemen & Helpers*, 134 F.3d 999, 1008 (9th Cir. 1997). A
7 bankruptcy judge can hear a non-core matter if it is “related to” a bankruptcy
8 proceeding when the outcome of that proceeding could conceivably have an
9 effect on the estate being administered in bankruptcy. *In re S & S 31*
10 *Flavors, Inc.*, 118 B.R. 202, 204 (Bankr.E.D.N.Y. 1990).

11 Here, Foremost’s alter ego claim is a non-core proceeding because it relates to
12 Foremost’s ability to collect the final judgment from Ayers Bath parent company
13 Tangshan Ayers. *See re J. Baranello & Sons, Inc.*, 149 B.R. 19 (E.D.N.Y. 1992)
14 (holding that a piercing the corporate veil claim relates to a debtors case under
15 title 11 as a non-core proceeding.). The Court hereby refers this matter to the
16 Bankruptcy Court for proposed findings of fact and conclusions of law.

17 The matter is placed on the Court’s inactive calendar pending a ruling from the
18 Bankruptcy Court. The parties shall notify the Court, in writing, if and when the
19 matter should be restored to this Court’s active calendar.

20 *Id.* at 1-2. Thereupon, on December 14, 2017, Foremost filed in this bankruptcy court
21 the pending renewed motion to amend the judgment of this court in the form of its
22 allowed proof of claim against the debtor, Ayers Bath, to add Tangshan Ayers as an
23 additional judgment debtor pursuant to Federal Rule of Civil Procedure 69(a) and
24 California Code of Civil Procedure § 187.

25 In considering Foremost’s objection to this court’s consideration of the issue of
26 the applicability of Rule 69(a) to the allowed proof of claim in this case based on the
27 doctrine of the law of the case, this court proceeds very cautiously, and as indicated
28 above, it has closely examined the prior proceedings before the District Court to assure
itself that it is not running afoul of a prior decision of the District Court. As previously
observed, the Ninth Circuit has stated, “For the doctrine [of law of the case] to apply, the
issue in question must have been ‘decided explicitly or by necessary implication in [the]
previous disposition,’” *United States v. Lummi Indian Tribe*, 235 F.3d at 452, and “The
‘law of the case acts as a bar only when the issue in question was actually considered
and decided by the first court,’” *United Steelworkers of America v. Retirement Income*

1 *Plan for Hourly-Rated Employees of ASARCO, Inc.*, 512 F.3d at 564 (citation omitted);
2 *see also, Mirchandani v. United States*, 836 F.2d at 1225 (the law-of-the-case doctrine
3 does not apply where the court did not previously reach a decision based on the merits).

4 In the Tangshan Ayers Litigation, the operative orders of the District Court were
5 its orders granting Tangshan Ayers's motions to dismiss the original and first amended
6 complaint, the Stay Order and the Referral Order as described above. The court has
7 examined the District Court's orders granting Tangshan Ayers's motions to dismiss, and
8 concludes that there were no explicit decisions in these orders that determined that
9 Rule 69(a) applied to Foremost's allowed bankruptcy claim. Functionally, it is difficult to
10 consider the orders granting motions to dismiss Foremost's prior complaints in the
11 Tangshan Ayers Litigation as ruling on the issue of applicability of Rule 69(a) because
12 the motions were granted pursuant to Federal Rule of Civil Procedure 12(b)(6) for
13 failure to state a claim upon which relief can granted, but with leave to amend, which
14 meant that Foremost was required to replead its claims. The District Court in such
15 orders was not determining that Foremost had valid claims which permitted it to utilize
16 Rule 69(a). As previously observed, the District Court chose its words in its orders
17 granting the motions to dismiss very carefully, stating that it was not making findings
18 under Rule 69(a): (1) in the order granting Tangshan Ayers's motion to dismiss
19 Foremost's original complaint, the District Court stated: "The Court does not consider
20 whether Plaintiff has a viable common law alter ego claim or action upon the judgment
21 because the Complaint does not allege standalone claims to enforce the proof of claim
22 against Tangshan," Supplemental RJN, Exhibit K at 9, n. 8; and (2) in the order granting
23 Tangshan Ayers's motion to dismiss Foremost's first amended complaint, the District
24 Court made the following statements: "Though the Court harbors serious concerns
25 about whether it would have jurisdiction to amend the judgment of another court, for the
26 purposes of this motion the Court only finds that Rule 69(a) does not provide an
27 independent cause of action" and "The Court makes no finding regarding whether
28 Federal Rule of Civil Procedure 69 would apply to the *In re Ayers Bath (USA) Co., Ltd.*,

1 Case No. 2:13-bk-17409-RK action itself through the Federal Rules Bankruptcy
2 Procedure Rule 7069 or another rule of bankruptcy procedure and what effect if any that
3 would have on this Court's jurisdiction," Supplemental RJN, Exhibit P at 2-3 and n. 3.
4 Under these circumstances and based on these statements by the District Court, this
5 court concludes that the District Court in its orders on Tangshan Ayers's motions to
6 dismiss Foremost's original and first amended complaints neither explicitly nor implicitly
7 decided the issue of whether Rule 69(a) applies to Foremost's allowed bankruptcy claim
8 to permit it to add Tangshan Ayers as an additional judgment debtor.

9 In its post-hearing brief, Foremost states its reliance on the Stay Order and the
10 Referral Order as indicating the District Court's intent that the bankruptcy court only
11 need decide whether Tangshan Ayers is the alter ego of Ayers Bath and need not
12 address any other issue. ECF 264 at 7 (internal citation page 4).

13 Regarding the Stay Order, the operative text is brief, stating as follows:

14 The Court has extensively considered the tangled procedural context of the
15 present motion and concludes that, as a first measure, Foremost should seek an
16 amended judgment through the bankruptcy court. Whichever way Foremost has
17 portrayed its case, ultimately, it is an effort to amend the judgment of the
18 bankruptcy court. In that regard, the action is STAYED in order to give Foremost
the opportunity to seek an amended judgment through the bankruptcy court. See
In re Levander, 180 F.3d 1114 (9th Cir. 1999).

19 In the text of the Stay Order, the District Court stated its conclusion that "as a first
20 measure, Foremost should seek an amended judgment through the bankruptcy court,"
21 observing, "Whichever way Foremost has portrayed its case, ultimately, it is an effort to
22 amend the judgment of the bankruptcy court." *Id.* Thus, the District Court decided to
23 stay the Tangshan Ayers Litigation "in order to give Foremost the opportunity to seek an
24 amended judgment through the bankruptcy court." *Id.*, citing, *In re Levander*, 180 F.3d
25 1114 (9th Cir. 1999). This court construes the District Court's Stay Order as not
26 substantive in deciding the merits of Foremost's claim for amendment of judgment, but
27 procedural in staying the Tangshan Ayers Litigation, so that Foremost could "as a first
28 measure" to seek amendment of its judgment through the bankruptcy court. As this

1 court interprets the Stay Order, the District Court instructed Foremost to seek relief on
2 the merits from the bankruptcy court. This court observes that nowhere in the Stay
3 Order does the District Court make a substantive ruling explicitly stating that Rule 69(a)
4 applies to an amendment of a proof of claim.¹¹ Foremost apparently acknowledges this
5 in its post-hearing brief by arguing that the District Court did not hold that its proof of
6 claim was not a money judgment within the meaning of Rule 69(a), but Foremost does
7 not argue that the District Court explicitly held that its proof of claim was a money
8 judgment within the meaning of Rule 69(a). ECF 264 at 5-6 (internal citation page 2-3).
9 Instead, Foremost argues that the District Court in the Stay Order referring the matter to
10 this court “necessarily assumes that amendment under Rule 69(a) is possible (which
11 had never been disputed), but leaves to this Court to determine, in the first instance,
12 whether the elements of California Code of Civil Procedure section 187---alter ego and
13 control of the litigation---are satisfied.” Foremost Groups, Inc.’s Post-Hearing
14 Supplemental Brief, ECF 264 at 7:2-6 (internal citation page 4).

15 Foremost’s “necessary assumption” argument was stated as follows:

16 In response [to Tangshan Ayers’s motion to dismiss Foremost’s second
17 amended complaint], the District Court issued the Stay Order, which states that
18 the Tangshan Ayers Litigation “is STAYED in order to give Foremost the
19 opportunity to seek an amended judgment through the bankruptcy court. See *In*
20 *re Levander*, 180 F.3d 1114 (9th Cir. 1999).” See *id.*, Ex. U (In Chambers Order
21 Staying Proceedings, dated March 8, 2016). In *Levander*, the only case cited by
22 the District Court, the Ninth Circuit expressly held that the bankruptcy court was
23 authorized to amend an order awarding attorneys’ fees to add an additional
24 judgment debtor under Rule 69(a) if the requirements of California law
(specifically, California Code of Civil Procedure section 187) are met. 180 F.3d
at 1120-1121. The Stay Order necessarily assumes that amendment under Rule
69(a) is possible (which had never been disputed), but leaves to this Court to
determine, in the first instance, whether the elements of California Code of Civil
Procedure section 187---alter ego and control of the litigation---are satisfied.

25
26
27 ¹¹ As the court previously noted, the District Court had determined Rule 69(a) was not a substantive
28 cause of action as it previously stated on Tangshan Ayers’s motion to dismiss the litigation against it:
“ . . . for purposes of this motion [to dismiss] the Court only finds that Rule 69(a) does not provide an
independent cause of action.” (emphasis added). In Chambers Order Granting in Part and Denying in
Part Defendant’s Motion to Dismiss [52], dated January 6, 2016, at 2, Supplemental RJN, ECF 263,
Exhibit P,

1 *Id.* at 3:19 - 4:6.

2 Foremost's argument is based on a presupposition that just because it is
3 possible that a judgment of the bankruptcy court can be amended pursuant to Rule 69
4 and applicable state law to add a judgment debtor under *In re Levander* that all
5 judgments of the bankruptcy court can be so amended, but such a presupposition is
6 unwarranted in this court's view, as shown by *Ziino v. Baker* and the cases following it
7 that an allowed bankruptcy proof of claim, while a final judgment for *res judicata*
8 purposes, is not a money judgment within the meaning of Rule 69, to allow methods of
9 execution pursuant to that rule and state law, such as adding other parties as judgment
10 debtors.¹²

11 The case of *In re Levander*, which Foremost heavily relies upon does not support
12 its presupposition that it is possible to utilize Rule 69 and state law to amend all
13 bankruptcy court judgments. Foremost's Supplemental Brief in Response to the Court's
14 Tentative Ruling, filed on May 10, 2021, ECF 255 at 8:9-22 (internal citation page 4).
15 While *In re Levander* stands for the general proposition that a bankruptcy court money
16 judgment may be amended to add a judgment debtor pursuant to Federal Rule of Civil
17 Procedure 69 and California Code of Civil Procedure § 187, it did not involve the precise
18 issue now before the court, that is, whether an allowed bankruptcy claim is a money
19 judgment under Rule 69 as the judgment amended in that case was a money judgment
20 in granting the debtors a monetary award against a creditor on their motion for
21 attorneys' fees, which was amended to add the transferee entity to which the creditor
22 had transferred its assets.¹³ *In re Levander*, 180 F.3d at 1116-1118. In *Levander*, the

24 ¹² *Ziino v. Baker*, decided in 2010, is the only circuit authority on point on the issue of whether Rule 69(a)
25 applies to an allowed bankruptcy claim. Inexplicably, Foremost did not cite, or refer, to it as adverse legal
26 authority when it first made its arguments to the District Court five years later in 2015 in opposing
27 Tangshan Ayers's motions to dismiss its complaints in the Tangshan Ayers Litigation and to this court in
its motions to amend judgment in 2017 that it can rely upon the rule to amend the allowed claim to add
Tangshan Ayers as an additional judgment debtor. Neither did Tangshan Ayers in its initial opposing
papers.

28 ¹³ Foremost in stating in its post-hearing brief that the Ninth Circuit in *Levander* had "expressly held that
the bankruptcy court was authorized to amend an order awarding attorneys' fees to add an additional
judgment debtor under Rule 69(a) if the requirements of California law" were met, it implicitly recognized

1 Chapter 11 debtors filed a motion for attorneys' fees against a creditor, a corporation,
2 after litigation over confirmation of debtors' Chapter 11 reorganization plan and
3 disallowance of the creditor's proof of claim in which the debtors prevailed. *Id.* at 1116-
4 1117. The bankruptcy court granted the debtors' motion for attorneys' fees and
5 awarded attorneys' fees against the corporation, but at the same time the fee motion
6 was pending, the corporation had transferred its assets to a related partnership entity
7 without knowledge of the bankruptcy court, apparently to defeat payment of any award
8 of attorneys' fees against it. *Id.* at 1117-1118. The debtors found out about the
9 corporation's transfer of its assets to a related entity, and they filed a motion to amend
10 the judgment awarding them attorneys' fees to add the transferee partnership as an
11 additional judgment debtor, which the bankruptcy court granted, stating that "equity
12 screams for some remediation" for the transfer which was a fraud on the court. *Id.* at
13 1117. On appeal, the district court reversed, holding that the ten-day time limit of
14 Federal Rule of Civil Procedure 59(e) for a motion to amend or alter judgment applied
15 and had expired and that California Code of Civil Procedure § 187 did not apply
16 because federal, not state, rules of procedure control in the bankruptcy court. *Id.* at
17 1118. The Ninth Circuit reversed, holding that the bankruptcy debtors as the judgment
18 creditors of the creditor corporation based on the money judgment they held from the
19 bankruptcy court's order awarding them attorneys' fees could seek relief to amend the
20 judgment to add the transferee corporation as a judgment debtor under two alternative
21 grounds: (1) under the trial court's inherent power to prevent a fraud on the court; and
22 (2) as provided in Federal Rule of Civil Procedure 69 and California Code of Civil
23 Procedure § 187. *Id.* at 1118-1121.

24 Regarding the federal court's inherent power to prevent a fraud on the court, the
25 Ninth Circuit stated in *In re Levander*:

26 The inherent powers of federal courts are those that "are necessary to the
27 exercise of all others." This inherent power, which is based on equity, not only
28 springs forth from courts' traditional power "to manage their own affairs so as to
achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO*,

that the case did not involve an allowed proof of claim. ECF 264 at 3-4.

1 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 21 (1991), but also “furthers the
2 pursuit of achieving complete justice by enabling the court to suspend those
3 judgments whose enforcement leads to inequitable results.” In *Chambers*, the
4 Supreme Court observed that the inherent power of federal courts includes, *inter*
alia, the power to vacate judgments on proof that a fraud upon the court has
been committed. See *Chambers*, 501 U.S. at 44, 111 S.Ct. at 2123.

5 The Court justified “the historic power of equity to set aside fraudulently begotten
6 judgments” on the basis that “tampering with the administration of justice in this
7 manner involves far more than an injury to a single litigant. It is a wrong against
the institutions set up to protect and safeguard the public.”

8 Just as a court may use its inherent power to protect its integrity by vacating a
9 judgment obtained by fraud, it may also amend a judgment for the same
10 purpose. When a court vacates a judgment obtained by fraud, it not only rids
11 itself of the defilement caused by the fraud, but also restores the balance and
12 fairness between the parties by removing the benefit gained by the party that
13 committed the fraud. Amending a judgment serves these same goals by
removing the benefit---for example, the avoidance of a judgment against itself---
that the parties gained by committing fraud on the court.

14 We therefore hold that a federal court may amend a judgment or order under its
15 inherent power when the original judgment or order was obtained through fraud
on the court.

16 *Id.* at 1118-1119 (footnote and citations omitted).

17 Citing a prior decision, the Ninth Circuit further stated in *In re Levander*,
18 addressing the impact of Rule 69(a):

19 We have held that Federal Rule of Civil Procedure 69(a) empowers federal
20 courts to rely on state law to add judgment-debtors under Rule 69(a), which
21 “permits judgment creditors to use any execution method consistent with the
22 practice and procedure of the state in which the district court sits.” *Cigna*
Property & Casualty Insurance Co. v. Polaris Pictures Corp., 159 F.3d 412, 421
23 (9th Cir. 1998) (*quoting Peacock v. Thomas*, 516 U.S. 349, 359 n. 7, 116 S.Ct.
862, 133 L.Ed.2d 817 (1996)) (internal quotation marks omitted). In *Cigna*, the
24 appellant, much like the appellees in the instant case, argued that the motion to
amend the judgment to add a judgment-debtor was untimely under Rule 59(e),
25 and that the court therefore had no jurisdiction. See *id.* We rejected this
26 argument, holding that Rule 69(a) allows judgment-debtors to use state law to
collect on their debts. See *id.* Because California law allows amendment of a
27 judgment to add a judgment-debtor, we held that the district court did not abuse
its discretion in so doing. See *id.* at 431-32.

28 The instant case is analogous since the Levanders also were judgment-debtors
attempting to collect a debt. As such, Rule 69(a) authorized the use of California

1 law to collect on their debt, and the district court erred by holding that the
2 bankruptcy court did not have jurisdiction to allow them to do so.

3 *Id.* at 1120-1121 (footnotes omitted). Thereupon, the Ninth Circuit determined in
4 *Levander* whether the requirements of California law pursuant to California Code of Civil
5 Procedure § 187 were met in order to add the transferee partnership as a judgment
6 debtor to the bankruptcy court's order granting the attorneys' fee motion and held that
7 they were. *Id.* at 1121-1123.¹⁴

8 It is significant for the purposes of this case now before the court to observe that
9 the Levanders, the judgment creditors in their case, were not holders of an allowed
10 bankruptcy claim as in this case because they did not hold an allowed claim against the
11 bankruptcy estate as creditors in their bankruptcy case, but were the debtors in the
12 bankruptcy case who held a money judgment from the bankruptcy court which had
13 granted their motion for attorneys' fees against their creditor and added a transferee of
14 that creditor as an additional judgment debtor on the money judgment from the fee
15 award. Thus, *Levander* is relevant because it recognizes that a judgment creditor
16 holding a money judgment from a bankruptcy court sitting in California may utilize
17 Federal Rule of Civil Procedure 69(a) and California Code of Civil Procedure § 187 to
18 enforce the money judgment and add a judgment debtor, but *Levander* is
19 distinguishable from the case before the court in that it did not involve a creditor which
20 seeks to enforce an allowed bankruptcy claim as a money judgment under Rule 69(a)
21 and California Code of Civil Procedure § 187. Accordingly, Foremost's presupposition
22 that all bankruptcy court judgments may be amended under Rule 69 and state law to
23 add additional judgment debtors is not warranted based on *In re Levander*, even if as
24

25 ¹⁴ The Ninth Circuit's decision in *In re Levander* was not entirely unanimous. All three members of the
26 panel agreed on the holding that the bankruptcy court could utilize Rule 69(a) and California Code of Civil
27 Procedure § 187 to amend its order granting the motion of the bankruptcy debtors for an award of
28 attorneys' fees against the creditor to add its transferee entity as an additional judgment debtor, but one
panel member, Judge O'Scannlain, in a separate specially concurring opinion, held that it was sufficient
to hold that Rule 69(a) allowed recourse to state procedures for execution of federal judgments, but that it
was not necessary for the court to reach the alternative ground of the federal court's inherent power to
amend a judgment based on a fraud on the court. *Id.* at 1123. Judge Ferguson in a separate concurring
opinion stated that the majority's opinion stated two independent bases for the court's disposition. *Id.*

1 Foremost points out, it was the only case cited by the District Court in the Stay Order.

2 As previously observed, the Ninth Circuit has stated, “The ‘law of the case acts
3 as a bar only when the issue in question was actually considered and decided by the
4 first court.” *United Steelworkers of America v. Retirement Income Plan for Hourly-
5 Rated Employees of ASARCO, Inc.*, 512 F.3d at 564 (citation omitted). Based on the
6 circumstances described above, Foremost has not shown that the District Court in the
7 Stay Order actually considered and decided the issue of whether Rule 69 applies to an
8 allowed bankruptcy claim, so that this court is barred from considering the issue based
9 on the doctrine of law of the case. That is, Foremost has not shown that the District
10 Court explicitly or implicitly decided the issue of whether Rule 69 applies to an allowed
11 bankruptcy claim because the ruling of the District Court was procedural to stay the
12 Tangshan Ayers Litigation in that court “in order to give Foremost the opportunity to
13 seek an amended judgment through the bankruptcy court.” Supplemental RJN, Exhibit
14 U.

15 Alternatively, Foremost argues that the law of the case doctrine precludes this
16 court from considering the issue of the applicability of Rule 69 to its allowed claim based
17 on the District Court’s intent expressed in the Referral Order. Foremost Groups, Inc.’s
18 Post-Hearing Supplemental Brief, ECF 264 at 7:7-17 (internal citation page 4).
19 Foremost’s argument is as follows:

20 If there was any question as to the District Court’s intent, it was resolved when
21 the District Court issued the Referral Order in November 2017. In that Order,
22 which was the result of Tangshan Ayers’s frivolous argument that Foremost was
23 required to re-serve Tangshan Ayers under the Hague Convention before
24 proceedings in the Bankruptcy Court could resume, the District Court confirmed
25 that, in issuing the Stay Order, it “***intended that the alter ego issue [be
26 referred] to the Bankruptcy Court for proposed findings of fact and
27 conclusions of law under 28 U.S.C. § 157.***” Supp. RJN, Ex. Y (In Chambers
28 Order Lifting Stay, dated November 1, 2017) (emphasis added). The Referral
Order does not contemplate this Court opining on any issue in the Tangshan
Ayers Litigation (which had been pending with the District Court for nearly four
years) other than alter ego.

Id. (emphasis in bold in original). At the risk of being overly repetitive, as previously

1 observed, the Ninth Circuit has stated, “For the doctrine [of law of the case] to apply, the
2 issue in question must have been ‘decided explicitly or by necessary implication in [the]
3 previous disposition,’” *United States v. Lummi Indian Tribe*, 235 F.3d at 452, and “The
4 ‘law of the case acts as a bar only when the issue in question was actually considered
5 and decided by the first court,’” *United Steelworkers of America v. Retirement Income*
6 *Plan for Hourly-Rated Employees of ASARCO, Inc.*, 512 F.3d at 564 (citation omitted);
7 *see also, Mirchandani v. United States*, 836 F.2d at 1225 (the law-of-the-case doctrine
8 does not apply where the court did not previously reach a decision based on the merits).
9 In its briefing, Foremost has not shown that the District Court explicitly decided the issue
10 of the applicability of Rule 69 to an allowed bankruptcy claim. Foremost is hard pressed
11 to do so because its motion to lift the stay in the Stay Order, which resulted in the
12 District Court’s issuance of the Referral Order, was procedural, not substantive, that is,
13 Foremost’s motion was made in order to allow for the filing of a Rule 69(a) motion to
14 amend the judgment against Ayers Bath to add Tangshan Ayers as a judgment debtor
15 and to subsequently refer the motion to amend judgment to the bankruptcy court for
16 proposed findings of fact and conclusions of law. Supplemental RJN, Exhibit V.
17 Foremost did not request in its motion to lift the Stay Order that the District Court
18 determine on the merits that Rule 69 applied to its allowed bankruptcy claim; rather,
19 Foremost was requesting permission of the District Court to file the Rule 69 motion to
20 amend judgment in the Tangshan Ayers Litigation and have the District Court refer it
21 over to the bankruptcy court for proposed findings of fact and conclusions of law. *Id.*
22 That is, Foremost was not asking the District Court to decide substantive issues relating
23 to its motion to amend judgment, but to decide procedural issues to have the
24 bankruptcy court first rule on the substantive issues and propose findings of fact and
25 conclusions of law for *de novo* review by the District Court.

26 Nor can it be said that the District Court implicitly decided the issue of the
27 applicability of Rule 69 to Foremost’s allowed bankruptcy claim because as stated in the
28 Referral Order, its intent was to refer Foremost’s Rule 69 motion to amend judgment to

1 the bankruptcy court in the first instance when it stated that it agreed with Foremost that
2 the Stay Order should be interpreted as a referral to the bankruptcy court.
3 Supplemental RJN, Exhibit Y. Therefore, the District Court stated in the Referral Order
4 that it was agreeing to grant Foremost's request that it "issue an Order clarifying that the
5 Stay Order be treated as such." *Id.*

6 Foremost's strongest argument that the Referral Order is the law of the case is
7 that in its words, "the District Court confirmed that, in issuing the Stay Order, it 'intended
8 that the alter-ego issue [be referred] to the Bankruptcy Court for proposed findings of
9 fact and conclusions of law under 28 U.S.C. § 157.'" Foremost Groups, Inc.'s Post-
10 Hearing Supplemental Brief, ECF 264 at 7:11-15 (internal citation page 4). In other
11 words, according to Foremost, in referring to the "alter-ego issue" alone, the District
12 Court implicitly decided: (1) the issue whether Rule 69 applied to its allowed bankruptcy
13 claim, (2) that Rule 69 so applied and (3) that the Bankruptcy Court need only decide
14 whether Tangshan Ayers is alter ego of Ayers Bath. Regarding this argument, this court
15 must examine the full context of the District Court's statements about the alter ego issue
16 in the Referral Order, which are as follows:

17 On October 24, 2017, Foremost argued before the Court that it interpreted the
18 Stay Order to be a referral to the Bankruptcy Court, and requested this Court
19 issue an Order clarifying that the Stay Order be treated as such. The Court
20 agrees. In issuing the Stay Order, the Court intended that the alter-ego issue to
21 the Bankruptcy Court for proposed findings of fact and conclusions of law under
22 28 U.S.C. § 157.

23 ****

24 Here, Foremost's alter-ego claim is a non-core proceeding because it relates to
25 Foremost's ability to collect the final judgment from Ayers Bath parent company
26 Tangshan Ayers. *See In re J. Baranello & Sons, Inc.*, 149 B.R. 19 (E.D.N.Y.
27 1992) (holding that a piercing the corporate veil claim relates to a debtors case
28 under title 11 as a non-core proceeding.). The Court hereby refers this matter to
the Bankruptcy Court for proposed findings of fact and conclusions of law.

Supplemental RJN, Exhibit Y at 2. The full context of the District Court's express
statements about Foremost's alter ego claim in the Referral Order indicates that as a
procedural matter, the District Court was expressly referring the matter of Foremost's

1 motion to amend a judgment of the bankruptcy court based on Foremost's alter ego
2 theory to that court as a non-core proceeding for initial determination and preparation
3 and submission of proposed findings of fact and conclusions of law for de novo review
4 by the District Court, and not that the District Court was rendering substantive rulings on
5 the alter ego claim itself, including the issue of whether Rule 69 applied to Foremost's
6 allowed bankruptcy claim. There is nothing in the express language of the District
7 Court's Referral Order that limits the bankruptcy court's consideration of the Foremost's
8 motion to amend the judgment of the bankruptcy court in the form of the allowed proof
9 of claim.

10 Foremost is essentially asking that this court "read between the lines" of the
11 District Court's Referral Order that the District Court already decided the issue of the
12 applicability of Rule 69 to the allowed bankruptcy claim. Foremost's interpretation of the
13 Referral Order is inconsistent with the District Court's express statements in prior
14 proceedings in the Tangshan Ayers Litigation that it was not making any findings as to
15 Rule 69. Moreover, Foremost's motion to lift the stay from the Stay Order was a
16 procedural motion simply asking for clarification from the District Court that the "matter"
17 of its motion to amend the bankruptcy court's judgment was referred to that court for
18 initial determination, i.e., the preparation and submission of proposed findings of fact
19 and conclusions of law for its motion to amend judgment, which is a non-core
20 proceeding that may be heard by the bankruptcy court. Finally, in this court's view,
21 given the parties were addressing Foremost's procedural motion to lift stay, it would be
22 uncharacteristic of the District Court to make substantive rulings on a procedural motion
23 without providing the parties the opportunity to brief and be heard on substantive issues
24 like whether Rule 69 applied to Foremost's allowed claim. The substantive issues
25 arising from Foremost's motion to amend the bankruptcy court's judgment were not
26 addressed in the briefing of the parties on Foremost's motion to lift stay, and thus, this
27 court concludes that the District Court did not address such issues in ruling on the
28 motion to lift stay in the Referral Order.

1 Having considered the post-hearing supplemental pleadings filed by Foremost
2 and Tangshan Ayers, the court determines that the law of the case does not apply to
3 the issue of whether this court may allow an amendment of the Foremost's proof of
4 claim under Rule 69(a) because the evidence shows that such issue was not explicitly
5 or implicitly decided by the District Court. *United States v. Lummi Indian Tribe*, 235
6 F.3d at 452. Accordingly, this court determines that the law of the case doctrine does
7 not apply to this bankruptcy case as to the question of whether Rule 69(a) allows
8 Foremost to amend their proof of claim to add Tangshan Ayers.

9 V. BANKRUPTCY COURT'S ANALYSIS OF APPLICABILITY OF FEDERAL
10 RULE OF CIVIL PROCEDURE 69(a)

11 Federal Rule of Civil Procedure 69(a) provides: "A money judgment is enforced
12 by a writ of execution, unless the court directs otherwise." Generally, "[t]he proper
13 means [] to secure compliance with a money judgment is to seek a writ of execution."
14 *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1147 (9th Cir 1983). According to *Moore's*
15 *Federal Practice*, "A writ of execution is an order issued by a court, in the form of a final
16 process designed to enforce a money judgment of that court, directing an officer of the
17 court to seize the property of a judgment debtor and transfer the proceeds over to the
18 judgment creditor. Such execution only applies to money judgments." 13 *Moore's*
19 *Federal Practice - Civil*, § 69.02 and n. 2 (3rd ed. online ed. 2021 update) (footnotes
20 omitted), *citing inter alia*, *NLRB v. Trans Ocean Export Packing, Inc.*, 473 F.2d 612,
21 615-616 (9th Cir. 1973) (Fed. R. Civ. P. 69 is applicable only to money judgments and
22 could not be used to enforce NLRB cease and desist order) and *Ziino v. Baker*, 613
23 F.3d 1326, 1328-1329 (11th Cir. 2010) (bankruptcy order allowing claim against
24 debtor's estate is not money judgment for purposes of Fed. R. Civ. P. 69).

25 Federal Rule of Civil Procedure 69(a) further provides that "[t]he procedure on
26 execution—and in proceedings supplementary to and in aid of judgment or execution—
27 must accord with the procedure of the state where the court is located, but a federal
28

1 statute governs to the extent it applies.” The Ninth Circuit has interpreted Rule 69(a) as
2 “empower[ing] federal courts to rely on state law to add judgment-debtors[.]” *Cadence*
3 *Design Systems, Inc. v. Pounce Consulting, Inc.*, Case No. 17-cv-04732-PJH, 2019 WL
4 3576900 at *3 (N.D. Cal. Aug. 6, 2019), *citing and quoting, In re Levander*, 180 F.3d
5 1114, 1120-1121 (9th Cir. 1999).

6 Here, the applicable state law is Section 187 of the California Code of Civil
7 Procedure. *Cadence Design Systems, Inc. v. Pounce Consulting, Inc.*, Case No. 17-cv-
8 04732-PJH, 2019 WL 3576900 at *3-4. “Under section 187, the court has the authority
9 to amend a judgment to add additional judgment debtors.” *Id.*, *citing and quoting, NEC*
10 *Elecs. v. Hurt*, 208 Cal.App.3d 772, 778 (1989) (“*NEC*”). “This is an equitable
11 procedure based on the theory that the court is not amending the judgment to add a
12 new defendant but is merely inserting the correct name of the real defendant.” *Id.* The
13 doctrine “does not guard every unsatisfied creditor of a corporation but instead affords
14 protection where some conduct amounting to bad faith makes it inequitable for the
15 corporate owner to hide behind the corporate form. Difficulty in enforcing a judgment or
16 collecting a debt does not satisfy this standard.” *Id.*, *citing and quoting, Sonora Diamond*
17 *Corp. v. Superior Court*, 83 Cal.App.4th 523, 539 (2000); *Perfect 10, Inc. v. Giganews,*
18 *Inc.*, 847 F.3d 657, 677 (9th Cir. 2017) (same).

19 “A § 187 amendment requires (1) that the new party be the alter ego of the old
20 party and (2) that the new party had controlled the litigation, thereby having had the
21 opportunity to litigate, in order to satisfy due process concerns.” *Cadence Design*
22 *Systems, Inc. v. Pounce Consulting, Inc.*, Case No. 17-cv-04732-PJH, 2019 WL
23 3576900 at *4, *citing and quoting, Katzir’s Floor and Home Design, Inc. v. M-MLS.com,*
24 394 F.3d 1143, 1148 (9th Cir. 2004) (internal quotation marks omitted; emphasis in
25 original) (henceforth, “*Katzir*”); *Toho-Towa Co., Ltd. v. Morgan Creek Prods., Inc.*, 217
26 Cal.App.4th 1096, 1106 (2013) (same); *NEC*, 208 Cal.App.3d at 778-79 (same). The
27 judgment creditor bears the burden of satisfying both requirements by a preponderance
28 of the evidence. *Id.*, *citing, Wollersheim v. Church of Scientology*, 69 Cal.App.4th 1012,

1 1018 (1999); *Reno-Tahoe Specialty, Inc. v. Mungchi, Inc.*, No. CV 16-00663-GHK, 2018
2 WL 6267823, at *3 (C.D. Cal. Sept. 19, 2018).

3 However, in this case, the asserted final judgment is an allowed bankruptcy
4 claim, and the courts which have addressed the issue of the applicability of Federal
5 Rule of Civil Procedure 69(a) to allowed bankruptcy claims have held that allowed
6 bankruptcy claims are not, and are not entitled to be treated as, money judgments.
7 *Ziino v. Baker*, 613 F.3d 1326 (11th Cir. 2010); *Kerr v. American Alternative Insurance*
8 *Corp. (In re One World Adoption Services, Inc.)*, 577 B.R. 474 (Bankr. N.D. Ga. 2017);
9 *In re Soelberg*, Case No. 15-01355-TLM, 2019 WL 3805980 (Bankr. D. Idaho Aug. 13,
10 2019); *In re 3109, LLC*, Case No. 10-00757, 2014 WL 1655415 (Bankr. D.D.C. Apr. 25,
11 2014); *see also, In re Southern California Plastics, Inc.*, 165 F.3d 1243 (9th Cir. 1999)
12 (holding that allowance of a bankruptcy claim is not the equivalent of a judgment to
13 perfect an attachment lien under California law); 13 Moore’s Federal Practice – Civil, §
14 69.02 n. 2, *citing, Ziino v. Baker*, 613 F.3d 1326, 1328-1329 (11th Cir. 2010) (treatise
15 citing case for the proposition that bankruptcy order allowing claim against debtor’s
16 estate is not money judgment for purposes of Fed. R. Civ. P. 69). As the court
17 previously stated, the Ninth Circuit has not ruled on the issue of whether an allowed
18 bankruptcy claim is a money judgment for the purposes of Rule 69.

19 The leading decision on the issue of whether an allowed bankruptcy claim is a
20 money judgment within the meaning of Federal Rule of Civil Procedure 69(a) is the
21 Eleventh Circuit’s decision in *Ziino v. Baker*, or as the Eleventh Circuit put it, the issue
22 was “the potency of an allowed claim in a bankruptcy proceeding.” 613 F.3d at 1328.
23 The case involved a couple named Ziino and Wellman who had lived together in
24 California for a number of years in a nonmarital domestic partnership, and during their
25 relationship, they had a son, of whom they shared joint custody. *Id.* at 1327. When the
26 relationship terminated, the parties negotiated a settlement whereby Wellman executed
27 two promissory notes for a total of \$800,000 in favor of Ziino, which amount represented
28 half of Wellman’s estimated future inheritance from her father. *Id.* According to Ziino,

1 the notes were to equalize their assets for the benefit of their child, but the notes were
2 not incorporated into any court order regarding child custody, visitation or support. *Id.* at
3 1327-1328. Subsequently, Wellman filed a Chapter 7 bankruptcy case, and Ziino filed a
4 proof of claim in her bankruptcy case for the principal on the promissory notes executed
5 by her. *Id.* at 1328. Wellman objected to Ziino's proof of claim on grounds that the
6 promissory notes lacked consideration, but the bankruptcy court rejected the objection
7 and allowed Ziino's claim against Wellman's bankruptcy estate. *Id.* The Ninth Circuit
8 Bankruptcy Appellate Panel affirmed the bankruptcy court's order allowing Ziino's claim,
9 and Ziino received nearly \$160,000 on his claim from the bankruptcy estate. *Id.* The
10 bankruptcy court also denied Wellman a Chapter 7 bankruptcy discharge. *Id.* Ziino
11 then filed a civil action in the federal district court for the Middle District of Florida
12 seeking to enforce his allowed bankruptcy claim through a levy against assets held in
13 trust for Wellman. *Id.* at 1327-1328. A magistrate judge made a recommendation that
14 summary judgment be granted against Ziino's claims, the district court adopted the
15 magistrate judge's recommendation, and Ziino appealed. *Id.*

16 The Eleventh Circuit affirmed the district court's grant of summary judgment
17 against Ziino, holding that his claims fail because it concluded that the bankruptcy court
18 order allowing Ziino's claim was not a final, executable money judgment for purposes of
19 Federal Rule of Civil Procedure 69(a). *Id.* at 1327-1328. The Eleventh Circuit
20 addressed and rejected Ziino's arguments that his allowed bankruptcy claim was a final,
21 executable judgment under Rule 69(a) as follows:

22 At issue in this case is the potency of an allowed claim in a bankruptcy
23 proceeding. Ziino argues that his allowed bankruptcy claim is an executable
24 judgment, one that enables him to levy against any asset belonging to the
25 bankruptcy debtor. For this proposition, Ziino cites a number of cases holding
26 that an allowed claim in bankruptcy is a "final judgment" for purposes of *res*
27 *judicata*. See *EDP Med. Computer Sys., Inc. v. United States*, 480 F.3d 621, 625
28 (2d Cir. 2007) (holding "that a bankruptcy court order allowing an uncontested
proof of claim constitutes a "final judgment" and is thus a predicate for *res*
judicata"); *In re Baudoin*, 981 F.2d 736, 742 (5th Cir. 1993)(noting "that
bankruptcy court orders authorizing the sale of part of the estate or confirming
such sale are final judgments on the merits for *res judicata* purposes").

1 Ziino fails to acknowledge, however, that a “judgment” is a term whose meaning
2 depends on the context in which it is used. For instance, a “final judgment” can
3 simply be “any order from which an appeal lies.” Fed.R.Civ.P. 54(a).
4 Additionally, as Ziino correctly notes, a “final judgment” can be any resolution of a
5 dispute from which a preclusive effect flows. See, e.g., *Baudoin*, 981 F.2d at
6 242. But, in terms of a judgment subject to execution, a “money judgment” must
7 exist. See Fed.R.Civ.P. 69(a)(1) (“A money judgment is enforced by a writ of
8 execution, unless the court directs otherwise.”).

9 An allowed claim in bankruptcy serves a different objective from that of a money
10 judgment---it permits the claimant to participate in the distribution of the
11 bankruptcy estate. See 11 U.S.C. § 507 (2006); 4 *Collier on Bankruptcy* ¶
12 501.01[2][b] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2010). “[T]he
13 assertion of a claim in bankruptcy is, of course, not an attempt to recover a
14 judgment against the debtor but to obtain a distributive share in the immediate
15 assets of the proceeding.” *Matter of Mobile Steel Co.*, 563 F.2d 692, 700 (5th
16 Cir. 1977) (quoting *In re Kansas City Journal-Post Co.*, 144 F.2d 792, 803-04
17 (8th Cir. 1944)); see also, 10 *Collier on Bankruptcy* ¶ 7069.01 (Alan N. Resnick &
18 Henry J. Sommer, eds., 15th ed. rev. 2009) (“By its terms, Civil Rule 69 is
19 applicable to enforcement of only judgments for the payment of money....If the
20 underlying cause of action against the estate arose prepetition, it normally will be
21 dealt with as a claim to be satisfied by a distribution upon liquidation or under a
22 reorganization plan....”).

23 In order to execute on a judgment under Rule 69, Ziino must have obtained a
24 money judgment. The district court correctly concluded that an allowed claim in
25 bankruptcy and a money judgment are not functionally identical. The bankruptcy
26 court order allowing Ziino’s claim bears little resemblance to a money judgment.
27 See R. 1, Ex. C at 3 (“overruling Wellman’s objection to Ziino’s proof of claim” on
28 the two promissory notes). The order contains no clear designation of Ziino’s
entitlement, especially in view of his significant recovery from the bankruptcy
estate after the order issued.

Id. at 1328-1329.¹⁵ The Eleventh Circuit finally addressed Ziino’s argument that his
agreement with his former partner was an enforceable judgment for child support:

We finally reject Ziino’s argument that his privately negotiated agreement with
Wellman qualifies as an enforceable judgment for child support. The underlying
bankruptcy court order acknowledged the professed purpose for the promissory
notes, but did not render a judgment for child support that would be enforceable

¹⁵ In the Eleventh Circuit’s observation that the bankruptcy court’s order allowing Ziino’s claim “bears little
resemblance” to a money judgment, noting the language of the order “overruling Wellman’s objection to
Ziino’s proof of claim,” the *Ziino* court was commenting that the allowance of the claim through overruling
the objection to the claim did not have the directive language of a money judgment. That is, a claim being
allowed meant in a Chapter 7 bankruptcy case, that the creditor holding an allowed claim was eligible for
a distribution of assets from the bankruptcy estate of the debtor.

1 under Florida law. Fla. Stat. § 88.6031 (2004) (providing for the enforceability of
2 foreign child support orders). Without a judgment on which to execute, Ziino's
3 remaining arguments about the validity of the trusts are moot.

4 *Id.* at 1329.

5 In conclusion, the Eleventh Circuit in *Ziino v. Baker* held:

6 Ziino's allowed claim in the prior bankruptcy proceeding in the prior bankruptcy
7 proceeding is not a judgment on which he can execute against assets of the
8 debtor. Ziino's proper recourse is to file a direct action against Wellman for her
9 breach of the promissory note obligations. Until an executable money judgment
10 against Wellman exists, it is improper to attempt to levy against assets held by or
11 for her. For these reasons, we affirm the district court's grant of summary
12 judgment in favor of the trustees and estate representatives.

13 *Id.*

14 In *Ziino v. Baker*, the Eleventh Circuit concluded that an allowed proof of claim in
15 a bankruptcy case is not equivalent to a money judgment because the purpose of
16 allowance of a proof of claim is to determine eligibility for a distribution from the
17 bankruptcy estate of the debtor in a bankruptcy case, which is a different purpose than
18 a money judgment subject to execution through Federal Rule of Civil Procedure 69,
19 which requires a direct action against the debtor. *Id.* at 1328. The Eleventh Circuit also
20 concluded that just because an allowed bankruptcy claim has *res judicata* effect does
21 not mean that it is a money judgment because not all judgments are money judgments,
22 recognizing that a "'final judgment' can be any resolution of a dispute from which a
23 preclusive effect flows." *Id.*, citing, *In re Baudoin*, 981 F.2d 736, 742 (5th Cir. 1993)
24 (noting "that bankruptcy court orders authorizing the sale of part of the estate or
25 confirming such sale are final judgments on the merits for *res judicata* purposes"); see
26 also, *Hamilton v. MacDonald*, 503 F.2d 1138, 1147-1149 (9th Cir. 1974) (judgments for
27 equitable relief are not money judgments and may not be enforced through Federal
28 Rule of Civil Procedure 69). Thus, the Eleventh Circuit in *Ziino v. Baker* also concluded
that if Ziino as the creditor holding an allowed claim sought to enforce collection of the
claim by levy, he had to bring a direct action against the debtor and her assets to obtain
an executable money judgment. 613 F.3d at 1329.

1 The statutory scheme for allowance of a proof of claim in a bankruptcy case does
2 not indicate that an allowed claim has the attributes of a money judgment enforceable
3 by a writ of execution or a levy. When a debtor files a Chapter 7 bankruptcy case, its
4 creditors may file a proof of claim to assert a right of payment against the debtor's
5 bankruptcy estate. 11 U.S.C. §§ 101(5)(A), 501 and 502 ¹⁶; *see also, Travelers*
6 *Casualty and Surety Co. of America v. Pacific Gas and Electric Co.*, 549 U.S. 443, 449
7 (2007) ("When a debtor declares bankruptcy, each of its creditors is entitled to file a
8 proof of claim—i.e., a document providing proof of a "right to payment," 11 U.S.C. §
9 101(5)(A)—**against the debtor's estate.**") (emphasis in bold added).

10 "A proof of claim is a written statement setting forth a creditor's claim." Federal
11 Rule of Bankruptcy Procedure 3001(a). As *Collier on Bankruptcy* explains, the policy
12 reasons for requiring the filing of proofs of claim in a bankruptcy case are:

13 The rationale for requiring the filing of a formal proof of claim or interest in
14 accordance with section 501 is to ensure that "all those involved in the
15 proceeding will be made aware of the claims against the debtor's estate." **A**
16 **proof of claim or interest should be filed when "some purpose would be**
17 **served." The primary purpose is, of course, to share in any distribution.**
Other purposes may be to make others aware of a claim and to allow for the
opportunity to contest a claim.

18 4 Levin and Sommer, *Collier on Bankruptcy*, ¶ 501.01[1] (16th ed. online ed. 2021
19 update) (emphasis in bold added; footnotes omitted), *citing and quoting inter alia, In re*
20 *PCH Associates*, 949 F.2d 585, 605 (2nd Cir. 1991) and *Kipp Flores Architects, L.L.C.*
21 *v. Mid-Continent Casualty Co.*, 852 F.3d 405, 410-411 (5th Cir. 2017).

22 The proof of claim is executed by the creditor or the creditor's authorized agent.
23 Federal Rules of Bankruptcy Procedure 3001(b). "A creditor or an indentured trustee
24 may file a proof of claim." 11 U.S.C. § 501(a). A "creditor," under 11 U.S.C. § 101(1)
25 means- - (A) entity that has a claim against the debtor that arose at the time of or before
26 the order for relief concerning the debtor; (B) entity that has a claim against the estate

27 ¹⁶ 11 U.S.C. § 101(5)(A) defines the term "claim" in pertinent part as "right to payment, whether or not
28 such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured,
disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 501 governs the filing of
proofs of claim or interests. 11 U.S.C. § 502 governs allowance of claims or interests.

. . . ; or (C) entity that has a community claim. A “debtor” is the person which a case under this title [Title 11] has been commenced. 11 U.S.C. § 101(13). The definition of a “person” includes a corporation. 11 U.S.C. § 101(41). Pursuant to Federal Rule of Bankruptcy Procedure 3001(f), “A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.” If a proof of claim or interest is timely filed with the court, and if no party in interest files an objection, the claim or interest is deemed “allowed” and thus constitutes a valid claim against the debtor's bankruptcy estate pursuant to 11 U.S.C. § 502(a), which provides: “A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects.”

Regarding the allowance and disallowance of claims under Section 502 of the Bankruptcy Code, *Collier on Bankruptcy* explains:

Section 502 of the Bankruptcy Code deals with the allowance and disallowance of claims. Under this section, a claim becomes allowed in one of three ways: first, a proof of claim is filed or deemed filed and no party objects; second, a claim is allowed by the court after an objection is filed; or third, the bankruptcy court estimates the claim. A claim may be disallowed under any of the paragraphs of section 502(b) or under section 502(d) or (e).

Section 502 is important because it provides the rules for determining the allowability of claims. Holders of allowed claims may receive distributions in chapter 7 cases or under confirmed plans in chapter 9, 11, 12 and 13 cases. Only holders of allowed claims may vote on chapter 11 plans under section 1126. A claim holder's rights with respect to a proposed plan are measured by the allowed amount of its claim under sections 943, 1129(b), 1225 and 1325 of the Bankruptcy Code. Thus, the process of allowing and disallowing claims is an essential part of the bankruptcy process and as such, is within the bankruptcy court's constitutional authority to decide.

4 Levin and Sommer, *Collier on Bankruptcy*, ¶ 502.01, *citing*, 11 U.S.C. § 502(a), (b) and (c); 28 U.S.C § 157(b)(2)(B); *Stern v. Marshall*, 564 U.S. 462, 499, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011). Allowed unsecured claims are entitled to a distribution from the available assets of a bankruptcy estate in a Chapter 7 bankruptcy case pursuant to Section 726(a)(1)-(4) of the Bankruptcy Code, 11 U.S.C., and such claims are classified in order of priority set forth in 11 U.S.C. § 507 and paid on a pro rata basis by priority

1 class pursuant to 11 U.S.C. § 726(b). The Bankruptcy Code does not provide for direct
2 liability of a debtor to a creditor based on the allowance of the claim of the creditor filed
3 in the debtor's bankruptcy case. *Ziino v. Baker*, 613 F.3d at 1328-1329.

4 In a Chapter 7 bankruptcy case, such as this one, the Chapter 7 trustee must
5 prepare and file a final report and account of administration of the estate; and must
6 close the estate as expeditiously as compatible with the best interests of parties in
7 interest. March, Ahart and Shapiro, *Rutter Group California Practice Guide:*
8 *Bankruptcy*, ¶ 10:147 (online edition December 2020 update), *citing*, 11 U.S.C. §
9 704(a)(1) and (9); Federal Rule of Bankruptcy Procedure 5009. Distributions
10 ("dividends") from assets of the debtor's bankruptcy estate liquidated in the Chapter 7
11 bankruptcy case are to be made to creditors in Chapter 7 on their claims "as promptly
12 as practicable" pursuant to Federal Rule of Bankruptcy Procedure 3009. *Id.* In most
13 cases, no distributions are made until the Chapter 7 trustee has liquidated the estate
14 assets and filed a final account. *Id.*

15 In this Chapter 7 bankruptcy case, Foremost filed its proof of claim, which was
16 deemed allowed as no objection was made to it, the Chapter 7 trustee prepared and
17 filed his final report and account of administration of the estate, paid distributions on
18 claims, including Foremost's allowed claim, from the liquidated assets of Ayers Bath's
19 bankruptcy estate, and the bankruptcy case was closed. Foremost's proof of claim was
20 deemed allowed when the Chapter 7 trustee filed his final report and account of
21 administration of the estate on April 14, 2015. Although there was no specific order
22 allowing Foremost's unobjected-to claim, its allowed proof of claim was a final judgment
23 for *res judicata* purposes. *Siegel v. Federal Home Loan Mortgage Corp.*, 143 F.3d at
24 529.

25 However, there is nothing in the Bankruptcy Code or Rules that indicates that an
26 allowed bankruptcy claim would be an executable money judgment against a
27 bankruptcy debtor. Under Federal Rule of Bankruptcy Procedure 7001(1), a proceeding
28 to recover money or property from a debtor or other party in a bankruptcy case must be

1 brought as an adversary proceeding, which requires service of a summons and
2 complaint pursuant to Federal Rule of Bankruptcy Procedure 7004. *In re Perkins*, 902
3 F.2d 1254, 1257-1258 (7th Cir. 1990); *In re Haber Oil Co., Inc.*, 12 F.3d 426, 437-440
4 (5th Cir. 1994); *In re Wheeler Technology, Inc.*, 139 B.R. 235 (9th Cir. BAP 1992); *In re*
5 *Grand View Financial, LLC*, No. 2:17-bk-20125-RK, 2018 WL 3025273 (Bankr. C.D.
6 Cal. Jun. 19, 2018); 10 Levin and Sommer, *Collier on Bankruptcy*, ¶ 7001.01.

7 *Collier on Bankruptcy* explains what are adversary proceedings in a bankruptcy
8 case as follows:

9 Federal Rule of Bankruptcy Procedure 7001 lists 10 separate categories of
10 proceedings specifically denominated as adversary proceedings governed by the
11 rules of Part VII [of the Federal Rules of Bankruptcy Procedure]. Certain of these
12 contain specific exclusions, introduced by the words “other than” or “except
when,” which are governed by other rules or sections of the [Bankruptcy] Code.

13 Adversary proceedings are separate lawsuits within the context of a particular
14 bankruptcy case and have all of the attributes of a lawsuit, including the filing and
15 service of a formal complaint and application, with certain modifications, of the
Federal Rules of Civil Procedure, as provided in Part VII of the Bankruptcy Rules.

16 10 Levin and Sommer, *Collier on Bankruptcy*, ¶ 7001.01 (footnotes omitted).

17 In contrast, as *Collier on Bankruptcy* explains, contested matters are different
18 from adversary proceedings and may proceed by motion:

19 Contested matters that are not denominated as adversary proceedings are
20 governed by other rules, including Rule 9014 [of the Federal Rules of Bankruptcy
21 Procedure], which provides that in contested matters not otherwise governed by
22 the Bankruptcy Rules, relief shall be requested by motion. Rule 9014 makes
specific Part VII rules applicable to motions, unless the court otherwise directs,
and gives the court the power and discretion to direct, at any stage, that one or
more of the other rules in Part VII shall apply.

23 *Id.* (footnote omitted).

24 A proof of claim filed in a bankruptcy case does not constitute an adversary
25 proceeding, but may become a contested matter if an objection is filed and may also
26 become an adversary proceeding if the proof of claim is joined with a request for certain
27 relief under the Federal Rules of Bankruptcy Procedure as further explained by *Collier*
28 *on Bankruptcy*:

1 The filing and subsequent objection to allowance of a proof of claim ordinarily
2 does not commence an adversary proceeding even if priority or security is also
3 claimed. The filing of an objection to the allowance of a claim is governed by
4 Rule 3007 and commences a contested matter governed by Rule 9014.
5 However, prior to the 2007 amendments to Rule 3007, when an objection was
6 joined with a demand for relief of the kind specified in Rule 7001, Rule 3007
7 dictated that the matter became an adversary proceeding. Thus, if the trustee or
8 debtor in possession asserted a counterclaim in response to a proof of claim, the
9 entire matter ordinarily became an adversary proceeding, subject to the rules of
10 Part VII, unless the counterclaim was not of the type specified in Rule 7001.
11 However, as amended by the 2007 amendments, Rule 3007 prohibits the
12 inclusion in a claim objection of a request for relief that requires an adversary
13 proceeding, and allows, but does not require, the inclusion of the objection in an
14 adversary proceeding. If a claim objection is filed separately from a related
15 adversary proceeding, the court may consolidate the objection with the adversary
16 proceeding pursuant to Rule 7042.

17 *Id.* (footnotes omitted).

18 Absent a money judgment against the debtor obtained through an adversary
19 proceeding or other direct action to recover money against the debtor, an allowed
20 bankruptcy claim is not an executable money judgment against the debtor because the
21 Bankruptcy Code only provides that the allowance of a claim in a bankruptcy case
22 means that the holder of an allowed bankruptcy claim is entitled to a distribution from
23 the bankruptcy estate of a debtor in a Chapter 7 bankruptcy case, and the entity that is
24 liable for payment of the claim through distributions from assets of the bankruptcy estate
25 is the bankruptcy estate itself, not the debtor directly, based on the statutory scheme for
26 filing and allowance of claims in a bankruptcy case under the Bankruptcy Code
27 described above. 11 U.S.C. §§ 501, 502 and 726; *Ziino v. Baker*, 613 F.3d at 1328-
28 1329. In a bankruptcy case, a money judgment is obtained through an adversary
proceeding brought against the debtor pursuant to Federal Rule of Bankruptcy
Procedure 7001(1) or other direct action against the debtor. *Zinno v. Baker*, 613 F.3d at
1329. Foremost did not obtain a money judgment in this bankruptcy case because it did
not obtain a money judgment as its judgment in the form of an allowed proof of claim
was not obtained in an adversary proceeding against the debtor pursuant to Federal
Rule of Bankruptcy Procedure 7001(1).

1 In a Chapter 7 bankruptcy case, a creditor who has a claim for a prepetition debt
2 owed by the debtor may have a dischargeable debt, in which case the creditor is limited
3 to a distribution, if any, from the bankruptcy case because the debt is subject to
4 discharge under 11 U.S.C. § 524, or the creditor may have a nondischargeable debt, in
5 which case the creditor will have to institute a proceeding to liquidate the debt to a
6 judgment, normally in an adversary proceeding to determine that the debt is excepted
7 from discharge under Federal Rule of Bankruptcy Procedure 7001(6). This is true for
8 individual Chapter 7 debtors whose debts allowed as general unsecured claims are
9 discharged pursuant to 11 U.S.C. § 727(a). See *Siegel v. Federal Home Loan*
10 *Mortgage Corp.*, 143 F.3d at 531.¹⁷ The debts of corporate Chapter 7 bankruptcy
11 debtors, such as Ayers Bath, are not generally subject to discharge pursuant to 11
12 U.S.C. § 727(a)(1); see, *In re Dow Corning Corp.*, 237 B.R. 380, 411-412 (Bankr. E.D.
13 Mich. 1999). The court in *Dow Corning* observed: "On the other hand, a corporate
14 debtor whose assets are liquidated in chapter 7 does indeed remain liable for claims not
15 paid in full since such claims are not discharged. 11 U.S.C. § 727(a)(1)." 237 B.R. at
16 411. The court in *Dow Corning* made this observation in addressing a creditor's
17 argument that postpetition interest on unsecured claims in a Chapter 7 bankruptcy case
18 of a solvent debtor under 11 U.S.C. § 726(a)(5) should be paid at a higher state law rate
19 than the federal judgment rate of 28 U.S.C. § 1961(a) and that such interest continues
20 to accrue on claims that are not discharged. *Id.* The court in *Dow Corning* rejected the
21 creditor's argument, stating:

22 . . . And in fact, when estate proceeds are sufficient, the Bankruptcy Code
23 requires all claims to be paid with interest, thereby leaving nothing upon which to
24 sue. In other words, the most that an unsecured creditor is entitled to receive in
25 a chapter 7 proceeding is the value of its claim as of the petition date plus post-

26 ¹⁷ In discussing why the allowed proof of claim in Siegel's bankruptcy case was *res judicata* and why his
27 challenge to the allowed proof of claim as a final judgment was impermissible, the Ninth Circuit in *Siegel*
28 set forth the need for finality of claim adjudication and the impact of the bankruptcy discharge, stating that
"we . . . conclude that it is better to see the debtor's attack for what it is---an attempt to undercut the order
of a bankruptcy court, deemed or otherwise, which allowed a creditor's claims and achieved finality for the
debtor and the creditor by granting the former's discharge and barring the latter from further pursuit of the
claims. Thus, the district court did not err when it treated the bankruptcy court's allowance of Freddie
Mac's claims as a final judgment." 143 F.3d at 531. This language indicates that the creditor has its
allowed claim, the individual debtor has its discharge, and the resolution of the dispute between them
over the debt owed by the debtor to the creditor in the bankruptcy case would be final. This language
does not indicate that there would be continuation of the dispute through a money judgment from the
allowed claim for the creditor to collect.

1 petition "interest at the legal rate." Once an unsecured claim is paid in
2 accordance with the above formula, it is satisfied and the claimant will have no
3 further recourse against the debtor. Were this not the case, Congress would not
4 have expressly provided for estate proceeds remaining after such distribution to
5 be returned to the debtor. See 11 U.S.C. § 726(a)(6).

6 *Id.* at 412, *citing*, 11 U.S.C. § 726(a). Similar to the situation involving an individual
7 Chapter 7 debtor, if "estate proceeds are sufficient," i.e., the bankruptcy estate is
8 solvent, there is finality of the dispute between the creditor holding an allowed
9 unsecured claim and a corporate debtor in a Chapter 7 case as "the most the
10 unsecured creditor is entitled to receive in a chapter 7 proceeding is the value of its
11 claim as of the petition date plus post-petition 'interest at the legal rate.'" *Id.* Once a
12 claim is paid in accordance with this formula, the claim is satisfied, and there is no
13 further recourse against the debtor, "thereby leaving nothing upon which to sue." *Id.* If
14 estate proceeds are not insufficient in the Chapter 7 case of a corporate debtor, there is
15 no entitlement to postpetition interest, and the creditor receives its pro rata distribution
16 on its unsecured claim pursuant to 11 U.S.C. § 726(a) and (b), but the debt is not
17 discharged, and as *Dow Corning* suggests there may be left something "upon which to
18 sue,"¹⁸ or in other words, the creditor would have to sue the debtor in an action for a
19 money judgment for further collection as the claim allowance and distribution process in
20 a Chapter 7 bankruptcy case does not confer a money judgment on an unsecured
21 creditor for an allowed claim that is not fully satisfied. 11 U.S.C. §§ 101(5)(A), 501, 502
22 and 726; *see also*, *Ziino v. Baker*, 613 F.3d at 1328-1329.

23 To obtain a money judgment against the debtor, a creditor would have to bring a
24 direct action against the debtor to reduce its claim to a money judgment in an adversary
25 proceeding or other separate proceeding. *Ziino v. Baker*, 613 F.3d at 1329. In an
26 action by a creditor to reduce its claim to a monetary judgment and/or determine
27 dischargeability of debt, if the claim is deemed allowed under 11 U.S.C. § 502(a), the
28 determination of amount of the debt should have *res judicata* effect as to the debtor

¹⁸ Since Foremost heavily relies upon *Dow Corning* in its briefing, the court discusses the case in greater detail, *infra*. Foremost's Supplemental Brief, ECF 255 at 9:12-28 (internal citation page 5).

1 unless the debtor contests the claim by filing an objection to the claim under Federal
2 Rule of Bankruptcy Procedure 3007. *Siegel v. Federal Home Loan Mortgage Corp.*,
3 143 F.3d at 528-531; *Ziino v. Baker*, 613 F.3d at 1328-1329; *see also, Trustees of*
4 *Operating Engineers Local 324 Pension Fund v. Bourdow Contracting, Inc.*, 919 F.3d
5 368, 380-384 and n. 9 (6th Cir. 2019) (holding that res judicata effect of a creditor's
6 allowed bankruptcy claim in the debtor's bankruptcy case did not bar litigation of the
7 amount of liability of the entity alleged to be the alter ego of the debtor in the creditor's
8 subsequent civil action in federal district court against the alleged alter ego nondebtor
9 party as its alter ego liability was not an issue litigated in the allowance of the claim in
10 the bankruptcy case of the debtor, but suggesting in dicta that the allowed proof of claim
11 may bar further litigation of the amount of liability based on collateral estoppel rather
12 than res judicata).¹⁹ Any judgment obtained in a proceeding to liquidate a claim and/or

14 ¹⁹ In *Bourdow Contracting*, a union pension fund brought a civil action in federal district court against a
15 corporation in the construction site preparation and excavation business, alleging that the company was
16 the alter ego of a defunct corporation substantially in the same business that incurred statutory liability of
17 \$1,163,279 for completely withdrawing from a multi-employer pension plan pursuant to Employee
18 Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1381(a). 919 F.3d at 373-374 and n. 2.
19 The union pension plan demanded that the defunct corporation pay this withdrawal liability in installments,
20 and when it defaulted, the union pension fund filed a lawsuit against it to recover the liability. *Id.* at 373-
21 374. Subsequently, the defunct corporation filed a Chapter 7 bankruptcy case, and the union pension
22 fund's lawsuit against it was stayed. *Id.* at 374. The union pension fund filed a proof of claim in the
23 defunct corporation's bankruptcy case for \$1,272,187, which was the amount of the liability, plus interest,
24 and because there was no objection to the claim, the claim was deemed allowed pursuant to 11 U.S.C. §
25 502(a). *Id.* The union pension fund received \$52,034 on its allowed proof of claim at the conclusion of the
26 defunct corporation's bankruptcy proceedings. *Id.* Meanwhile, while the defunct corporation was ending
27 its business, a new corporation was formed with some of the same family members who were the
28 principals of the defunct corporation, and the new corporation engaged in substantially the same business
as the defunct corporation. *Id.* The union pension fund filed the instant civil action in federal district court
against the new corporation, seeking to recover the outstanding ERISA withdrawal liability that was not
satisfied in the defunct corporation's bankruptcy proceedings, alleging that the new corporation was
created for the purpose of evading the defunct corporation's withdrawal liability and thereby responsible
for the liability pursuant to 29 U.S.C. § 1392(c) and the new corporation was the alter ego of the defunct
corporation and thereby responsible for the withdrawal liability pursuant to the equitable doctrine of alter
ego. *Id.* Following discovery, the parties filed cross-motions for summary judgment, and the district court
denied the corporation's motion for summary judgment and granted the union pension fund's motion for
summary judgment on grounds that the new corporation was the alter ego of the defunct corporation. *Id.*
The district court further determined that the pension fund was entitled to judgment in the amount of
\$3,221,981, representing the amount of the withdrawal liability of the defunct corporation, less the amount
paid on the pension fund's claim from the defunct corporation's bankruptcy case, plus interest and
attorneys' fees pursuant to 29 U.S.C. § 1132(g)(2). *Id.* at 374-375. The new corporation appealed on
grounds that the district court erroneously applied the alter ego standard under the National Labor
Relations Act ("NLRA") and that the pension fund's allowed bankruptcy claim was a judgment that had *res*
judicata effect and the district court erred in awarding a greater amount than the amount of the judgment

1
2 in the form of the proof of claim. *Id.* at 375-384. The Sixth Circuit affirmed the district court's judgment
3 applying the NLRA alter ego test to the new corporation, holding that it was an alter ego of the defunct
4 corporation as "merely the disguised continuance" of the prior business, on grounds that the corporation
5 waived its objection to use of the NLRA test because it had requested the district court to grant summary
6 judgment in its favor on the basis of the test and the evidence presented by the cross-motions for
7 summary judgment supported the district court's grant of summary judgment to the pension fund in that
8 six of the eight relevant factors under the NLRA test supported alter ego liability and the other two factors
9 did not outweigh the six factors supporting alter ego. *Id.* at 375-380. As to the *res judicata* effect of the
10 allowed bankruptcy claim, the Sixth Circuit stated that it was an issue of first impression in that circuit, but
11 considering the state of the case law, it held, following the Second and Ninth Circuits in *EDP Medical*
12 *Computer Systems, Inc. v. United States*, 480 F.3d 621 (2nd Cir. 2007) and *Siegel v. Federal Home Loan*
13 *Mortgage Corp.*, 143 F.3d 525 (9th Cir. 1998), that "an uncontested proof of claim that is allowed
14 pursuant to 11 U.S.C. § 502(a) is a final judgment on the merits for the purposes of *res judicata*, with or
15 without a separate court order specifically allowing the claim." *Id.* at 380-383. However, on the appeal
16 before it, the Sixth Circuit held that the *res judicata* effect of the pension fund's proof of claim did not bar
17 litigation of the amount of the new corporation's liability and the district court did not err in determining
18 that the pension fund was entitled a judgment in excess of the amount on the proof of claim. *Id.* at 383-
19 384. The new corporation argued that the *res judicata* effect of the pension fund's allowed proof of claim
20 barred the pension fund from seeking more than was stated on the proof of claim, i.e., the interest and
21 attorneys' fees under 29 U.S.C. § 1132(g)(2), which the Sixth Circuit could have been asserted on the
22 proof of claim. The Sixth Circuit held that three of the four required elements for *res judicata* applied: (1)
23 a final decision on the merits by a court of competent jurisdiction was met in the allowed proof of claim;
24 (2) a subsequent action between the same parties or their privies was met in that the subsequent action
25 involved the same parties as the new corporation was the alter ego of the defunct corporation; and (3) an
26 issue in the subsequent action which was litigated or could have been litigated in the prior action was met
27 in that the amount of the interest and fees under 29 U.S.C. § 1132(g)(2) could have been asserted on the
28 proof of claim along with the withdrawal liability of the defunct corporation, but it was not. *Id.* at 380-383.
(The issue of whether the defunct corporation incurred the amount of the withdrawal liability was not an
issue on appeal as the defendant, the new corporation, conceded the issue in its briefing, and in fact,
based its *res judicata* argument on the amount as stated on the allowed proof of claim of the creditor. *Id.*
at 380-384.) However, the Sixth Circuit held that the fourth element of *res judicata* of an identity of the
causes of action was not met in the case because the pension fund's proof of claim arose out of, and was
created by, the defunct corporation's failure to make the withdrawal liability payments to the pension fund
while the pension fund's claim arose out of, and was created by, the new corporation's status as the
defunct corporation's alter ego, and the operative facts to prove these claims are different, and "[t]hus,
there is not an identity of 'the facts creating the right of action and of the evidence necessary to sustain
each action' for *res judicata* to apply. *Id.*, citing and quoting, *Sanders Confectionary Prods., Inc. v. Heller*
Financial, Inc., 973 F.2d 474, 484 (6th Cir. 1992). In footnote 9 of the opinion, the Sixth Circuit
commented that collateral estoppel may have been a better argument for the new corporation, but it had
not properly raised it: ". . . collateral estoppel---which does not require an identity of the causes of action--
may have been a more successful argument for Defendant. Indeed, the relief Defendant alludes to
throughout its briefs to this Court is the type of relief typically sought in collateral estoppel cases---barring
litigation of an *issue*---not the type of relief typically sought in *res judicata* cases, i.e., barring litigation of a
claim." *Id.* see *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 582 (6th Cir. 1994). However,
Defendant did not raise a collateral estoppel argument until its reply brief. See *supra*, note 6." *Id.* at 384
and n. 9. *Bouradow Contracting* is procedurally different from this case in that it was a civil action in
federal district court brought by the creditor against an entity alleged alter ego of a bankruptcy debtor,
seeking to collect the liability of the bankruptcy debtor not satisfied by the distribution on the creditor's
proof of claim from the bankruptcy estate of the debtor, based on the equitable doctrine of alter ego, and
the creditor recovered. In this case, the creditor, Foremost, has moved to amend the proof of claim in the
debtor's bankruptcy case to add the entity alleged to be alter ego of the bankruptcy debtor as an
additional judgment debtor on the judgment in the form of the allowed proof of claim pursuant to Federal
Rule of Civil Procedure 69(a) and state law, which is procedurally impermissible as the court discusses
herein.

1 determine the nondischargeable status of a claim is subject to Federal Rules of
2 Bankruptcy Procedure 7058 and 7062, which make Federal Rules of Civil Procedure 58
3 and 62 governing entry of a judgment and stay of proceedings to enforce a judgment
4 applicable to adversary proceedings. See *In re 3109, LLC*, Case No. 10-00757, 2014
5 WL 1655415, at *2-3.

6 An allowed proof of claim does not have the attributes of a money judgment in a
7 proceeding before the bankruptcy court to recover money or property required to be
8 brought under Federal Rules of Bankruptcy Procedure 7001 *et seq.* as an adversary
9 proceeding. See, e.g., *Ziino v. Baker, supra*; *In re 3109, LLC*, Case No. 10-00757, 2014
10 WL 1655415, at *2-3 (discussed in detail below). As such, a creditor holding an allowed
11 bankruptcy claim cannot collect on the claim against the bankruptcy debtor through levy
12 or writ of execution without first reducing the amount of the claim to a money judgment
13 through an adversary proceeding in the bankruptcy court or other proceeding in another
14 court. *Id.* As *Collier on Bankruptcy* comments:

15 **Execution would be necessary or appropriate only in an action to recover**
16 **money or property, which would generally require an adversary proceeding**
17 **to be commenced under Bankruptcy Rule 7001.** Principally for that reason, it
18 is difficult to see how execution ever would be appropriate in connection with a
19 contested matter. While money could be sought on a motion for payment of an
20 administrative expense, which would be a contested matter, the chances that a
21 bankruptcy court would permit execution to collect on an administrative expense
22 are remote, by reason of Bankruptcy Code section 362(a)(3) and the other
23 reasons discussed below.

24 10 Levin and Sommer, *Collier on Bankruptcy*, ¶ 7069.01, n. 2 (emphasis in bold
25 added).²⁰ As *Collier on Bankruptcy* further comments:

26 ²⁰ The reference to a contested matter is to Federal Rule of Bankruptcy Procedure 9014, which may
27 include a motion for payment of an administrative expense claim if objected to by a party in interest.
28 *Collier on Bankruptcy* recognizes that the allowance of such an administrative expense claim does not
normally result in automatic allowance of execution to collect unless specifically permitted by the
bankruptcy court. The reference to Bankruptcy Code section 362(a)(3) in the quoted text from *Collier on
Bankruptcy* pertains to the automatic stay that stays acts to obtain possession or exercise control over
property of the bankruptcy estate. 11 U.S.C. § 362(a). The “other reasons” mentioned in the text are not
listed here. It is also questionable how Federal Rule of Civil Procedure 69 applies to Foremost’s allowed
proof of claim. Federal Rule of Bankruptcy Procedure 7069 provides that Federal Rule of Civil Procedure
69 applies in adversary proceedings, that is, judgments obtained in adversary proceedings. Foremost’s
judgment in the form of an allowed proof of claim was not obtained through an adversary proceeding

1 By its terms, Civil Rule 69 is applicable to enforcement of only judgments for the
2 payment of money. As a practical matter, therefore, it almost always will apply
3 only when the underlying cause of action is not against an estate. If the
4 underlying cause of action against the estate arose prepetition, it normally will be
5 dealt with as a claim to be satisfied by a distribution upon liquidation or under a
6 reorganization plan in the same manner as other similar claims. Even when relief
7 from the stay is granted to permit an action on a prepetition claim to be
8 commenced or continued in another forum, the order granting that relief will
9 typically provide for leave only to obtain a judgment liquidating the claim or to
10 proceed against non-estate assets, and will not permit execution on assets of the
11 estate to enforce any resulting judgment. Permitting execution would materially
12 risk impairing statutory priorities or the equality of treatment among similarly
13 situated claims, one of the most important objectives of bankruptcy law.

14 Even when a judgment against the estate has been obtained with respect to a
15 postpetition claim and the automatic stay is inapplicable, or the court has ordered
16 the estate to make a postpetition payment (as for rent due under a lease),
17 enforcement of the judgment against assets of the estate will run afoul of section
18 362(a)(3) of the Code—staying acts, among others, to obtain property from the
19 estate or to exercise control over property of the estate. Accordingly, such
20 judgments, if not otherwise satisfied, normally will be enforced by filing a motion
21 for an order requiring payment of an administrative expense, and not by
22 execution.

23 *Id.*, ¶ 7069.01 (footnotes and citations omitted). This commentary from one of the
24 leading bankruptcy law treatises, *Collier on Bankruptcy*, “Permitting execution [on
25 bankruptcy claims] would materially risk impairing statutory priorities or the equality of
26 treatment among similarly situated claims, one of the most important objectives of
27 bankruptcy law,” identifies a serious policy concern presented by Foremost’s argument
28 that its allowed bankruptcy claim is a monetary judgment within the meaning of Rule

29 within the meaning of Federal Rule of Bankruptcy Procedure 7001(1)-(10). Federal Rule of Bankruptcy
30 Procedure 9014 provides that Federal Rule of Bankruptcy Procedure 7069 applicable to contested
31 matters, and thus, Federal Rule of Civil Procedure 69 applies to contested matters, that is, judgments
32 obtained in contested matters. However, Foremost’s judgment in the form of its allowed proof of claim
33 was not obtained through a contested matter as it was an uncontested matter. It may be that Federal
34 Rule of Civil Procedure 69 is applicable to Foremost’s judgment in the form of the allowed proof of claim
35 by reason of the holding in *In re Levander*, but the judgment in that case was obtained through the
36 contested matter of the bankruptcy debtors’ motion for an award of attorneys’ fees, which was a
37 contested matter under Federal Rule of Bankruptcy Procedure 9014. Thus, it is unclear how procedurally
38 Federal Rule of Civil Procedure 69 applies to Foremost’s judgment in the form of its allowed proof of claim
39 as it was not obtained through an adversary proceeding or a contested matter, and thus, Federal Rules of
40 Bankruptcy Procedure 7069 and 9014 would not apply to make Federal Rule of Civil Procedure 69
41 applicable. However, in this court’s view, it is a moot point in this case because the court concludes that
42 the allowed proof of claim is not a money judgment for Federal Rule of Civil Procedure 69 to apply.

69(a). As the case law and commentary discussed herein indicates, it is not. As *Collier on Bankruptcy* observes, “If the underlying cause of action against the estate arose prepetition, it normally will be dealt with as a claim to be satisfied by a distribution upon liquidation or under a reorganization plan in the same manner as other similar claims.” *Id.*

The case law is consistent that the above-described attributes of an allowed bankruptcy claim do not make it a money judgment enforceable by a writ of execution for purposes of Federal Rule of Civil Procedure 69(a). *Ziino v. Baker, supra; In re One World Adoption Services, Inc.*, 577 B.R. at 482-486; *In re Soelberg*, Case No. 15-01355-TLM, 2019 WL 3805980; *In re 3109, LLC*, Case No. 10-00757, 2014 WL 1655415. The case of *Siegel v. Federal Home Loan Mortgage Corp.*, which Foremost heavily relies upon is not inconsistent as that case did not involve Rule 69(a). In *Siegel*, two partners took out two loans on two parcels of real property and executed promissory notes and deeds of trust in favor of the lender to secure the loans. 143 F.3d at 527. The lender sold and assigned the notes and deeds of trust to the Federal Home Loan Mortgage Corp. (“Freddie Mac”). *Id.* The partners, or borrowers, defaulted on the loans, and Freddie Mac foreclosed on one property and filed an action in federal district court seeking a deficiency judgment against the borrowers. *Id.* at 528. Prior to trial in this action, one borrower, Siegel, filed for bankruptcy. *Id.* Freddie Mac filed two proofs of claim in Siegel’s bankruptcy case, one for each real property loan, and neither Siegel nor the bankruptcy trustee filed an objection to those proofs of claim. *Id.* The bankruptcy court granted Freddie Mac relief from the automatic stay so that it could foreclose the other property. *Id.* Siegel was discharged from bankruptcy, and the bankruptcy case was closed. *Id.* Subsequently, Freddie Mac foreclosed on the other property. *Id.* Meanwhile, the borrowers had filed an action in state court against Freddie Mac for tort and breach of contract regarding the foreclosures upon the two properties, which Freddie Mac removed to federal district court. *Id.* Freddie Mac then moved for summary judgment against Siegel on all claims on grounds that his action

1 was barred by the res judicata effect of the bankruptcy proceeding. *Id.* The district
2 court granted Freddie Mac's summary judgment motion against Siegel and its
3 subsequent motion for attorneys' fees against Siegel. *Id.* The Ninth Circuit affirmed.
4 *Id.* at 528-533. As to *res judicata*, the Ninth Circuit stated that an allowed bankruptcy
5 claim was entitled to *res judicata* effect because it met its four-factor test for res
6 judicata: "(1) whether rights or interests established in the prior judgment would be
7 destroyed or impaired by prosecution of the second action; (2) whether substantially the
8 same evidence is presented in the two actions; (3) whether the two suits involved
9 infringement of the same right; and (4) whether the two suits arise out of the same
10 transactional nucleus of facts." *Id.* at 529, *citing and quoting, In re International*
11 *Nutronics*, 28 F.3d 965, 970 (9th Cir. 1994).

12 According to the Ninth Circuit in *Siegel*, Freddie Mac's allowed proof of claim met
13 this standard:

14 Application of this test indicates that the district court correctly concluded that
15 Siegel's claims were barred by res judicata. Freddie Mac filed two proofs of
16 claim (Windell and Dalton Place) in Siegel's bankruptcy proceeding. No
17 objection was filed to the claims in the bankruptcy action. Siegel's present suit
18 against Freddie Mac in contract and tort states a variety of causes of actions all
19 of which are premised on Freddie Mac's failure to repair projects on the Windell
20 and Dalton Place properties, and its failure to approve the sale and transfer of
21 the Dalton Place property. The gravamen is that Freddie Mac violated its duties
22 under the notes and deeds of trust and, among other things, should not have
23 been able to proceed against Siegel due to its own defaults and wrongdoing.
24 Clearly, Freddie Mac's right to recover on its proofs of claim in the bankruptcy
25 court could have been attacked on that basis. Just as clearly, its rights
26 established in the bankruptcy would be affected by resolution of the present
27 action. Similarly, the present suit and the proofs of claim stem from the same
28 nucleus of facts, and involve similar evidence, i.e., the loan documentation and
the surrounding circumstances. Again, the interests at stake in both actions
involve Freddie Mac's right to recovery under the loan agreements. As such, the
district court correctly concluded that res judicata bars Siegel's claims in the
present action.

14 *Id.* at 529. The Ninth Circuit further rejected Siegel's argument that a separate order of
15 the bankruptcy court expressly allowing the proofs of claim was required before the
16 allowed claims would have *res judicata* effect. *Id.* at 530. The Ninth Circuit affirmed the

1 award of attorneys' fees based on the contractual provisions for such an award in the
2 loan agreements. *Id.* at 531-533. *Siegel* did not involve the attempt of a creditor to
3 enforce an allowed bankruptcy claim as a money judgment under Rule 69, but rather,
4 the creditor used its allowed proof of claim in debtor's bankruptcy case, having *res*
5 *judicata* effect, as a defense against the debtor's lawsuit alleging causes of action for
6 tort and breach of contract arising out of the same nucleus of facts from which both the
7 creditor's allowed proof of claim and the debtor's lawsuit stemmed. The precise issue in
8 the case now before the court in this case, that is, the applicability of Rule 69 to an
9 allowed bankruptcy claim was not involved in *Siegel* and thus, it is not directly on point
10 on that issue.

11 In the case of *In re 3109, LLC*, the court expressly followed the Eleventh Circuit's
12 decision in *Ziino v. Baker* stated that its reliance on *Ziino v. Baker* was reinforced by the
13 Federal Rules of Bankruptcy Procedure governing how to obtain a money judgment in
14 bankruptcy proceedings. *In re 3109, LLC*, No. 10-00757, 2014 WL 1655415, at *1-3. In
15 this case, the court issued an order striking writs of attachment to enforce a money
16 judgment, holding that an order allowing 11 U.S.C. § 330(a)(1) compensation as an
17 administrative expense claim was not a monetary judgment to warrant issuance of such
18 writs, and discussing the distinctions between an allowed bankruptcy claim and a
19 money judgment. *Id.* The party filing the writs of attachment was the attorney
20 employed as counsel for the debtor-in-possession in a Chapter 11 bankruptcy case who
21 held an allowed administrative expense claim for his professional fees in the case. *Id.*
22 As the court noted, the attorney's allowed claim was for services rendered before
23 confirmation of the Chapter 11 plan, and the confirmed Chapter 11 reorganization plan
24 provided for treatment of the claim, which was binding on the attorney. *Id.* As the court
25 noted, the order allowing the administrative expense claim did not direct that the claim
26 was to be treated as a monetary judgment. *Id.* The court held that the attorney could
27 not obtain writs of attachment to collect the unpaid portion of his allowed administrative
28 expense claim in the bankruptcy case against the bankruptcy debtor, holding that it was

1 not a monetary judgment executable through writs of attachment. *Id.* at *1-3. In so
2 holding, the court explained the differences between an allowed bankruptcy claim and a
3 monetary judgment, following the Eleventh Circuit's holding in *Ziino v. Baker* and
4 discussing how Federal Rules of Bankruptcy Procedure reinforced its concurrence with
5 the holding in *Ziino v. Baker*, stating:

6 An order allowing a claim in a bankruptcy case, regardless of whether the
7 claim is an administrative claim or instead a prepetition claim of a creditor,
8 adjudicates the amount owed to the holder of the claim, but does not
9 amount to a monetary judgment unless the court so directs. The
10 distinction between an order allowing a claim and a monetary judgment
11 was aptly described in *Ziino v. Baker*, 613 F.3d 1326 (11th Cir. 2010).
12 That case involved an action brought by Ziino seeking to enforce an order
13 allowing his claim in a prior bankruptcy proceeding against assets held in
14 trust for his former domestic partner, Wellman. *Id.* The Eleventh Circuit
15 determined that the court order allowing Ziino's claim in Wellman's prior
16 bankruptcy proceeding was not a final, executable money judgment. *Id.* at
17 1327. As explained by the court:

18 An allowed claim in bankruptcy serves a different objective from
19 that of a money judgment—it permits the claimant to participate in
20 the distribution of the bankruptcy estate. See 11 U.S.C. § 507
21 (2006); 4 Collier on Bankruptcy ¶ 501.01[2][b] (Alan N. Resnick &
22 Henry J. Sommer, eds., 16th ed. 2010). “[T]he assertion of a claim
23 in bankruptcy is, of course, not an attempt to recover a judgment
24 against the debtor but to obtain a distributive share in the
25 immediate assets of the proceeding.” *Matter of Mobile Steel Co.*,
26 563 F.2d 692, 700 (5th Cir.1977) (quoting *In re Kansas City*
27 *Journal-Post Co.*, 144 F.2d 791, 803-04 (8th Cir.1944)); see also
28 10 Collier on Bankruptcy ¶ 7069.01 (Alan N. Resnick & Henry J.
Sommer, eds., 15th ed. rev. 2009) (“By its terms, Civil Rule 69 is
applicable to enforcement of only judgments for the payment of
money.... If the underlying cause of action against the estate arose
prepetition, it normally will be dealt with as a claim to be satisfied by
a distribution upon liquidation or under a reorganization plan....”).

24 *Id.* at 1328-29. Here, similarly, the court's award in favor of Johnson for
25 postpetition services was the section 330 predicate for his being allowed
26 to obtain a distribution under the terms of the confirmed plan. The court
27 did not indicate that the award in favor of Johnson was to go beyond that
28 and be treated as a monetary judgment.

This conclusion is reinforced by the Federal Rules of Bankruptcy
Procedure. Under Rule 7001(1), with exceptions of no relevance here, “a

proceeding to recover money or property” is an adversary proceeding, which, under Rule 7003, must be commenced by the filing of a complaint. Johnson's application was not filed as a complaint commencing an adversary proceeding. Instead, Johnson's application was filed under Rule 2016(a). As in the case of a proceeding pursuant to Rule 3007 or Rule 3008 (the rules regarding allowance or disallowance of disputed prepetition claims), the proceeding commenced by Johnson's application created merely a contested matter governed by Rule 9014.

Unlike an adversary proceeding monetary judgment to which Rules 7058 and 7062 apply, an order adjudicating a contested matter is, under Rule 9014(c), not automatically subject to the strictures of Rules 7058 and 7062. If Johnson had wished to obtain a monetary judgment when he sought an award of fees, he ought to have filed a complaint commencing an adversary proceeding, with any monetary judgment being subject to the 14-day stay after entry under Rule 7062.

True, the court's order fixed the amount of compensation owed to Johnson, and is entitled to preclusive effect. *See EDP Med. Computer Sys., Inc. v. United States*, 480 F.3d 621, 625 (2d Cir.2007) (holding that “a bankruptcy court order allowing an uncontested proof of claim constitutes a ‘final judgment’ and is thus a predicate for res judicata.”). However, unlike a monetary judgment, the order allowing the claim did not provide that interest would commence to run in accordance with 28 U.S.C. § 1961. Moreover, by the terms of the confirmed plan, Johnson's claim for pre-confirmation fees was not payable until 30 days following the entry of the court's order allowing his claim. *See* Dkt. No. 97, section 3.02. This means that at the time the order allowing the claim was entered, there was not yet a default pursuant to which Johnson could seek a monetary judgment for the unpaid fees. Both the lack of judgment interest and the lack of any obligation for which payment was past due when Johnson sought his award distinguish the court's order awarding compensation and a reimbursement of expenses from a monetary judgment.

In re 3109, LLC, No. 10-00757, 2014 WL 1655415, at *2-3 (footnotes omitted); *see also*, 11 U.S.C. §§ 501, 502, 503, 507 and 726; *In re Trigee Foundation, Inc.*, Case No. 12–00624, 2017 WL 3190737, at *1-3 (Bankr. D.D.C. July 26, 2017) (determining that the allowance of a claim as an administrative expense or as a claim against the estate does not constitute entry of a money judgment but merely determines that the claimant is entitled to a distribution from the bankruptcy estate being administered, and that fee orders were not intended to be money judgments collectible by writs of execution after

1 the dismissal of the case; holding that fee orders are not civil judgments, and 28 U.S.C.
2 § 1961 providing for post-judgment interest does not apply; and finding Fed. R. Civ. P.
3 69(a) is inapplicable as it only permits the enforcement of money judgments). Thus, the
4 case law recognizes that an allowed claim does not have the attributes of a money
5 judgment under Federal Rule of Civil Procedure 69(a) as it is not enforced by a writ of
6 execution.

7 In a case not involving Federal Rule of Civil Procedure 69, the Ninth Circuit held
8 in *In re Southern California Plastics, Inc.*, that the attributes of an allowed bankruptcy
9 claim were not equivalent to a state court judgment to perfect an attachment lien under
10 state law, observing:

11 Nonetheless, the BAP's conclusion may be justified if an allowance of
12 claim were truly equivalent to obtaining a judgment. The procedure for
13 allowance of a claim, however, is similar but not identical to that for
14 obtaining a judgment. In the allowance process, the validity and legality of
15 claims are determined by applicable nonbankruptcy law. See e.g.,
16 *Christison v. Norm Ross Co. (In re Eastview Estates II)*, 713 F.2d 443, 447
17 (9th Cir. 1983). A claim cannot be allowed if it is unenforceable under
18 nonbankruptcy law. See 11 U.S.C. § 502(b)(1). The Trustee therefore may
19 raise state law defenses to the claim. Unlike in a state court judgment,
20 however, the proof of claim is prima facie evidence of the validity of the
21 claim. See 4 Collier on Bankruptcy at ¶ 502.02[2][f] (15th ed., 1998).
22 Although the creditor bears the ultimate burden of persuasion, the debtor
23 must come forward with evidence to rebut the presumption of validity. See
24 *id.* Additionally, because the allowance of a claim is a contested matter,
25 the proceeding is before the bench not a jury.

26 Because of these differences, we hold that an allowance of claim is not
27 equivalent to a judgment for purposes of perfecting an attachment lien.
28 Attachment liens “can be created and continue to exist only in the cases
and to the extent to which the [California] Legislature by statutory
enactment has authorized their creation and continued existence.”
Arcturus Mfg. Corp., 35 Cal.Rptr. at 503. Because attachment is a “harsh
remedy,” as the debtor loses some control of its property without the
protection of a full adjudication, “the provisions related thereto should be
strictly construed.” *United States Liab. Ins. Co. v. Superior Court*, 252
Cal.App.2d 557, 60 Cal.Rptr. 723, 725 (1967) (citations omitted). One of
the protections for the debtor built into the process is that the attachment
creditor cannot proceed against the attached property until a judgment,
with all of its procedural protections, is obtained. The BAP's solution
upsets this balance and gives an advantage to the attachment creditor.

1 We recognize that the BAP's holding preserves many of the objectives of
2 the automatic stay and that it results in a straightforward procedure for
3 dealing with attachment liens. We also recognize that at times bankruptcy
4 law may define what otherwise would be defined by state law. See, e.g.,
5 *California Dept. of Health Serv. v. Jensen (In re Jensen)*, 995 F.2d 925,
6 929–30 & n. 5 (9th Cir. 1993) (recognizing that, because of the Code's
7 broad definition of “claim,” bankruptcy law defines when a claim arises
8 even though the claim is based on nonbankruptcy law). But it is axiomatic
9 that, even in the bankruptcy context, state law governs the validity and
10 extent of liens. Moreover, the Bankruptcy Code intends to preserve, to the
11 extent possible, the state law rights possessed by parties outside of the
12 bankruptcy context. See *HAL, Inc. v. United States (In re Hal, Inc.)*, 122
13 F.3d 851, 852 (9th Cir. 1997). Permitting an allowance of claim to
14 substitute for a judgment perfecting an attachment lien undermines the
15 rights and protections created by the California Legislature. We therefore
16 reverse the BAP.

17 163 F.3d at 1247-1248; see also, *In re One World Adoption Services, Inc.*, 577 B.R. at
18 485-486 (citing *In re Southern California Plastics, Inc.*, for the proposition that an
19 allowed claim may be a final judgment under *Siegel v. Federal Home Loan Mortgage*
20 *Corp.*, but being a final judgment does not make it necessarily a money judgment).

21 Foremost attempts to distinguish *In re Southern California Plastics, Inc.*, by
22 arguing “the Ninth Circuit’s limited finding that an allowed bankruptcy claim is not a
23 ‘judgment in the underlying action’ for purposes of California lien law does not support
24 this Court’s tentative ruling that an allowed bankruptcy claim is not a ‘money judgment’
25 for purposes of federal law.” Foremost’s Supplemental Brief, ECF 255 at 10:8 - 11:7
26 (internal citation pages 6-7). While it is correct for Foremost to state that the Ninth
27 Circuit was considering application of California lien law in *In re Southern California*
28 *Plastics, Inc.*, the Ninth Circuit had nonetheless considered whether an allowed
bankruptcy claim was the equivalent of a judgment, “whether that be in state or federal
court,” and held that it was not, stating “that an allowance of claim is not equivalent to a
judgment for purposes of perfecting an attachment lien.” *In re Southern California*
Plastics, Inc., 165 F.3d at 1248. As the above-quoted text from the opinion indicates,
an allowed bankruptcy claim had different attributes which set it apart from a standard

1 federal or state court judgment. Moreover, the Ninth Circuit in *Southern California*
2 *Plastics* noted that it had previously decided in the case of *Federal Deposit Insurance*
3 *Corp. v. Jenson (In re Jenson)*, 980 F.2d 1254 (9th Cir. 1992) that a judgment by the
4 bankruptcy court on a deficiency claim initiated in a lawsuit in the federal district court
5 before the debtor filed bankruptcy and later referred by the district court to the
6 bankruptcy court was sufficient to perfect an attachment lien relating back to the date of
7 writ of attachment. *In re Southern California Plastics, Inc.*, 165 F.3d at 1246, *citing, In re*
8 *Jenson*, 980 F.2d at 1258-1259. The Ninth Circuit observed that “[u]nder state law, an
9 attachment lien is perfected by obtaining judgment in the underlying action,” the
10 allowance of a bankruptcy proof of claim is not the equivalent of a judgment to perfect
11 an attachment lien under state law. *Id.* at 1247-1248.

12 The holding of *Southern California Plastics* supports the conclusion that the
13 allowance of a proof of claim in a bankruptcy case is not the equivalent to a money
14 judgment for purposes of amending a judgment under Rule 69(a) because the decision
15 shows that an allowed claim, though a final judgment, is not a judgment for all purposes
16 as it cannot serve as a judgment to base an attachment lien under California law to
17 collect the amount owed on the proof of claim. This court concludes that similarly, an
18 allowed proof of claim in a bankruptcy case is not a money judgment that can be the
19 basis of a writ of execution as held by the Eleventh Circuit in *Ziino v. Baker*.

20 Foremost relies upon language in the Ninth Circuit’s opinion in *In re Cardelucci*,
21 285 F.3d 1231 (9th Cir. 2002) to support its argument that its allowed bankruptcy claim
22 is a money judgment under Rule 69(a). Foremost’s Supplemental Brief, ECF 255 at
23 8:23 - 11:24 (internal citation pages 4-7). Foremost argued in its brief:

24 In *In re Cardelucci*, 285 F.3d 1231 (9th Cir. 2002), the question before the Ninth
25 Circuit was whether interest on an allowed bankruptcy claim should be calculated
26 under California’s state statutory interest rate or the federal post-judgment
27 interest rate. See *id.* at 1233. In holding that the claimant was entitled to interest
at the federal post-judgment rate, the Ninth Circuit observed that an allowed
claim is equivalent to a money judgment:

28 Upon the filing of the bankruptcy petition, creditors with a claim against the
estate must pursue their rights to the claim in federal court and entitlement

1 to a claim is a matter of federal law Absent a timely objection, all
2 claims filed against the bankruptcy estate are “deemed allowed” as of the
3 date of the filing. 11 U.S.C. § 502(a). This allowed claim, like a judgment,
4 gives the creditor a legal “right to payment” of a specific sum of money
5 against the debtor. 11 U.S.C. § 101(5); 11 U.S.C. § 502(b).

6 *Id.* at 1235 (citations omitted)(emphasis added). Because “[i]n bankruptcy, an
7 allowed claim becomes a federal judgment,” the Ninth Circuit held that the holder
8 of the claim is entitled to post-judgment interest at the federal rate.

9 Foremost’s Supplemental Brief, ECF 255 at 8:23 - 11:24 (internal citation pages 4-7).
10 Regarding *Ziino v. Baker* and its progeny, Foremost argues: “The Eleventh Circuit’s
11 ruling and, by extension, the bankruptcy courts’ decisions in *Soelberg* and *3109*, are
12 simply at odds with the Ninth Circuit’s holding in *Cardelucci* that a deemed allowed
13 claim is the equivalent of a judgment in that it gives the creditor ‘a legal right to payment’
14 of a specific sum of money against the debtor.” *Id.* at 11:20-24 (internal citation page
15 7), *citing and quoting, In re Cardelucci*, 285 F.3d at 1235 (citation omitted).

16 *Cardelucci* is not directly on point because it did not involve the issue of the
17 applicability of Rule 69(a) to an allowed bankruptcy claim. The issue in *Cardelucci* was
18 how to interpret 11 U.S.C. § 726(a)(5) providing for payment of interest “at the legal
19 rate” on claims to be paid in full under the confirmed reorganization plan in a Chapter 11
20 bankruptcy case of a solvent debtor required under the “best interests of creditors” test
21 of 11 U.S.C. §1129(a)(7)(A)(ii).²¹ *Id.* at 1233-1234. In *Cardelucci*, unsecured creditors
22 holding a claim based on a state court judgment objected to the debtor’s proposed
23 Chapter 11 reorganization plan on grounds that the legal rate of interest on their claim

24 ²¹ Under the “best interests of creditors” test of 11 U.S.C. §1129(a)(7)(A)(ii), in order for a reorganization
25 plan to be confirmed under Chapter 11 of the Bankruptcy Code, 11 U.S.C., the plan must pay each holder
26 of a claim of a class that has not accepted the plan by paying an amount not less than the claim holder
27 would receive in a Chapter 7 liquidation bankruptcy case, and in the case of a solvent debtor, where there
28 are sufficient assets to pay 100 percent of unsecured claims, postpetition interest “at the legal rate” must
be paid on such claims pursuant to 11 U.S.C. §726(a)(5). The Ninth Circuit in *Cardelucci* observed:
“Where a debtor in bankruptcy is solvent, an unsecured creditor is entitled to ‘payment of interest at the
legal rate from the date of the filing of the petition’ prior to any distribution of remaining assets to the
debtor.” *Id.* at 1234, citing, 11 U.S.C. § 726(a)(5)). “Under [the best interests of creditors test of 11
U.S.C. § 1129(a)(7).] the bankruptcy court must compare what a dissenting creditor would receive if the
estate were liquidated under the provisions of chapter 7 of the Bankruptcy Code with what the claimant
would receive under the plan. If the creditor would get more in a chapter 7 liquidation, then the plan
cannot be confirmed.” *In re Dow Corning Corp.*, 237 B.R. 380, 384 (Bankr. E.D. Mich. 1999).

1 should have been the 10 percent interest on judgments as provided under state law
2 rather than the lower interest rate on federal court judgments under 28 U.S.C. §1961(a).
3 *Id.* at 1233. The Ninth Circuit stated in *Cardelucci* that the case presented “the narrow
4 but important issue of whether such post-petition interest is to be calculated using the
5 federal judgment interest rate or is determined by the parties' contract or state law,” and
6 held that the legal rate of interest for an allowed claim is determined by federal law. *Id.*
7 That is, the issue in *Cardelucci* was to determine what Congress meant in 11 U.S.C. §
8 726(a)(3) by the term “payment of interest at the legal rate” in referring to payment of
9 post-petition interest in solvent Chapter 7 bankruptcy estates. The Ninth Circuit noted:
10 “The Bankruptcy Code does not define the term ‘interest at the legal rate’ and there is a
11 paucity of legislative history regarding this statutory provision.” 285 F.3d at 1234. The
12 Ninth Circuit addressed whether the provision meant a rate fixed by federal statute or by
13 the parties’ contract or by state law. *Id.* Congress did not specify federal or state statute
14 or other law to determine what would be the legal rate of interest, such as 28 U.S.C. §
15 1961(a).

16 The Ninth Circuit in *Cardelucci* reasoned that the federal rate of interest was the
17 appropriate rate because the statute referred to the definite article “the” as opposed to
18 indefinite article of “a” or “an” in referring to “the legal rate of interest,” indicating
19 congressional intent for a single source to calculate the rate of interest, suggesting one
20 uniform rate set by federal statute, such as the federal judgment rate under 28 U.S.C.
21 §1961(a). 285 F.3d at 1234-1235. The Ninth Circuit further reasoned that using the
22 federal rate promotes uniformity within federal law as once a bankruptcy petition is filed,
23 creditors with claims against the bankruptcy estate must pursue their rights to their
24 claims in federal court and entitlement to a claim is a matter of federal law. *Id.* at 1235,
25 *citing and quoting, Bursch v. Beardsley & Piper*, 971 F.2d 108, 114 (8th Cir. 1992)
26 (“[O]nce a bankruptcy petition is filed, federal law, not state law, determines a creditor’s
27 rights.”).

28 In *Cardelucci*, the Ninth Circuit described the process for allowing creditor claims

1 in a federal bankruptcy case as follows:

2 Upon the filing of the bankruptcy petition, creditors with a claim against the estate
3 must pursue their rights to the claim in federal court and entitlement is a matter of
4 federal law. Absent a timely objection, all claims filed against the bankruptcy
5 estate are “deemed allowed” as of the date of filing. 11 U.S.C. § 507(a). This
6 allowed claim, like a judgment, gives the creditor a legal “right to payment”: of a
7 specific sum of money against the debtor. 11 U.S.C. § 110(5); 11 U.S.C. §
8 502(b). As of the date of the filing of the petition, creditors hold a claim, similar to
9 a federal judgment, against the estate, the payment of which is only dependent
10 upon the completion of the bankruptcy process. In this respect, the purpose of
11 post-petition interest makes the award analogous to an award of post-judgment
12 interest. See *Kaiser Aluminum and Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835-
13 36, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990) (stating that the purpose of post-
14 judgment interest is “to compensate the successful plaintiff for being deprived of
15 compensation for the loss from the time between the ascertainment of the
16 damages and the payment by the defendant”) (citation omitted).

17 It has long been the rule that an award of post-judgment interest is procedural in
18 nature and thereby dictated by federal law. *Hanna v. Plumer*, 380 U.S. 460, 473-
19 74, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965) (stating that procedural matters arising in
20 federal court are decided by federal law). This rule is best illustrated by the
21 difference in treatment of pre-judgment and post-judgment interest in diversity
22 actions. In diversity actions brought in federal court a prevailing plaintiff is
23 entitled to pre-judgment interest at state law rates while post-judgment interest is
24 determined by federal law. See *Northrup Corp. v. Triad Int’l Mktg., S.A.*, 842
25 F.2d 1154, 1155 (9th Cir. 1988). In bankruptcy, an allowed claim becomes a
26 federal judgment and therefore entitles the holder of the judgment to an award of
27 interest pursuant to federal statute. *In re Chiapetta*, 159 B.R. 152, 160-61
28 (Bankr. E.D. Penn. 1993); *In re Melenzyer*, 141 B.R. [829,] at 833 [(Bankr. W.D.
Tex. 1992)].

20 *Id.* at 1235 (citations omitted).

21 In its supplemental brief, Foremost relies upon the following language from this
22 passage from the Ninth Circuit’s opinion in *Cardelucci*: “This allowed claim, like a
23 judgment, gives the creditor a legal ‘right to payment’ of a specific sum of money
24 against the debtor.” Foremost’s Supplemental Brief, ECF 255 at 8:23 - 9:9 (internal
25 citation pages 4-5), *citing and quoting*, *In re Cardelucci*, 235 F.3d at 1235, citing 11
26 U.S.C. §§ 101(5) and 502(b). From this quoted language, Foremost argues that its
27 allowed claim is the equivalent of a judgment which entitles it to a right to payment, or a
28 money judgment under Rule 69(a). Foremost reads too much into this particular

1 language in *Cardelucci* because the language is selectively quoted as Foremost does
2 not quote the following sentence which puts the language of the sentence quoted by
3 Foremost into context, which states: “As of the filing of the petition, creditors hold a
4 claim, similar to a federal judgment, against the estate, the payment of which is only
5 dependent upon the completion of the bankruptcy process.” *In re Cardelucci*, 285 F.3d
6 at 1235.

7 These two sentences read together state:

8 This allowed claim, like a judgment, gives the creditor a legal ‘right to payment’ of
9 a specific sum of money against the debtor. 11 U.S.C. § 101(5); 11 U.S.C. §
10 502(b). As of the filing of the petition, creditors hold a claim, similar to a federal
11 judgment, against the estate, the payment of which is only dependent upon the
completion of the bankruptcy process.

12 *Id.* These two sentences reflect the express understanding of the Ninth Circuit in
13 *Cardelucci* that creditors holding allowed claims “hold a claim, similar to a federal
14 judgment, **against the estate**,” which gets paid through the bankruptcy process (i.e.,
15 through distributions after administration of the bankruptcy estate in the bankruptcy
16 case, see 11 U.S.C. §§ 502 and 726), which do not support Foremost’s argument that
17 the quoted language supports its argument that creditors hold a money judgment
18 against the debtor directly. *Id.* (emphasis in bold added); see also, *Travelers Casualty*
19 *and Surety Co. of America v. Pacific Gas and Electric Co.*, 549 U.S. at 449 (“When a
20 debtor declares bankruptcy, each of its creditors is entitled to file a proof of claim—i.e.,
21 a document providing proof of a “right to payment,” 11 U.S.C. § 101(5)(A)—against the
22 debtor’s estate.”).

23 The two sentences support the following sentence in *Cardelucci*, which
24 concluding that an award of postpetition interest on an allowed claim is “analogous” to
25 an award of post-judgment interest:

26 In this respect, the purpose of post-petition interest makes the award analogous
27 to an award of post-judgment interest. See *Kaiser Aluminum and Chem. Corp. v.*
28 *Bonjorno*, 494 U.S. 827, 835-836, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990)
(stating that the purpose of post-judgment interest is “to compensate the
successful plaintiff for being deprived of compensation for the loss from the time

1 between the ascertainment of the damages and the payment by the defendant”)
2 (citation omitted).

3 *Id.* *Cardelucci* only involved the issue of how much was needed to be paid on a claim to
4 be paid through distributions in a bankruptcy case, or specifically, how much interest
5 needed to be paid on such a claim when distributions from the bankruptcy estate are to
6 be made through a reorganization plan or a liquidation, which is clearly indicated from
7 the text of the opinion:

8 Absent a timely objection, all claims filed against the bankruptcy estate are
9 “deemed allowed” as of the date of filing. 11 U.S.C. § 507(a). This allowed
10 claim, like a judgment, gives the creditor a legal “right to payment”: of a specific
11 sum of money against the debtor. 11 U.S.C. § 110(5); 11 U.S.C. § 502(b). As of
12 the date of the filing of the petition, creditors hold a claim, similar to a federal
13 judgment, against the estate, the payment of which is only dependent upon the
14 completion of the bankruptcy process. In this respect, the purpose of post-
petition interest makes the award analogous to an award of post-judgment
interest. . . . In bankruptcy, an allowed claim becomes a federal judgment and
therefore entitles the holder of the judgment to an award of interest pursuant to
federal statute.

15 *In re Cardelucci*, 285 F.3d at 1235 (citations omitted). In other words, a creditor with an
16 allowed claim in a bankruptcy case holds a claim: (1) which is **similar** to a federal
17 judgment; (2) which is **against the bankruptcy estate**; (3) for which payment is only
18 **dependent on the completion of the bankruptcy process**; and (4) which is entitled to
19 an **award of interest** pursuant to federal statute. ²²

21 ²² In the last sentence of its argument based on *Cardelucci* that its allowed claim is a money judgment for
22 purposes of Federal Rule of Civil Procedure 69(a), Foremost asserted: “Because “[i]n bankruptcy, an
23 allowed claim becomes a federal judgment,” the Ninth Circuit held that the holder of the claim is entitled to
24 post-judgment interest at the federal rate.” Foremost’s Supplemental Brief, ECF 255 at 8:23 - 11:24
25 (internal citation pages 4-7). The entire sentence of the *Cardelucci* opinion partially quoted by Foremost
26 reads as follows: “In bankruptcy, an allowed claim becomes a federal judgment and therefore entitles the
27 holder of the judgment to an award of interest pursuant to federal statute. *In re Chiapetta*, 159 B.R. 152,
28 160-61 (Bankr. E.D. Penn. 1993); *In re Melenzyer*, 141 B.R. [829,] at 833 [(Bankr. W.D. Tex. 1992)].” *In*
re Cardelucci, 285 F.3d at 1235. The *Chiapetta* and *Melenzyer* cases cited by the Ninth Circuit in
Cardelucci similarly are not directly on point as they only addressed the issue of whether postpetition
interest was to be paid on allowed claims in a solvent Chapter 7 bankruptcy case under the federal
postjudgment rate of 28 U.S.C. § 1961(a) pursuant to 11 U.S.C. § 726(a)(5), holding that it did, and these
cases did not involve the issue of whether an allowed bankruptcy claim is a money judgment for purposes
of Federal Rule of Civil Procedure 69. The court in *Melenzyer* stated its rationale for adopting the federal
postjudgment interest rate as “interest at the legal rate” under 11 U.S.C. § 726(a)(5):

The instant case now affords us another opportunity to consider the meaning of “interest at the

1 That *Cardelucci* concerned payment on a claim through a distribution from the
2 bankruptcy estate in a bankruptcy case bears emphasis because *Cardelucci* did not
3 involve Federal Rule of Civil Procedure 69 or payment of a money judgment through
4 enforcement against the debtor through that rule, which is different from payment of a
5 claim through a distribution from a bankruptcy estate in a bankruptcy case. *Cardelucci*
6 is inapplicable here because Foremost is not seeking an award of postpetition interest
7 on an allowed claim paid through a confirmed plan in the Chapter 11 reorganization
8 case of a solvent bankruptcy debtor, which Ayers Bath was not; rather, Foremost is
9 seeking to collect against Tangshan Ayers outside the bankruptcy case through what it
10 considers to be an amendment of an enforceable money judgment, which its allowed
11 proof of claim against Ayers Bath is not. *Cardelucci* does not support such an
12 argument.

13 Foremost also cites to the case of *In re Dow Corning Corp.*, 237 B.R. 380 (Bankr.
14 E.D. Mich. 1999), which presented the same legal issue as *Cardelucci*, that is, whether
15 “the legal rate of interest” under 11 U.S.C. § 726(a)(5) was governed by federal or state
16 law. Foremost’s Supplemental Brief, ECF 255 at 9:12-28 (internal citation page 5). The
17

18 legal rate,” and once again we conclude that the appropriate rate of interest payable to unsecured
19 creditors pursuant to 11 U.S.C. § 726(a)(5) is the federal judgment rate. As we pointed out in
20 *Laymon*, use of the federal judgment rate not only assures a ratable distribution, but it also meets
21 the requirement that federal law decide a federal issue. *In re Laymon*, 117 B.R. [856.] at 862
22 [(Bankr. W.D. Tex. 1990)]. Using the federal judgment rate, moreover, affords all affected parties
23 a predictable, easily ascertainable, nationally uniform rate and best comports with the analytical
24 posture of claims vis-a-vis the federal bankruptcy. *Id.* **Upon bankruptcy, absent a timely
objection, all claims against the estate are “deemed allowed” as of the filing. 11 U.S.C. §
502(a). From and after the petition date, then, creditors hold the equivalent of a federal
judgment against estate assets, enforceable only in federal court.** *Id.* (citing 28 U.S.C. §
1334(a) (original and exclusive jurisdiction over bankruptcy), § 1334(d) (exclusive jurisdiction over
property of the estate); 28 U.S.C. § 157(b)(2)(B) (claims adjudication a core proceeding); 11
U.S.C. § 524(a) (discharge bars further assertion of prepetition claims against the debtor); 11
U.S.C. § 362(a) (automatic stay of acts to collect claims against property of the estate); 11 U.S.C.
§ 726 (distribution of assets in satisfaction of claims); 11 U.S.C. § 1141 (confirmed plan binds all
holders of claims against the debtor)).

26 *In re Melenzyer*, 141 B.R. at 833 (footnote omitted’ emphasis in bold added). *Melenzyer* does not support
27 Foremost’s assertion that an allowed bankruptcy claim is a money judgment directly against the debtor;
28 as opposed to the bankruptcy estate of the debtor; rather, the opinion contradicts such an argument in
stating the general understanding of the courts that creditors holding an allowed claim in a bankruptcy
case “**hold the equivalent of a federal judgment against estate assets.**” *Id.* (emphasis in bold added).

1 court in *Dow Corning* held that an “order allowing claim in bankruptcy case is equivalent
2 of ‘money judgment’ within meaning of federal postjudgment interest statute” in
3 interpreting 11 U.S.C. § 726(a)(5) providing for payment of interest “at the legal rate” on
4 claims to be paid in full under the confirmed reorganization plan in a Chapter 11
5 bankruptcy case of a solvent debtor required under the “best interests of creditors” test
6 of 11 U.S.C. § 1129(a)(7)(A)(ii).²³ *Id.* at 380. Similar to *Cardelucci*, *Dow Corning*
7 involved a Chapter 11 bankruptcy case in which the official committee of unsecured
8 creditors and certain unsecured creditors objected to plan confirmation based on the
9 rate of interest on allowed unsecured claims pursuant to 11 U.S.C. §§ 726(a)(5) and
10 1129(a)(7)(A)(ii).

11 In *Dow Corning*, the issue before the court was “on how, for purposes of
12 distribution within the bankruptcy case, the treatment of a deemed-allowed claim
13 compares with that of a claim allowed pursuant to a [11 U.S.C.] § 502(b) order.” *Id.* at
14 392. The court determined that: “It is only where estate proceeds are sufficient that
15 post-petition interest becomes payable pursuant to [11 U.S.C.] § 726(a)(5).” *Id.* at 393.
16 For purposes of its case, the court had defined a money judgment as follows: “[A]
17 ‘money judgment’ consists of three elements: it must be a judgment; entitling the plaintiff
18 to specified sum of money; and such entitlement must be against an identifiable party.”
19 *Id.* at 386, citing, *In re Commonwealth Oil Ref. Co.*, 805 F.2d 1175, 1186 (5th Cir.
20 1986)). In *Dow Corning*, the court determined that each allowed unsecured claim was a
21 money judgment under this definition because the creditor’s allowed claim gave the
22 creditor a right to payment of a specified sum of money pursuant to 11 U.S.C. § 502(b),
23 the allowed claim identified the party against whom such right of payment is enforceable
24 is the bankruptcy estate of the debtor, and third, the allowed claim being deemed
25 allowed is a judgment having preclusive effect. *Id.*, citing *inter alia*, *Siegel v. Federal*

26
27 ²³ The “best interests of creditors” test of 11 U.S.C. § 1129(a)(7)(A)(ii) is explained in footnote 16, *supra*.
28 The court and the parties in *Dow Corning* had assumed for purposes of the opinion that there would be
sufficient funds on hand to pay post-petition interest pursuant to 11 U.S.C. §§ 726(a)(5) and
1129(a)(7)(A)(ii). 237 B.R. at 385.

1 *Home Loan Bank Corp.*, 143 F.3d at 530. The court concluded in *Dow Corning* that
2 there was no meaningful difference because claims allowed in contested claim objection
3 proceedings under an order pursuant to 11 U.S.C. § 502(b) and claims “deemed
4 allowed” without objection pursuant to 11 U.S.C. § 502(a). Thus, the court further
5 concluded that “for purposes of distribution a claim that is ‘deemed allowed’ will be
6 treated as if were also a ‘money judgment.’” *Id.* at 392. The court then considered and
7 concluded that the legal rate of interest under 11 U.S.C. § 726(a)(5) meant the federal
8 judgment rate of 28 U.S.C. § 1961(a) and overruled the creditors’ objection to the
9 proposed reorganization plan of the debtor providing for post-petition interest on allowed
10 unsecured claims at the federal judgment rate of 28 U.S.C. § 1961(a). *Id.* at 392-412.

11 Applying the “money judgment” test of *Dow Corning* here has limited utility, that
12 is, regarding *Dow Corning*’s element of right of payment against an identifiable party.
13 As indicated by *Siegel*, Foremost’s allowed claim was a judgment, and Foremost had a
14 right of payment based on its allowed proof of claim as to the debtor, Ayers Bath, which
15 entitled Foremost to a specific amount as shown on the allowed proof of claim filed in
16 the debtor’s bankruptcy case, but such entitlement was only against the bankruptcy
17 estate of the debtor, which is the identifiable party, and only to the extent there were
18 assets in the debtor’s bankruptcy estate. The allowed bankruptcy claim against the
19 debtor, Ayers Bath, is not a money judgment directly against the debtor under the *Dow*
20 *Corning* test in its present form as the identifiable party liable for the judgment is only
21 the bankruptcy estate of the debtor, Ayers Bath. See 11 U.S.C. §§ 101(5)(A), 501 and
22 502; *In re Dow Corning Corp.*, 237 B.R. at 387 (“Second, it identifies the party against
23 whom such right of payment is enforceable---**the estate.**”) (emphasis in bold added);
24 *see also, Travelers Casualty and Surety Co. of America v. Pacific Gas and Electric Co.*,
25 549 U.S. at 449 (“When a debtor declares bankruptcy, each of its creditors is entitled to
26 file a **proof of claim—i.e., a document providing proof of a “right to payment,” 11**
27 **U.S.C. § 101(5)(A)—against the debtor’s estate.**”) (emphasis in bold added).

28 The identifiable party liable for the judgment is also not Tangshan Ayers as

1 Tangshan Ayers would have to be added to the judgment to meet the *Dow Corning* test
2 through Rule 69(a) and California Code of Civil Procedure § 187, if that were legally
3 permitted. The issue of such extension of liability under Rule 69(a), such as based on
4 an alter ego theory, was not presented in *Dow Corning*, and therefore, it is not
5 determinative of the issue in this case of applicability of Rule 69(a) to an allowed
6 bankruptcy claim.

7 The Ninth Circuit in the case of *Ministry of Defense and Support for the Armed*
8 *Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 665 F.3d 1091
9 (9th Cir. 2011), adopted its own definition of the term “money judgment” in determining
10 whether post-judgment interest under 28 U.S.C. § 1961(a) may be paid on an order of
11 the district court confirming an international arbitration award. *Id.* at 1101. The Ninth
12 Circuit adopted the Third Circuit’s definition in its case law:

13 We have not previously defined the term “money judgment.” The Third Circuit
14 has done so, however, and we find its definition persuasive.

15 Under this definition, a money judgment consists of two elements: “(1) an
16 identification of the parties for and against whom judgment is being entered, and
17 (2) a definite and certain designation of the amount which plaintiff is owed by
18 defendant.” *Penn Terra Ltd. v. Dep’t of Env’tl. Res.*, 733 F.2d 267, 275 (3d
19 Cir.1984) (defining the term “money judgment” for purposes of former Bankruptcy
Code § 362(b)(5)); *see also Eaves v. Cnty. of Cape May*, 239 F.3d 527, 533 (3d
Cir.2001) (extending Penn Terra’s definition to § 1961(a)); *cf. In re Haugen*, 998
F.2d 1442, 1448 (8th Cir.1993) (employing a similar definition).

20 *Id.* Recently, the Ninth Circuit in an unpublished disposition applied this definition of
21 money judgment in upholding a civil contempt order against a defendant compelling
22 discovery, apparently with monetary sanctions, as a money judgment, and stating that
23 plaintiffs were also entitled to conducted post-judgment discovery under Rule 69.
24 *Invesco High Yield Fund v. Jecklin*, __ Fed. Appx. __, No. 21-15809, 2021 WL
25 3778595 (9th Cir. Aug. 25, 2021). Applying this test to an allowed proof of claim would
26 be problematic for Foremost’s theory of the case because Foremost’s “deemed allowed”
27 claim does not mean that it has a money judgment directly against the debtor, Ayers
28 Bath. Allowance of Foremost’s bankruptcy claim means under the Bankruptcy Code

1 that it holds an allowable claim against the bankruptcy estate of the debtor, Ayers Bath,
2 representing the amount that is owed by the debtor to Foremost. See, e.g., *In re Dow*
3 *Corning Corp.*, 237 B.R. at 387 (“Second, it identifies the party against whom such right
4 of payment is enforceable---the estate.”). This judgment in the form of the allowed proof
5 of claim under the Bankruptcy Code only entitles Foremost to a pro rata share of the
6 distributable assets of the bankruptcy estate in order of priority under the Bankruptcy
7 Code. 11 U.S.C. § 501, 502, 507 and 726. Allowance of Foremost’s bankruptcy claim
8 does not mean that Foremost has a money judgment directly against the debtor, Ayers
9 Bath, as the Bankruptcy Code does not provide for such a direct judgment against the
10 debtor for recovery of money unless obtained through an adversary proceeding. Thus,
11 the parties for and against whom the judgment is being entered by Foremost’s allowed
12 claim is that Foremost has a judgment in the form of its proof of claim against the
13 bankruptcy estate of the debtor, which represents the debt owed by the debtor to
14 Foremost, and the amount of which the bankruptcy estate owes Foremost as the
15 claimant is not fixed and determined by the amount of the allowed claim, but only after
16 administration of the estate by the Chapter 7 trustee and payment of administrative
17 expenses and other claims entitled to priority over Foremost’s claim paid on a pro rata
18 basis with other claims of its claim, i.e., general unsecured claims. 11 U.S.C. § 501,
19 502, 507 and 726; see also, *Travelers Casualty and Surety Co. of America v. Pacific*
20 *Gas and Electric Co.*, 549 U.S. at 449 (“When a debtor declares bankruptcy, each of its
21 creditors is entitled to file a proof of claim—i.e., a document providing proof of a “right to
22 payment,” 11 U.S.C. § 101(5)(A)—against the debtor’s estate.”).

23 As discussed above, by allowing Foremost’s unopposed claim, this bankruptcy
24 court did not enter a money judgment in its favor against the debtor, Ayers Bath, in this
25 bankruptcy case. There was no order of this court specifically allowing Foremost’s
26 claim as it was deemed allowed since no party in interest objected to it pursuant to 11
27 U.S.C. § 502(a), and the Chapter 7 bankruptcy trustee made a distribution to Foremost
28 on its allowed claim after the court entered an order approving the Chapter 7 trustee’s

1 final report and account which proposed distributions on claims, including Foremost's.
2 As discussed herein, Foremost's allowed claim does not have the attributes of an
3 executable money judgment under Federal Rule of Civil Procedure 69(a). Despite
4 Foremost's contentions and citations to Federal Rule of Civil Procedure 69 and *In re*
5 *Levander, supra*, the authorities do not support the assertion that the order deeming
6 Foremost's claim as allowed was a money judgment enforceable by a writ of execution.
7 Thus, this bankruptcy court concludes that while Foremost obtained an allowed proof of
8 claim against the debtor, Ayers Bath, and now seeks to add a nondebtor party,
9 Tangshan Ayers, to its "judgment" based on its allowed proof of claim, which Foremost
10 seeks to enforce against Tangshan Ayers as an executable money judgment, this is not
11 proper because an allowed proof of claim, which entitles the claim holder to a
12 distribution from the bankruptcy estate of the bankruptcy debtor, is not an executable
13 money judgment in that there is no legal mechanism to enforce it through levy or a writ
14 of execution. Foremost cannot convert its allowed proof of claim against the bankruptcy
15 estate of one party, the bankruptcy debtor, which is not an executable money judgment,
16 into an executable money judgment against a non-bankruptcy debtor party. Under the
17 above-recited provisions of the Bankruptcy Code, based on its "judgment" from its
18 allowed proof of claim, Foremost can only have a "claim" against the bankruptcy debtor
19 or its estate, which is Ayers Bath, and not Tangshan Ayers. 11 U.S.C. §§ 101(13), 501,
20 502, 507 and 726. Foremost has not cited any specific legal authority to support the
21 amendment of an allowed bankruptcy proof of claim to include a nondebtor party, and
22 as Tangshan Ayers asserts, no such legal authority exists. Moreover, amending a
23 claim still means that the holder only has a claim, not an executable money judgment.
24 Amending a claim to add another party as the debtor is not theoretically possible by
25 simply amending a claim to add another party as the "debtor" pursuant to 11 U.S.C. §
26 101(13) as the term "debtor" means the "person . . . concerning which a case under this
27 title has been commenced." Under this definition, that is only Ayers Bath.²⁴

²⁴ Foremost apparently wants to bring in the assets of Tangshan Ayers into the Ayers Bath bankruptcy

1 For the foregoing reasons, Foremost is not entitled to amend its allowed proof of
2 claim add Tangshan Ayers as a judgment debtor pursuant to Federal Rule of Civil
3 Procedure 69(a) and California Code of Civil Procedure § 187, and Foremost's renewed
4 motion to amend the judgment of this court should be denied.²⁵

5
6 estate, but that cannot be done by just amending a claim against the bankruptcy estate in the Ayers Bath
7 bankruptcy case to assert the claim against an entity, which is not the bankruptcy debtor which filed the
8 voluntary bankruptcy petition to commence the bankruptcy case. What Foremost is trying to do is to hold
9 Tangshan Ayers, a third party, liable for the debts of its subsidiary, Ayers Bath, and collect upon
10 Tangshan Ayers's assets to satisfy these debts by disregarding the separate legal entities of the parent
11 and subsidiary entities, piercing their corporate veils and reaching the assets of a related corporation to
12 satisfy such debts. There is an equitable remedy called substantive consolidation which may permit this
13 and Foremost is apparently aware of, but Foremost has not utilized this remedy. See *In re Bonham*, 229
14 F.3d 750, 763-769 (9th Cir. 2000). Foremost in its briefing in response to the court's tentative ruling
15 indicated a prior awareness of a substantive consolidation remedy, acknowledging: "The Proof of Claim
16 was filed against Ayers Bath because it was the named debtor and that there had been not a finding of
17 alter ego, substantive consolidation, or some other basis to assert a claim under section 501 of the
18 Bankruptcy Code against Tangshan Ayers." ECF 255 at 13 (internal citation page 9). Although the
19 sentence for Foremost's acknowledgment is written in the passive voice, it indicates Foremost's
20 knowledge and intent for filing the proof of claim in the Ayers Bath bankruptcy case at the time when it
21 filed its proof of claim in this bankruptcy case, that is, it only meant to assert a claim against Ayers Bath,
22 and not against Tangshan Ayers, because it did not yet find a basis to assert a claim against Tangshan
23 Ayers on an alter ego, substantive consolidation or other theory under Section 501 of the Bankruptcy
24 Code. Since there is no substantive consolidation claim before the court, the court does not opine
25 whether Foremost would have a viable claim for substantive consolidation.

26 ²⁵ Foremost argues in one of its supplemental briefs as follows:

27 If the Tentative Ruling stands, the Court will be condoning the following course of conduct by a
28 foreign entity: (1) create a U.S. subsidiary in order to breach or subvert contractual obligations;
(2) when, inevitably, the U.S. subsidiary is sued, frustrate any effort to uncover the extensive
connections between the U.S. subsidiary and foreign parent; (3) when that is no longer possible,
put the now asset-less company into bankruptcy; (5) when creditors, having received pennies on
the dollar on account of their bankruptcy claims, look to the foreign entity for the deficiency, argue
that they are foreclosed from bringing any standalone claims against the parent due to res
judicata effect of the allowed claim, while also arguing that the allowed claim cannot, as a matter
of law, be amended to add the parent as a judgment debtor, leaving the creditor without any
recourse whatsoever. This cannot be the Court's intent, but it will be the road map that future
tortfeasors will follow if Foremost's Renewed Motion to Amend is denied for the reasons set forth
in the Tentative Ruling.

29 Foremost Groups, Inc.'s Supplemental Brief in Response to the Court's Tentative Ruling on Foremost's
30 Renewed Motion and Judgment, ECF 255 at 5:6-19 (internal citation page 1). This argument is an appeal
31 to emotion. The argument lacks merit not only because it is not based on legal analysis, but because
32 Foremost was not without recourse as shown by the example of the *Bourdow Contracting* alter ego case
33 discussed *supra*. As the plaintiff pension fund had alleged in its complaint in *Bourdow Contracting*,
34 Foremost as the plaintiff in the Tangshan Ayers Litigation had alleged in its original complaint standalone
35 claims in a civil action filed in federal district court in which it could have asserted alter ego as a theory of
36 liability as pointed out by the District Court in its order ruling on Tangshan Ayers's motion to dismiss the
37 first amended complaint. In *Bourdow Contracting*, the plaintiff prevailed on its alter ego claim to collect
38 the liability stated on its allowed bankruptcy claim, plus interest and attorneys' fees, by pursuing
standalone claims in a civil action in the district court, and not by amending the judgment of the

1 VI. BANKRUPTCY COURT'S ANALYSIS OF APPLICABILITY OF
2 CALIFORNIA CODE OF CIVIL PROCEDURE §187

3 Assuming *arguendo* that Foremost may assert a claim under California Code of
4 Civil Procedure § 187 against Tangshan Ayers through Federal Rule of Civil Procedure
5 69(a), the evidence does not support that claim on due process grounds.

6 As discussed above, a California Code of Civil Procedure § 187 amendment
7 requires that the plaintiff prove by a preponderance of the evidence “(1) that the new
8 party [is] the alter ego of the old party and (2) that the new party [] controlled the
9 litigation, thereby having had the opportunity to litigate, in order to satisfy due process
10 concerns.” *Katzir*, 394 F.3d at 1148. The court finds no cause to reach the alter ego
11 issue because Foremost has failed to show that Tangshan Ayers “controlled” the
12 litigation in a manner that satisfies due process. As explained above, under *Katzir* and
13 *NEC*, due process requires that Tangshan Ayers (1) controlled the litigation and (2) had
14 occasion to conduct that control with a diligence corresponding to the risk of personal
15 liability that was involved.

16 Arguably, the three seminal California cases on the topic of due process
17 concerns regarding relief under California Code of Civil Procedure § 187 are: *Motores*
18 *De Mexicali, S. A. v. Superior Court in & for Los Angeles County*, 51 Cal.2d 172, 173
19 (1958); *NEC Electronics Inc. v. Hurt*, 208 Cal.App.3d at 775-781; and *Wolf Metals Inc.*
20 *v. Rand Pac. Sales, Inc.*, 4 Cal.App.5th 698 (2016). See *Cadence Design Systems, Inc.*

21
22 bankruptcy court in the form of the allowed claim as if it were a money judgment for purposes of Federal
23 Rule of Civil Procedure 69(a). This is where Foremost has gone astray by making a legally unsound
24 argument to the District Court in opposing Tangshan Ayers's motion to dismiss Foremost's original
25 complaint in the Tangshan Ayers Litigation that because its allowed proof of claim in the Ayers Bath
26 bankruptcy case became a judgment when the Ayers Bath bankruptcy trustee filed his final report, this
27 judgment has *res judicata* effect as to the alleged tortious conduct of Ayers Bath, and Foremost was only
28 “executing on a judgment” from its allowed claim based on its legally unsupported assumption that its
allowed claim was an executable money judgment, contrary to existing case law. See, e.g., *Ziino v.*
Baker, 613 F.3d at 1328-1329. As discussed herein, the court concludes that the allowed proof of claim
that Foremost has in this bankruptcy case is not an executable money judgment for purposes of Federal
Rule of Civil Procedure 69. *Id.* Foremost should have pursued a different procedure to assert and prove
its claims that Tangshan Ayers is liable to it as the alter ego of Ayers Bath, which in this court's view is
suggested by the result in *Bouradow Contracting*. However, this court does not opine on what that
procedure might have been because this court's role is limited based on the referral from the District
Court to rule on Foremost's motion to amend the judgment of this court.

1 *v. Pounce Consulting, Inc.*, Case No. 17-cv-04732-PJH, 2019 WL 3576900 (N.D. Cal.
2 Aug. 6, 2019), at *2, *citing*, 2 Ahart, *Rutter Group California Practice Guide: Enforcing*
3 *Judgments and Debts*, Chapter 6G-15 (Amending Judgment to Add Nonparty Alter
4 Egos as Judgment Debtors) (2019).

5 In an unpublished opinion in the case of *Cadence Design Systems, Inc. v.*
6 *Pounce Consulting, Inc.*, Case No. 17-cv-04732-PJH, 2019 WL 3576900, the United
7 States District Court for the Northern District of California discussed the due process
8 concerns raised by a motion to amend judgment and add judgment debtors to a default
9 judgment pursuant to California Code of Civil Procedure § 187 applicable through
10 Federal Rule of Civil Procedure 69(a) with extensive and detailed analysis of the case
11 law, including three seminal cases in *Motores*, *NEC* and *Wolf Metals*, with which the
12 court substantially agrees with and quotes at length below.

13 The court in *Cadence Design Systems* first analyzed the California Supreme
14 Court's decision in *Motores*:

15 In *Motores*, the California Supreme Court first recognized the due process
16 concerns implicated by California Code of Civil Procedure § 187. There, after
17 suing a corporation and obtaining a default judgment, plaintiff sought to add three
18 individuals as judgment debtors on an alter ego theory. *Motores*, 51 Cal. 2d at
19 173. The California Supreme Court held that adding the alleged debtors to a
20 default judgment would violate their due process rights. *Id.* at 176. In reaching
21 that conclusion, *Motores* distinguished two prior California appellate court
22 opinions, by explaining that, unlike in those cases, the proposed judgment
23 debtors in *Motores* “in no way participated in the defense of the basic action[.]”
24 *Id.* at 175. The proposed judgment debtors “did not have attorneys subsidized by
25 them appearing and defending the action against the corporation [] alleged to be
26 their alter ego. Instead, the judgment was entered against [the corporation]
27 strictly by default.” *Id.* at 175-76. *Motores* explained that due process
28 “guarantees that any person against whom a claim is asserted in a judicial
proceeding shall have the opportunity to be heard and to present his defenses.”
Id. “To summarily add” the proposed debtors “to the judgment ... without allowing
them to litigate any questions beyond their relation to the allegedly alter ego
corporation would patently violate this constitutional safeguard.” *Id.* at 176. Nor
were the proposed judgment debtors under any “duty to appear and defend
personally in that action, since no claim had been made against them
personally.” *Id.*

Cadence Design Systems, Inc. v. Pounce Consulting, Inc., Case No. 17-cv-04732-PJH,

1 2019 WL 3576900, at *2.

2 Second, the court in *Cadence Design Systems* discussed the California Court of
3 Appeal's decision in *NEC* 30 years later:

4 Thirty years later, in *NEC*, a California appellate court applied *Motores* to a
5 situation where the corporate defendant failed to present a defense at trial. *NEC*,
6 208 Cal. App. 3d at 775-81. After appearing and filing a general denial—and
7 without any other proceedings being conducted—the day before trial, the
8 corporate defendant's CEO and sole shareholder notified the plaintiff that the
9 corporation would not appear, apparently in light of a potential bankruptcy. *Id.* at
10 775, 781. The court subsequently entered judgment after holding a one-day trial,
11 for which defendant did not appear. *Id.* at 775-76. Thereafter, the court granted
12 the plaintiff's § 187 motion to add the corporation's CEO to the judgment. *Id.* at
13 776.

14 Relying on *Motores*, the California Court of Appeals reversed. *NEC* explained
15 that because the corporation “did not make any attempt to defend the NEC
16 lawsuit ... [the CEO's] interests were [not] represented in the underlying action.”
17 *Id.* at 780. *NEC*, however, did not stop there. Rather, *NEC* next turned to whether
18 the corporate defendant's interests aligned with the proposed judgment debtor's
19 interest. *Id.* at 780. The *NEC* court answered that question in the negative.
20 Though the corporate defendant believed it had a defense, it let the matter
21 proceed uncontested because it planned to file a Chapter 11 bankruptcy petition
22 and thus had no incentive to defend against the lawsuit. *Id.* In contrast, and
23 unlike the usual situation where alter ego interests align, the CEO “was not
24 named as a party, had no risk of personal liability and therefore was not required
25 to intervene.” *Id.* at 780-81. Because the interests of the corporation and the
26 CEO were different, the appellate court could not “say that [the CEO] had
27 occasion to conduct the litigation with a diligence corresponding to the risk of
28 personal liability that was involved or that [the CEO] was virtually represented in
the lawsuit.” *Id.* at 781. Like *Motores*, *NEC* completed its analysis by considering
whether there was sufficient “evidence to show that [the CEO] controlled the
defense of the litigation.” *Id.* at 781. The court held that that factor too was not
met because “[t]here was no defense for [the proposed judgment debtor] to
control,” as other than a “general denial, no further proceedings were conducted.”
Id. (control contemplates “some active defense of the underlying claim”).

24 *Cadence Design Systems, Inc. v. Pounce Consulting, Inc.*, Case No. 17-cv-04732-PJH,
25 2019 WL 3576900, at *3.

26 Third, the court in *Cadence Design Systems* discussed the last case in the
27 trilogy, *Wolf Metals*:

28 Admittedly, *Wolf Metals*, the final case . . . gets closer to stating a per se rule
against amending default judgment. In *Wolf Metals*, after initially answering the

1 complaint, the corporate defendant abandoned the litigation, which prompted the
2 trial court to strike the corporation's answer and enter default judgment. *Wolf*
3 *Metals*, 4 Cal.App.5th at 701-02. Subsequently, the trial court granted plaintiff's §
4 187 motion to amend judgment to add the corporation's president. *Id.* 702.
5 Reviewing the holdings in *NEC* and *Motores*, the *Wolf Metals* appellate court
6 reversed. The court held that the action was factually indistinguishable from
7 *Motores*: "Like the defendant corporation in *Motores*, [the corporate defendant]
8 offered no evidence-based defense in the underlying action, and the judgment
9 against [the corporation] was entered by default." *Id.*

10 *Cadence Design Systems, Inc. v. Pounce Consulting, Inc.*, Case No. 17-cv-04732-PJH,
11 2019 WL 3576900, at *3.

12 After analyzing this case law, the court in *Cadence Design Systems* concluded
13 that whether due process is met is addressed by determining whether the proposed
14 judgment debtor had "the opportunity to be heard and present his defenses":

15 But neither *Motores* nor *NEC* stand for the conclusion that California Code of
16 Civil Procedure § 187 does not apply to judgments entered after a defendant fails
17 to present an "evidence-based defense." Rather, *Motores* and *NEC* require
18 courts to consider whether the proposed judgment debtor's interest aligned with
19 the named debtor's interest, and whether the type of and degree of control the
20 proposed judgment debtor exerted over the named debtor ameliorates any due
21 process concerns. Critically, that analysis does not require active litigation or an
22 "evidence-based defense." *Id.* Instead, what matters is whether the proposed
23 judgment debtor had "the opportunity to be heard and to present his defenses."
24 *Motores*, 51 Cal. 2d at 176 (emphasis added). Requiring that defenses actually
25 be presented "would create a perverse incentive for potential alter ego
26 defendants to incur default judgments when their corporations are sued, because
27 default judgments would make them immune from personal liability." *Ermis*
28 [*Mgmt. Co. Ltd. v. United California Disc. Corp.*], 2008 WL 11450869, at *4 [(D.
Nev. Jan. 2, 2008)] (rejecting conclusion that there is a per se rule against § 187
amendments to default judgments). And requiring that the corporate defendant
actually present defenses related to its officers' personal liability—the natural
extension of the argument—would aggravate those perverse incentives.

10 *Cadence Design Systems, Inc. v. Pounce Consulting, Inc.*, Case No. 17-cv-04732-PJH,
11 2019 WL 3576900, at *3.

12 Then, the court in *Cadence Design Systems* observed, "Moreover, the Ninth
13 Circuit has implicitly recognized that the normal § 187 analysis applies to attempts to
14 amend a default judgment." *Cadence Design Systems, Inc. v. Pounce Consulting, Inc.*,

1 Case No. 17-cv-04732-PJH, 2019 WL 3576900, at *4, *citing and quoting, Katzir’s Floor*
2 *and Home Design, Inc. v. M-MLS.com*, 394 F.3d 1143 (9th Cir. 2004). Regarding
3 *Katzir*, the court stated:

4 In *Katzir*, the Ninth Circuit reversed a district court's order adding the owner, “sole
5 director, president, treasurer, and secretary of the corporation” to a default
6 judgment under Cal. Civ. Code § 187. *Katzir*, 394 F.3d at 1148-50. Reviewing
7 *Motores* and *NEC*, *Katzir* concluded that *NEC* “represents the law that the
8 California Supreme Court would apply if faced with th[e] issue of” whether the
9 proposed judgment debtor exercised sufficient control. *Katzir*, 394 F.3d at 1150.
10 *Katzir*, however, did not go on to interpret *NEC* as prohibiting § 187 amendments
11 of default judgments. To the contrary, the Ninth Circuit applied the standard §
12 187 two-part analysis and held that the trial court had failed to make factual
13 findings to support either the alter ego finding or the finding of control.

14 *Cadence Design Systems, Inc. v. Pounce Consulting, Inc.*, Case No. 17-cv-04732-PJH,
15 2019 WL 3576900, at *4.

16 Regarding the finding of control, the court in *Cadence Design Systems* stated:

17 As to the “control” prong, which embodies the due process concerns first set forth
18 in *Motores*, *see Katzir*, 394 F.3d at 1149, in lieu of applying a per se rule, the
19 Ninth Circuit explained that “Section 187 ‘is an equitable procedure ... [that]
20 ‘bind[s] new individual defendants where it can be demonstrated that in their
21 capacity as alter ego of the corporation they in fact had control of the previous
22 litigation, and thus were virtually represented in the lawsuit.’” *Id.* at 1149 (quoting
23 *NEC*; alterations in original; some internal quotations omitted). “A prior judgment
24 against a corporation ... ‘can be made individually binding on a person
25 associated with the corporation only if the individual to be charged ... [1] had
26 control of the litigation and [2] occasion to conduct it with a diligence
27 corresponding to the risk of personal liability that was involved.’” *Id.*, at 1150
28 (emphasis added) (quoting *NEC*). As the *Katzir* trial court failed to analyze that
question as it applied to the owner of the defaulted corporation, the Ninth Circuit
reversed. *Id.* (footnote omitted). Further, the Ninth Circuit noted that, as in *NEC*,
the owner “was not named individually, knew [the corporation] was on the verge
of dissolution through Canadian bankruptcy law, and had no personal duty to
defend the underlying lawsuit.” *Katzir*, 394 F.3d at 1150. That is, like the *NEC*
court, the interests of the owner and his corporation were not aligned, such that
the owner was not virtually represented in the underlying suit. In short, beyond
how it factored into the control analysis, it was of no matter to the Ninth Circuit
that the judgment was entered pursuant to default.

True, at first blush, one might conclude that that is a distinction without a
difference because the control requirement articulated by *Motores*, *NEC*, and
Ka[tz]ir could never be satisfied vis-à-vis a default judgment. For, how could a

1 proposed judgment debtor's interest be effectively represented by a named
2 defendant that failed to present any defense at all? Relatedly, if an alter ego
3 faces personal liability, is it consistent for him to control the litigation 'with a
4 diligence corresponding to the risk of personal liability' by allowing the named
5 defendant to default?

6 While those considerations factor into a § 187 analysis, they do not show that the
7 analysis is a foregone conclusion when applied to a default judgment. That is
8 because, as noted above, *Motores*, *NEC*, and *Ka[tz]ir* stand for a narrower
9 proposition: The proposed judgment debtor must have had the "opportunity to be
10 heard and present defenses[.]" *Motores*, 51 Cal. 2d at 176 (emphasis added),
11 and the "occasion to conduct" the litigation "with a diligence corresponding to the
12 risk of personal liability," *Katzir*, 394 F.3d at 1149 (emphasis added); *NEC*, 208
13 Cal. App. 3d at 781. "The real issue is not whether [the proposed judgment
14 debtors] (or, technically, [the named defendant]) actually litigated the issue of [the
15 named defendant's] liability, but rather whether [the proposed judgment debtors]
16 had an opportunity to present a defense." *Id.*, citing, *Dow Jones Co. v. Avenel*,
17 151 Cal. App. 3d 144, 150 (1984) (emphasis added) (proposed judgment debtors
were given opportunity to litigate summary judgment through alter ego corporate
defendant). And that is all due process requires. *Id.*, citing *Mathews v. Eldridge*,
424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the
opportunity to be heard at a meaningful time and in a meaningful manner."
(internal quotation marks and citation omitted)); *Shanghai Minguang Int'l Grp. Co.*
v. Yang, No. E044331, 2008 WL 4004697, at *4 (Cal. Ct. App. Aug. 29, 2008)
(unpublished) (default judgment amended where proposed judgment debtor had
"the opportunity to present his own defense and controlled the corporations'
defense but chose not to do so[.]")."

18 *Cadence Design Systems, Inc. v. Pounce Consulting, Inc.*, Case No. 17-cv-04732-PJH,
19 2019 WL 3576900, at *4 (footnotes omitted).

20 In *Cadence Design Systems*, the court denied the plaintiff's motion under Rule
21 69(a) and California Code of Civil Procedure § 187 to add the proposed additional
22 judgment debtor, Viera, to the monetary judgment entered by default against two
23 companies in which he was the CEO of one company and CFO of the other company
24 on grounds that he was the alter ego of both companies. *Id.* at *1, 5-7. While the court
25 found that Viera had participated in the early stages of the underlying litigation, and that
26 even if plaintiff had shown that Viera had "controlled" the litigation, plaintiff had
27 "presented virtually no evidence that Viera had 'occasion to conduct [that control] with a
28 diligence corresponding to the risk of personal liability.'" *Id.*, citing and quoting, *Katzir*,

1 394 F.3d at 1150. The court found that “Viera’s mere participation in this litigation does
2 not come close to outweighing the lack of evidence showing that Viera had notice that
3 he faced the risk of personal liability before the court entered judgment.” *Id.* (footnote
4 omitted). Thus, the court held: “Given the due process concerns at stake, the court
5 cannot conclude that Viera had the opportunity to control the litigation with a diligence
6 corresponding to the risk of personal liability when there is no evidence that Viera knew
7 or should have known he faced the risk of such liability.” *Id.* (footnote omitted).

8 The court in *Cadence Design Systems* further held:

9 Nor has plaintiff shown that it could not have raised Viera’s liability at an earlier
10 stage because it only recently discovered that there was evidence supporting
11 Viera’s alleged alter ego status. Indeed, much of the alter ego evidence plaintiff
12 relies upon matches the evidence that plaintiff’s February 2019 motion for default
13 judgment relied upon. *Compare* Dkt. 208-25 at 9-16 to Dkt. 228-4 at 6-15.
14 Plaintiff has provided no persuasive explanation for its failure to raise the issue of
15 Viera’s alleged alter ego status until after default judgment had been entered.
16 And the court will not countenance the strategic use of § 187 in a manner that
17 raises due process concerns. *See also Correa Pallet, Inc. v. Lambeth*, No.
18 F052934, 2008 WL 1822639, at *15 (Cal. Ct. App. Apr. 24, 2008) (unpublished)
19 (discussing § 187 and explaining that the alter ego doctrine is grounded in equity
20 that requires the movant to act with “due diligence”). For those reasons, the
21 court finds that plaintiff has not shown by a preponderance of the evidence that
22 Viera had the “opportunity” or “occasion” to conduct this litigation with a diligence
23 corresponding to his risk of personal liability.

24 *Id.* at 7.

25 Finally, the court in *Cadence Design Systems* held regarding movant’s failure to
26 demonstrate that Viera’s interests were virtually represented in the prior litigation:

27 For similar reasons, plaintiff has not shown that Viera was virtually represented in
28 the lawsuit or that his interests aligned with the judgment debtors. Like in *NEC*, it
is not apparent that Pounce’s “interests and [Viera’s] interests were [] the same.”
NEC, 208 Cal. App. 3d at 780. Though disputed, evidence shows that, as in
NEC, Pounce defaulted because it “had no incentive to defend the [] lawsuit,” as
it “was on the verge of bankruptcy.” *Id.* Plaintiff had the burden of showing that
that litigation strategy effectively represented the personal interests of Pounce’s
alleged alter ego, Viera, who “was not named as a party, had no risk of personal
liability and therefore was not required to intervene.” *Id.* Because plaintiff has
failed to carry that burden, the court “cannot say that [Viera] ... had occasion to
conduct the litigation with a diligence corresponding to the risk of personal liability
that was involved or that [Viera] was virtually represented in the lawsuit.” *Id.* at

781.

Id. (footnote omitted).

Accordingly, like the Ninth Circuit in *Katzir* and the district court in *Cadence Design Systems*, this court applies California Code of Civil Procedure § 187's standard two-prong analysis to Foremost's motion to amend its allowed bankruptcy claim to add Tangshan Ayers. *Cadence Design Systems, Inc. v. Pounce Consulting, Inc.*, Case No. 17-cv-04732-PJH, 2019 WL 3576900, at *5. In undertaking that analysis, the court is cognizant of the serious due process concerns implicated by applying that analysis to a default judgment like Foremost's allowed bankruptcy claim, as Foremost requests the court do here. The facts and evidence do not support Foremost's argument that Tangshan Ayers received due process. The evidence shows that Foremost did not make an alter ego liability claim specifically related to the \$5.265 million proof of claim until after the claim was deemed allowed and the court closed the bankruptcy case.

Foremost has shown that Tangshan Ayers may have exercised some control over the litigation in that its directors common with Huida and Ayers Bath were involved in authorizing the filing of Debtor Ayers Bath's Chapter 7 bankruptcy petition. Pretrial Stipulation Pursuant to Local Bankruptcy Rule 7016-1(b)(1)(B), ECF 208, filed on January 5, 2021, Stipulated Facts Nos. 3, 8, 9, 11, 19, 21 and 23.²⁶ While there is

²⁶ The parties have stipulated that Peter Yao, the president of Ayers Bath, signed the bankruptcy petition for Ayers Bath authorized by Wang Yanqing and Dong Huazhong, the directors of Ayers Bath, and Mr. Yao had asked permission of Mr. Wang to file the petition, which was granted. Pretrial Stipulation Pursuant to Local Bankruptcy Rule 7016-1(b)(1)(B), ECF 208, filed on January 5, 2021, Stipulated Facts Nos. 3, 8, 9, 11, 19, 21, 23. At the time, Mr. Wang was chairman, president and legal representative of Tangshan Ayers as well as chief executive officer of Huida, and Mr. Dong was a director of Tangshan and a director and senior consultant for Huida. *Id.* Mr. Yao was employed at Tangshan Ayers before and after he was the president of Ayers Bath. *Id.* Tangshan Ayers disputes that it was consulted in the decision of Ayers Bath to file for bankruptcy, asserting that the decision was made by the management of Huida, and not Tangshan Ayers. See Second Declaration of Yang Chun, filed on March 10, 2021, ECF 223 at 4, 11 (trial declaration of former general manager and CEO of Tangshan Ayers); Declaration of Wang Yaoqing, filed on March 10, 2021, ECF 222 at 3, 8 (trial declaration of general manager and CEO of Huida, board chairman of Tangshan Ayers and director of Ayers Bath); Declaration of Junjuan Yao, filed on March 10, 2021, ECF 220 at 4, 10 (trial declaration of CEO and president of Ayers Bath); Declaration of Xing Jinrong, filed on March 10, 2021, ECF 221 at 3-8 (trial declaration of vice president of sales for Huida). The evidence indicates that the common management of Huida and Tangshan Ayers was aware of their subsidiary Ayers Bath's decision to file for bankruptcy, though Huida was the entity technically consulted about the decision of Ayers Bath's board of directors to file the bankruptcy case. Mr. Yao, the president and CEO of Ayers Bath recommended to Mr. Wang and Mr. Dong, the common

1 largely undisputed evidence that Tangshan Ayers was involved in Ayers Bath's decision
2 early on in this bankruptcy case to file a Chapter 7 bankruptcy petition, that evidence
3 does not translate into evidence that Tangshan Ayers controlled the entire litigation
4 relating to Foremost's claim against Ayers Bath. Even if Foremost could show that
5 Tangshan Ayers controlled the litigation, Foremost has presented virtually no evidence
6 that Tangshan Ayers had "occasion to conduct [that control] with a diligence
7 corresponding to the risk of personal liability." *Cadence Design Systems, Inc. v. Pounce*
8 *Consulting, Inc.*, Case No. 17-cv-04732-PJH, 2019 WL 3576900, at *6, *citing and*
9 *quoting, Katzir*, 394 F.3d at 1150. Specifically, there is no evidence that Tangshan
10 Ayers ever had notice of Foremost's claim as there is no evidence of any service of the
11 proof of claim on Tangshan Ayers in the bankruptcy case. The claims register indicates
12 that Foremost's proof of claim was filed, but there is no indication of service on
13 Tangshan Ayers, which was listed as a creditor and equity security holder on the
14 bankruptcy schedules of Ayers Bath and was listed on the creditors mailing list in the
15 case. Petition, ECF 1 at 8 and 21; Pretrial Stipulation Pursuant to Local Bankruptcy
16 Rule 7016-1(b)(1)(B), ECF 208, filed on January 5, 2021, Stipulated Fact No. 29.

17 Moreover, Foremost's proof of claim had no indication that it would seek to hold
18 Tangshan Ayers liable as a judgment debtor for the proof of claim based on alter ego
19 liability. The proof of claim on its face only asserts a claim against the bankruptcy
20 estate of the debtor, Ayers Bath, and not against any other party. Foremost admits,
21 "The Proof of Claim was filed against Ayers Bath because it was the named debtor and
22 there had not yet been a finding of alter ego, substantive consolidation, or some other
23 basis to assert a claim under section 501 of the Bankruptcy Code against Tangshan
24 Ayers." Foremost Supplemental Brief, ECF 255 at 13:11-14 (internal citation page 9).
25 Thus, without notice of the Proof of Claim, Tangshan Ayers had no meaningful
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27
28 _____
directors of Huida, Tangshan Ayers and Ayers Bath, to authorize the bankruptcy filing, which they did as
shown on the unanimous consent of the Ayers Bath board of directors, attached as Exhibit A to the Wang
Declaration. ECF 222 at 5, 8; ECF 222-1 at 2-4. This evidence is some proof of Tangshan Ayers's
knowledge and participation in the decision of Ayers Bath to file for bankruptcy.

1 opportunity to contest the validity of the amount of Foremost's claim on the Proof of
2 Claim. Tangshan Ayers's participation in this litigation by initiating the bankruptcy case
3 does not come close to outweighing the lack of evidence showing that Tangshan Ayers
4 had notice that it faced the risk of its own liability before the court entered judgment in
5 allowing Foremost's bankruptcy claim against the estate of debtor Ayers Bath. Given
6 the due process concerns at stake, the court cannot conclude that Tangshan Ayers had
7 the opportunity to control the litigation with a diligence corresponding to the risk of
8 personal liability when there is no evidence that Tangshan Ayers knew or should have
9 known it faced the risk of such liability.

10 Foremost argues that Squire Sanders, which represented Debtor in the
11 bankruptcy filing and the Rule 2004 examination, also represented Tangshan Ayers at
12 the time of filing the proof of claim. *Id.* at 13:15-17 (internal citation page 9). Even if
13 Squire Sanders had represented both parties, there is no evidence to show Tangshan
14 Ayers had knowledge of its potential liability for the proof of claim filed in this case. See
15 Second Declaration of Yang Chun, filed on March 10, 2021, ECF 223 at 4-5, 11 (trial
16 declaration of former general manager and CEO of Tangshan Ayers).

17 Foremost argues this case is more similar to the case of *DEPCOM Power, Inc. v.*
18 *CSUN Solar, Inc.*, Case No. 18-cv-00729-JST, 2020 WL 5176193 (N.D. Cal. Jul. 30,
19 2020) than *Cadence Design Systems*. Foremost Supplemental Brief, ECF 255, 12:11 -
20 15:2 (internal citation pages 8-11). In *DEPCOM*, under California Code of Civil
21 Procedure § 187, a factor in the court's determination that the alter ego had control over
22 the litigation and had an opportunity to litigate was the fact that parties shared
23 employees and lawyers. *DEPCOM Power, Inc. v. CSUN Solar, Inc.*, Case No. 18-cv-
24 00729-JST, 2020 WL 5176193, at *15.²⁷

25
26 ²⁷ The determination under California Code of Civil Procedure § 187 whether the alleged alter ego
27 defendant "had occasion to conduct the litigation with a diligence corresponding to the risk of personal
28 liability that was involved or that [it] was virtually represented in the lawsuit" is fact-driven by the evidence
of the particular case. *NEC Electronics Inc. v. Hurt*, 208 Cal.App.3d 772, *Id.* at 781. As such, the court
does not find that comparing the specific facts in *Cadence Design Systems* with those in *DEPCOM*
Power, Inc., to be a useful exercise in making the fact determination in this case. The court in its analysis
has considered the specific facts of this case in light of the applicable law relating to California Code of

1 Foremost believes Tangshan Ayers had the opportunity to litigate the claim
2 because Squire Sanders, who represented Debtor in the initial bankruptcy filing and at
3 the Rule 2004 examination, also represented Tangshan Ayers at the time of filing the
4 proof of claim. Foremost Supplemental Brief, ECF 255, 13:15-17 (internal citation page
5 9). However, Foremost acknowledges when they tried to serve Squire Sanders with the
6 original complaint that alleged alter ego liability against Tangshan Ayers, Tangshan
7 Ayers did not authorize the Squire Sanders law firm to accept service of the complaint
8 which forced Foremost to serve Tangshan pursuant to the Hague Convention. *See Id.*
9 at 13:19-22 (internal citation page 9). Moreover, Squire Sanders's representation of
10 Ayers Bath was limited to the filing of the voluntary petition under Chapter 7 of the
11 Bankruptcy Code. Pretrial Stipulation Pursuant to Local Bankruptcy Rule 7016-
12 1(b)(1)(B), ECF 208, filed on January 5, 2021, Stipulated Fact No. 23; *see also*,
13 Declaration of Junjuan Yao, filed on March 10, 2021, ECF 220 at 5-6, 10 (trial
14 declaration of president and CEO of Ayers Bath). According to Tangshan Ayers, Squire
15 Sanders did not represent it generally in the Ayers Bath bankruptcy case and was not
16 engaged to monitor the Ayers Bath bankruptcy proceedings on its behalf or represent its
17 interests. Second Declaration of Yang Chun, filed on March 10, 2021, ECF 223 at 4, 11
18 (trial declaration of former general manager and CEO of Tangshan Ayers).

19 Foremost filed its proof of claim in this bankruptcy case on December 12, 2013.
20 On January 9, 2014, Foremost commenced litigation against Tangshan Ayers in the
21 United States District Court, No. 14-cv-00188) when it filed its original complaint in the
22 Tangshan Ayers Litigation. Complaint, Tangshan Ayers Litigation, filed on January 9,
23 2014, Supplemental RJN, ECF 263, Exhibit A. The claims asserted against Tangshan
24 in the original complaint were: (1) intentional interference with prospective economic
25 advantage; (2) tortious interference with contractual relations; (3) Unfair Competition
26 Under State Law [Cal. B&P Code § 17200]; (4) Unfair Competition. *Id.* This original
27 complaint in the Tangshan Ayers Litigation refers to the Ayers Bath bankruptcy case,
28

Civil Procedure § 187 as discussed herein.

1 but not to the proof of claim, and the complaint did not allege that Tangshan Ayers
2 would be potentially liable under an alter ego theory of liability for the proof of claim. *Id.*
3 Foremost's complaint alleges that Ayers Bath is the alter ego of Tangshan Ayers, but its
4 allegations in the complaint are insufficient to put Tangshan Ayers on notice that it could
5 potentially be liable for a \$5.265 million proof of claim in the Ayers Bath bankruptcy
6 case. See *id.* at 2, ¶ 3. After Foremost filed its original complaint in the Tangshan
7 Ayers Litigation, the Chapter 7 trustee filed his final report in this bankruptcy case on
8 April 14, 2015. ECF 50. The Chapter 7 trustee's notice of proposed payments, also
9 filed on April 14, 2015, showed Foremost had an allowed claim against the Ayers Bath
10 bankruptcy estate in the amount of \$5,265,000 with a proposed payment of \$7,757.24.
11 ECF 51. The bankruptcy court closed the Ayers Bath bankruptcy case on July 27,
12 2015. ECF 59.

13 As the District Court discussed in its order granting Tangshan Ayers's motions to
14 dismiss Foremost's original complaint in part on October 28, 2015, Foremost intended
15 to argue that Tangshan Ayers would be liable for the multi-million dollar proof of claim
16 based on the principle of *res judicata*. As the District Court stated in footnote 8 of its
17 order, "The court does not consider whether Plaintiff has a viable common law alter ego
18 claim or action upon the judgment because the Complaint does not allege standalone
19 claims to enforce the proof of claim against Tangshan." *Id.* The evidence shows that
20 the first time Tangshan Ayers received any formal notice of potential liability for the
21 proof of claim filed against Ayers Bath, based on alter ego, was when Foremost filed its
22 opposition to Tangshan Ayers's second motion to dismiss the original complaint in the
23 Tangshan Ayers Litigation on or about July 13, 2015. See Second Declaration of Yang
24 Chun, filed on March 10, 2021, ECF 223 at 4-5, 11 (trial declaration of former general
25 manager and CEO of Tangshan Ayers).

26 The first pleading in which Foremost alleged a claim based on its theory that its
27 allowed bankruptcy claim had preclusive effect against Tangshan Ayers was its first
28 amended complaint filed in the Tangshan Ayers Litigation on November 17, 2015. In

1 the First Amended Complaint, filed on November 17, 2015, Foremost alleged (1) alter
2 ego liability, (2) enforcement of judgment per Rule 69(a), and (3) action on judgment.
3 First Amended Complaint, Tangshan Ayers Litigation, filed on November 17, 2015,
4 Supplemental RJN, ECF 263, Exhibit L. Foremost's Second Amended Complaint filed
5 in the Tangshan Ayers Litigation on January 25, 2016 also alleges alter ego liability
6 against Tangshan Ayers and its liability for the allowed proof of claim in the Ayers Bath
7 bankruptcy case. Second Amended Complaint, Tangshan Ayers Litigation, filed on
8 January 25, 2016, Supplemental RJN, ECF 263, Exhibit Q. Foremost filed its original
9 motion to amend the judgment in the form of its allowed claim in this bankruptcy case to
10 add Tangshan Ayers as a judgment debtor on January 13, 2017. ECF 66. At the time
11 Foremost filed its first and second amended complaints in the Tangshan Ayers
12 Litigation and its original motion to amend judgment in this court, the proof of claim filed
13 by Foremost against Ayers Bath in this bankruptcy case had been already allowed
14 when the Chapter 7 trustee filed his final report on April 14, 2015. Thus, it is clear,
15 based on this record, that Foremost only made the alter ego liability argument related to
16 the proof of claim in the Tangshan Ayers Litigation and in this bankruptcy case only
17 after the proof of claim was deemed allowed. This court cannot conclude that
18 Tangshan Ayers had the opportunity to control the litigation with a diligence
19 corresponding to the risk of liability when there is insufficient evidence to show that
20 Tangshan Ayers knew or should have known it faced the risk of such liability until after
21 the proof of claim was deemed allowed. *See Cadence Design Systems, Inc. v. Pounce*
22 *Consulting, Inc.*, Case No. 17-cv-04732-PJH, 2019 WL 3576900, at *5-7. Since, at the
23 time Foremost filed the first and second amended complaints seeking alter ego liability
24 of Tangshan Ayers related to the allowed proof of claim, the proof of claim was already
25 deemed allowed, the court determines that there is a lack of due process as to now
26 amending the allowed claim against Ayers Bath to add Tangshan Ayers as a liable
27 party.

28 The evidence that there was no notice of any alter ego claim in Foremost's proof

1 of claim filed in this bankruptcy case is unrefuted. Nevertheless, Foremost argues that
2 Tangshan Ayers was on notice of Foremost's intent to hold Tangshan Ayers liable as an
3 alter ego in the bankruptcy case as follows:

4 Tangshan Ayers knew that Foremost was alleging that it was the alter ego of
5 Ayers Bath through the participation of its attorneys and employees in Ayers
6 Bath's bankruptcy case. Unlike in *Cadence*, Foremost did not wait until judgment
7 was entered to allege alter ego, it raised it to the Court as early as May 2013 and
8 expressly asserted that Tangshan Ayers was the alter ego of the Debtor in the
9 January 2014 complaint, more than 14 months prior to the Proof of Claim was
10 deemed allowed. During this time period, Tangshan Ayers and/or its counsel
11 received: (1) the transcript of the Rule 2004 Exam; (2) Foremost's Proof of Claim
12 against Ayers Bath; (3) Foremost's complaint against Tangshan Ayers [in the
Tangshan Ayers Litigation before the District Court]; and (4) the Trustee's Final
Report, which detailed the proposed allowance of the Proof of Claim. Tangshan
Ayers had sufficient opportunity to object to the Proof of Claim, but it made the
calculated decision not to do so, confident that the fiction of a separate corporate
existence and its physical presence in China would insulate it from liability.

13 *Id.* at 14:16 - 15:2 (internal citation pages 10-11). Foremost's argument is unpersuasive
14 as none of these matters put Tangshan Ayers on notice that Foremost that it sought to
15 impose alter ego liability on Tangshan Ayers through the proof of claim or otherwise
16 through the bankruptcy case, so that it had "occasion to conduct [the litigation, i.e.,
17 contesting the proof of claim in this case] with a diligence corresponding to the risk of
18 personal liability that was involved." *Katzir's Floor and Home Design, Inc v. M-*
19 *MLS.com*, 394 F.3d at 1150, *citing inter alia*, *NEC Elecs. Inc. v. Hurt*, 256 Cal.Rptr. at
20 444. The "Rule 2004 Exam" was Foremost's oral examination in the bankruptcy case of
21 Tangshan Ayers employees who were former employees of Ayers Bath pursuant to
22 Federal Rule of Bankruptcy Procedure, which, unlike a summons and complaint in an
23 adversary proceeding pursuant to Federal Rules of Bankruptcy Procedure 7001 *et seq.*,
24 is not an appropriate vehicle to put a party on notice of liability, even if counsel was
25 representing the employees on behalf of the company. Foremost's proof of claim had
26 no indication that it sought to impose alter ego liability on Tangshan Ayers as Foremost
27 has admitted that when it filed the proof of claim, it had not made any finding that it had
28 such an alter ego claim. Foremost's original complaint filed in the Tangshan Ayers

1 Litigation had no indication that it intended to assert alter ego liability against Tangshan
2 Ayers based on the proof of claim filed in the Ayers Bath bankruptcy case. Notice of
3 Foremost's proof of claim to Tangshan Ayers through service of the Trustee's Final
4 Report which resulted in the proof of claim being deemed allowed was only given at the
5 time the final report was filed which meant that there was no opportunity for Tangshan
6 Ayers to respond to the proof of claim until after it was deemed allowed.

7 Similarly, Foremost has not shown that Tangshan Ayers was virtually
8 represented in the bankruptcy case or that its interests were aligned with the debtor,
9 Ayers Bath. As in the *NEC* case, it is not apparent that Ayers Bath's "interests and
10 [Tangshan Ayers's] interests were [] the same." *NEC*, 208 Cal.App.3d at 780. Though
11 disputed, evidence shows that, as in *NEC*, Ayers Bath "defaulted" in not objecting to
12 Foremost's proof of claim because it "had no incentive to defend the [] lawsuit," that is,
13 to object to the claim as it had few assets and was in Chapter 7 liquidation bankruptcy
14 under the supervision of the bankruptcy trustee pursuant to 11 U.S.C. § 704, that is,
15 beyond the situation in *NEC* where the judgment debtor merely "was on the verge of
16 bankruptcy." *Id.*²⁸ Foremost had the burden of showing that that litigation strategy
17 effectively represented the interests of Ayers Bath's alleged alter ego, Tangshan Ayers,
18 which "was not named as a party [to the proof of claim], had no risk of personal liability
19 and therefore was not required to intervene." *Id.* Moreover, as previously noted,
20 Foremost in its briefing in response to the court's tentative ruling had acknowledged:
21 "The Proof of Claim was filed against Ayers Bath because it was the named debtor and
22 that there had been not a finding of alter ego, substantive consolidation, or some other
23 basis to assert a claim under section 501 of the Bankruptcy Code against Tangshan
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26 ²⁸ According to the bankruptcy petition filed by Ayers Bath, its total assets were \$81,953.56 as of the
27 petition date, and it had scheduled debts owed to Tangshan Ayers of \$655,290.78. Pretrial Stipulation
28 Pursuant to Local Bankruptcy Rule 7016-1(b)(1)(B), ECF 208, filed on January 5, 2021, Stipulated Facts
Nos. 19, 20, 28 and 29. Foremost filed its proof of claim asserting a debt owed by Ayers Bath in an
amount not less than \$5,265,000. Pretrial Stipulation Pursuant to Local Bankruptcy Rule 7016-1(b)(1)(B),
ECF 208, filed on January 5, 2021, Stipulated Fact No. 30. There is no evidence that the Chapter 7
bankruptcy trustee operated the business of Ayers Bath pursuant to 11 U.S.C. § 704(a)(8) after it filed for
bankruptcy.

1 Ayers.” ECF 255 at 13 (internal citation page 9). That is, when Foremost filed its proof
2 of claim against the debtor, Ayers Bath, in this bankruptcy case, Foremost’s knowledge
3 and intent for filing the proof of claim in the Ayers Bath bankruptcy case at the time
4 when it filed its proof of claim was only meant to assert a claim against Ayers Bath, and
5 not against Tangshan Ayers, because Foremost had not yet found a basis to assert a
6 claim against Tangshan Ayers on an alter ego, substantive consolidation or other theory
7 under Section 501 of the Bankruptcy Code. Thus, if Foremost did not know that it had
8 an alter ego claim against Tangshan Ayers when it filed its proof of claim in the Ayers
9 Bath bankruptcy case, it cannot expect anyone else to know in order to defend against
10 such alter ego claim based on the proof of claim. Thus, it cannot be said that Tangshan
11 Ayers was virtually represented to defend against such an alter ego claim against
12 Tangshan Ayers by the debtor, Ayers Bath, in the bankruptcy case if no one knew that
13 there was such an alter ego claim based on the proof of claim when it was filed. The
14 record before the court indicates that there is no evidence of a court filing that put Ayers
15 Bath or Tangshan Ayers on notice that Foremost intended to base an alter ego claim
16 against Tangshan Ayers on the proof of claim filed in the Ayers Bath bankruptcy case
17 so that either the debtor, Ayers Bath, or Tangshan Ayers, could mount a defense before
18 the proof of claim was deemed allowed on the filing of the bankruptcy trustee’s final
19 report. Moreover, the Ayers Bath bankruptcy case was not actively litigated on behalf of
20 the debtor as its lawyers, Squire Sanders, only represented it in filing the bankruptcy
21 petition, and Ayers Bath was otherwise unrepresented by counsel in the case, and as
22 an entity debtor, it could only appear in the case through counsel to litigate any matters.
23 See Local Bankruptcy Rule 9011-2 (a corporation may not appear without counsel in
24 any bankruptcy case or proceeding in this judicial district). Furthermore, Squire
25 Sanders was not engaged to monitor the Ayers Bath bankruptcy case for Tangshan
26 Ayers and was not generally representing its interests in the case, and only represented
27 it in representing its two employees formerly at Ayers Bath in the Rule 2004
28 examination relating to their involvement with Ayers Bath. Finally, as discussed above,

1 Foremost cannot base an alter ego claim against Tangshan Ayers on its allowed proof
2 of claim against the debtor, Ayers Bath, in this bankruptcy case though amending the
3 proof of claim to add Tangshan Ayers as an additional judgment debtor through Federal
4 Rule of Civil Procedure 69.

5 Based on this record, the court "cannot say that [Tangshan Ayers] ... had
6 occasion to conduct the litigation with a diligence corresponding to the risk of personal
7 liability that was involved or that [Tangshan Ayers] was virtually represented in the
8 lawsuit," *NEC*, 208 Cal.App.3d at 781, therefore, the court determines that Foremost
9 has not satisfied by a preponderance of the evidence the element of due process which
10 is required to amend a judgment pursuant to California Code of Civil Procedure § 187.

11 VII. FINAL RECOMMENDATION OF THE BANKRUPTCY COURT

12 IT IS THEREFORE RECOMMENDED by the United States Bankruptcy Court
13 that for the foregoing reasons, the United States District Court accept this Report and
14 Recommendation and deny Foremost's motion to amend the judgment of the
15 bankruptcy court.

16 IT IS SO ORDERED.

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25 Date: September 22, 2021



26 Robert Kwan
27 United States Bankruptcy Judge
28