

NATURE OF THE CASE

*This is an adversary proceeding (contested matter) (set forth a brief general statement of the nature of the case; answer questions of who, what, where and why) _____.

IMPORTANT DATES

*State the following important dates:

A. Date the bankruptcy case was filed. (If converted, state the date of conversion.)

A. Date the adversary proceeding was filed.

A. Date the contested matter was filed.

JURISDICTION AND VENUE

*The venue is properly laid in this District; the United States Bankruptcy Court for the District of Kansas has jurisdiction of the parties and the subject matter of this adversary proceeding (or contested matter), and all proper, necessary and indispensable parties are joined hereto.

[Caveat: Federal courts are courts of limited jurisdiction. An adversary complaint in federal court must plead jurisdiction to avoid dismissal under the "well-pleaded complaint rule" of federal practice. *Louisville & Nashville Railroad v. Mottley*, 211 U.S. 149 (1908); see also Fed. R. Civ. P. 8(a)(1) and Fed. R. Bankr. P. 7008(a). If jurisdictional allegations are challenged, they must be proved and the party invoking federal jurisdiction has the burden of proof. The Bankruptcy Code states that "The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection [28 U.S.C. § 157(b)] or is a proceeding that is otherwise related to a case under title 11." 28 U.S.C. § 157(b)(3). It follows that if a complaint (or perhaps a motion) fails to show subject matter

jurisdiction, the Court should dismiss the complaint on its own motion as directed by Fed. R. Bankr. P. 7012(h)(3) which states: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Of course, if the proceeding is a "related to" matter, submission to the district court with findings of fact and conclusions of law, rather than dismissal, is the result. Fed. R. Bankr. P. 9033.]

CONSENT TO FINAL ORDER

[If counsel believe that the proceeding is noncore, they may wish to consider whether to include the following consent.] The parties to the above-captioned adversary proceeding or contested matter consent under 28 U.S.C. § 157(c)(2) that the Court has jurisdiction to *hear* and *determine* this proceeding and enter appropriate orders and judgments subject to review as *final* under 28 U.S.C. § 158.

AMENDMENTS TO PLEADINGS

*There are no amendments to the pleadings.

(or)

* _____ amended his/her/its _____
_____ to allege _____.

DISPOSITIVE MOTIONS

*There are no dispositive motions to be filed.

(or)

* _____ will file dispositive motions by _____, 19__, and bring it/them to the Court's attention for ruling prior to trial.

STIPULATIONS

*The parties hereto stipulate and agree to the following facts:

A.

A.

A.

A.

The parties further stipulate and agree that the law governing
(the issue of) this case is _____

_____.

The parties further stipulate and agree that _____

_____.

THEORY(S) OF RECOVERY, CONTENTIONS, RELIEF SOUGHT & BURDEN OF PROOF

[You may combine into one section your statement of the THEORIES OF RECOVERY, CONTENTIONS, BURDEN OF PROOF, STANDARD OF PROOF, and RELIEF SOUGHT. This section must enumerate any *statutes* your theory relies upon and list the elements of proof required to be proven under the theory. Be sure to negate any relevant matter that is not at issue. This helps assure the Court that counsel have dealt with questions indispensable to the decision. As an EXAMPLE, in an action under § 523(a)(2), the plaintiff might state:]

PLAINTIFFS (OR MOVANTS)

*Plaintiff contends that prior to the filing of this Chapter 7 case on July 4, 1976, the defendant obtained credit from the plaintiff by credit card fraud. Plaintiff's claim for relief is therefore nondischargeable under 11 U.S.C. § 523(2)(A). Plaintiff bears the burden to prove by a preponderance of the evidence that:

A. Debtor made representations to the plaintiff;

- B. At the time the debtor knew the representations were false;
- C. The debtor made them with the intention and purpose of deceiving the creditor;
- D. The creditor relied upon such representations; and
- E. The creditor sustained loss and damage as the proximate result of the representations.

Creditor seeks an order of the Court determining its claim for relief to be nondischargeable under § 523(a)(2)(A). However, plaintiff has already received judgment on its cause of action in state court; therefore, it does not seek a money judgment against the defendant in this court. (Example of negating an issue that might otherwise be of concern to the Court.)

DEFENDANTS (OR OBJECTORS)

[You may combine into one section your statements of the THEORIES OF RECOVERY, CONTENTIONS, BURDEN OF PROOF, STANDARD OF PROOF, and RELIEF SOUGHT. This section must enumerate any statute your theory relies upon and list the elements of proof required to be proven under the theory. Be sure to negate any matter that is not at issue. This helps assure the Court that questions indispensable to the decision are dealt with. For an EXAMPLE of the statement see the comment above under "Plaintiff's (or Movant's) Theory."]

ISSUES

If the parties cannot agree upon a joint statement of the issues, each party may state its view of the issues separately.

*A. The issue(s) of fact remaining to be determined at the trial of this action (is)(are):

- 1.
- 2.
- 3.
- 4.

*B. The issue(s) of law remaining to be determined at the trial of this action (is)(are):

- 1.
- 2.
- 3.
- 4.

*C. Mixed issues of law and fact remaining to be determined at the trial of this action are:

- 1.
- 2.
- 3.
- 4.

QUESTIONS OF LAW

[If counsel agree that the controversy presented by this pretrial order can be decided as a matter of law without trial, they should enter a briefing schedule and state whether oral argument is requested. If oral argument is requested, the Clerk will schedule it when the time for filing briefs has expired. If the order does not request oral argument, counsel must state that the proceeding is submitted for decision so that the Clerk will know to prepare an under-advisement file and deliver it to the Court for decision.]

REMINDER OF COMPLIANCE

*Counsel are cautioned that failure to timely comply with

D. Kan. LBR 9072-1(b)(formerly D. Kan. Bk. Rule 9029.3) may result in a ruling that exhibits are not admissible in evidence. Counsel are directed to furnish the Court with copies of all exhibits not later than 72 hours before the date of trial, prefaced by an exhibit list in a form substantially in compliance with the form available from the Clerk's Office. When exhibits are numerous, the Court would prefer that they be submitted in a three-ring binder.

*The Court may choose not to consider briefs filed later than 72 hours prior to a scheduled trial.

PLAINTIFF'S EXHIBITS

*Plaintiff has identified the following exhibits which may be offered into evidence at the trial of this case:

	<u>Title of Document</u>	<u>Date</u>	<u>Number of Pages</u>
1.			
2.			
3.			
4.			

DEFENDANT'S EXHIBITS

*Defendant has identified the following exhibits which may be offered into evidence at the trial of this case:

	<u>Title of Document</u>	<u>Date</u>	<u>Number of Pages</u>
A.			
B.			

C.

D.

AUTHENTICATION OF EXHIBITS

*Not less than 15 days prior to trial [or as otherwise directed], each party shall serve upon each opposing party a legible copy of each exhibit to be offered as evidence in the trial. If any adverse party contests the authentication of any such exhibit, that party shall serve upon the proponent of the exhibit a written notice of intention not to waive authentication of the exhibit. The notice must be served not less than 7 days prior to trial. If such a notice of nonwaiver is served, the proponent of the exhibit must be prepared to comply with Fed. R. Evid. 901 at trial. In the absence of such a notice, Rule 901 objections are waived; however, all other objections to the receipt of the exhibit shall be reserved for the time of trial.

EXHIBIT SUMMARIES

*If counsel intend to use exhibit summaries as permitted by Fed. R. Evid. 1006, they must comply with the requirements of the rule by making the exhibits available for examination or copying, or both, by other parties at a reasonable time and place.

JUDICIAL NOTICE

*The Court will take judicial notice of *adjudicative facts* in accordance with Fed. R. Evid. 201. Subsection (d) permits the Court

to refuse to take judicial notice if the party making the request does not furnish the Court with the necessary information.

PLAINTIFF'S WITNESSES

*The names and addresses of witnesses plaintiff intends to call are:

	<u>Name</u>	<u>Address</u>
1.		
2.		
3.		
4.		

DEFENDANT'S WITNESSES

*The names and addresses of witnesses defendant intends to call are:

	<u>Name</u>	<u>Address</u>
1.		
2.		
3.		
4.		

SUMMARY OF TESTIMONY

*Each party shall attach to this order a concise summary of the anticipated testimony of all witnesses and other evidence that the party intends to offer at trial. This order will not be accepted without the witness summary attached.

LIST OF CASE CITATIONS

If the parties do not file pretrial briefs, they *must* list citations supporting each issue as follows:

A. Plaintiff lists the following case citations and authorities supporting its contentions or theories. List citations by identifying them with the appropriate issue somewhat as follows:

Issue #1: _____

Citation #1: _____

Citation #2: _____

Issue #2: _____

Citation #1: _____

Citation #2: _____

B. Defendant lists the following case citations supporting its contentions or theories. List citations by identifying them with the appropriate issue somewhat as follows:

Issue #1: _____

Citation #1: _____

Citation #2: _____

Issue #2: _____

Citation #1: _____

Citation #2: _____

ORDERS OF THE COURT

*A. Except by consent of the parties or by order of the Court

to prevent manifest injustice, exhibits not listed and not described in this order shall not be admitted into evidence and witnesses not named and whose address is not given in this order shall not testify except in proper rebuttal. Any party may offer the testimony of witnesses listed by any other party, and any party may offer into evidence exhibits listed by any other party.

*B. This order shall control the subsequent course of this action and shall not be modified except by order of the Court on its own motion or on motion of the parties to prevent manifest injustice.

*C. The Court finds that this case is at issue, all discovery is complete and the case is ready for trial.

*D. This case will be tried at Kansas City, Kansas.

*E. Trial will be to the Court.

*F. Estimated trial time: _____ days.

*G. Prospects for settlement: (Excellent) (Good) (Fair) (Poor).

*H. All counsel are directed to furnish the Court with an *IBM compatible 3½-inch computer disk* containing the contents of this order and any briefs filed in connection with the issues presented by this order. The files submitted on the computer disk should be written in WordPerfect 6.1 or a word processing application that can be readily converted to WordPerfect 6.1

John T. Flannagan

Bankruptcy Judge

APPROVED:

Final Pretrial Conference Order
Cover Sheet
December 1, 1995

This Cover Sheet for the Court's form of Final Pretrial Conference Order explains everything you wanted to know (and a lot you didn't want to know) about the practice before Judge Flannagan in adversary proceedings and contested matters. It also includes some reminders.

Adversary Proceedings

1.The Federal Rules of Civil Procedure apply in adversary proceedings. Fed. R. Bankr. P. 7001 *et seq.*

2.Federal Rules of Civil Procedure 16 and 26 also apply. Fed. R. Bankr. P. 7016 and 7026.

3.In adversary proceedings, the parties must conduct a *discovery conference* at least 14 days before a Scheduling Conference (often referred to informally by the personnel of this Court as a "Pretrial Conference") required by Rule 16(b). Fed. R. Civ. P. 26(f). At the discovery conference, the parties must develop a discovery plan setting out the parties' views and proposals concerning matters specified by the rule. A *written report* outlining the discovery plan must be submitted to the Court within 10 days after the meeting. Form 35 appended to the Federal Rules of Civil Procedure embodies what should be in the report.

4.The Clerk must schedule a Scheduling Conference in all adversary proceedings within the time requirements of Rule 16(b).

5.The Court will conduct most Scheduling Conferences off the record and in chambers, but a court reporter will always be present to record rulings and settlements and to honor any request by counsel for a record of the proceeding.

6.At the Scheduling Conference, the Court must confer with the parties, consider their written report, and enter a Scheduling Order that limits the parties' time to accomplish those steps listed in the rule. Fed. R. Civ. P. 16(b). The Court must issue the Scheduling Order "as soon as practicable but in any event within 90 days after the appearance of the defendant and within 120 days after the complaint has been served on a defendant."

7.In this Court, counsel must submit the written report outlining the discovery plan in the form of a Scheduling Order containing the

information in Form 35 of the Federal Rules of Civil Procedure. The Scheduling Order must also name the counsel responsible for preparing and filing the Final Pretrial Conference Order and state the date by which it must be filed. If the Scheduling Order is in proper form when it is presented to the Court at the Scheduling Conference, the Court will sign and file the order to fulfill its scheduling obligation under Rule 16(b).

8. After the Scheduling Conference, the Clerk will send each party a copy of the completed Scheduling Order and the Court's suggested form for the Final Pretrial Conference Order.

9. When counsel present the proposed Final Pretrial Conference Order for signature, the Court will sign the Final Pretrial Conference Order and direct the Clerk to schedule the proceeding for trial in the same manner as explained below under "Contested Matters."

10. For cause shown, counsel will be permitted to extend the date for filing the Final Pretrial Conference Order, but the moving party must request the extension by motion filed no later than the date originally set for filing the Final Pretrial Conference Order.

11. If counsel agree that the controversy presented by a pretrial order presents a matter of law that can be decided without trial, they should enter a briefing schedule in the order and state whether they want oral argument. If they want oral argument, the Clerk will schedule it for a date after the time for filing briefs has expired. If counsel do not want oral argument, they must state that the proceeding is submitted for decision. The Clerk will then prepare an under-advisement file and deliver it to the Court for decision.

Contested Matters

1. Unless otherwise ordered by the Court, the meeting, disclosure, and reporting procedures for adversary proceedings outlined above are not required in contested matters. (D. Kan. LBR 7026-1; formerly Standing Order 94-2).
2. When the Court does not resolve or continue a contested matter at the general docket, the Clerk will assign the matter a date for a Scheduling Conference. At the request of counsel or on its own motion, the Court may order that the parties comply with Rules 16(a) and 26(f) before the Scheduling Conference. If so, counsel must follow the procedures outlined above for adversary proceedings. They must submit the written report outlining the discovery plan in the form of a Scheduling Order containing the information in Form 35 of the Federal Rules of

Civil Procedure. It must include the name of counsel responsible for preparing and filing the Final Pretrial Conference Order and the date by which it must be filed.

3. If the Court does not order the parties to comply with the Rule 26(f), it will complete its own Scheduling Order at the Scheduling Conference, provided the particular contested matter merits such an order. At a minimum, the Court's Scheduling Order will set a deadline for completion of discovery, order a preliminary exchange of witness lists and exhibit lists, fix the responsibility for preparing the Final Pretrial Conference Order, and establish a date for its filing.
4. After the Scheduling Conference, the Clerk will send each party a copy of the completed Scheduling Order and the Court's suggested form of Final Pretrial Conference Order.
5. The Court will conduct most Scheduling Conferences off the record and in chambers, but a court reporter will always be present to record rulings and settlements and to honor any request by counsel for a record of the proceeding.
6. Because of time demands, the Clerk will set Scheduling Conferences at 15- minute intervals. Since the parties settle 90% of the adversaries and contested matters brought to conference, the Court cannot justify spending more time on each matter. However in such a short time period, the Court cannot explore the issues in detail. Consequently, the Court often receives proposed Final Pretrial Conference Orders that are inadequate. When this occurs, the Court will (1) contact the parties about making corrections to the Order, or (2) schedule another conference to correct the deficiency before signing the Order and setting the matter for trial on the *stacked trial docket*. This conference may be by telephone, depending on the complexity of the litigation.
7. The Court requires a Final Pretrial Conference Order in every adversary proceeding and contested matter.
8. Even in those situations where the Court can decide the issues as a matter of law, the parties must submit a Final Pretrial Conference Order that stipulates to the facts in sufficient detail to allow a decision. This requirement applies even when the parties file motions for summary judgment. The Court makes this requirement because it often experiences motions for summary judgment that present two or more fact versions, resulting in a waste of the Court's time reading the motions and attachments only to find that there are genuine issues of

material fact which prevent granting summary judgment.

Stacked Trials

1. When the Court has signed a Final Pretrial Conference Order, the Clerk will place the matter on a stacked trial docket. The Court will hear the matter when it reaches the top of the trial docket. This means that counsel must carefully monitor developments on the stacked trial docket to insure that witnesses are available for trial.
2. The Clerk will furnish counsel with an "Order For And Notice of Evidentiary Trial" and a letter explaining the stacked trial process.

Declaration Practice

1. In appropriate cases, the Court's Guidelines permit the use of declarations (affidavits) to present a witness' direct testimony, provided the witness is present in court for cross examination.
2. Counsel should become familiar with this procedure and use it whenever it will save the Court time. The procedure is especially helpful for presenting the testimony of valuation experts.

Reminders

1. Several points about federal jurisdiction in general and bankruptcy court jurisdiction in particular should be kept in mind, preferably at the pleading stage, but also at this later stage.
 - a. The federal courts are courts of limited jurisdiction. A complaint in federal court must plead jurisdiction to avoid dismissal under the "well pleaded complaint rule" of federal practice. *Louisville & Nashville Railroad v. Mottley*, 211 U.S. 149 (1908); see also Fed. R. Civ. P. 8(a)(1) and Fed. R. Bankr. P. 7008(a).
 - b. If jurisdictional allegations are challenged, they must be proved and the party invoking federal jurisdiction has the burden of proof.
 - c. The Bankruptcy Code states that "The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection [28 U.S.C. § 157(b)] or is a proceeding that is otherwise related to a case under

- title 11." 28 U.S.C. § 157(b)(3).
- d. It follows that if a complaint (or perhaps a motion) fails to show subject matter jurisdiction, the Court should dismiss the complaint on its own motion as directed by Fed. R. Civ. P. 12(h)(3) which states: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Of course, if the proceeding is a "related to" matter, submission to the district court with findings of fact and conclusions of law, rather than dismissal, is the result. Fed. R. Bankr. P. 9033.
2. Bankruptcy law is primarily statutory. In most instances, an adversary complaint or motion must allege title 11 sections justifying the requested relief.
 3. The Final Pretrial Conference Order should negate uncontested points or issues. Doing so informs the Court that issues it might otherwise be concerned about are not at issue and that the parties have not overlooked a consideration material to the decision.
 4. The parties must submit with the Final Pretrial Conference Order an *IBM compatible 3½-inch computer disk* containing the Order and any briefs filed in connection with the issues presented by the Order. The files submitted on the computer disk should be written in WordPerfect 6.1 or a word processing application that can be readily converted to WordPerfect 6.1
 5. Unless excused in advance by the Court, trial counsel must attend the final pretrial conference. The Scheduling Conference will often be the final pretrial conference.
 6. The parties should do a cost/benefit analysis on proceedings before the bankruptcy court. Often a party will not be able to afford the cost of proceeding, especially where he or she is pursuing a debt that will be uncollectible even if the party is successful in having it determined nondischargeable.
 7. When a complaint joins requests for relief under § 523 and § 727, plaintiff should advise the Court. The Court will decide on a case-by-case basis whether the joinder will advance the litigation in a just, speedy, and inexpensive manner. If not, the Court will split the proceedings for trial. Generally, the creditor's best interest is served by, and the Court's time preserved by proceeding on the § 523 matter first.
 8. The form of Final Pretrial Conference Order that accompanies

this cover sheet is designed so that some paragraphs must be included. Those mandatory paragraphs are marked with an asterisk ("*"). Other paragraphs are optional and may be deleted if not applicable. If counsel will furnish a blank *IBM compatible 3½ inch computer disk*, the Clerk will copy the form of Final Pretrial Conference Order in WordPerfect 6.1 to the disk and hold the disk for counsel to pick up.