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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	AZ-07-1145-KDN
)		
6	JAWAD MAHMOUD HASHIM)	Bk. No.	94-09453-CGC
)		
7	Debtor.)	Adv. No.	96-00668-CGC
)		
8	ARAB MONETARY FUND)		
)		
9	Appellant,)		
10)		
	v.)	OPINION	
11	JAFAR HASHIM; MARYAM SALASS;)		
12	ALI SALASS; JAWAD MAHMOUD)		
	HASHIM; JHH CANADIAN CAPITAL)		
13	CORPORATION; 1954920 NOVA)		
	SCOTIA LIMITED; MARK D.)		
14	HASHIMOTO, Chapter 7 Trustee;)		
	LOUIS A. MOVITZ, Chapter 7)		
15	Trustee; 1954933 NOVA SCOTIA)		
	LIMITED; WESTFALEN BANK)		
16	INTERNATIONAL, S.A.,)		
)		
17	Appellees.)		
)		

Argued and Submitted on October 25, 2007
at Phoenix, Arizona

Filed - December 6, 2007

Appeal from the United States Bankruptcy Court
for the District of Arizona (Phoenix)

Honorable Charles G. Case II, Bankruptcy Judge, Presiding

Before: KLEIN, DUNN and NEITER*, Bankruptcy Judges.

*Hon. Richard M. Neiter, Bankruptcy Judge for the Central
District of California, sitting by designation.

1 KLEIN, Bankruptcy Judge:
2

3 The appellant won a \$49.6 million judgment against the
4 debtor, followed him into bankruptcy court, and filed an
5 adversary proceeding to recover embezzled funds allegedly
6 transferred or concealed by the debtor, in which it named the
7 chapter 7 trustee as a defendant. The court declined to permit
8 appellant to maintain an action to recover for the benefit of the
9 estate and denied the trustee's motion to be realigned as
10 plaintiff real party in interest, leaving appellant only with
11 nonbankruptcy causes of action on which it did not prevail at
12 trial. We AFFIRM the result of trial, but REVERSE the pretrial
13 dismissal of the bankruptcy avoiding action counts.

14 If a court does not authorize a creditor under 11 U.S.C.
15 § 503(b)(3) to recover, for the benefit of the estate, property
16 that was transferred or concealed by the debtor, then Federal
17 Rules of Civil Procedure 17(a) and 19(a) require that the court
18 realign as plaintiff a bankruptcy trustee who is a defendant.
19

20 FACTS

21 Pertinent factual background appears in Arab Monetary Fund
22 v. Hashim (In re Hashim), 213 F.3d 1169, 1170-71 (9th Cir. 2000).

23 The debtor Jawad Hashim ("Hashim") was, from 1977 to 1982,
24 President and Director General of the Arab Monetary Fund ("AMF"),
25 an organization based in the United Arab Emirates designed as a
26 Middle Eastern Islamic counterpart to the International Monetary
27 Fund. At the end of his term, Hashim, his spouse Salwa Al-
28 Rufaiee ("Salwa"), and sons Jafar and Omar emigrated to Canada.

1 Hashim was prosecuted in the United Arab Emirates in
2 absentia for embezzlement, forgery, and criminal breaches of
3 trust, was convicted, and was ordered to pay the AMF \$80,539,412.

4 In 1988, the AMF initiated proceedings in England in the
5 High Court of Justice Chancery Division in which Hashim, his
6 spouse, and sons were among the defendants. Following a six-
7 month trial, judgment was entered in 1994 that directed Hashim to
8 pay the AMF \$49,648,110.83 in damages, plus \$83,501,716.94 in
9 interest fixed through July 14, 1994 ("English Judgment"). The
10 English court also made a lesser award against Salwa and
11 determined that their sons were wrongful recipients, and hence
12 constructive trustees, of various funds and properties traceable
13 to AMF funds, including cash and real estate in Canada.

14 Upon conclusion of the English litigation, Hashim moved to
15 Arizona, where Jafar already lived. The AMF filed an action in
16 the Maricopa County (Arizona) Superior Court to domesticate the
17 English Judgment, and the bankruptcy cases ensued.

18 Hashim filed a chapter 7 case in the District of Arizona on
19 October 24, 1994. Louis A. Movitz was assigned as bankruptcy
20 trustee. Hashim eventually waived his discharge.

21 Jafar Hashim filed a chapter 11 case on November 10, 1994,
22 which case was converted to chapter 7, with Mark Hashimoto
23 appointed as trustee. In April 2003, the court denied Jafar's
24 discharge.

25 The bankruptcy court's order sustaining an objection to
26 claim for costs based on the English Judgment was reversed by the
27 Ninth Circuit on a comity theory. Hashim, 213 F.3d at 1172-73.

28 As part of its efforts to trace funds, the AMF unearthed

1 information that JHH Canadian Capital Corporation ("JHH"), which
2 Hashim, Salwa, and Jafar formed in 1986, and of which Jafar
3 became sole owner, officer, and director in 1987, had received at
4 least \$511,451 of funds traceable to AMF that were used to
5 purchase interests in property. It also obtained information
6 that Jafar had created two Nova Scotia shell corporations,
7 1954933 Nova Scotia and 1954920 Nova Scotia, with Jafar's spouse
8 Maryam Salass as figurehead, to hide identities of investors in
9 Canadian properties from the AMF. It also identified a transfer
10 that had been made through Westfalen Bank International, S.A.
11 Luxembourg.

12 The AMF filed the eight-count complaint that is the basis of
13 this appeal on August 26, 1996, which appears to have been soon
14 after the information was developed. In addition to the Hashim-
15 related defendants, it named both bankruptcy trustees as
16 defendant parties.

17 18 1. Trustee Avoiding Powers

19 Four counts sought to recover for the bankruptcy estate
20 under Arizona's Uniform Fraudulent Transfer Act ("UFTA"), Ariz.
21 Rev. Stat. §§ 44-1001 to 44-1010, and 11 U.S.C. § 544.

22 As noted, the chapter 7 trustees were named as defendants.
23 The AMF explained that it was motivated to act in this fashion
24 because it was concerned that a statute of limitations might
25 expire with respect to transfers that had been concealed before
26 the respective trustees could decide whether to act.

27 On October 22, 1996, Hashim's trustee Movitz and the AMF
28 stipulated that the AMF could pursue avoidance actions on

1 Movitz's behalf because the AMF was better able to investigate
2 and prosecute avoidance actions than the trustee. The bankruptcy
3 court disapproved the stipulation on January 10, 1997. The
4 district court affirmed that decision.

5 Trustee Movitz, as real party in interest and defendant,
6 responded to the disapproval of the Movitz-AMF stipulation with a
7 motion filed February 13, 1997, pursuant to Federal Rules of
8 Civil Procedure 17(a) and 19(a), to be realigned as a plaintiff.

9 Trustee Movitz's motion to be realigned as a plaintiff on
10 the fraudulent transfer counts (counts III-VI) was not acted upon
11 until February 26, 1998, when the court denied the motion. That
12 denial was followed by a ruling issued March 12, 1998, granting a
13 motion to dismiss those four counts because the AMF lacked
14 standing to assert avoiding actions owned by the trustee. That
15 left for trial only the AMF's counts founded on Arizona common
16 law.

17 18 2. Common Law Counts

19 Trial on the four common law counts was held from September
20 2004 to April 2005. Findings were rendered on January 3, 2007.

21 The AMF alleged Arizona fraud¹ in Counts I (injunction) and
22

23
24 ¹The Arizona tort of fraudulent misrepresentation has nine
25 elements: (1) a representation; (2) its falsity; (3) its
26 materiality; (4) the defendant's knowledge of its falsity or
27 ignorance of its truth; (5) the defendant's intent that it should
28 be acted upon by the plaintiff and in the manner reasonably
contemplated; (6) the plaintiff's ignorance of its falsity; (7)
the plaintiff's reliance on its truth; (8) the plaintiff's right
to rely thereon; and (9) the injury proximately caused. Carrel
v. Lux, 420 P.2d 564, 568 (Ariz. 1966).

1 II (damages) and alleged an actionable Arizona common law
2 conspiracy to commit fraudulent conveyances in Counts VII
3 (damages) and VIII (declaratory judgment and injunction).²

4 The court ruled that Arizona law requires proof of all
5 elements of the common law causes of action by clear and
6 convincing evidence. Thus, the AMF, which does not appeal the
7 ruling, had to prove by clear and convincing evidence that the
8 source of funds in the various challenged transactions derived
9 from misappropriated AMF money.

10 The funds at issue are proceeds from sales of Don Mills Bowl
11 Shopping Centre ("Don Mills")³ and of Suite 803, Rosehill Avenue,
12 ("Suite 803"), Canadian properties that the English Court had
13 earlier determined were purchased with the AMF's funds.

14 In 1986, Don Mills and Suite 803 were sold. About
15 C\$1,750,000 of Don Mills proceeds were transferred to Tayeb,
16 supposedly as repayment of a loan. Thereafter, a holding
17 company, Landglaze Holdings, SA ("Landglaze"), loaned JHH
18 C\$1,500,000. The AMF contends that Tayeb controlled Landglaze
19 and that the loan was traceable to the Don Mills sale.

21 ²The Arizona action for conspiracy to commit fraudulent
22 conveyances has four elements: (1) fraudulent conveyance (made
23 with intent to hinder, delay, or defraud creditors); (2)
24 agreement between two or more persons to commit a fraudulent
25 conveyance; (3) damages resulting from the conveyance traceable
26 to the conspiracy; and (4) inadequate equitable remedies under
27 UFTA. Pearce v. Stone, 720 P.2d 542, 545 (Ariz. Ct. App. 1986);
28 McElhanon v. Hing, 728 P.2d 256 (Ariz. Ct. App. 1985).

³Don Mills was purchased in 1984 by Rosehill Trust, of which
Hashim and Salwa were trustees, and three trusts controlled by
Nezhet Tayeb ("Tayeb"), a Hashim associate. Suite 803 was
purchased in 1983 and sold by Salwa in 1986.

1 Suite 803 netted about C\$1,350,000, from which proceeds
2 C\$511,451 was given to Jafar as capital for JHH. The English
3 Court determined that JHH received at least C\$511,451 directly
4 traceable to proceeds from the sale of Suite 803.

5 At trial, while the parties agreed JHH was capitalized with
6 the Landglaze loan and Suite 803 proceeds, the appellees contend
7 that the AMF did not establish that Tayeb had funded Landglaze,
8 either with Don Mills proceeds, or otherwise.

9 In its findings, the court ruled that the AMF did not
10 establish by clear and convincing evidence its claims sounding in
11 fraud and conspiracy to commit fraudulent conveyances based on
12 the Don Mills and Suite 803 sales. As to Don Mills, the court
13 was not clearly convinced that AMF funds were used to purchase
14 assets or were shuttled to multiple overseas accounts. As to
15 Suite 803, it ruled that the evidence did not establish that the
16 AMF's damages exceeded the combined value of two properties the
17 AMF had already recovered (Chambly I and St. Luc).

18 The court, however, was persuaded by clear and convincing
19 evidence that Jafar made representations to the AMF about the
20 properties at issue that were false, that he knew were false, and
21 upon which he intended the AMF to rely. Evaluation of Jafar's
22 testimony was affected by the court's assessment of his lack of
23 credibility, which led it to announce it would give little weight
24 to any Jafar testimony not corroborated by other evidence.⁴

25
26 ⁴The court explained:

27 Jafar's testimony in these bankruptcy proceedings has, from
28 the beginning, been incomplete, misleading, vague,
(continued...)

1 In the presentation of its evidence, the AMF relied on a
2 forensic accounting expert witness, whose testimony was equivocal
3 about tracing Don Mills sale proceeds.⁵ The focus was on whether
4 money Tayeb received from the Don Mills sale then flowed through
5 Landglaze to JHH as a C\$1,500,000 loan for the purchase of
6 certain properties (Chambly II and Duke & William), and whether
7 Don Mills proceeds flowed through Landglaze for purchase of the
8 relevant share in the Yonge & Gamble property.⁶

9 Taking the expert's testimony together with circumstantial
10 evidence, the court concluded it was not persuaded by clear and
11 convincing proof that the Don Mills proceeds attributable to the
12 AMF were used to purchase other properties.

13 The court entered judgment in favor of the appellees on the
14 fraud and conspiracy to commit fraudulent conveyance claims

16 ⁴(...continued)

17 contradictory and outright false. Many reasons have been
18 given; he was unfamiliar with the court proceedings; he
19 didn't trust the AMF after the English Proceedings; he
20 didn't understand the questions; or perhaps he just lied.

21 ... The problem with a liar in court is that when he decides
22 to tell the truth, no one believes him.

23 (Mem. Decision at 22:2-9.)

24 ⁵"I don't know where Landglaze got its money from. I don't
25 even know that it came from Nezhnet Tayeb for that matter." Hr'g
26 Tr. 122:9-15, Dec. 2, 2004.

27 ⁶This share was in the name of HT Canadian Capital
28 Corporation ("HT"), which purchased a ten percent interest in
Yonge & Gamble, as a joint venture. HT was formed in March 1987
by Hashim and others (including Tayeb) and acquired by Jafar in
November 1988, who became HT's sole director, president, and
secretary. According to appellees, HT was an investment vehicle
acting on behalf of Landglaze for tax purposes. The AMF alleged
that HT was funded with Don Mills proceeds.

1 (Counts I, II, VII, and VIII) on April 5, 2007.

2 This timely appeal ensued.

3
4 JURISDICTION

5 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.
6 We have jurisdiction under 28 U.S.C. § 158(a)(1).

7
8 ISSUES

9 (1) Whether it was error to refuse to realign the bankruptcy
10 trustee as the real party in interest and plaintiff in the
11 adversary proceeding.

12 (2) Whether the court erred in not making certain inferences
13 from Jafar's testimony regarding the transactions at issue.

14 (3) Whether the court accorded appropriate evidentiary
15 weight to the testimony of plaintiff's forensic accountant.

16
17 STANDARDS OF REVIEW

18 Realignment of a party is reviewed de novo. Smith v. Salish
19 Kootenai Coll., 434 F.3d 1127, 1133 (9th Cir. 2006) (en banc);
20 Prudential Real Estate Affiliates v. PPR Realty, Inc., 204 F.3d
21 867, 872-73 (9th Cir. 2000), citing City of Indianapolis v. Chase
22 Nat'l Bank, 314 U.S. 63, 69 (1941); Standard Oil Co. v. Perkins,
23 347 F.2d 379, 382 (9th Cir. 1965).

24 We review findings of fact for clear error and conclusions
25 of law de novo. Carrillo v. Su (In re Su), 290 F.3d 1140, 1142
26 (9th Cir. 2002). A finding is clearly erroneous when, despite
27 evidence to support it, the reviewing court on the entire
28 evidence is left with the definite and firm conviction that a

1 mistake has been committed. Anderson v. City of Bessemer City,
2 470 U.S. 564, 573 (1985). Findings based on credibility receive
3 deference. Fed. R. Civ. P. 52(a), incorporated by Fed. R. Bankr.
4 P. 7052; Anderson, 470 U.S. at 573-75; Hansen v. Moore (In re
5 Hansen), 368 B.R. 868, 874-75 (9th Cir. BAP 2007).
6

7 DISCUSSION

8 We address the refusal to realign the bankruptcy trustee
9 from the status as a defendant to that of plaintiff before
10 turning to issues involved in the court's evaluation of the trial
11 evidence and the credibility of certain witnesses.
12

13 I

14 Bankruptcy trustee Movitz, who was a named defendant in the
15 complaint, made a motion to be realigned as a plaintiff because
16 he is the real party in interest. The specific relief requested
17 in the motion was an order: "realigning and designating, and/or
18 to the extent necessary and appropriate, adding the Trustee as a
19 Plaintiff." The denial of that motion is assigned as error.

20 Four salient factors affect our conclusion that the denial
21 of this motion was error. First, the bankruptcy trustee was a
22 named party defendant from the outset who was subject to the
23 realignment doctrine. Second, the AMF was eligible to be
24 authorized by the court under § 503(b)(3) to prosecute the
25 fraudulent transfer claims on behalf of the estate and in the
26 name of trustee Movitz, who had consented to the AMF's
27 prosecution. Third, prompt steps were taken to obtain the
28 agreement of trustee Movitz to seek permission for the AMF to

1 prosecute the action under § 503(b)(3). Fourth, prompt steps
2 were taken to realign Movitz as a party plaintiff following the
3 court's refusal to grant § 503(b)(3) permission.

4
5 A

6 Although no Federal Rule of Civil Procedure directly
7 provides for realigning parties, the well-settled realignment
8 doctrine underlies several rules, including, as relevant here,
9 Rules 17(a) and 19(a). Fed. R. Civ. P. 17(a), incorporated by
10 Fed. R. Bankr. P. 7017;⁷ Fed. R. Civ. P. 19(a), incorporated by
11
12
13

14 ⁷Rule 17(a) provides:

15 (a) Real Party in Interest. Every action shall be
16 prosecuted in the name of the real party in interest. An
17 executor, administrator, guardian, bailee, trustee of an
18 express trust, a party with whom or in whose name a contract
19 has been made for the benefit of another, or a party
20 authorized by statute may sue in that person's own name
21 without joining the party for whose benefit the action is
22 brought; and when a statute of the United States so
23 provides, an action for the use or benefit of another shall
24 be brought in the name of the United States. No action
25 shall be dismissed on the ground that it is not prosecuted
26 in the name of the real party in interest until a reasonable
27 time has been allowed after objection for ratification of
28 commencement of the action by, or joinder or substitution
of, the real party in interest; and such ratification,
joinder, or substitution shall have the same effect as if
the action had been commenced in the name of the real party
in interest.

26 Fed. R. Civ. P. 17(a). Rule 7017 provides an exception for the
27 provision in Rule 2010(b) permitting an action on a trustee's
28 bond to be brought in the name of the United States for the use
of the injured entity. Fed. R. Bankr. P. 2010(b) & 7017.

1 Fed. R. Bankr. P. 7019.⁸

2 Under the realignment doctrine, as explained by the Supreme
3 Court, when a person who should be plaintiff is not prepared to
4 participate in the action, the solution is to make that person "a
5 party defendant by process and he will be lined up by the court
6 in the party character which he should assume." Indep. Wireless
7 Tel. Co. v. Radio Corp. of Am., 269 U.S. 459, 468 (1926).

8 The doctrine articulated in Independent Wireless was a basis
9 for the provision in Rule 19(a) that if a "person should join as
10 a defendant but refuses to do so, the person may be made a
11 defendant." Fed. R. Civ. P. 19(a), adv. comm. note to 1937
12 adoption (citing Independent Wireless).

13 ⁸Rule 19(a) provides:

14 (a) Persons to be Joined if Feasible. A person who is
15 subject to service of process and whose joinder will not
16 deprive the court of jurisdiction over the subject matter of
17 the action shall be joined as a party in the action if (1)
18 in the person's absence complete relief cannot be accorded
19 among those already parties, or (2) the person claims an
20 interest relating to the subject of the action and is so
21 situated that the disposition of the action in the person's
22 absence may (i) as a practical matter impair or impede the
23 person's ability to protect that interest or (ii) leave any
24 of the persons already parties subject to a substantial risk
25 of incurring double, multiple, or otherwise inconsistent
26 obligations by reason of the claimed interest. If the
27 person has not been so joined, the court shall order that
28 the person be made a party. If the person should join as a
plaintiff but refuses to do so, the person may be made a
defendant, or, in a proper case, an involuntary plaintiff.
If the joined party objects to venue and joinder of that
party would render the venue of the action improper, that
party shall be dismissed from the action.

27 Fed. R. Civ. P. 19(a) (emphasis supplied). Rule 7019 provides
28 exceptions relating to lack of subject-matter jurisdiction and
improper venue. Fed. R. Bankr. P. 7019.

1 Until revised in 1966, however, Rule 19 contained terms such
2 as "indispensable," "necessary," and "joint interest" that were
3 criticized as unduly formalistic in a manner that "distracted
4 attention from the pragmatic considerations which should be
5 controlling." Id., adv. comm. note to 1966 amendments.

6 Two criticisms of the pre-1966 version of Rule 19 seem to
7 have replicated themselves in the present litigation. First,
8 there was what the Rules Advisory Committee described as the
9 "jurisdiction fallacy" in which some courts held that the absence
10 of an "indispensable" party deprived a court of jurisdiction to
11 adjudicate between the parties already joined. Second, there
12 appears to have been "undue preoccupation with abstract
13 classification of rights or obligations." Id. ("Defects in the
14 Original Rule"). These problems prompted the 1966 revision.

15 As reformed in 1966, Rule 19 continues to assume the
16 vitality of the realignment doctrine and emphasizes that the
17 purpose of the rule is to bring into the court all persons needed
18 in order to afford complete relief, which typically is equated
19 with the concept of a just adjudication. 7 CHARLES A. WRIGHT ET
20 AL., FEDERAL PRACTICE & PROCEDURE §§ 1601-04 (3d ed. 2001).

21 By joining the chapter 7 trustee as a party defendant in the
22 complaint commencing the adversary proceeding, the AMF invoked
23 the joinder provision of Rule 19(a). The AMF recognized that the
24 chapter 7 trustee was a person whose presence, in the context of
25 a trustee avoiding power, was needed in order to be able to
26 afford complete relief among those already parties. A necessary
27 consequence of making the trustee a party defendant was to
28 trigger the realignment doctrine, which required that the trustee

1 be regarded as a plaintiff.

3 B

4 Nor can the AMF be said to have been devoid of standing when
5 it invoked Arizona's UFTA. It had at least the minimum required
6 for constitutional standing. As the master creditor in the
7 bankruptcy case, it would be the main pecuniary beneficiary of a
8 successful avoiding action and would be adversely affected by a
9 lapse of the ability to obtain such a recovery. Indeed, the
10 bankruptcy court agreed that the AMF had such standing.

11 In addition, the AMF had standing to prosecute an Arizona
12 UFTA action in a nonbankruptcy court if there had not been a
13 bankruptcy case pending. UFTA provides a remedy that is
14 generally available to creditors, regardless of bankruptcy.

15 More important, the AMF also had statutory standing in
16 bankruptcy under § 503(b)(3)(B), which recognizes that creditors
17 may recover, for the benefit of the estate, property transferred
18 by the debtor and be compensated if court approval is obtained
19 before there is a recovery. 11 U.S.C. §§ 503(b)(3)(B) & (4).⁹

21 ⁹Section 503(b)(3)(B) provides:

22 (b) After notice and a hearing, there shall be allowed
23 administrative expenses ... including - (3) the actual,
24 necessary expenses, other than compensation and
25 reimbursement specified in paragraph (4) of this subsection,
26 incurred by - ... (B) a creditor that recovers, after the
court's approval, for the benefit of the estate any property
transferred or concealed by the debtor.

27 11 U.S.C. § 503(b)(3)(B).

28 (continued...)

1 The creditor-recovery provision of § 503(b)(3)(B) carried
2 forward a provision in the Bankruptcy Act of 1898 that authorized
3 administrative expense compensation: "where property of the
4 bankrupt, transferred or concealed by him either before or after
5 the filing of the petition, is recovered for the benefit of the
6 estate of the bankrupt by the efforts and at the cost and expense
7 of one or more creditors, the reasonable costs and expenses of
8 such recovery." Bankruptcy Act § 64a(1), 11 U.S.C. § 104(a)(1)
9 (redesignated from § 64b(2) in 1938) (repealed 1978).

10 Between 1898 and 1903, judges created the authority for
11 creditors to recover for the benefit of the estate. In 1903,
12 Congress added then-§ 64b(2) to the Bankruptcy Act. Chatfield v.
13 O'Dwyer, 101 F. 797, 799-800 (8th Cir. 1900); Simantob v. Claims
14 Prosecutor, LLC (In re Lahijani), 325 B.R. 282, 291-92 (9th Cir.
15 BAP 2005); In re Godon, Inc., 275 B.R. 555, 561 (Bankr. E.D. Cal.
16 2002); 3A JAMES WM. MOORE ET AL., COLLIER ON BANKRUPTCY ¶ 64.104 n.6
17 (14th ed. rev. 1975) ("COLLIER 14th ed.").

18 Creditors acting for the benefit of the estate were allowed
19 to sue in the name of the bankruptcy trustee. In re Kenny, 269
20

21 ⁹(...continued)
22 Section 503(b)(4) authorizes:

23 (4) reasonable compensation for professional services
24 rendered by an attorney or an accountant of an entity whose
25 expense is allowable under subparagraph (A), (B), (C), (D),
26 or (E) of paragraph (3) of this subsection, based on the
27 time, the nature, the extent, and the value of such
services, and the cost of comparable services other than in
a case under this title, and reimbursement for actual,
necessary expenses incurred by such attorney or accountant.

28 11 U.S.C. § 503(b)(4).

1 F. 54, 57 (W.D. Pa. 1920) (creditors "were the prosecutors of the
2 suit; the trustee's name being used simply as a legal
3 necessity"); Godon 275 B.R. at 562; cf. A.C. James Co. v.
4 Reconstr. Fin. Corp. (In re W. Pac. R.R. Co.), 122 F.2d 807, 808
5 (9th Cir. 1941); Australia v. MacDonald (In re Patterson-
6 MacDonald Shipbldg. Co.), 288 F. 546, 548 (9th Cir. 1923); Ohio
7 Valley Bank v. Mack, 163 F. 155, 156 (6th Cir. 1906); 3A COLLIER
8 14th ed. ¶ 62.29 [2.4].

9 An initial uncertainty regarding creditor recovery under
10 Bankruptcy Act § 64a(1) was what approval, if any, was needed in
11 order to qualify the creditor for reimbursement of expenses and
12 fees. It was early established that the trustee could give the
13 creditor permission. In re Stearns Salt & Lumber Co., 225 F. 1,
14 3 (6th Cir. 1915). Absent permission by the trustee, some courts
15 required judicial permission. In re Eureka Upholstering Co., 48
16 F.2d 95, 96 (2d Cir. 1931); Lahijani, 325 B.R. at 291 n.15.

17 Eventually, the settled practice became, as described in the
18 contemporaneous Collier treatise, that a creditor could file an
19 action and thereafter give the trustee an opportunity to
20 participate in the lawsuit:

21 Yet orderly administrative practice calls for a
22 qualification. It is primarily for the trustee to
23 decide whether the estate should embark on an attempt
24 to recover concealed or transferred assets. The right
25 to attorney's fees is, therefore, limited to cases in
26 which the services are rendered either before a trustee
has been appointed or in which a trustee has been given
an opportunity to intervene and has refused to do so,
even though the creditor is allowed to proceed in the
trustee's name.

27 3A COLLIER 14th ed. ¶ 62.29[2.4], at 1578 (footnotes omitted).

28 In the 1978 Bankruptcy Code, Congress codified the

1 Bankruptcy Act § 64a(1) practice by requiring in § 503(b) (3) (B)
2 that there be court approval of the action before there is a
3 recovery for which expenses and professional fees may be
4 compensated by the estate. 11 U.S.C. § 503(b) (3) (B). The
5 Bankruptcy Act practice, however, was otherwise unchanged.

6 Since the rule of construction regarding transition from the
7 Bankruptcy Act to the Bankruptcy Code is that judge-made
8 doctrines are presumed to be carried forward except to the extent
9 Congress indicated contrary intent, Kelly v. Robinson, 479 U.S.
10 36, 47 (1986), it follows that the above-quoted description from
11 the Collier treatise retains vitality with one modification: The
12 right to attorney's fees is, therefore, limited to cases in which
13 the services are rendered either before a trustee has been
14 appointed or in which a trustee has been given an opportunity to
15 intervene and has refused to do so, and [~~even though~~] the
16 creditor is allowed to proceed in the trustee's name.

17 Although § 503(b) (3) (B) is often described as a "prior
18 permission" requirement, precision requires sharper focus. The
19 statute does not mandate that judicial approval be obtained
20 before the action is filed. Rather, it authorizes administrative
21 expense awards only if the court approves the action before
22 recovery is obtained.

23 This temporal distinction in § 503(b) (3) (B) between filing
24 and recovery is important in the contexts of time bars and
25 actions pending in nonbankruptcy courts at the time of
26 bankruptcy. If judicial permission were to be essential before
27 an action could be filed, then a purpose of the statute easily
28 could be frustrated. Obtaining permission takes time and, if

1 resisted, can devolve into satellite litigation in which an
2 opponent's agenda could be to stall until after the action is
3 time-barred.¹⁰ Moreover, § 503(b)(3)(B) accommodates the
4 possibility that a creditor's UFTA action pending at the time of
5 bankruptcy may be removed to federal court.

6 While the standard - and better - practice is to obtain
7 permission before filing an action, such a requirement would be
8 dysfunctional when a creditor learns of facts supporting a
9 meritorious avoiding action too late to permit a trustee to
10 evaluate whether to sue before a time bar occurs or in the
11 situation where a creditor's avoiding action is pending at the
12 time of bankruptcy. For these reasons, § 503(b)(3)(B) permits
13 the action to be filed and permission to be obtained after
14 filing, but before recovery.

15 We are mindful that in our own decisions we have sometimes
16 referred to "prior" permission without being precise. E.g.,
17 Lahijani, 325 B.R. at 291; Com-1 Info, Inc. v. Wolkowitz (In re
18 Maximus Computers, Inc.), 278 B.R. 189, 197 (9th Cir. BAP 2002);
19 Hansen v. Finn (In re Curry & Sorensen, Inc.), 57 B.R. 824, 828
20 n.3 (9th Cir. BAP 1986). But, those occasions have not presented
21 the potentially short-fused time bar problem that is present in
22 this appeal. The Lahijani context was a remand to consider
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24 ¹⁰The act of filing an avoiding action that seeks to recover
25 for the benefit of the estate and that names the bankruptcy
26 trustee as defendant, who is eligible for realignment as a
27 plaintiff, does not offend 11 U.S.C. § 362(a)(3) as an "act ...
28 to exercise control over property of the estate." It would be a
strange result if the operation of the automatic stay barred the
filing of an action to preserve property of the estate in the
face of a looming time bar, thereby causing the estate to lose a
potentially valuable right.

1 whether to authorize such a recovery where the possibility had
2 not earlier been raised. In Maximus Computers, § 503(b)(3)(B)
3 was an unargued basis for affirming an otherwise defective trial
4 court decision. In Curry & Sorensen, we were dealing with a
5 challenge to issuance of corporate stock that did not affect
6 "property of the debtor" and the avoidance of which would have
7 had no effect on the estate. Curry & Sorensen, 57 B.R. at 829.

8 As none of these cases involved a creditor who sued in the
9 context of a looming time bar and named the chapter 7 trustee as
10 defendant, none makes a controlling holding on the question of
11 the stage at which § 503(b)(3)(B) judicial permission must be
12 obtained. Thus, although we wish we had used a pencil with a
13 sharper point when writing them, those decisions did not hold
14 that permission is required before an action is filed, despite
15 statutory language that permission is needed before recovery is
16 obtained. As the Supreme Court notes, "[i]t is to the holdings
17 of our cases, rather than their dicta, that we must attend."
18 Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 379 (1994).

19 Our controlling decision on the temporal question is
20 Spaulding Composites, in which we clarified that Curry &
21 Sorensen's reference to prior approval states what is plainly the
22 better practice but does not preclude requests for court approval
23 that are made after the complaint is filed. Liberty Mut. Ins.
24 Co. v. Official Unsecured Creditors' Comm. (In re Spaulding
25 Composites Co.), 207 B.R. 899, 904-05 (9th Cir. BAP 1997).

26 In short, even though a bankruptcy trustee may have a
27 superior claim to standing, the AMF was not without standing to
28 assert the Arizona UFTA causes of action on behalf of the estate

1 and could, after filing the complaint, seek and obtain permission
2 to prosecute the action for the benefit of the estate.

3
4 C

5 Recognizing that § 503(b)(3)(B) requires the court's
6 permission for a creditor to recover property for the benefit of
7 the estate in order to qualify for an administrative expense, the
8 AMF promptly obtained the agreement of bankruptcy trustee Movitz
9 that it should be allowed to prosecute the action. That
10 agreement was timely presented to the court.

11 Although arguments by the Hashim-related defendants¹¹ that
12 misconstrued our Curry & Sorensen decision apparently led the
13 court to reject the AMF-trustee § 503(b)(3)(B) litigation
14 agreement, that order is not questioned in this appeal.¹²

15 What matters about that order for our purposes is that the
16 action by the AMF to make the trustee a defendant in the initial
17 complaint and then promptly to obtain agreement of the trustee
18 was a correct strategy that immediately preceded the filing of
19 the motion to realign the trustee as a plaintiff.

20
21 D

22 The specific order now in question is the order denying the
23 motion to permit trustee Movitz to participate as a plaintiff.

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25 ¹¹Defendants may lack standing to choose who will be
26 prosecuting an action against them. Cf. Fondiller v. Robertson
27 (In re Fondiller), 707 F.2d 441, 442-43 (9th Cir. 1983)
(appellate standing); Maximus Computers, 278 B.R. at 198 (same).

28 ¹²The order rejecting the § 503(b)(3)(B) agreement is
inherently interlocutory and can be revisited on remand.

1 That motion was filed February 13, 1996, and denied February 26,
2 1997. The order also precipitated dismissal of the UFTA counts
3 from the complaint for want of the real party in interest.

4 The relevant rules are straightforward. Rule 17(a) requires
5 that the action be prosecuted in the name of the real party in
6 interest. The court, however, cannot dismiss for want of the
7 real party in interest until after the real party in interest has
8 been afforded an opportunity to ratify the commencement of the
9 action or join or substitute. Fed. R. Civ. P. 17(a). The motion
10 to have Movitz designated as a plaintiff operated as a
11 ratification of the AMF's commencement of the action.

12 Since trustee Movitz was already a party by virtue of having
13 been named as a defendant in the complaint in the manner
14 permitted by Rule 19(a), the correct procedural measure would
15 have been realignment as a plaintiff according to the realignment
16 doctrine outlined above. Fed. R. Civ. P. 19(a).

17 Moreover, in context, the court's rejection of the
18 § 503(b)(3)(B) litigation agreement between the AMF and the
19 trustee made it mandatory that the court honor Movitz's request
20 as bankruptcy trustee to become a plaintiff. He unquestionably
21 was the real party in interest within the meaning of Rule 17(a)
22 and was already a party by virtue of having been included as a
23 defendant under Rule 19(a) in the complaint.

24 The AMF took the correct procedural steps to deal with a
25 situation in which an action to recover property for the benefit
26 of the estate came to light while a time bar loomed. It filed
27 the action, naming the bankruptcy trustee as a defendant under
28 Rule 19(a). The combination of the realignment doctrine and the

1 real party in interest provisions of Rule 17(a) assured that the
2 estate would not lose the benefit of a potentially meritorious
3 avoiding action. This strategy was strictly according to the
4 book.

5 Since the trustee promptly agreed that the action should be
6 prosecuted for the benefit of the estate, this appeal does not
7 present the problem of what would happen if the trustee
8 repudiated the commencement of the action.

9 The Ninth Circuit's decision in United States ex rel. Wulff
10 v. CMA, Inc., 890 F.2d 1070, 1075 (9th Cir. 1989), upon which the
11 bankruptcy court relied, does not compel a different result. In
12 Wulff, a complaint that was amended to reflect an acquisition of
13 a cause of action by assignment did not relate back under Rule 15
14 where the action had been commenced in circumstances in which a
15 "party with no cause of action file[d] a lawsuit to toll the
16 statute of limitations and [eight months] later obtain[ed] a
17 cause of action through assignment." Wulff, 890 F.2d at 1075.
18 Although Wulff contained dictum indicating that Rule 17(a) should
19 not be used to circumvent a limitations period, that appeal did
20 not present a Rule 17(a) issue of ratification, substitution, or
21 joinder by the real party in interest. Nor had the plaintiff in
22 Wulff made the party that later assigned its rights a party under
23 Rule 19(a). Moreover, the Ninth Circuit has since clarified that
24 Wulff is an exception that does not trump Rule 17(a). Mutuelles
25 Unies v. Kroll & Linstrom, 957 F.2d 707, 712 (9th Cir. 1992).

26 In Kroll & Linstrom, the Ninth Circuit rejected the argument
27 based on Wulff that Rule 17(a) "ratification is improper if used
28 to defeat a statute of limitations." Kroll & Linstrom, 957 F.2d

1 at 712. Rather, it held that a trial court must accept a
2 ratification by a real party in interest and that the "function
3 of Rule 17(a) 'is simply to protect the defendant against a
4 subsequent action by the party actually entitled to recover, and
5 to insure generally that the judgment will have its proper effect
6 as res judicata.'" Id., quoting Fed. R. Civ. P. 17(a) adv. comm.
7 note. It proceeded to explain that a proper Rule 17(a)
8 ratification by a real party in interest requires that the
9 ratifying party, first, authorize continuation of the action,
10 and, second, agree to be bound by the result of the lawsuit. Id.

11 The court was presented with a realignment motion by the
12 bankruptcy trustee as real party in interest, in which the
13 trustee effectively authorized the continuation of the action and
14 agreed to be bound by the result of the lawsuit. In these
15 circumstances, the court was required to accept that ratification
16 and to realign the trustee as plaintiff.

17 Since the parties agree that a burden of preponderance of
18 evidence governs UFTA causes of action, instead of the clear and
19 convincing standard applicable to the common law actions that
20 were tried, the error was not harmless. Accordingly, the orders
21 denying the motion and dismissing the UFTA counts for lack of
22 standing must be reversed.

23 II

24 The AMF argues that the bankruptcy court erred in declining
25 to use Jafar's false testimony as a basis to make negative
26

1 evidentiary inferences or presumptions of fraud.¹³

2 In contrast, the appellees contend that the AMF confuses
3 inferences (which are permissive) with presumptions (which are
4 mandatory); and in this case, the court was permitted, but not
5 required, to draw inferences suggested by the AMF.

6 The bankruptcy court ruled that the AMF did not prove that
7 it was damaged as a result of the misrepresentations made by
8 Jafar because it did not prove by clear and convincing evidence
9 that its money was used to fund the various transactions even
10 though it recognized that Jafar was not a credible witness.

11 Findings of fact based upon credibility are given particular
12 deference on appeal. Anderson, 470 U.S. at 575. The reviewing
13 court must give due regard to the opportunity of the trial court
14 to judge of the credibility of witnesses. Fed. R. Civ. P. 52(a)
15 incorporated by Fed. R. Bankr. P. 7052; Fed. R. Bankr. P. 8013.

16 This deference is also given to inferences drawn by the
17 trial court. Beech Aircraft Corp. v. United States, 51 F.3d 834,
18 838 (9th Cir. 1995); Thiara v. Spycher Bros. (In re Thiara), 285
19 B.R. 420, 427 (9th Cir. BAP 2002).

20 Where there are two permissible views of the evidence, the
21 factfinder's choice between them is not clearly erroneous; this
22 applies to credibility-based findings and to findings based on
23 inferences from other facts. Anderson, 470 U.S. at 574.

24 Moreover, when findings are based on determinations
25 regarding credibility of witnesses, an even greater deference to

26
27 ¹³Because we defer to the trial court's assessment of the
28 evidence and do not perceive clearly erroneous findings of fact,
we need not address the portion of the AMF's argument discussing
such evidentiary issues as circumstantial evidence considered
through the "badges of fraud" and spoliation.

1 the trial court's findings is demanded because only the trial
2 judge is aware of variations in demeanor and tone of voice that
3 bear on one's understanding of and belief in what is said. Id.

4 Application of the foregoing deferential principles here
5 persuades us that the trial court did not clearly err in its
6 conclusion that the AMF did not prove that it was the source of
7 the funds in the various transactions.

8 Although the AMF argues that the court should have inferred
9 fraud from Jafar's false statements, the court did not do so.
10 The factfinder's choice between two permissible views of the
11 evidence cannot be said to be clearly erroneous. Id.

12 Unless we are definitely and firmly convinced that the court
13 erred, we will not set aside its judgment. The reviewing court
14 oversteps the bounds of its duty if it undertakes to duplicate
15 the role of the lower court. Id. at 573.

16 Accordingly, the court did not err in declining to draw
17 negative inferences and/or presumptions from Jafar's testimony in
18 rendering its judgment that the AMF was unable to prove its money
19 was used to fund the transactions at issue.

20
21 III

22 The AMF also contends that the court did not accord the
23 proper evidentiary weight to the expert's testimony and report in
24 tracing the AMF funds. The AMF argues that, even if the expert
25 could not demonstrate dollar-for-dollar tracing to prove that the
26 funds in question were derived from monies that Hashim had
27 misappropriated from the AMF, it still met its burden of proof
28 given the magnitude of fraud in this case and that the testimony

1 and report were uncontradicted. The reality is, however, that
2 the court was not persuaded.

3 Although the AMF contends that the court incorrectly
4 required proof to "a metaphysical certainty" that the Landglaze
5 funds were derived from AMF funds, the expert's testimony was
6 more equivocal ("I don't know where Landglaze got its money from.
7 I don't even know that it came from Nezhnet Tayeb for that
8 matter."). The court's assessment of this testimony does not
9 appear to constitute clear error.

10 The court held that, by relying entirely upon the equivocal
11 forensic accounting testimony, AMF did not prove the essential
12 element of fraud that it was damaged by misrepresentations.
13 While the court was troubled by the pattern of deceit in Jafar's
14 actions and previous testimony and recognized that fraud
15 typically is proved by circumstantial evidence, it reasoned that
16 the strength of such evidence in this case did not amount to
17 clear and convincing proof of the source of funds.

18 We are not persuaded that the court erred in its assessment
19 of the expert testimony and report in determining that the AMF
20 did not prove all applicable essential elements. We accord the
21 trial court, as finder of fact, deference. As such, we are not
22 definitely and firmly convinced that the court made a mistake in
23 the evidentiary weight it accorded to the AMF's expert witness.

24
25 CONCLUSION

26 The trial court did not err in concluding that the AMF did
27 not prove by clear and convincing evidence that it was the source
28 of the funds in the various transactions at issue. Affording the

1 requisite deference to the trial court's evaluation of testimony,
2 we perceive no clear error in its assessment of the testimony and
3 other trial evidence. The decision following trial on counts I,
4 II, VII, and VIII is AFFIRMED.

5 However, the court erred by refusing to realign the Hashim
6 case trustee as a plaintiff and real party in interest in counts
7 III-VI. Hence, we REVERSE the order denying that motion and the
8 ensuing order dismissing the UFTA claims, and REMAND for further
9 proceedings.

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