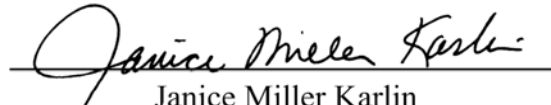


**SO ORDERED.**

**SIGNED this 6th day of April, 2016.**



  
Janice Miller Karlin  
United States Bankruptcy Judge

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**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF KANSAS**

**In re:  
Tara Rene Roberson,**

**Case No. 15-40041  
Chapter 7**

**Debtor.**

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**Darcy Williamson, Chapter 7 Trustee,**

**Plaintiff,**

**Case No. 15-7011  
Adversary Proceeding**

**v.**

**Bradley Roberson and  
Stacy T. Roberson,**

**Defendants.**

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**Order Denying Defendants Bradley Roberson and Stacy Roberson's  
Motions to Dismiss/Motions for Extension of Deadlines**

Defendant Bradley Roberson is currently representing himself in this adversary proceeding, and ten months into the proceeding filed a motion to dismiss alleging that

this Court lacks personal jurisdiction over him.<sup>1</sup> But Mr. Roberson's counseled answer to the complaint against him, and the pro se pleading the Court construed as an answer to an amended complaint, did not raise this defense. And Mr. Roberson, both when he had counsel and now that he is proceeding pro se, has actively participated in the case against him throughout, without ever challenging the personal jurisdiction of this Court over him. Mr. Roberson has, therefore, waived his personal jurisdiction challenge under Rule 12(h)(1) of the Federal Rules of Civil Procedure, and his motion to dismiss is denied.

Defendant Stacy Roberson, added to this adversary proceeding more recently via an amended complaint and also proceeding pro se, filed her own motion to dismiss alleging a lack of personal jurisdiction.<sup>2</sup> This motion is Ms. Roberson's first responsive pleading to that amended complaint. Because, however, the Trustee has satisfied her prima facie burden of showing this Court's personal jurisdiction over Ms. Roberson, and Ms. Roberson has not met her complimentary burden of establishing constitutionally significant inconvenience in response, Ms. Roberson's motion to dismiss must also be denied.

Both Mr. and Ms. Roberson have also requested a one hundred twenty day extension of all deadlines in the adversary proceeding, to enable the Robersons to prepare their defense to the Trustee's amended complaint. Because of the inordinate

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<sup>1</sup> Doc. 53.

<sup>2</sup> Doc. 66.

delay already encountered in this case due to the Robersons' pro se status, the Court will not further delay this litigation, and also denies these requests.

## **I. Procedural Background**

The Chapter 7 Trustee, Darcy Williamson, filed a complaint against (only) Mr. Roberson on May 5, 2015. That complaint stated two claims: Count 1 for avoidance of fraudulent conveyances under 11 U.S.C. § 548<sup>3</sup> and Count 2 for recovery of the avoided interest under §§ 550, 551, and 542. Mr. Roberson was represented by counsel at that time, and his counsel filed an answer to the complaint, wherein he generally admitted or denied the allegations of the complaint and then raised several affirmative defenses. Those affirmative defenses included that his sister, Tara Roberson—the Debtor in this case—herself held some of the property alleged to be in Mr. Roberson's possession, that other persons had possession of certain of the property, and that certain property was transferred to an auction service. The answer did deny that service of the complaint was “completed to the defendant” because the address given for Mr. Roberson was incorrect. A scheduling order was then entered and discovery commenced.

Shortly thereafter, however, Mr. Roberson's counsel withdrew from the proceeding. Discovery deadlines were extended to give Mr. Roberson, now proceeding pro se, additional time to answer the discovery propounded to him and retain new counsel if he chose. After receiving leave from the Court, the Trustee then filed an amended complaint on December 18, 2015, adding new counts and one new defendant,

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<sup>3</sup> All future statutory references are to title 11 of the United States Code, unless otherwise specified.

Stacy Roberson. The additional counts are: Count 3 for accounting and turnover of documents under § 542 and Kansas statutory sections 58-651 and 58-662, Count 4 for conversion of property and turnover, and Count 5 for breach of fiduciary duty. Plaintiff appropriately served the amended complaint on both defendants, but neither answered or filed a timely dispositive motion.

This is where the procedural history gets complicated. On January 5, 2016, the Trustee filed a request for a Clerk's entry of default against Mr. Roberson, and on January 8, 2016, the Clerk entered default. On January 11, 2016, the Court received lengthy correspondence from Mr. Roberson, generally setting out his version of the facts of the case and disputing the claims made against him in the amended complaint. As a result, the Court liberally treated the correspondence as an answer to the amended complaint, and directed the Clerk to so file it on January 12, 2016. Via letter from the Clerk's Office, Mr. Roberson was instructed to file an amended answer within fourteen days that—paragraph by paragraph—explained why he felt the Trustee's position was incorrect factually and as a matter of law. He was also instructed that his wife and co-defendant, Ms. Roberson, must also file a proper answer to the amended complaint.

The correspondence construed by the Court as Mr. Roberson's answer to the amended complaint also makes no mention of this Court's jurisdiction. Nevertheless, on January 26, 2016, rather than file an amended answer to the amended complaint, Mr. Roberson filed the motion to dismiss for lack of personal jurisdiction that is the subject of this order. Mr. Roberson's motion also requests a one hundred twenty day

extension of all deadlines for Stacy Roberson to obtain counsel and prepare an adequate defense. The Trustee responded to Mr. Roberson's motion, alleging that Mr. Roberson had waived any argument that the Court lacked personal jurisdiction against him by not including the argument in his answer to the complaint. The Trustee also filed a request for Clerk's entry of default against Ms. Roberson, who had not filed an answer to the amended complaint. Soon thereafter, Ms. Roberson filed a motion to dismiss that is identical to Mr. Roberson's; it also seeks the lengthy extension of all deadlines. Pending resolution of the motions to dismiss, the Court directed the Clerk to not enter default against Ms. Roberson.

## **II. Factual Allegations**

The amended complaint, highly summarized, generally alleges an all too common scenario: older parents become deceased or infirm, no formal probate or accounting of caretaker expenditures is undertaken, and some years later the adult children dispute what happened with the funds from the parents' estate. Fortunately, the Roberson family tree is not as complicated as some—William Roberson was married to Betty Roberson, and they had two children, namely Bradley Roberson and Tara Roberson. A brief time line of events as alleged by the Trustee is necessary to the analysis below.<sup>4</sup>

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<sup>4</sup> The facts laid out in this section are taken from the Trustee's amended complaint, as those facts have not been controverted by either Bradley or Stacy Roberson in their motions to dismiss. *See Ten Mile Indus. Park v. W. Plains Serv. Corp.*, 810 F.2d 1518, 1524 (10th Cir. 1987) ("In ascertaining the facts necessary to establish jurisdiction, the district court must accept as true the allegations set forth in the complaint to the extent they are uncontroverted by defendant's affidavits.

William Roberson owned real property at 431 Westchester Road, in Topeka, KS. In 2009, a transfer on death deed was recorded on that property by William and Betty Roberson, conveying the property to Tara Roberson at their death. At the same time, Betty Roberson executed a power of attorney, designating William Roberson as her attorney-in-fact and Tara Roberson as the alternate. Years later, on August 20, 2013, William Roberson passed away. At that point, title to the 431 Westchester property transferred to Tara Roberson via the transfer on death deed, and she held title in fee simple. Two days later, on August 22, 2013, Tara Roberson listed the property for sale, as Betty Roberson required assisted care and could no longer stay in the home. No sale of the property was made at that point, however.

About five months later, on January 18, 2014, Betty Roberson executed a new power of attorney in Topeka. The 2014 power of attorney appointed Bradley and Stacy Roberson as her co-attorneys-in-fact, authorizing them to make financial and health care decisions in Kansas and in the state of Washington on Betty's behalf. At some point thereafter, Betty Roberson relocated to Washington, where Bradley and Stacy Roberson lived. On January 31, 2014, Tara Roberson quit claimed the 431 Westchester property to Bradley Roberson for no consideration. Shortly thereafter, on February 20, 2014, Bradley and Stacy Roberson sold the 431 Westchester property for \$245,000 to unrelated buyers. (The Trustee alternatively alleges that the 431 Westchester property was sold, and that Defendants received funds in their capacity as co-attorneys-in-fact

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However, only the well pled facts of plaintiff's complaint, as distinguished from mere conclusory allegations, must be accepted as true." (internal citations omitted)).

for Betty Roberson.) After payment of the first and second mortgages, closing costs, and taxes, Bradley and Stacy Roberson received the net sum of \$38,430.17. This entire amount was deposited into Bradley and Stacy Robersons' joint account at Twin Star Credit Union in Olympia, Washington. The Trustee alleges that these funds were used, disbursed, converted, and spent for Bradley and Stacy Robersons' personal expenses, wants, and needs.

Betty Roberson had a bank account at CoreFirst Bank in Topeka and at Cottonwood Valley Bank in Cottonwood Falls, Kansas. At all times relevant, two monthly deposits were made into the Cottonwood Valley account:<sup>5</sup> \$1984 from Social Security and \$946.75 from KPERS, the Kansas retirement system. Beginning on February 1, 2014, Bradley and Stacy Roberson executed checks, drawn on Betty Roberson's Cottonwood Valley bank account, and deposited the funds in their Twin Star Credit Union account for their own personal expenses, wants, and needs. The checks were executed by Bradley Roberson and made payable to Stacy Roberson.

On June 30, 2015, Betty Roberson passed away. Between February 1, 2014 and January 2015, Bradley and Stacy Roberson drew checks on Betty Roberson's account for a total of \$32,084. The Trustee estimates \$46,737.75 was spent in this manner through June 2015. Bradley and Stacy Roberson continued to draw checks on the

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<sup>5</sup> The Trustee's amended complaint discusses Betty Roberson's two accounts and then states "this account . . . had two regular deposits . . ." As a result, it is unclear which account the Trustee is referring to. It is assumed from context clues, however, that the Trustee refers to the account at Cottonwood Valley Bank. Regardless, it is immaterial for analysis of the motions to dismiss which of the two Betty Roberson accounts had the monthly deposits.

Cottonwood Valley bank account until August 2015. The Trustee's amended complaint alleges additional facts concerning Tara Roberson's transfer of certain personal property to Bradley Roberson within the two years proceeding her bankruptcy petition, but these additional facts appear irrelevant to resolution of the current motions.

On January 15, 2015, Tara Roberson filed a Chapter 7 bankruptcy petition. The Trustee is now pursuing causes of action against Bradley and Stacy Roberson on Tara Roberson's behalf, alleging those causes of action are property of the bankruptcy estate.

### **III. Analysis**

#### **A. Personal Jurisdiction Generally**

The concept of personal jurisdiction requires that "the court must have jurisdiction over the defendant's person, his property, or the res that is the subject of the suit."<sup>6</sup> "[A] court without jurisdiction over the parties cannot render a valid judgment."<sup>7</sup> "Although plaintiff bears the burden of establishing personal jurisdiction over defendant, in the preliminary stages of litigation this burden is 'light' . . . [and] the plaintiff need only make a prima facie showing that jurisdiction exists."<sup>8</sup> "The plaintiff may make this prima facie showing by demonstrating, via affidavit or other written materials, facts that if true would support jurisdiction over the defendant. In order to

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<sup>6</sup> 4 Charles Alan Wright et al., *Federal Practice & Procedure* § 1063 (4th ed.).

<sup>7</sup> *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1090 (10th Cir. 1998).

<sup>8</sup> *Intercon, Inc. v. Bell A. Internet Cols., Inc.*, 205 F.3d 1244, 1247 (10th Cir. 2000) (internal citations and quotations marks omitted).



defeat a plaintiff's prima facie showing of jurisdiction, a defendant must present a compelling case demonstrating that the presence of some other considerations would render jurisdiction unreasonable.”<sup>9</sup> Although both of the Robersons challenge this Court's personal jurisdiction over them, because of the unique procedural posture of this adversary proceeding, the analysis for each differs, and each will be addressed separately.

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<sup>9</sup> *OMI Holdings, Inc.*, 149 F.3d at 1091 (internal quotation marks omitted).

To make her prima facie case, the Trustee submitted an affidavit in support of her opposition to Stacy Roberson's motion to dismiss. The affidavit did not, however, include a statement that it was “made on personal knowledge” or “show that the affiant . . . is competent to testify on the matters stated.” Fed. R. Civ. P. 56(c)(4); *see also Thompson v. Chambers*, 804 F. Supp. 188, 191 (D. Kan. 1992) (stating that if there are affidavits filed in support of contested facts when considering a motion to dismiss based on personal jurisdiction, those affidavits “must be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein”). As a result of these facial defects, the Court does not consider the Trustee's affidavit for resolving Ms. Roberson's motion to dismiss.

Because the Trustee's amended complaint is sufficiently detailed, however, and the facts therein are not controverted by the Robersons' motions, the Court relies on the facts alleged in the amended complaint to assess the motions to dismiss. *See Pytlik v. Prof. Resources, Ltd.*, 887 F.2d 1371, 1376 (10th Cir. 1989) (“In ascertaining the facts necessary to establish jurisdiction, the court must accept as true the allegations set forth in the complaint to the extent they are uncontroverted by the defendant's affidavits.” (internal citations omitted)); *Behagen v. Amateur Basketball Ass'n of USA*, 744 F.2d 761, 733 (10th Cir. 1984) (“The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits.”); *Am Land Program, Inc. v. Bonaventura Uitgevers Maatschappij, N.V.*, 710 F.2d 1449, 1454 (10th Cir. 1983) (analyzing the facts alleged in plaintiff's complaint, when assessing defendant's motion to dismiss based on personal jurisdiction, and noting that “the allegations of the complaint are taken as true to the extent they are not contradicted by affidavits;” if the defendant does counter with a sworn affidavit, then the plaintiff must support the allegations in their complaint with an affidavit or some other evidence of their own).

## **B. Waiver of the Personal Jurisdiction Argument by Mr. Roberson**

The Trustee contends that Mr. Roberson has waived his personal jurisdiction challenge, and it is true that “[a] defect in the district court’s jurisdiction over a party . . . is a personal defense which may be asserted or waived by a party.”<sup>10</sup> Rule 12(h)(1) of the Federal Rules of Civil Procedure states that a party waives the defense of lack of personal jurisdiction by “failing to either (i) make it by motion under this rule; or (ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.”<sup>11</sup>

As a result of Rule 12(h)(1)’s strictures, if the lack of personal jurisdiction defense is not made in a preliminary motion under Rule 12, is omitted from the answer, or is omitted from any permitted amendment to the answer, then the defense is waived. As stated by the leading treatise on federal procedure, if a “party wishes to raise any of these defenses [including lack of personal jurisdiction], that must be done at the time the first significant defensive move is made—whether it be by way of a Rule 12 motion or responsive pleading.”<sup>12</sup>

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<sup>10</sup> *Williams v. Life Sav. & Loan*, 802 F.2d 1200, 1202 (10th Cir. 1986).

<sup>11</sup> *Am. Fid. Assur. Co. v. Bank of New York Mellon*, 810 F.3d 1234, 1237 (10th Cir. 2016) (“Federal Rule of Civil Procedure 12(h)(1) provides that a party waives the defenses listed in Rule 12(b)(2)–(5), including lack of personal jurisdiction, Rule 12(b)(2), by failing to assert them in a responsive pleading or an earlier motion.”). Rule 12 is made applicable to bankruptcy via Federal Rule of Bankruptcy Procedure 7012.

<sup>12</sup> 5C Charles Alan Wright et al., *Federal Practice & Procedure* § 1391 (3d ed.).

In this case, the Trustee filed her complaint against Mr. Roberson on May 5, 2015. On June 7, 2015, Mr. Roberson, represented by counsel, filed his answer to that complaint. In his answer, Mr. Roberson asserted that service of the complaint had been made to the wrong address, but he did not raise the matter of personal jurisdiction. Mr. Roberson, through counsel, then participated in a scheduling conference with the Trustee, submitted a report of parties' planning meeting, and a scheduling order was entered. Discovery commenced by both parties (the docket notes indicate that initial disclosures were made in mid-July 2015, and subpoenas were issued in August 2015), and again, no personal jurisdiction defense was ever mentioned. Mr. Roberson's counsel then withdrew from his representation. The Trustee then filed an amended complaint two months later, on December 18, 2015, adding Ms. Roberson and additional counts to the complaint. After the Trustee requested and obtained a Clerk's entry of default against Mr. Roberson for his failure to answer that amended complaint, Mr. Roberson then submitted a lengthy, pro se "answer" to the amended complaint, setting out his version of the facts. Out of consideration to Mr. Roberson's pro se status,<sup>13</sup> the Court construed this pleading as an answer to the amended complaint, filed January 12, 2016. Yet again, however, no mention of personal jurisdiction was made in this pleading.

Mr. Roberson, therefore, either through counsel or proceeding pro se, actively

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<sup>13</sup> *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) ("A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers.").

participated in this litigation for eight months without raising personal jurisdiction. As a result, he has waived that defense under Rule 12(h).

The case law supports this result. The Tenth Circuit has explicitly found the defense of personal jurisdiction waived when a defendant fails to either timely file a motion to dismiss asserting that ground or raise the defense in an answer, even when the defendant later attempts to raise the defense.<sup>14</sup> And even if Mr. Roberson had not waived personal jurisdiction by not including the defense in his answer to the complaint or in his answer to the amended complaint, a party can implicitly waive the defense by participating in discovery and hearings or by waiting a significant period to submit a Rule 12(b)(2) motion.<sup>15</sup> The amended complaint did not raise anything that would give rise to a personal jurisdiction defense that was not available before<sup>16</sup>—and

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<sup>14</sup> *United States v. 51 Pieces of Real Property, Roswell, New Mexico*, 17 F.3d 1306, 1314 (10th Cir. 1994) (concluding that by filing a response to a motion for default judgment, the defendant waived its personal jurisdiction defense, and could not raise lack of personal jurisdiction in a later filed motion to dismiss).

<sup>15</sup> *Fabara v. GoFit, LLC*, 308 F.R.D. 380, 393 (D.N.M. 2015), as amended (Aug. 20, 2015).

<sup>16</sup> See 5B Charles Alan Wright et al., *Federal Practice & Procedure* § 1347 (3d ed.) (“[I]f the plaintiff has raised new matter in the amended complaint that may be vulnerable to one of the defenses enumerated in Rule 12(b), the defendant may assert that defense by a pre-answer motion or in the responsive pleading even if she did not assert it initially.”); *Artistic Stone Crafters, Inc. v. Safeco Ins. Co. of Am.*, No. CV 108-153, 2010 WL 317472, at \*3 (S.D. Ga. Jan. 25, 2010) (holding that an amended complaint gave rise to a Rule 12(b)(3) venue defense for the first time, and the defendants could therefore assert the defense in response to that amendment); *Sohns v. Dahl*, 392 F. Supp. 1208, 1220 n.7 (W.D. Va. 1975) (raising the issue, but not addressing, whether the defendant had waived a Rule 12(b)(3) venue objection prior to an amended complaint, as “the alleged defect of improper venue was not created by the new matter raised in plaintiff’s amended complaint”).

even if it had, Mr. Roberson answered the amended complaint without raising personal jurisdiction. No matter how you look at it, the personal jurisdiction defense is waived as to Mr. Roberson.

### **C. The Court's Personal Jurisdiction Over Ms. Roberson**

Ms. Roberson was just brought in to this lawsuit via the amended complaint on December 18, 2015, and is raising personal jurisdiction in her motion in lieu of an answer.<sup>17</sup> As a result, the Trustee does not argue that Ms. Roberson waived her assertion of the personal jurisdiction defense. The Court must therefore assess this Court's personal jurisdiction over Ms. Roberson through a multi-step process. Bankruptcy cases, because they derive from a comprehensive, nationwide federal statute, have a more expansive view of personal jurisdiction than some other types of cases<sup>18</sup> The Bankruptcy Code, via Federal Rule of Bankruptcy Procedure 7004, confers

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<sup>17</sup> The amended complaint was filed on December 18, 2015, and Ms. Roberson was served with an alias summons on January 13, 2016. Ms. Roberson's answer to the amended complaint was due, therefore, on February 12, 2016. Ms. Roberson did not timely file an answer, and the Trustee filed a request for a Clerk's entry of default against Ms. Roberson on February 17, 2016 (but did not show any service on either defendant of that request). The Court asked for that request to be mailed to both Mr. and Ms. Roberson, and the Trustee complied by filing a certificate of service showing the same. Shortly thereafter, on February 26, 2016, Ms. Roberson filed her motion to dismiss. The Court has requested the Clerk's Office to hold off on entering the Clerk's entry of default against Ms. Roberson while it assesses the current motion.

<sup>18</sup> See *Christensen v. Madsen (In re Madsen)*, No. UT-13-094, 2014 WL 4180846, at \*4 (10th Cir. BAP Aug. 25, 2014) ("Congress has exerted federal control over various aspects of economic relations by enacting comprehensive securities, antitrust, ERISA, and bankruptcy laws. These statutory schemes typically provide for nationwide service of process. In bankruptcy, Rule 7004 specifically permits service of a summons and complaint in an adversary proceeding anywhere in the

personal jurisdiction with a nationwide service of process provision, assuming its requirements are met. Rule 7004 states:

(d) Nationwide service of process

The summons and complaint and all other process except a subpoena may be served anywhere in the United States.

...

(f) Personal jurisdiction

If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code.

Despite this broad personal jurisdiction directive, however, the Tenth Circuit's case law requires more than just compliance with Rule 7004. Rather, the Tenth Circuit "requires that before 'a federal court can assert personal jurisdiction over a defendant in a federal question case, the court must determine (1) whether the applicable [federal] statute potentially confers jurisdiction by authorizing service of process on the defendant and (2) whether the exercise of jurisdiction comports with due process.'"<sup>19</sup>

The first step then is to determine whether Ms. Roberson was properly served under Rule 7004. Rule 7004 permits service by first class mail upon individuals at "the individual's dwelling house or usual place of abode."<sup>20</sup> Ms. Roberson was served by both

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United States.").

<sup>19</sup> *Klein v. Cornelius*, 786 F.3d 1310, 1317 (10th Cir. 2015) (quoting *Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1209 (10th Cir. 2000)).

<sup>20</sup> Fed. R. Bankr. P. 7004(b)(1).

first class and certified mail at 427 Milroy Street SW, Olympia, WA 98502. An alias summons was also served on Ms. Roberson at an alternate address at 4526 N. Larson Drive, Oak Harbor, WA 98277. Ms. Roberson was therefore served by first class and certified mail—a step above and beyond what is required by Rule 7004. The Trustee has, therefore, complied with the provisions of Rule 7004 for service.

Because Rule 7004’s nationwide service of process applies, the Court moves to the second step in determining Ms. Roberson’s personal jurisdiction challenge: namely, “whether the exercise of jurisdiction comports with due process”<sup>21</sup> The due process question asks whether the forum is “fair and reasonable to the defendant.”<sup>22</sup> The primary focus is “protecting an individual’s liberty interest in avoiding the burdens of litigating” in an unfair or unreasonable forum.”<sup>23</sup> The Tenth Circuit has addressed this issue in detail, and stated:

To establish that jurisdiction does not comport with Fifth Amendment due process principles, a defendant must first demonstrate that his liberty interests actually have been infringed. The burden is on the defendant to show that the exercise of jurisdiction in the chosen forum will make litigation so gravely difficult and inconvenient that he unfairly is at a severe disadvantage in comparison to his opponent.

However, . . . given the practical considerations emanating from the realities of contemporary litigation, any constitutional due process limitations upon a federal extraterritorial (nationwide) service of process statute must be broadly defined. Thus, in evaluating whether the defendant has met his burden of establishing constitutionally significant

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<sup>21</sup> *Klein*, 786 F.3d at 1317 (quoting *Peay*, 205 F.3d at 1209).

<sup>22</sup> *Peay*, 205 F.3d at 1212.

<sup>23</sup> *Id.* at 1211 (internal quotation marks omitted).

inconvenience, courts should consider the following factors: (1) the extent of the defendant's contacts with the place where the action was filed; (2) the inconvenience to the defendant of having to defend in a jurisdiction other than that of his residence or place of business, including (a) the nature and extent and interstate character of the defendant's business, (b) the defendant's access to counsel, and (c) the distance from the defendant to the place where the action was brought; (3) judicial economy; (4) the probable situs of the discovery proceedings and the extent to which the discovery proceedings will take place outside the state of the defendant's residence or place of business; and (5) the nature of the regulated activity in question and the extent of impact that the defendant's activities have beyond the borders of his state of residence or business.

We emphasize that it is only in highly unusual cases that inconvenience will rise to a level of constitutional concern. Certainly, in this age of instant communication and modern transportation, the burdens of litigating in a distant forum have lessened.

If a defendant successfully demonstrates that litigation in the plaintiff's chosen forum is unduly inconvenient, then jurisdiction will comport with due process only if the federal interest in litigating the dispute in the chosen forum outweighs the burden imposed on the defendant. To determine whether infringement on the defendant's liberty is justified sufficiently by government interests, courts should examine the federal policies advanced by the statute, the relationship between nationwide service of process and the advancement of these policies, the connection between the exercise of jurisdiction in the chosen forum and the plaintiff's vindication of his federal right, and concerns of judicial efficiency and economy.<sup>24</sup>

There are several takeaways from this Tenth Circuit jurisprudence. First, it is the defendant, Ms. Roberson's, burden to show that this Court's exercise of jurisdiction will place her at a severe disadvantage. Second, it is not mere inconvenience that must

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<sup>24</sup> *Id.* at 1212–13 (internal citations and quotation marks omitted). The *Peay* reasoning was followed by the Tenth Circuit BAP in *In re Madsen*, 2014 WL 4180846, at \*3–5 (reviewing the holding in *Peay* and instructing the bankruptcy court to apply its reasoning upon remand).



be shown, but rather the “highly unusual” case where the burden of litigating in this forum causes “constitutionally significant inconvenience.” And third, even if this burden is met, the exercise of jurisdiction may still be justified if there is a sufficient government interest.

Ms. Roberson’s motion to dismiss simply states that she lives outside the state of Kansas, that if she did have contacts with Kansas, they were not related to the claims against her, and that she made non annual visits to Kansas “only for a week or two.” Notwithstanding the matter that these “facts” are not made by affidavit,<sup>25</sup> these assertions are nowhere near the level needed to meet Ms. Roberson’s burden of proof. Ms. Roberson has not alleged, let alone shown, how her liberty interests will be infringed by participating in this adversary proceeding in Kansas. Merely stating that she does not live here and has not visited regularly is not sufficient. Ms. Roberson must instead show this Court that litigation here, as opposed to her home state, will be “gravely difficult and inconvenient.”<sup>26</sup> She has not even attempted to do so.

But even if she had made such an attempt, addressing the factors urged by the Tenth Circuit for considering “whether the defendant has met his burden of establishing constitutionally significant inconvenience,”<sup>27</sup> Ms. Roberson has not carried

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<sup>25</sup> Ms. Roberson could meet her burden through an affidavit or by putting on evidence at an evidentiary hearing. *Black & Veatch Constr., Inc. v. ABB Power Generation, Inc.*, 123 F. Supp. 2d 569, 572 (D. Kan. 2000).

<sup>26</sup> *Peay*, 205 F.3d at 1212.

<sup>27</sup> *Id.* (internal quotation marks omitted).

her burden. Regarding the first factor, Ms. Roberson's contacts with Kansas, the Trustee's amended complaint alleges causes of action stemming from the sale of the 431 Westchester property in Kansas, the use of the funds withdrawn monthly from Betty Roberson's Kansas bank accounts, and Ms. Roberson's exercise of fiduciary duty under the Kansas power of attorney she was granted. And while Stacy Roberson was not living in Kansas while engaged in these activities, they all originate in Kansas and deal with Kansas property, real and personal. Simply because they occurred electronically does not mean that they did not impact Kansas property and people.

The second factor, the inconvenience to Stacy Roberson of having to litigate in Kansas, rather than in her home state of Washington, is more sympathetic to Ms. Roberson. It would certainly be more convenient for Ms. Roberson to attend hearings in her home state. But, as Ms. Roberson presumably did when she was allegedly withdrawing funds from Betty Roberson's accounts in Kansas, many things can be done electronically. Most, if not all, discovery can be conducted via emailed documents or telephone, and many hearings at this Court can also be conducted with the parties appearing telephonically. As a result, the distance to a courthouse is not as large of a concern to the Court as it once was. And the fact that Ms. Roberson does not have an attorney would be just as true in Washington as in Kansas.

Regarding the third factor—judicial economy, it appears that conducting the adversary proceeding in this forum may be more efficient, as Tara Roberson's bankruptcy case has already been proceeding in this forum for some time. Even more importantly, the judge assigned to this matter has been managing the adversary

proceeding since its initial filing in May 2015 (including entering a Scheduling Order, granting authority to amend, granting some continuances, allowing counsel to withdraw, construing a letter as an answer, directing the Clerk not to enter default as to Ms. Roberson, reviewing the motions and briefs concerning jurisdiction, etc.), and thus has already developed some familiarity with the matter.

Regarding the fourth factor, the probable site of discovery proceedings, as noted above, most discovery can be handled electronically, whether by sending scanned documents back and forth by email, or conducting a deposition by telephone or video. And finally, the fifth factor, the nature of Ms. Roberson's activity and the impact of that activity beyond Ms. Roberson's home state of Washington, is closely related to the "contacts" question. Again, Ms. Roberson was not physically located in Kansas while she sold the 431 Westchester property or conducted Betty Roberson's affairs through her Kansas bank accounts, but these activities affected the real property in Kansas and were done under the Kansas power of attorney authority she was given. When analyzing these factors, Ms. Roberson has not carried her burden of showing the constitutional inconvenience required.

And out of an abundance of consideration for Ms. Roberson's pro se status, even if she had met her burden of showing constitutionally significant inconvenience, the federal interest in litigating this adversary proceeding in this forum is strong. The Bankruptcy Code strives to treat debtors and creditors fairly, and to do so it must have a national reach for property and persons affecting the bankruptcy estate, no matter

where situated.<sup>28</sup> Further, the amended complaint against Ms. Roberson is filed by the Trustee, in furtherance of garnering assets for Tara Roberson's bankruptcy estate creditors. Conducting the adversary proceeding in this forum assists the Trustee in that effort, and as noted above, is more efficient for the judiciary. "Where . . . Congress has provided for nationwide service of process, courts should presume that nationwide personal jurisdiction is necessary to further congressional objectives,"<sup>29</sup> and this Court so presumes here.

Even after all this, there is one more step. Another requirement for Rule 7004(f) to apply, is that the Court must also be assured that it has subject matter jurisdiction over this adversary proceeding, *i.e.*, is this "a case under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code."<sup>30</sup> The Trustee's amended complaint states five claims: 1) avoidance of fraudulent conveyance under § 548, 2) recovery of the avoided interest under §§ 550, 551, and 542, 3) accounting and turnover of documents under § 542 and Kansas statutes, 4) conversion of property and turnover, and 5) breach of fiduciary duty.

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<sup>28</sup> See *Kelley v. Nodine (In re Salem Mortgage Co.)*, 783 F.2d 626, 635 (6th Cir. 1986) (stating that "Congress wisely chose a broad jurisdictional grant and a broad abstention doctrine over a narrower jurisdictional grant so that the district court could determine in each individual case whether hearing it would promote or impair efficient and fair adjudication of bankruptcy cases.").

<sup>29</sup> *Peay*, 205 F.3d at 1213 (internal quotation marks omitted).

<sup>30</sup> Fed. R. Bankr. P. 7004(f); see also *Redhawk Global, LLC v. World Projects Int'l*, 495 B.R. 368, 373 (S.D. Ohio 2013) (stating that the Court must determine whether it has proper subject matter jurisdiction to hear the proceeding when applying Rule 7004's nationwide service of process).

First, Rule 7004 applies to core proceedings, i.e., those “arising under the Code”. Section 157(b)(2) of title 28 defines core proceedings, and the Trustee’s amended complaint cites subsections A, E, H, and O of that statute. Those subsections state that core proceedings are: “(A) matters concerning the administration of the estate,” “(E) orders to turn over property of the estate,” “(H) proceedings to determine, avoid, or recover fraudulent conveyances,” and “(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims[.]” In addition, the Tenth Circuit BAP has stated that core proceedings have no existence outside of bankruptcy, depend on bankruptcy laws for their existence, and could not proceed in another court.<sup>31</sup>

Second, Rule 7004 also applies to “related to” proceedings, which are those that “could have been commenced in federal or state court independently of the bankruptcy case, but the outcome of that proceeding could conceivably have an effect on the estate being administered in bankruptcy.”<sup>32</sup> To determine whether a matter is related to a bankruptcy case, courts focus on “whether the action potentially impacts administration of the bankruptcy estate.”<sup>33</sup> “Although the proceeding need not be

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<sup>31</sup> *Santander Consumer, USA, Inc. v. Houlik (In re Houlik)*, 481 B.R. 661, 674 (10th Cir. BAP 2012).

<sup>32</sup> *Personette v. Kennedy (In re Midgard)*, 204 B.R. 764, 771 (10th Cir. BAP 1997) (internal quotations omitted).

<sup>33</sup> *In re Houlik*, 481 B.R. at 674.

against the debtor or his property, the proceeding is related to the bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action in any way, thereby impacting on the handling and administration of the bankruptcy estate."<sup>34</sup>

The first two of the Trustee's claims—for fraudulent conveyance under § 548, and her derivative claim for recovery of the avoided transfer under §§ 550, 551, and 542—undoubtedly arise under the Code and are core proceedings. These claims are directly dependent on Bankruptcy Code sections for their existence and are designated as core under 28 U.S.C. § 157(b)(2)(H).

The Trustee's third claim is for an accounting of funds during the time Ms. Roberson acted as Betty Roberson's power of attorney under K.S.A. §§ 58-651 and 58-662, and for turnover of those account records under § 542. As the daughter of Betty Roberson, Debtor Tara Roberson is "an adult member of the principal's family" who may petition for an accounting by the attorney-in-fact (Stacy Roberson) if the principal (Betty Roberson) is deceased.<sup>35</sup> As the Trustee of Tara Roberson's bankruptcy estate, the Trustee may, therefore, pursue this claim on Tara Roberson's behalf. The claim is related to the Trustee's fourth and fifth claim: for conversion of property and breach of fiduciary duty, both again directed at Stacy Roberson's actions against Betty Roberson's property. The Trustee, standing in the shoes of Betty Roberson's heir, Tara

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<sup>34</sup> *Gardner v. United States (In re Gardner)*, 913 F.2d at 1518 (internal citations and quotations omitted).

<sup>35</sup> K.S.A. § 58-662(a).

Roberson, is attempting to expand the scope of the funds held by the bankruptcy estate, and if she is successful, then Debtor Tara Roberson's creditors will directly benefit. This potential distribution to creditors would certainly have an impact on the handling and administration of the bankruptcy estate. As a result, the Court finds that the Trustee's final three claims are related to Debtor Tara Roberson's bankruptcy case.

The Court's analysis is lengthy, but it is confident of its result. Ultimately, the Court is satisfied that Rule 7004's nationwide service of process applies to Ms. Roberson, and that, as a result, her motion to dismiss should be denied.<sup>36</sup>

#### **IV. Conclusion**

The Court denies Mr. Roberson's motion to dismiss,<sup>37</sup> because the argument upon which it is based has been waived. Likewise, the Court denies Ms. Roberson's

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<sup>36</sup> The Trustee contends that Ms. Roberson is subject to this Court's jurisdiction in two ways: 1) the Kansas power of attorney statute states that persons acting pursuant to a power of attorney governed by that statute "with respect to matters relating to acts and transactions of the attorney in fact . . . performed in this state, performed for a resident of this state, or affecting property of this state" are subject to personal jurisdiction in Kansas, K.S.A. 58-663(b), and 2) the Kansas long-arm statute grants this Court personal jurisdiction because of Ms. Roberson's minimum contacts with Kansas. Because the proper analysis does not require resort to Kansas law, but instead originates under Rule 7004, this Court will not address the Trustee's arguments. *See Redhawk Global, LLC v. World Projects Intern'l*, 495 B.R. 368, 372 (S.D. Ohio 2013) (stating that the personal jurisdiction analysis "does not require a state long arm statute analysis when a district court exercises federal question jurisdiction and the underlying action stems from a federal statute providing for nationwide service of process"); *see also In re Madsen*, 2014 WL 4180846, at \*4 (applying Rule 7004's nationwide personal jurisdiction analysis on appeal rather than the analysis utilized by the parties and bankruptcy court).

<sup>37</sup> Doc. 53.

motion to dismiss,<sup>38</sup> because she has not carried her burden to show constitutionally significant inconvenience from litigating in this forum.

In the alternative to the dismissal of the Trustee's Amended Complaint, both Mr. and Ms. Roberson have requested a one hundred and twenty day extension of all deadlines for Ms. Roberson to obtain counsel and prepare her defense. But the Court sees no reason to further delay this adversary proceeding. Mr. Roberson has been involved in this litigation for eleven months, and Ms. Roberson was served with the amended complaint three months ago. The Court therefore denies their alternate request for an extension of deadlines. Under Rule 12(a)(4)(A), both Mr. and Ms. Roberson should file a detailed answer to the Trustee's amended complaint within fourteen days of the date of this Order.<sup>39</sup> The Court further requests that the Trustee email a copy of this Order to the Robersons at the email addresses contained in their most recent pleadings since as unrepresented Defendants and non-debtors, they are

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<sup>38</sup> Doc. 66.

<sup>39</sup> As this Court has previously stated, a proper answer addresses head on each factual assertion made in a complaint, answering numbered paragraph by numbered paragraph and by specifically indicating whether the defendant admits, denies, or has insufficient knowledge to admit or deny each allegation. If either Mr. Roberson or Ms. Roberson do not timely file such an answer to the amended complaint **by April 20, 2016**, then the Clerk will at that time enter default against Ms. Roberson and the Trustee is permitted to seek default judgment against both defendants by filing a motion for default judgment against each. The Robersons may file a joint answer, signed by each, that complies with this directive. Since neither of the Robersons have disclosed they are admitted to practice law, they are prevented from answering or filing pleadings on behalf of the other pursuant to D. Kan. LBR 9010.1. Copies of all local rules can be found on the Court's website, and these Defendants are required to know and follow those rules, as well as the Rules of Civil Procedure and Bankruptcy Procedure.



not able to receive electronic mail from the Court.<sup>40</sup>

**It is so ordered.**

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<sup>40</sup> These are the addresses shown on recent pleadings: sroberson33@hotmail.com and bcroberson67@gmail.com. This request does not extend to future pleadings; the Trustee is only required to serve pleadings in the future on these Defendants as required by the Federal Rules. The Court has requested the Trustee email this Order since the Court does want to be sure the Defendants get the full benefit of the fourteen day answer period. The Court further strongly encourages these Defendants to retain counsel to assist them—a recommendation that is made to all self-represented parties.