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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	
	)	BAP No. SC-09-1032-PaRMo
SCHWARZ PUBLISHING, INC.,	)	
	)	Bk. No. 07-02122
Debtor.	)	
<hr/>		
HAIDEE JOY,	)	
	)	
Appellant,	)	
	)	<b>MEMORANDUM<sup>1</sup></b>
v.	)	
	)	
GERALD H. DAVIS, Chapter 7	)	
Trustee; SCHWARZ PUBLISHING,	)	
INC.,	)	
	)	
Appellees.	)	
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Submitted Without Oral Argument  
on July 10, 2009<sup>2</sup>

Filed - August 4, 2009

Appeal from the United States Bankruptcy Court  
for the Southern District of California

Honorable Laura S. Taylor, Bankruptcy Judge, Presiding

<sup>1</sup> This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> In an order entered on July 7, 2009, the Panel determined that this matter was suitable for disposition without oral argument. Fed. R. Bankr. P. 8012; 9th Cir. BAP R. 8012-1.

1 Before: PAPPAS, RIEGLE<sup>3</sup> and MONTALI, Bankruptcy Judges.  
2

3 Creditor Haidee Joy ("Joy") appeals the bankruptcy court's  
4 Order Granting Trustee's Settlement With Michael Schwarz and  
5 Abandonment of Records. We AFFIRM.<sup>4</sup>  
6

7 **FACTS**

8 Debtor Schwarz Publishing, Inc. ("Schwarz Pub.") published  
9 the San Diego Jewish Times, at which Joy worked.<sup>5</sup> On April 30,  
10 2007, Schwarz Pub. filed a chapter 7<sup>6</sup> bankruptcy petition, and as  
11 required, filed its Statement of Financial Affairs. In answer to  
12 Question No. 3, the statement listed three separate payments made  
13 to Michael J. Schwarz ("Mr. Schwarz"), the President of Schwarz  
14 Pub., within one year of the bankruptcy filing, totaling  
15  
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17 <sup>3</sup> The Honorable Linda B. Riegler, United States Bankruptcy  
18 Judge for the District of Nevada, sitting by designation.

19 <sup>4</sup> In so doing, we note that we have considered each of  
20 Joy's pleadings. She filed several briefs captioned  
21 "continuation" briefs, and contended that those briefs were not  
22 additional briefs, which would be unauthorized under Rules 8009  
23 and 8010, but were merely continuations of properly filed briefs.  
24 While the rules do not allow for "continuation" briefs, because  
25 Joy appears pro se, we have exercised our discretion and  
26 construed her papers liberally. Ozenne v. Bendon (In re Ozenne),  
337 B.R. 214, 218 (9th Cir. BAP 2006).

27 <sup>5</sup> Joy argues that she was an employee at the San Diego  
28 Jewish Times rather than an independent contractor as the  
schedules provide. However, her precise employment status is not  
factually relevant to the issues she raises on appeal.

<sup>6</sup> Unless specified otherwise, all references are to the  
Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules  
of Bankruptcy Procedure, Rules 1001-9037.

1 \$17,500.<sup>7</sup> Additionally, in response to Question No. 23, which  
2 concerns withdrawals from a partnership or distributions by a  
3 corporation, Schwarz Pub. again listed the three payments to Mr.  
4 Schwarz, and noted the purpose of the distribution to him was  
5 “[r]epayment of monies loaned for corporate expenses—in lieu of  
6 compensation.” This gave rise to a potential preference action  
7 under § 547 to recover the \$17,500 paid to Mr. Schwarz.

8 On September 3, 2008, chapter 7 trustee Gerald H. Davis  
9 (“Trustee”) filed a Trustee’s Notice of Proposed Abandonment of  
10 Property.<sup>8</sup> In this document, Trustee proposed to abandon “all  
11 books and records of the Debtor” on the grounds that there “is  
12 little or no equity in the property for the estate.” Id. On  
13 September 8, 2008, Trustee filed a notice of his intention to  
14 settle the potential preference claim against Mr. Schwarz.

15 On October 6, 2008, Joy objected to the proposed settlement  
16 as well as the intention to abandon Schwarz Pub.’s business  
17 records, and requested a hearing. The matter was briefed, and on  
18 November 13, 2008, the bankruptcy court held a hearing on the  
19 proposed settlement and abandonment and the objection thereto.  
20 The Minute Order from the bankruptcy court reflects that both the  
21 settlement of the proposed preference action and the abandonment  
22 of business records were approved.

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24 <sup>7</sup> The payments were made on October 27, 2006, November 28,  
25 2006 and February 23, 2007.

26 <sup>8</sup> This document was not included in the excerpts of record;  
27 however, this Panel may exercise its discretion to consider  
28 pleadings appearing on the docket in the underlying bankruptcy  
case. FED. R. EVID. 201; O’Rourke v. Seaboard Sur. Co. (In re  
E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989).

1 Joy filed this timely appeal from the bankruptcy court's  
2 Minute Order on November 20, 2008. A final order granting  
3 Trustee's proposed settlement with Michael Schwarz and  
4 abandonment of the business records was entered on December 10,  
5 2008.

### 6 7 **JURISDICTION**

8 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
9 §§ 1334 and 157(b) (2) (F). We have jurisdiction pursuant to 28  
10 U.S.C. § 158.

### 11 12 **ISSUES**

13 1. Whether the bankruptcy court abused its discretion in  
14 granting Trustee's Settlement of a potential preference  
15 action with Mr. Schwarz.

16 2. Whether the bankruptcy court abused its discretion in  
17 granting Trustee's motion to abandon Schwarz Pub.'s business  
18 records.

### 19 20 **STANDARDS OF REVIEW**

21 The bankruptcy court's factual findings are reviewed for  
22 clear error, and its conclusions of law are reviewed de novo.  
23 Rule 8013; Educ. Credit Mgmt. Corp. v. Coleman (In re Coleman),  
24 560 F.3d 1000, 1003 (9th Cir. 2009).

25 We review a bankruptcy court's decision to approve a  
26 compromise for an abuse of discretion. Martin v. Kane (In re A&C  
27 Props.), 784 F.2d 1377, 1380 (9th Cir. 1986). A court's decision  
28

1 to authorize or deny abandonment under § 554 is reviewed for  
2 abuse of discretion. Johnston v. Webster (In re Johnston), 49  
3 F.3d 538, 540 (9th Cir. 1995).

4 "Under the abuse of discretion standard, we will not reverse  
5 the bankruptcy court unless we have a definite and firm  
6 conviction that it made a clear error in judgment." In re  
7 Brooks-Hamilton, 400 B.R. 238, 245 (9th Cir. BAP 2009) (citing  
8 Valley Eng'rs Inc. v. Elec. Eng'g Co., 158 F.3d 1051, 1057 (9th  
9 Cir. 1998)). "A court abuses its discretion if it does not apply  
10 the correct law or if it rests its decision on a clearly  
11 erroneous finding of material fact." Ho v. Dowell (In re Ho),  
12 274 B.R. 867, 871 (9th Cir. BAP 2002) (citing United States v.  
13 Sprague, 135 F.3d 1301, 1304 (9th Cir. 1998)).

## 14 15 DISCUSSION

### 16 I.

#### 17 Settlement of Potential Preference<sup>9</sup> Action

18  
19 <sup>9</sup> A brief word about preferences in bankruptcy. Joy has  
20 argued, both before the bankruptcy court and in her appellate  
21 briefs, that payment of the \$17,500 must have been illegal if the  
22 Trustee was able to go after it and get it back. This is not the  
23 case. It is a central policy of the Bankruptcy Code that  
24 creditors of equal priority should receive pro rata shares of the  
25 debtor's property. Begier v. I.R.S., 496 U.S. 53, 58 (1990);  
26 Endo Steel, Inc. v. Janas (In re JWJ Contracting Co., Inc.), 371  
27 F.3d 1079, 1081 (9th Cir. 2004) (quoting Danning v. Bozek (In re  
28 Bullion Reserve of N. Am., 836 F.2d 1214, 1217 (9th Cir. 1988)).  
By permitting a bankruptcy trustee to avoid certain preferential  
payments made by the debtor just prior to filing for bankruptcy,  
§ 547 prevents the debtor from favoring one creditor over others.  
In this way, Congress attempted to level the playing field for  
all creditors during a specified period of time prior to  
bankruptcy, and thus § 547 may be viewed as a protection to  
creditors. It does not imply that debtor's actions were illegal

(continued...)

1           When bankruptcy trustees enter into settlements or  
2 compromises, such agreements are subject to approval by  
3 bankruptcy courts following notice and a hearing. See Rule  
4 9019(a); Local R. Bankr. S.D. Cal. 9019-1. Although the  
5 bankruptcy court has wide latitude in approving compromise  
6 agreements, its discretion is not unlimited. Woodson v.  
7 Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610, 620 (9th  
8 Cir. 1988). Rather, bankruptcy courts may only approve the  
9 settlement if it is "fair and equitable" and "reasonable, given  
10 the particular circumstances of the case". In re A&C Props., 784  
11 F.2d at 1381. The bankruptcy court should also consider whether  
12 the compromise is in the best interests of the estate. CAM/RPC  
13 Elecs. v. Robertson (In re MGS Mktg.), 111 B.R. 264, 266-67 (9th  
14 Cir. BAP 1990).

15           In In re A&C Props., the court adopted four factors to aid  
16 bankruptcy courts in their determination of the "fairness,  
17 reasonableness and adequacy" of proposed settlement agreements:

- 18           (a) the probability of success in the litigation;
- 19           (b) the difficulties, if any, to be encountered in the  
20           matter of collection;
- 20           (c) the complexity of the litigation involved, and the  
21           expense, inconvenience and delay necessarily attending  
22           it; and
- 21           (d) the paramount interest of the creditors and a proper  
22           deference to their reasonable views in the premises.

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23  
24           <sup>9</sup>(...continued)  
25 or improper, but were merely violative of Congress' bright line  
26 timetable for pre-petition payments. Thus, because the payments  
27 made to Mr. Schwarz occurred during the relevant reach back  
28 period, the Trustee alleged they were preferential, and thereby  
avoidable as a matter of bankruptcy law, but not necessarily  
improper or illegal. In fact, outside of bankruptcy, preferring  
a creditor is not only legal, it is expressly authorized by  
California law. See CAL. CIV. CODE § 3432.

1 In re A&C Props., 784 F.2d at 1381. The trustee bears the burden  
2 of proving that the compromise is fair and equitable. Id.

3 In this case, the bankruptcy court specifically considered  
4 each of the In re A&C Props. factors, and concluded that the  
5 settlement met that standard. We agree.

6 A. Success in the Litigation.

7 Mr. Schwarz contended that payments totaling \$17,500 were  
8 salary payments, as opposed to reimbursement of loaned amounts as  
9 Schwarz Pub. provided in its Statement of Financial Affairs.  
10 Thus, the very status of the money was in question, and Trustee  
11 would have to resolve that issue before the preference action  
12 could be decided. This generates a certain amount of uncertainty  
13 with regard to Trustee's likelihood of success on the preference  
14 action. Accordingly, there was a risk of losing the preference  
15 action and success was uncertain.

16 B. Difficulty of Collection.

17 This factor is well-documented in the record. Mr. Schwarz  
18 filed two affidavits in which he described, under oath, his  
19 financial situation. Having lost his job, his wife's salary  
20 combined with his unemployment benefits just barely covered their  
21 living expenses. He further stated that his home was over-  
22 encumbered, and thus could provide no equity upon which Trustee  
23 could rely for payment of a judgment. He stated that he borrowed  
24 the \$7,500 for the settlement payment.

25 Thus, the record supports the bankruptcy court's finding  
26 that, were the Trustee to obtain a judgment, any collection of  
27 the judgment amount would present a significant challenge.

28

1           C. Complexity, Expense and Delay.

2           While it appears that this particular preference action  
3 would not be overly complex, it would require a trial. There  
4 would also necessarily be a certain amount of discovery and  
5 document production that would take place, particularly on the  
6 issue of whether the payments were reimbursement or salary.

7           Taking a preference action to trial would inevitably cost  
8 creditors, both in terms of expense and delay. Creditors, of  
9 course, wish to receive the maximum payment they are owed in the  
10 shortest possible time. Thus, Trustee must strive to arrive at  
11 that balance. While he might be able to obtain a judgment from  
12 the bankruptcy court for the full \$17,500, it would arrive months  
13 later, and after the costs of discovery, trial preparation, and  
14 trial had been incurred. Here, Trustee estimates that it would  
15 cost \$5,000 - 7,500 to try the preference action.

16           And even after successfully prosecuting the preference  
17 action, all Trustee would have in hand is a paper judgment.  
18 Converting that judgment into cash with which to pay creditors,  
19 and lawyers, would likely not be easy, given Mr. Schwarz'  
20 financial situation, nor would it be instantaneous. It requires  
21 time and money to ferret out assets and convert those assets into  
22 cash. And from any cash obtained, all approved professional  
23 costs would be deducted before creditors were paid.

24           Finally, while the delay cannot be effectively reduced to a  
25 dollar amount, to most creditors a dollar today is worth more  
26 than one received next year. This delay must also factor into  
27 Trustee's decision to settle.



1           D. Interests of Creditors.

2           Finally, the bankruptcy court is to consider the paramount  
3 interests of the creditors. It is a bankruptcy trustee's job to  
4 maximize the value of the bankruptcy estate, which in turn  
5 maximizes the payment to creditors. A trustee's compensation is  
6 a direct reflection of the amount he or she distributes to  
7 creditors from the bankruptcy estate. § 326. Thus, there is  
8 proper motivation to bring as much into the estate as possible.  
9 However, as noted above, all approved expenses incurred are  
10 subtracted from the estate before payout, so minimizing expenses  
11 is also a valid consideration. Here, Trustee was able to secure  
12 a cash settlement totaling approximately 43 percent of the total  
13 payments made to Mr. Schwarz, with a minimum of expenses incurred  
14 and very little delay.

15           The Panel finds that the bankruptcy court properly  
16 considered the In re A&C Props. factors, and that there is a  
17 basis in the record for its finding that the settlement agreement  
18 at issue satisfied those factors. Thus, we hold that there was  
19 no abuse of discretion and affirm the bankruptcy court's approval  
20 of the settlement.<sup>10</sup>

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23  
24           <sup>10</sup> Joy raises numerous requests for this Court to subpoena  
25 various documents from both Schwarz Pub. and Mr. Schwarz.  
26 However, such requests need to be raised before the bankruptcy  
27 court, as it is the proper finder of fact. King v. Stanton (In  
28 re Stanton), 766 F.2d 1283, 1287 (9th Cir. 1985); Dolliver v.  
United States, 379 F.2d 307, 308 n. 1 (9th Cir. 1967). To the  
extent Joy may have sought such documentation from the bankruptcy  
court, she has not raised on appeal any allegation that the  
bankruptcy court erred in not requiring such production.

1 II.

2 **Abandonment of Business Records**

3 The Bankruptcy Code allows Trustee to abandon property of  
4 the estate that is "burdensome to the estate or that is of  
5 inconsequential value and benefit to the estate." § 554(a).  
6 However, the code and rules require notice, a hearing, and an  
7 order of the court authorizing the abandonment. § 554; Rule  
8 6007; Pace v. Battley (In re Pace), 146 B.R. 562, 564 (9th Cir.  
9 BAP 1992) (citing Hyman v. Plotkin (In re Hyman), 123 B.R. 342,  
10 348 (9th Cir. BAP 1991), aff'd 967 F.2d 1316 (9th Cir. 1992)).  
11 Both the procedural and the substantive requirements of § 554  
12 must be satisfied. Robertson v. Alsberg (In re Alsberg), 161  
13 B.R. 680, 683-84 (9th Cir. BAP 1993) (citing Sierra Switchboard  
14 Co. v. Westinghouse Elec. Corp., 789 F.2d 705, 709-10 (9th Cir.  
15 1986)). It appears there were no procedural deficiencies:  
16 Trustee gave notice to the creditors, a hearing was held, and the  
17 bankruptcy court entered an order authorizing the abandonment.

18 "In order to approve a motion to abandon property, the  
19 bankruptcy court must find either that (1) the property is  
20 burdensome to the estate or (2) of inconsequential value and  
21 inconsequential benefit to the estate." Viet Vu v. Kendall (In  
22 re Viet Vu), 245 B.R. 644, 647 (9th Cir. BAP 2000) (citing  
23 § 554(b); Morgan v. K.C. Mach. & Tool Co. (In re K.C. Mach. &  
24 Tool Co.), 816 F.2d 238, 245 (6th Cir. 1987)); In re Johnston, 49  
25 F.3d at 540.

26 On the notice sent to creditors, Trustee indicated his  
27 intention to abandon Schwarz Pub.'s business records because they  
28

1 provided little or no equity for the estate. However, at the  
2 hearing on the proposed abandonment, he also indicated that the  
3 storage of the business records was costing the estate \$60 per  
4 month but that he had made copies of all documents necessary to  
5 the administration of the estate. The Trustee also noted that he  
6 had not found any evidence of wrongdoing or fraud which would  
7 require a forensic examination of the documents. Finally, in her  
8 briefing, Joy acknowledged that Trustee made the Schwarz Pub.'s  
9 business records available for her to examine, but that she found  
10 the costs to do so were significant.

11 Based on the record, we cannot find that the bankruptcy  
12 court abused its discretion in ordering the abandonment. A  
13 seasoned Trustee made copies of relevant documents, and deemed  
14 the others to be of no import to the administration of the  
15 estate. Furthermore, the storage of the documents was  
16 diminishing the estate at the rate of \$60 per month. The record  
17 supports the abandonment order by the bankruptcy court, and we  
18 affirm that order.

19  
20 **CONCLUSION**

21 We AFFIRM the order of the bankruptcy court granting  
22 Trustee's Settlement of a potential preference action with  
23 Michael J. Schwarz. We also AFFIRM the bankruptcy court's order  
24 allowing the abandonment of Schwarz Pub.'s business records.