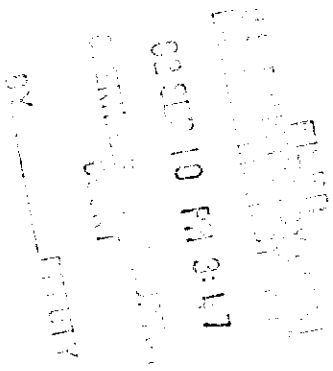
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

IN RE:	§	
	§	
PAGE WAGGENER	§	Case No. 00-61332
	§	
	§	
Debtor	§	Chapter 7



MEMORANDUM OF DECISION

This matter came before the Court for hearing and determination of the objections[1] filed by Page Waggener (the "Debtor") to the two proofs of claim filed in the Debtor's Chapter 7 proceeding by Derenda Waggener and Kacy Waggener (collectively, the "Creditors"). At the conclusion of the hearing, the Court took the matter under advisement. This memorandum of decision disposes of all issues pending before the Court.[2]

Background

The Debtor, Page Waggener, filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on July 26, 2000. On September 6, 2000, the Creditors each filed proofs of claim in the amount of $2,090,950.96. Both claims are based on an Oregon state court judgment entered against the Debtor on September 25, 1996, in the Multnomah County Circuit Court awarding each creditor $1,000,000 in non-economic damages and $500,000 in punitive damages,

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[1] *See* Debtor's Objection to Proof of Claim No. 1 Filed by Kacy Waggener, and Debtor's Objection to Proof of Claim No. 2 Filed by Derenda Waggener.

[2] This Court has jurisdiction to consider these exemption objections pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157(a). This Court possesses the authority to enter a final order in this contested matter since it constitutes a core proceeding as contemplated by 28 U.S.C. §157(b)(2)(A), (B) and (O).

plus post-judgment interest at 9%.[3] It is undisputed that the Debtor never appeared in the Oregon proceeding.

On July 27, 1997, the Creditors filed a Notice of Filing Foreign Judgment in the 44th Judicial District Court of Dallas County, Texas, in Cause No. 97-6701.[4] The Debtor appeared in Cause No. 97-6701 by filing a Motion to Transfer Venue and, later, an Answer invoking a general denial pursuant to Tex. R. Civ. P. 92.[5] The Debtor then filed his petition in bankruptcy on July 26, 2000, and subsequently objected to the two proofs of claim filed by the Creditors on various theories.[6]

The Debtor claims that the Oregon judgment is void due to defective service; that the judgment was entered by default against the Debtor and thus was not "fully litigated," which prevents res judicata or collateral estoppel from affecting the bankruptcy proceedings in this Court; and that the damages awarded by the Oregon court fail to comply with the requirements of Oregon law.[7] In response, the Creditors argue that the service of process in the Oregon proceeding was valid and that this Court is without jurisdiction to consider the Debtor's

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[3] *See* Derenda Waggener and Kacy Waggener's Brief in Support of Response to Debtor's Objection to Proofs of Claim Nos: 1 & 2 and attached Exhibit D.

[4] *See Id.* and attached Exhibit F.

[5] *See Id.* and attached Exhibit G.

[6] The Debtor has standing to prosecute these objections in light of the reasonable probability, which all parties to this dispute have acknowledged, that the Debtor would realize a surplus distribution from the bankruptcy estate in the event that his objections were sustained. *See, e.g., In re Cult Awareness Network, Inc.*, 151 F.3d 605, 608 (7th Cir. 1998); *In re Toms*, 229 B.R. 646, 650 (Bankr. E.D. Pa. 1999).

[7] *See* Debtor's Objection to Proof of Claim No. 1 Filed by Kacy Waggener, and Debtor's Objection to Proof of Claim No. 2 Filed by Derenda Waggener.

objections because of the *Rooker-Feldman* doctrine, as well as the doctrines of res judicata and collateral estoppel.[8]

Discussion

The *Rooker-Feldman* doctrine[9] is a jurisdictional doctrine prohibiting a lower federal court, whose jurisdiction is strictly original, from usurping the functions of a state appellate court. *See Hachamovitch v. DeBuono*, 159 F.3d 687 (2d Cir. 1998). Because the *Rooker-Feldman* doctrine is jurisdictional in nature, its applicability to the current controversy must be determined prior to any consideration of the doctrines of res judicata or collateral estoppel. *Singleton v. Fifth Third Bank of Western Ohio (In re Singleton)*, 230 B.R. 533, 536-37 (B.A.P. 6th Cir. 1999).

The *Rooker-Feldman* doctrine prevents lower federal courts from reviewing a state court decision when the issues raised in the federal court would be "inextricably intertwined" with a state court judgment and the federal court would, in essence, be called upon to review the state court decision. *Davis v. Bayless*, 70 F.3d 367, 375-76 (5th Cir. 1995) (*citing United States v. Shepherd*, 23 F.3d 923, 924 (5th Cir. 1994)). A claim entertained by a lower federal court is "inextricably intertwined" with those addressed in the state court "whenever the relief requested in the federal action would effectively reverse the state court decision or void its ruling." *In re Popkin & Stern*, 259 B.R. 701, 706 (B.A.P. 8th Cir. 2001) (*quoting Bechtold v. City of*

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[8] *See* Derenda Waggener and Kacy Waggener's Brief in Support of Response to Debtor's Objection to Proofs of Claim Nos: 1 & 2.

[9] This doctrine arises from two U.S. Supreme Court cases: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

Rosemount, 104 F.3d 1062, 1065 (8th Cir. 1997)). The rationale for this doctrine is that "judicial errors committed in state courts are for correction in the state court systems" through the appellate process. *Hale v. Harney*, 786 F.2d 688, 691 (5th Cir. 1986). As explained in *In re Lease Oil Antitrust Litigation (No. II)*, 16 F. Supp.2d 744 (S.D. Tex. 1998), two elements are required for application of the *Rooker-Feldman* doctrine:

> First, the plaintiff must have been a party to a final judgment in state court judicial proceedings. *Johnson v. De Grandy*, 512 U.S. 997, 114 S.Ct. 2647, 2654, 129 L.Ed.2d 775 (1994); *Johnson v. Odom*, 901 F.Supp. 220, 223 (W.D. La. 1995). Second, the plaintiff's federal complaint must seek "what in substance would be an appellate review of the state judgment(s) in a United States District Court." *Id.* (*quoting Johnson [v. DeGrandy]*, 114 S.Ct. at 2654).

Id. at 757.

In other words, even if the plaintiff does not explicitly state that he is seeking review of the state court judgment, the *Rooker-Feldman* doctrine applies if the federal court is confronted with issues that are "inextricably intertwined" with a state court judgment and the court cannot reach a decision regarding the issues presented without engaging in a review of the propriety of the state court decision. *Davis*, 70 F.3d at 375; *Shepherd*, 23 F.3d at 924.

The first requirement for the application of the *Rooker-Feldman* doctrine is that the state court judgment be a final judgment. The United States Supreme Court has stated that a state court judgment is final if: (1) it is "subject to no further review or correction in any other state tribunal," and (2) it is "an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market St. Ry. Co. v. Railroad Comm'n of California*, 324 U.S. 548, 551, 65 S.Ct. 770, 773, 89 L.Ed. 1171 (1945). The Oregon judgment in this case satisfies both elements. At the hearing before the Court, the Debtor argued that the Oregon record

contains no evidence that the Creditors' causes of action in the Oregon proceeding against defendant Greg Shipley have been finally adjudicated or dismissed. If this were true, then the Oregon judgment against the Debtor would be considered merely interlocutory, rather than final, under both the *Market St.* definition and pursuant to OR. R. CIV. P. 67(B).[10] *See, e.g., Sidag Aktiengesellschaft v. Smoked Foods Products Co.*, 813 F.2d 81, 84 (5th Cir. 1987) [holding under FED. R. CIV. P. 54(b), which is virtually identical to OR. R. CIV. P. 67(B), that two prior orders from a state court proceeding were not final judgments because the state court record did not indicate any disposition of the plaintiff's remaining claims against the other defendants, nor did the record contain any certification under Rule 54(b)]. However, the Creditors offered into evidence a "Judgment of Dismissal" entered by the Oregon state court on January 5, 1996, which dismissed co-defendant Greg Shipley from the Creditors' lawsuit.[11] The Creditors argue that such "Judgment of Dismissal," when combined with the adjudication or dismissal of the Creditors' causes of action against each of the other defendants, can be considered a final judgment under Oregon law.

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[10] OR. R. CIV. P. 67(B) provides:

> Judgment for Less Than All Claims or Parties in Action. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

[11] *See* Judgment of Dismissal, Trial Exhibit P-9.

OR. R. CIV. P. 70(B)(1) states that

> [a]ll judgments shall be filed and notation of the filing shall be entered in the register by the clerk. The clerk, on the date judgment is entered, shall mail a notice of the date of entry of the judgment in the register and shall mail a copy of the entry in the judgment docket. . . .

Hence, it is evident that a distinction exists under Oregon law between the entry of a judgment in the register and the entry of a judgment in the judgment docket. The "register"[12] is defined as follows:

> The register is a record wherein the clerk or court administrator shall enter, by its title, every action, suit or proceeding commenced in, or transferred or appealed to, the court whereof he is clerk or administrator, according to the date of its commencement, transfer or appeal. Thereafter, the clerk or court administrator shall note therein all the following:
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> (1) The date of any filing of any paper or process.
>
> (2) The date of making, filing and entry of any order, judgment, ruling or other direction of the court in or concerning such action, suit or proceeding.
>
> (3) Any other information required by statute, court order or rule.

OR. REV. STAT. §7.020 (1999).

The "judgment docket," on the other hand, is "a record wherein the clerk or court administrator shall docket judgments for the payment of money and such other judgments and decrees as specifically provided by statute." OR. REV. STAT. §7.040 (1999).

The Oregon state court record establishes that the "Judgment of Dismissal" dismissing

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[12] The Court notes that prior to 1985, the trial court record in Oregon state courts was contained in the "journal." In 1985, however, "the journal was eliminated as a trial court record in favor of the document entitled the 'register.' *See* Or. Laws 1985, ch. 540, §§ 1, 2, and 47." *Wilson v. Maass*, 752 P.2d 840, 841 (Or. 1988).

Greg Shipley from the Creditors lawsuit was entered in the register on January 5, 1996.[13] The Oregon state court record further establishes that such "judgment" was never entered in the judgment docket. This fact is further evidenced by a letter from the Multnomah County Circuit Court entitled "Notice of Entry of Judgment" in which the court states that the Judgment of Dismissal regarding Greg Shipley was not docketed in the Multnomah County judgment docket.[14] The Debtor submits that this failure to enter the Judgment of Dismissal in the judgment docket prevented such judgment from constituting a "final and appealable judgment,"[15] which would be protected from review by this Court under the *Rooker-Feldman* doctrine.

However, the Debtor has misconstrued Oregon law. It is undoubtedly true that, at the time the Oregon court issued its Judgment of Dismissal against Greg Shipley, the judgment could not yet constitute a final judgment because the Creditors' claims against the other defendants in the Oregon proceeding had yet to be adjudicated or dismissed. *See* OR. R. CIV. P. 67(B). However, the Judgment of Dismissal was correctly entered in the register by the Multnomah County court clerk pursuant to OR. R. CIV. P. 70(B)(1),[16] and upon such entry in the register, the judgment became effective pursuant to OR. R. CIV. P. 70(B)(2).[17] Thus, although the Judgment of Dismissal was not yet a final and appealable judgment, it was immediately efficacious for the

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[13] *See* Judgment of Dismissal, Trial Exhibit P-9.

[14] *See* Trial Exhibit P-10.

[15] *See* OR. R. CIV. P. 67(B), *supra,* note 10.

[16] OR. R. CIV. P. 70(B)(1) states, in pertinent part, "[a]ll judgments shall be filed and notation of the filing shall be entered in the register by the clerk."

[17] *See* OR. R. CIV. P. 70(B)(2) ["Notwithstanding ORS 3.070 or any other rule or statute, for purposes of these rules, a judgment is effective only when entered in the *register* as provided in this rule."] (emphasis added).

dismissal of Greg Shipley from the Oregon lawsuit. Furthermore, after the dismissal of defendants Sandy Union High School District #2 and City of Sandy Department of Police on September 17, 1996,[18] and upon the subsequent entry of a default judgment against the Debtor on September 26, 1996,[19] all the claims and the rights and liabilities of all the parties had been completely determined. The entry of the "Money Judgment" against the Debtor on September 26, 1996, brought the Oregon proceeding to a conclusion and, under the "Seriatim Judgment Rule," the entry of this final component of the litigation necessarily transformed the interlocutory "Judgment of Dismissal" against defendant Greg Shipley into a final judgment. *See Zidell v. Jones*, 720 P.2d 350, 361 (Or. 1986) ["By way of summary, we hold that two or more documents, when considered together, may constitute a final judgment if they adjudicate every claim presented and determine the rights and liabilities of each party. To reach this conclusion, we have held that . . . ORCP 67(B) does not apply after all claims against all parties have been determined, and that ORCP 70(A) does not require that every judgment be set forth in a single document."]; *see also Gruett v. Nesbitt*, 17 P.3d 1090, 1095 (Or. Ct. App. 2001) [citing *Zidell v. Jones* for the proposition that the Seriatim Judgment Rule applies to convert an earlier intermediate judgment into a final judgment when multiple judgments dispose of all claims as to all parties]. Thus, because the Oregon proceeding ultimately dismissed or adjudicated every claim presented and determined the rights and liabilities of each party in the lawsuit, the Court

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[18] *See* Trial Exhibits P-7 and P-8.

[19] The Oregon record indicates that an "Order of Default" against the Debtor was entered in the register on December 1, 1995, and that such "Order of Default" was thereafter reduced to a "Money Judgment" on September 26, 1996. The Court notes that the "Money Judgment" was entered in the register and docketed in the judgment docket on September 26, 1996.

concludes that the "Judgment of Dismissal" entered against Greg Shipley, along with the dismissal of defendants Sandy Union High School District #2 and City of Sandy Department of Police and the entry of a default judgment against the Debtor, collectively constitute a final judgment sufficient to satisfy the first prerequisite to the application of the *Rooker-Feldman* doctrine.

The second element required for the proper application of the *Rooker-Feldman* doctrine is that the plaintiff's federal complaint must seek, in essence, an appellate review of the state judgment in the federal court. This element clearly has been met. Before this Court could sustain the Debtor's claims objections, it would first have to determine that the Oregon state court erred in awarding a default judgment in favor of the Creditors. In the Oregon proceeding, the Multnomah County Circuit Court made a final determination that the Debtor was liable to each of the Creditors for the amount of $1,500,000. The Debtor now belatedly asserts before this Court that this state court judgment was erroneous. A finding in favor of the Debtor would necessarily entail a reversal of the state court judgment, and this result is precisely what the *Rooker-Feldman* doctrine prohibits. *See In re Brazelton Cedar Rapids Group, LC*, 264 B.R. 195 (Bankr. N.D. Iowa 2001).

In *Brazelton*, a default judgment was entered by the Iowa state district court against the debtor prior to the debtor's filing of a Chapter 11 petition for reorganization. The judgment creditor timely filed a claim in the debtor's bankruptcy case, to which the debtor objected. *Id.* at 198. After finding that the debtor had had an opportunity to present his defenses in state court but failed to do so, the *Brazelton* Court stated that, "based squarely upon the *Rooker-Feldman* doctrine, this Court lacks subject matter jurisdiction to hear Debtor's objection." *Id.* at 199.

Similarly, other cases have held that a debtor's challenge to the sufficiency of service of process in a state court proceeding was not properly before the bankruptcy court. *See Lasky v. Itzler (In re Itzler)*, 247 B.R. 546 (Bankr. S.D. Fla. 2000). Citing to the *Rooker-Feldman* doctrine, the *Itzler* Court determined that it should not consider the debtor's argument that he was never served with the state court complaint nor with any other papers in the state court litigation because "[t]he proper place for review of any aspect of the state court judgment, including the sufficiency of process, is the state court, not the federal bankruptcy court." *Id.* at 554. The *Itzler* Court went on to explain that any discussion of the sufficiency of process in the prior state court proceeding would effectively constitute a review of the correctness of the state court's decision to enter a default final judgment, and would be improper according to the *Rooker-Feldman* doctrine. *Id.*

In the same manner, the Debtor in the present case had the opportunity to present his defenses in the Oregon state court. The preponderance of the evidence establishes that, at a minimum, the Debtor received notice of the Oregon proceeding through the service of the summons on him. In fact, the "Order of Default" issued against the Debtor by the Multnomah County Circuit Court clearly states that "it appearing from the records and files herein that defendant Page Waggener (the Debtor) was duly served on October 17, 1995, with Summons and plaintiffs' Complaint."[20] It is undisputed that, despite such notice, the Debtor took no action in the Oregon proceeding. It is further undisputed that the Debtor forfeited his right to directly appeal the state court judgment because he never filed a notice of appeal after the Oregon state

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[20] *See* Trial Exhibit P-5.

court entered its final judgment in September of 1996.[21]

Furthermore, even after receiving subsequent notice of, and subsequently resisting, the effort of the Creditors to domesticate the Oregon judgment in Texas, the Debtor did not attempt to raise any of his due process arguments during the Texas proceeding.[22] Accordingly, because a finding in favor of the Debtor would effectively reverse the decision of the Oregon state court, the second element for the application of the *Rooker-Feldman* doctrine has been satisfied.

Thus the Court concludes that both of the traditionally recognized prerequisites for the application of the *Rooker-Feldman* doctrine have been satisfied in this case. The Fifth Circuit, however, recognizes a singular exception to the application of the *Rooker-Feldman* doctrine. "[O]ur circuit has not allowed the *Rooker-Feldman* doctrine to bar an action in federal court when that same action would be allowed in the state court of the rendering state." *Davis,* 70 F.3d at 376. Therefore, "[w]e decline to apply *Rooker-Feldman* in a way that would require a federal court to give greater deference to a state court judgment than a court of the state in which the judgment was rendered would give it." *Gauthier v. Continental Diving Services, Inc.*, 831 F.2d 559, 561 (5th Cir. 1987) [stating that the *Rooker-Feldman* doctrine is "very close if not identical to the more familiar principle that a federal court must give full faith and credit to a state court judgment."].

This rule is consistent with the refusal of other jurisdictions to apply the *Rooker-Feldman* doctrine "when the state court judgment is void ab initio." *See In re Dabrowski*, 257 B.R. 394,

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[21] OR. REV. STAT. §19.255(1) (1999) states that "the notice of appeal shall be served and filed within 30 days after the judgment appealed from is entered in the register."

[22] *See* Trial Exhibits P-16 and P-19.

406 (Bankr. S.D.N.Y. 2001). In fact, the Fifth Circuit has stated, in the context of a *Rooker-Feldman* discussion, that "jurisdictional defects render a judgment void, and . . . void judgments are subject to collateral attack [by a federal court]." *Reitnauer v. Texas Exotic Feline Foundation, Inc. (In re Reitnauer)*, 152 F.3d 341, 344 (5th Cir. 1998). Therefore, if a sister Oregon court would allow the Debtor to attack the validity of the Oregon judgment in a collateral proceeding on the basis that the judgment issued by the Multnomah County Circuit Court was void, then such an attack would not be precluded in this Court by the *Rooker-Feldman* doctrine.

Similar to many states, Oregon law recognizes a distinction between "void" judgments and those judgments that are merely "voidable." As articulated by the Supreme Court of Oregon in *Ketcham v. Selles*, 748 P.2d 67 (Or. 1987):

> The distinction between void and voidable "is often related to the distinction between 'direct' and 'collateral' attack, in that it is said that a 'void' judgment is vulnerable either to direct or collateral attack, while a 'voidable' judgment is subject only to direct attack. (Restatement (Second) of Judgments, Chapter 5 Introductory Note, *comment c* at 143 (1982). . . . [W]e think that the appropriate distinction for present purposes is between a "procedural error" and a "jurisdictional" defect: "The former is submerged in the judgment and ordinarily beyond remedy after the judgment has become final and the time to appeal expired; the latter in some situations can be a basis for future avoidance of the judgment." *Id.*, §69 *comment b* at 177.

Id. at 71.

Thus, "[o]nce the judgment has been entered and the time for appeal has expired, the defaulting party has no recourse unless the trial court lacked jurisdiction [over the parties and the subject matter] to enter the judgment." *Rajneesh Foundation Int'l v. McGreer*, 734 P.2d 871, 874 n. 3 (Or. 1987) [finding that a default judgment is not subject to collateral attack on the grounds that

the pleadings were insufficient to support the judgment].

Accordingly, the "Order of Default" and the "Money Judgment" entered against the Debtor which collectively constituted the entry of a final judgment on September 26, 1996, can only be collaterally attacked under Oregon law if a "jurisdictional defect" existed in the Oregon proceeding. If the Multnomah County Circuit Court proceeding contained no errors, or if mere procedural errors existed, then the Oregon state courts would not allow a collateral attack on the judgment and this Court is likewise compelled to dismiss any collateral attack.

In his effort to justify his collateral attack on the Oregon judgment, the Debtor claims that the default judgment entered by the Oregon state court is void for several reasons. First, the Debtor avers that the default judgment is void due to defective service upon the Debtor because: (1) the summons as filed contains no sworn statement by an attorney that it is a true and exact copy of the original summons; (2) the state court complaint asserts that the Debtor resided at 4300 East Amherst, Dallas, Texas, which was not his address; (3) the Affidavit and Return of Service fail to indicate that the state court complaint was actually served upon the Debtor along with the Summons; and (4) the Return of Service does not indicate that Frank R. Clabough had the authority to serve the process in Texas, nor does it comply with certain Oregon procedural rules.[23] Secondly, the Debtor argues that, with respect to the award of non-economic damages, "[d]espite being required by law to do so, the Judgment does not allocate the percentage of fault as between the Defendants."[24] Finally, the Debtor claims that the judgment is void because it

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[23] *See* OR. R. CIV. P. 7D(2), 7(F)(2)(a)(i), 7(F)(2)(c), or 7(F)(2)(d) as referenced in ¶ 4 of Debtor's Objection to Proof of Claim No. 2 Filed by Derenda Waggener.

[24] *Id.* at ¶8.

exceeds the $500,000 cap which Oregon law places upon an award of non-economic damages, and because it fails to comply with the Oregon requirement that any award of punitive damages be allocated between the prevailing party and the Criminal Injuries Compensation Account for the State of Oregon.[25]

OR. R. CIV. P. 7 provides a detailed framework for determining the adequacy of service under Oregon law.[26] This framework, as interpreted by the Oregon Supreme Court, involves two

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[25] *Id.* at ¶¶9-10.

[26] The germane portions of OR. R. CIV. P. 7 prescribing manners of service state as follows:

D(1) Notice Required.

> Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. Summons may be served in a manner specified in this rule or by any other rule or statute on the defendant or upon an agent authorized by appointment or law to accept service of summons for the defendant. Service may be made, subject to the restrictions and requirements of this rule, by the following methods: personal service of summons upon defendant or an agent of defendant authorized to receive process; substituted service by leaving a copy of summons and complaint at a person's dwelling house or usual place of abode; office service by leaving with a person who is apparently in charge of an office; service by mail; or, service by publication.

D(2) Service Methods.

> D(2)(a) Personal Service. Personal service may be made by delivery of a true copy of the summons and a true copy of the complaint to the person to be served.

D(3) Particular Defendants. Service may be made upon specified defendants as follows:

> D(3)(a) Individuals.
> D(3)(a)(i) Generally. Upon an individual defendant, by personal delivery of a true copy of the summons and the complaint to such defendant or other person authorized by appointment or law to receive service of summons on behalf of such defendant, by substituted service or by office service. Service may also be made upon an individual defendant to whom neither subparagraph (ii) nor (iii) of this paragraph applies by mailing made in accordance with paragraph (2)(d) of this section provided the defendant signs a receipt for the certified, registered or express mailing, in which case service shall be complete on the date on which the defendant signs a receipt for the mailing.

basic questions: (1) "[w]as the method in which service of summons was made one of those methods described in ORCP 7 D(2), specifically permitted for use upon the particular defendant by ORCP 7 D(3), and accomplished in accordance with ORCP 7 D(2)?" and (2) "[d]oes the manner of service employed by plaintiff satisfy the 'reasonable notice' standard of adequate service set forth in ORCP 7 D(1)?" *Baker*, 797 P.2d at 354-55. If the answer to question one is "yes," then service is presumed to be valid because it is presumed to be reasonably calculated, under all the circumstances, to apprise the defendant of the pendency of the action and to afford him a reasonable opportunity to appear and defend. *Id.* If, however, the evidence in the record overcomes this presumption, or if the answer to the first question is "no," then we must proceed to question two. If the answer to question two is "yes," then service of summons is adequate; if the answer is "no," then the service is defective. In attempting to answer question two, the Court may look to the totality of the circumstances to decide whether service of process was reasonably satisfied.[27] In applying this analysis, Oregon courts do not give OR. R. CIV. P. 7 an "over-

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[27] The legislative history behind Rule 7 clearly states its underlying purpose:

> The objective of the Council in Rule 7 is to reduce archaic and technical requirements related to service of summons while achieving the important objective of adequate notice to the defendant through service of summons. . . . To achieve this objective the Council took several steps. First, the rule does not specify rigid methods of service of summons. It specifies a standard of adequate service in [the first sentence of] Section 4D. . . . This language is the constitutional standard of adequate notice. Mullane v. Hanover Trust Co., 339 U.S. 306 [70 S.Ct. 652, 94 L.Ed. 865] (1950). Summons may then be served in any manner specifically described. But the rule does not absolutely require service to be by the specifically described methods. In certain circumstances other methods of service could provide adequate notice. The specifically described methods, however, would be presumed to provide adequate notice and were included to provide some reasonable guidance to attorneys and judges. Secondly, the Council included section 7 G. and subsection 7 F.(4), which provide that defects in the form of summons and return and the person serving summons do not invalidate service, provided that the basic standard of adequate notice is met. Under this rule, a body of old irrational case law, invalidating perfectly reasonable summons due to over-technical application of the summons statutes, is rejected. Lacy, Personal Jurisdiction and Service of Summons after *Shaffer v. Heitner*, 57 OLR 505 (1978).

technical application" so as to invalidate reasonable service of process. *Id.* at 352 ["Rather than requiring a particular manner of service to satisfy the standard of adequate service, the rule (OR. R. CIV. P. 7) endorses the process of examining the totality of the circumstances, to determine if the service of summons was reasonably calculated to provide defendant with notice of the action and reasonable opportunity to appear and defend."]; *Lake Oswego Review, Inc. v. Steinkamp*, 695 P.2d 565, 568 (Or. 1985) ["Compliance with methods or manners of service which are preceded [in OR. R. CIV. P. 7] by the word 'may' is not required. The methods of service listed in ORCP 7 D. (2)-(4) are not exclusive of other methods of service reasonably calculated to apprise defendant of the action."].

As to question #1, the Creditors have demonstrated by a preponderance of the evidence that service was properly accomplished upon the Debtor under applicable Oregon law. The evidence establishes that personal service was made upon the Debtor by delivery of a true copy of both the Summons and the Complaint. Although the "Affidavit and Return of Service" submitted by the process server, Frank R. Clabough, fails to state specifically that a true copy of the Complaint was served upon the Debtor,[28] this omission is the only evidence supporting the Debtor's contention that he was not served with an actual copy of the Complaint. The Debtor did not testify before this Court that he failed to receive a copy of the complaint. Nor did he take any such action or make any such argument in his attempt to prevent the domestication of the Oregon judgment in Texas. Conversely, the Creditors' evidence supports their assertion that the Return

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Summary of Rules: Council on Court Procedures–Rules 1 through 10, p 6, Exhibit A, House Judiciary Committee, H.B. 3131, 1979, *quoted in Lake Oswego Review, Inc. v. Steinkamp*, 695 P.2d 565, 567 (Or. 1985).

[28] *See* Trial Exhibit P-2.

of Service merely contains a clerical error. The Multnomah County Circuit Court specifically found that the "defendant Page Waggener (the Debtor) was duly served on October 17, 1995, with Summons and plaintiffs' (Creditors') Complaint."[29] The Oregon state court thus implicitly determined that the failure of the Return of Service to explicitly state that the complaint was served along with the summons was merely a clerical error which did not invalidate the legitimacy of the service of process.

Additionally, the Fifth Circuit, applying Texas law, has recognized the "absolute verity" rule, which states that "plain jurisdictional recitals contained within a judgment are conclusive as to the rendering court's jurisdiction in a collateral proceeding." *See A.L.T. Corp. v. Small Business Admin.*, 801 F.2d 1451 (5th Cir. 1986). Specifically, the Fifth Circuit acknowledged that:

> Regardless of whether these alleged defects of service of process would have sustained a direct attack on the judgment, Texas courts refuse to entertain collateral attacks based on service defects if the judgment recites that the defendant was fully served. *See, e.g., Joiner v. Vasquez,* 632 S.W.2d 755, 757, 759 (Tex. App. — Dallas 1981, writ ref'd n.r.e.), *cert. denied,* 464 U.S. 981, 104 S.Ct. 422, 78 L.Ed.2d 357 (1983). '[I]t is the settled rule of this state that where a judgment is collaterally attacked, plain jurisdiction recitals contained therein must be accorded absolute verity.' *Pure Oil Co. v. Reece,* 124 Tex. 476, 78 S.W.2d 932, 934 (1935). The judgment here asserted that the court properly assumed personal jurisdiction. . . . This judgment was thus subject to the Texas absolute verity rule, and is not open to collateral attack. The SBA's contention that the record affirmatively establishes the defects in service is not well taken. Under

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[29] *See* Trial Exhibit P-5. The Creditors also provided the Court with an affidavit from their attorney stating that the Debtor "was duly and regularly served with Summons and Complaint on October 17, 1995." *See* Trial Exhibit P-4.

> Texas law, '[a] clear and definite recital of jurisdictional findings imports absolute verity, and is conclusive of the issue of jurisdiction.' *See* 48 Tex. Jur. 3d *Judgments* § 326 (1986). The general rule is that, where such recitals appear in the judgment, no evidence -- not even the remainder of the record – will be received to contradict these findings. *See id.* A judgment asserting the due service of process may not be attacked in a collateral proceeding, notwithstanding evidence from the remainder of the record which indicates to the contrary.

Id. at 1457; *see also, Bludworth Bond Shipyard, Inc. v. M/V Caribbean Wind,* 841 F.2d 846, 849, n.7 (5th Cir. 1988).

However, in applying the absolute verity rule, the Fifth Circuit has noted that "when a federal court is asked to enforce a state judgment, the rendering state's law determines the preclusive effect of jurisdictional findings contained within the judgment." *Harper Macleod Solicitors v. Keaty & Keaty*, 260 F.3d 389, 396 (5th Cir. 2001). Thus, the Court must look to Oregon law to determine the preclusive effect of the jurisdictional findings contained in the Oregon judgment.

In that vein, the Oregon Supreme Court has recently declared that "[i]n the absence of anything to the contrary in the record, a judgment entered in the register is regarded as stating an absolute verity." *Sea-Air Handling Services, Inc. v. Reed by Hartvig*, 956 P.2d 953, 956 (Or. 1998); *see also Rogers v. King*, 423 P.2d 761, 765 (Or. 1967) ["[A] recital [in a judgment] generally imports absolute verity."]. Hence, this Court is faced with a situation in which the findings of the Oregon court are not literally supported by the actual language utilized in the Return of Service. However, despite clearly having an opportunity to do so, the Debtor has failed to testify that the complaint was not properly served upon him. Instead, he merely points to the Return of Service and the omission of any definitive statement regarding the service of the complaint from that document and, upon that basis, asks this Court to infer that the specific

finding of the Oregon court regarding the legitimacy of the service upon him was erroneous. However, in the absence of any additional evidence to substantiate the Debtor's position, including the Debtor's own refusal to testify under oath in support of that position, this Court will reject that proffered inference and will instead confer verity upon the specific findings of the Oregon court. Thus, since question #1 of the accepted analytical framework in this context has been answered in the affirmative, there is no need to proceed to the remaining portions of the analysis.

However, the Court will note that, even if the Debtor had submitted evidence to the Court demonstrating that he was never served with a copy of the Complaint, this constitutes a mere defect in service which does not render the Oregon judgment void, but merely voidable. As stated by the Oregon Supreme Court, "[t]he rule seems to be that, if there is actually some notice to the defendant, it is sufficient on a collateral attack, and the irregularity or defect in the service or lack of compliance with the statute does not render the judgment void, but merely voidable." *Bay Plaza Management Co. v. Estep*, 525 P.2d 56, 57 (Or. 1974) (*quoting Moore Realty Co. v. Carr*, 120 P. 742, 744 (1912)). Because "[t]he purpose of the summons . . . is to give the defendant notice of an action against him," *Kalich v. Bryson*, 453 P.2d 659, 660 (Or. 1969), and because the Debtor did receive actual notice of the Oregon proceeding through the service of the Summons upon him, there has been no basis established for any finding that the purported failure of the Creditors to serve upon the Debtor a copy of the complaint along with the summons rendered the Oregon state court judgment void *ab initio*. Thus, because a failure to serve a copy of the Complaint upon the Debtor, if such failure had actually occurred, would only render the Oregon judgment voidable, it could not be collaterally attacked by a sister Oregon court under

applicable Oregon law and, therefore, the *Rooker-Feldman* doctrine applies to preclude this Court from supplying the Debtor a new forum in which to challenge the legitimacy of the Oregon judgment.

Alternatively, the Debtor argues that the Oregon judgment is rendered void because it fails to comply with OR. REV. STAT §18.485, which controls the apportionment of liability and damages pursuant to Oregon law.[30] However, "the language of the statute and its context clearly demonstrate that the comparison of fault involves only *parties* to the action, and not to other tortfeasors . . . whose liability was not at issue at trial." *Faverty v. McDonald's Restaurants of*

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[30] That statute provides, in relevant part, that:

> (1) Except as otherwise provided in this section, in any civil action arising out of bodily injury, death or property damage, including claims for emotional injury or distress, loss of care, comfort, companionship and society, and loss of consortium, the liability of each defendant for damages awarded to plaintiff shall be several only and shall not be joint.
>
> (2) In any action described in subsection (1) of this section, the court shall determine the award of damages to each claimant in accordance with the percentages of fault determined by the trier of fact under ORS 18.480 and shall enter judgment against each party determined to be liable. The court shall enter a judgment in favor of the plaintiff against any third party defendant who is found to be liable in any degree, even if the plaintiff did not make a direct claim against the third party defendant. The several liability of each defendant and third party defendant shall be set out separately in the judgment, based on the percentages of fault determined by the trier of fact under ORS 18.480. The court shall calculate and state in the judgment a monetary amount reflecting the share of the obligation of each person specified in ORS 18.470 (2). Each person's share of the obligation shall be equal to the total amount of the damages found by the trier of fact, with no reduction for amounts paid in settlement of the claim or by way of contribution, multiplied by the percentage of fault determined for the person by the trier of fact under ORS 18.480.

OR. REV. STAT §18.485 (2001).

Oregon, Inc., 892 P.2d 703, 712 (Or. App. 1995). The Oregon Court of Appeals in *Faverty* did not require apportionment of liability or damages between the defendant at trial and a party with whom the plaintiff had previously settled its dispute, instead declaring that "we find nothing in the legislative history that demonstrates that the legislature intended even to address the comparative fault of nonparties, much less establish a rule that the fault of such persons must be taken into account." *Id.* at 712-13. Since, in the present dispute, the Debtor was the only remaining party in the Oregon lawsuit at the time the final judgment was rendered, there was no other defendant then present in the lawsuit with whom the damages could have been apportioned. Thus, the failure to apportion the damages among parties other than the Debtor under OR. REV. STAT §18.485 does not appear to constitute any type of error, but certainly does not constitute a jurisdictional defect which would render the Oregon judgment void. *Travelers Ins. Co. of Hartford, Conn. v. Staiger*, 157 Or. 143, 148, 69 P.2d 1069, 1071 (Or. 1937) ["If the relief awarded or recovery authorized by a judgment is excessive, either as being greater than the amount demanded, greater than the facts or the evidence would justify, or as improperly including interest, costs, or counsel fees, or as allowing excessive interest, or costs, it is erroneous and voidable, but may not be impeached in a collateral proceeding."].

The Debtor additionally argues that, since OR. REV. STAT §18.560 places a cap on the award of non-economic damages at $500,000, the Oregon judgment is rendered void because it awards $1,000,000 in non-economic damages to each of the Creditors. *See Greist v. Phillips*, 906 P.2d 789 (Or. 1995) [upholding the non-economic damages cap imposed by OR. REV. STAT §18.560 only as to wrongful death claims, thereby overruling the contrary decisions of the Oregon Supreme Court which found the statutory cap to be per se unconstitutional]. However, a

subsequent Oregon Supreme Court ruling again found the statutory cap on the award of non-economic damages to be unconstitutional. *See Lakin v. Senco Products, Inc.*, 987 P.2d 463 (Or. 1999) [finding the cap to be unconstitutional in civil cases because it infringes upon the common law right to a jury trial]. In *Lakin*, the Oregon Supreme Court specifically distinguished its earlier decision in *Greist* by finding that *"Greist* did not resolve the constitutionality of ORS 18.560(1) as applied to a statutory limit on recovery of noneconomic damages in a common-law action such as this for which, until recently, no statutory limitation on noneconomic damages had existed." *Id.* at 472. Thus, it is far from established as to whether OR. REV. STAT §18.560 even remains viable in litigation such as this which is based upon torts recognized at common law. However, it is virtually certain that, even if such a statutory cap is still applicable, an erroneous failure of the Oregon trial court to apply the cap properly, or at all, does not render its judgment void. As the Oregon Supreme Court has recognized:

> Clearly, a judgment given by a court that has obtained jurisdiction can be considered a nullity only when that jurisdiction has been lost or exceeded. If the court in rendering the judgment stays within the powers conferred upon it by law and does not transcend the jurisdiction it has acquired in the particular case, its decision, however erroneous, is at most *voidable* and not for that reason subject to challenge in an independent proceeding. The decision may be palpably wrong in its deductions from the facts or its conclusion upon the legal points presented but these are matters for direct relief, available on appeal and reasons perhaps for reversal; they cannot be pleaded against the record collaterally, *for to say that a court is divested of its jurisdiction to decide matters properly brought before it by deciding them erroneously, is to deny it the very power it is called upon to exercise.*

Cooper v. Cooper, 275 Or. 627, 630, 552 P.2d 536, 538 (Or. 1976) (*citing* 1 FREEMAN ON

JUDGMENTS § 357 at pp. 743-44 (5th ed. 1925)) (emphasis added and citations and footnotes omitted).

Accordingly, this Court cannot permit the Oregon judgment to be attacked collaterally in this proceeding because of alleged error regarding the applicability of OR. REV. STAT §18.560.

For the same reason, the Debtor's final argument that the Oregon judgment is void because it omits the State of Oregon as a party-plaintiff pursuant to OR. REV. STAT §18.540 must fail. Pursuant to §18.540, the State of Oregon, specifically the Criminal Injuries Compensation Account, is entitled to a portion of every punitive damages award. However, the Oregon Court of Appeals has held that the failure to include the State of Oregon as a party entitled to a portion of a punitive damage award under §18.540 is not fatal to the finality of the judgment. *See Eulrich v. Snap-On Tools Corp.*, 798 P.2d 715 (Or. App. 1990). Further, pursuant to the Oregon authorities previously cited, such an omission, even if erroneous, did not deprive the Oregon court of jurisdiction over the matter which could have rendered its judgment void.

Therefore, because the Oregon judgment is a final judgment arising from the proper invocation of jurisdiction which sister Oregon courts would protect from collateral attack, the *Rooker-Feldman* doctrine precludes this Court from entertaining the Debtor's objections to the Creditors' claims based upon a challenge to the validity of that final judgment. Such a challenge, though tantalizingly draped in the fabric of a core proceeding which this Court routinely entertains, actually asks this Court either to ignore the Oregon judgment or to sit in judgment of it. This Court will do neither. Its validity has been established and the Debtor willfully forfeited his opportunity to challenge it. Accordingly, this Court will give it the full faith and credit which it rightfully deserves. Since the Debtor's claims objections present no grounds which are not

dependent upon the purported invalidity of the Oregon judgment, the Debtor's objections to the proofs of claim filed by Kacy Waggener and Derenda Waggener, respectively, must be denied.

This memorandum of decision constitutes the Court's findings of fact and conclusions of law[31] pursuant to Fed. R. Civ. P. 52, as incorporated into contested matters in bankruptcy cases by Fed. R. Bankr. P. 7052 and 9014. Separate orders will be entered which is consistent with this opinion.

SIGNED SEP 10 2002

BILL PARKER
UNITED STATES BANKRUPTCY JUDGE

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[31] To the extent that any finding of fact is construed to be a conclusion of law, it is hereby adopted as such. To the extent any conclusion of law is construed to be a finding of fact, it is hereby adopted as such. The Court reserves the right to make additional findings and conclusions as necessary or as may be requested by any party.