NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. WW-08-1149-MkMoJu
BELLINGHAM INSURANCE AGENCY, INC.,	Bk. No. 06-11721-TTG
Debtor.	
A.R.I.S.; NICHOLAS PALEVEDA,	
Appellants,	
v.	**M E M O R A N D U M**[*]
PETER ARKISON, Ch. 7 Trustee; BELLINGHAM INSURANCE AGENCY, INC.; CHARLES P. FARRINGTON,	
Appellees.	

Argued and Submitted on February 19, 2009
at Pasadena, California

Filed - April 6, 2009

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Thomas T. Glover, Bankruptcy Judge, Presiding

Before: MARKELL, MONTALI and JURY, Bankruptcy Judges.

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[*]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.

The chapter 7[1] trustee of Bellingham Insurance Agency, the corporate debtor in this case ("Debtor"), filed a motion requesting the bankruptcy court to compel a third party insurance company to turn over certain funds to a creditor, arguing that the bankruptcy estate had no ownership interest in those funds. The bankruptcy court granted the motion; Nicholas Paleveda, a principal and purported creditor of the Debtor ("Paleveda"), appeals.[2] We AFFIRM.

I. FACTS

Debtor is the successor to PFP Plan Administrators, Inc., a/k/a the 412(I) Company ("PFP"). Paleveda was a co-owner and the chief executive officer of PFP; appellee Charles Farrington ("Farrington") was a co-owner and officer of PFP.

A. Relevant Prepetition Events

Paleveda, Farrington and others organized PFP, which was in the business of selling insurance and annuities. At the times relevant to this dispute, Farrington was a licensed insurance agent; Paleveda was not.

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[1]Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

[2]The notice of appeal indicates that A.R.I.S. Incorporated ("ARIS") is also an appellant. ARIS did not file a brief, however, and thus has waived any arguments on appeal. Branam v. Crowder (In re Branam), 226 B.R. 45, 55 (9th Cir. BAP 1998), aff'd, 205 F.3d 1350 (9th Cir. 1999) (an issue not adequately addressed by appellant in his opening or reply brief is deemed abandoned). ARIS was represented by separate counsel in the bankruptcy court, but that counsel did not sign the notice of appeal. Paleveda admitted at oral argument that he was representing only himself on appeal.

In Washington, only licensed insurance agencies may sell the types of insurance at issue here, and corporations can only be licensed if all individuals "empowered to exercise the authority conferred by the corporate or firm license" are themselves licensed agents. See Wash. Rev. Code Ann. § 48.17.180. Paleveda was unable or unwilling to obtain a license, and, consequently, PFP was not a licensed broker. As a result, Farrington used his license to procure agency, marketing and commission agreements with various insurance companies. Typically, Farrington was the counterparty on contracts with insurers and outside agents. Farrington would in turn assign his commissions or payments due under such contracts to PFP, especially since much of the work undertaken to obtain the policies would have been done by others.[3]

In January 2003, Farrington signed an Independent Marketing Agreement (the "Agreement") with Lafayette Life Insurance Company ("Lafayette"). The first page of the Agreement reflects that the contracting parties were Lafayette and an "Independent Marketing Organization." The text of the Agreement does not name or otherwise identify the Independent Marketing Organization.[4] The

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[3]This arrangement apparently was not lawful and Farrington was reprimanded by Washington Insurance Commissioner for being part of it.

[4]The Agreement does not describe the import of the designation of "Independent Marketing Organization." It appears that Lafayette wanted to make one aggregate commission payment at a time, and rely on the Independent Marketing Organization to distribute individual commissions to the appropriate sub-brokers and sub-agents who had a hand in procuring the policy that generated the commission.

identity of the Independent Marketing Organization was therefore the crux of the bankruptcy court's inquiries.

The Agreement contains clues as to the identity of the Independent Marketing Organization, none of which is definitive. The Agreement's signature line, the only place where an entity other than Lafayette could identify itself, permits the Independent Marketing Organization to insert its true name and to specify whether it is a corporation, partnership or individual. The Agreement is manually signed by Farrington (and not in a representative capacity). In addition, the signature block indicates that the Independent Marketing Organization which signed the Agreement is an "individual."[5] Contrary to these indications, however, the words "PFP Plan Administrators, Inc./Charles P. Farrington" appear above Farrington's manual signature.[6]

The identity of the Independent Marketing Organization is a key point of dispute as the Agreement states that the Independent Marketing Organization is the only entity entitled to receive "the commissions, service fees and asset based compensation, of any kind, described in (b) [of Section II] below." (Emphasis

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[5]PFP was a corporation; the signature block states that "[i]f you are a corporation, the President must sign this Agreement and indicate their title." The president of PFP did not sign the Agreement.

[6]Farrington maintains that the words "PFP Plan Administrators, Inc./Charles P. Farrington" were added after he signed the Agreement.

added.)[7] Section II of the Agreement, in turn, provided that the commissions, service fees and asset based compensation would be paid to "you" – i.e., the Independent Marketing Organization – according to an attached schedule of compensation. The Agreement does not provide for payment related to other types of consideration.[8]

In February 2007, Lafayette filed a pleading with the bankruptcy court indicating that as of January 31, 2007, it was "holding funds representing compensation owed under the

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[7]The Agreement provided elsewhere:

> Your full compensation will be the commissions, service fees and asset based compensation provided for in the Agreement. There shall be no additional compensation or reimbursement to you for services performed or expenses incurred.

(Emphasis added.)

[8]At oral argument, Paleveda asserted that the amounts held by Lafayette constitute "management overrides" (as opposed to commissions) which belong to PFP and which were not at issue during the state court arbitration which we describe later. In making this argument, Paleveda referred to a separate Independent Marketing Organization Agreement not signed by Lafayette and signed by Farrington as "secretary/treasurer." (See Exhibit 6 to Paleveda's declaration filed on February 2, 2007). This is not the agreement in dispute and under which Lafayette admitted owing the held funds. The unsigned and undated agreement referenced by Paleveda in oral argument does contain a separate schedule for override commissions; this override commission schedule, however, is not attached or incorporated into the Agreement at issue.

Even if the Agreement did contain such a schedule, that schedule provides that "you" – the Independent Marketing Organization – would receive those override commissions. It did not contemplate that certain commissions would be paid by Lafayette to one recipient, while other amounts due (i.e., the management override commissions) would be paid to a different recipient. As explored below, unlike other similar arrangements, Farrington did not assign the Agreement to PFP.

Agreement" in the amount of $64,895.55. In other words, all of the funds being held by Lafayette and at issue before the bankruptcy court were funds that were payable under the Agreement. The issue considered was thus whether those funds were payable to Farrington or PFP.

As we indicate above, the Agreement contemplates no other basis of compensation other that described in its Section II. In addition, Lafayette admitted that the amount it held represented compensation under that Agreement. Furthermore, the Agreement required Lafayette to pay all compensation arising under the Agreement to the Independent Marketing Organization. In light of these facts, a finding that any amount of the held funds was properly paid or payable to PFP or Farrington necessarily meant that PFP or Farrington would be the proper payee of all of the funds held by Lafayette.

The amounts payable under the Agreement first became an issue when PFP's principals clashed over the firm's operation and direction, with Farrington and others leaving PFP. Debtor thereafter acquired all of PFP's assets and liabilities. Debtor then sued Farrington and other defendants in Washington state court, alleging (among other things) conversion of corporate property (including commissions) and corporate opportunities. Farrington and the other defendants responded with counterclaims against Debtor.

This dispute was sent to arbitration, and from October 31, 2005 through November 4, 2005, an arbitrator conducted a hearing on the claims asserted by Debtor and the defendants. In their pre-hearing arbitration memorandum, Farrington and the other

defendants put at issue Farrington's entitlement to compensation from Lafayette:

> As the Respondents will demonstrate at the hearing, PFP had no right to the monies in question - insurance commission checks from ANICO[9] and Lafayette Life - without an assignment of the same from Charles Farrington, a licensed insurance agent. Farrington agreed, at Paleveda's request, to serve as PFP's licensed insurance agent when the previous license holder left the Company. Farrington agreed to assign to PFP commission moneys received from ANICO, but never assigned any commissions from Lafayette Life. Farrington's assignment with respect to ANICO was premised on an agreement between Farrington and PFP's President, Paleveda, that Farrington would receive some percentage of all commissions earned, and that the Company would keep its promise to bonus Price and Farrington as owners, officers, and directors of the Company. Farrington revoked his assignment when Paleveda made known his intention to breach these and other agreements. As noted, there was never an assignment with respect to the Lafayette Life commissions, and Farrington was, in any event, entitled to the commissions as agent of record. Indeed, Lafayette continues to hold additional commission monies legally owed to Farrington, apparently at the insistence of the Claimant and out of fear of litigation.

(Emphasis added.)

During the arbitration, Farrington testified that he had never assigned to PFP monies paid or owed by Lafayette under the Agreement (" . . . I never had an assignment with PFP for those monies, so I'm the agent of record, those monies are to be paid to me"), but that he had not made a demand against Lafayette for the funds it was holding. Id. The arbitrator asked counsel for Farrington "why isn't that a claim in this arbitration" and counsel responded that "I did not explicitly request that relief"

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[9]Farrington had assigned to PFP any commissions that he would have received from American National Life Insurance Company (ANICO), but then revoked the assignment.

but indicated that the assignment of the Lafayette compensation was nonetheless an issue in the arbitration:

> [ARBITRATOR]: So that's not within the issues of [sic] being asked to decide here?
>
> [FARRINGTON'S COUNSEL]: Well, in only the sense that the relationship between the parties is at issue, yeah, I think it is, because one of the issues is is there an assignment in place.
>
> [ARBITRATOR]: So depending on how I rule on that issue that could have impact on his ability or inability to get that to that 40,000 dollars[10] without a whole new legal proceeding?
>
> [FARRINGTON'S COUNSEL]: Somebody is going to have to get that at some point, yeah. And I think we can probably avoid having a new lawsuit about that 40,000 dollars.
>
> [ARBITRATOR]: I just wanted to make sure about what I was being asked to decide and what I'm not being asked to decide here. Let's move along. I think I now at least understand what you're saying about that issue.
>
> [COUNSEL FOR PFP]: So if there was no assignment and you were the agent of record on all these cases why is LaFayette [sic] holding the money back?
>
> [FARRINGTON]: You have to talk to Chris.
>
> [COUNSEL FOR PFP]: Is it possible that there was an assignment?
>
> [FARRINGTON]: No.

ER 11:391-92.

Farrington testified further about his entitlement to the compensation under the Agreement. For example, he explained that commissions from annuities would provide his compensation for being the licensed agent:

> [FARRINGTON'S COUNSEL]: What consideration, if any, did you

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[10]According to Farrington's testimony, Lafayette held approximately $40,000 due under the Agreement at the time of the arbitration hearing.

receive for being the licensed agent?

> [FARRINGTON]: Well, I didn't receive any consideration. What I did receive was a substantial amount of liability from the standpoint of being the agent for the company. Ultimately any problems that associated with either me being an agent of record on a particular application or any agent presumably under my umbrella creating any problems out in the field would have created liability for me, and that's one of the considerations that I too[k] into account to do that.
>
> And I had discussions with [Paleveda] about getting compensated for that, and he said you know, "No problem, we'll compensate for you that [sic], I mean we'll give you some compensation. And one way you can get compensation is through the annuities. The annuities aren't really a major revenue generator as far as the commissions, so those can go to you as far as commissions for annuities and then we'll figure out some amount of salary or – and you know, there will be cases that will need to be placed by an agent in a particular state where there might not be an agent in that state available or familiar with 412(I), so you can be the signer on those."

Farrington also testified that he never executed an assignment to PFP of amounts due under the Agreement. A party in interest, Marjorie Ewing,[11] filed a declaration with the Washington state court in January 2004 stating that an assignment was "formally" in place with Farrington but was "apparently" revoked by Farrington. No proof of such an assignment was produced by Paleveda or Ms. Ewing, however. When asked if he had revoked any assignment of Lafayette commissions, he responded that he never executed such an assignment and thus "[t]here was nothing to revoke. And that was one thing that Mr. Paleveda indicated, 'I'm not concerned about commissions from annuities because there's no big money there.'" He further testified that

[11]Ms. Ewing is Paleveda's wife and allegedly owns the majority of Debtor's equity interests.

"Paleveda had indicated . . . [that] as long as the license assignment is revoked that money belongs to the agent, not the company."

On cross-examination, Farrington explained further why he had assigned other commissions to PFP:

> [T]ypically in a situation like this the principal of the company . . . would be the licensed agent for the company and there's no question of assignment [because] you don't need to assign anything. But because the principal is the licensed agent, all the money comes into the licensed agent, they have a company they run and you pay money out to the people. Well, this case is very unusual, and the idea is that well, since Nick Palevada can't get licensed for whatever reason, Marjorie can't get or doesn't want to, they have got to have a licensed agent, they obviously don't want the agent to control all the money so they want an assignment from the agent to the company. That in essence is probably the purpose of the assignment.

He reiterated, however, that he executed no such assignment to PFP with respect to amounts payable from Lafayette.

Following a multiple-day hearing, the arbitrator entered a "Final Reasoned Award." Among other things, the arbitrator held that Farrington never assigned to PFP his right to commissions from Lafayette:

> Lafayette Annuity Commission. The Lafayette annuity commission properly was paid to Chuck Farrington as agent of record. His right to commissions from Lafayette was never assigned to [PFP] and he is therefore entitled to any and all commissions with respect to policies written in his name and issued by Lafayette.

On February 3, 2006, the Superior Court of Washington for Whatcom County entered a judgment confirming and incorporating the arbitrator's final reasoned award. The court then entered judgment against Debtor in the amount of $90,021.92 and dismissed with prejudice all claims against the defendants.

Debtor filed a motion to vacate the judgment, which the state court denied by order dated March 6, 2006. At the hearing on the motion to vacate the judgment, the state court ruled that the dispute over the Lafayette commissions was within the scope of an arbitration agreement between the parties, that the arbitrator's decision constitutes law of the case, that no evidentiary hearing was necessary, and that the arbitrator was not disqualified because of a purported conflict of interest. In ruling on the motion to vacate, the court noted that "it seems to me the whole issue is over who got the commissions. That's what this case is all about." "[T]he true nature of this lawsuit is over collection of those commissions and premiums, and so I'm satisfied that that's the basis of the arbitration as well."

Farrington filed a motion with the state court seeking an order compelling turnover of commissions held in his name by Lafayette. On May 12, 2006, the state court entered an order granting the motion and directing Lafayette "to turn over to Farrington within 7 days of receipt of this Order any and all commissions with respect to policies written in Farrington's name and issued by Lafayette."[12]

B. Postpetition Events

Debtor filed its voluntary chapter 7 petition on June 1, 2006, and Peter Arkison was appointed as the chapter 7 trustee ("Trustee"). Debtor's schedules reflect unsecured liabilities in the amount of $1,595,763.62 and assets in the amount of

[12]According to Farrington's opening brief, the Debtor's appeal of the state court judgment was dismissed on or about January 11, 2008.

$258,881.81.[13] Debtor listed Paleveda as an unsecured creditor, showing two unsecured claims owed to him: (1) a judgment debt in the amount of $255,681.00 based on a judgment entered on May 19, 2006,[14] and (2) a claim in the amount of $31,231.41.[15]

In February 2007, Farrington filed a motion for order compelling Lafayette to comply with the state court order requiring turnover.[16] In that motion, Farrington contended that the arbitrator had resolved the issue of who was entitled to the funds held by Lafayette. Farrington additionally noted that although Lafayette was still holding the funds representing compensation under the Agreement, it had issued multiple 1099 forms showing Farrington as the recipient of that compensation.[17]

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[13]These assets include a $250,000 claim by Debtor which had been asserted and dismissed with prejudice in the state court litigation.

[14]Trustee has filed a complaint against Paleveda, Ewing and ARIS to avoid transfers to them (including the judgment in favor of Paleveda) and to equitably subordinate their debts. To date, however, no judgment has been entered in that adversary proceeding (A.P No. 08-1132).

[15]On May 17, 2007, Paleveda filed a unsecured priority claim in the amount for $226,781 for wages, salaries and commissions and for taxes and penalties owed to governmental units. No order disallowing this claim has been entered.

[16]This motion was filed in an adversary proceeding in which Farrington and others had sued Paleveda and his current company. (Adv. Proc. No. 06-1306).

[17]The 1099s for 2004-2007 (introduced as Exhibit 4 to Farrington's supplemental brief in support of turnover of the Lafayette funds (Docket No. 134)) show the recipient's tax identification number as a social security number and not a corporate tax identification number. The recipient is identified as:

(continued...)

Paleveda filed an objection to this motion, arguing that the funds being held constituted management overrides and not commissions awarded to Farrington by the state court. As noted previously, this argument failed to acknowledge that Lafayette was holding funds due under the Agreement, and the Agreement provided that the compensation was limited to its terms (which did not incorporate a management override commission schedule) and that all compensation was payable to "you," that is, the Independent Marketing Organization. The Agreement did not provide that Lafayette would pay a portion of the funds to the Independent Marketing Organization and another portion to someone else. Therefore, the issue was whether Farrington was the "you" to whom Lafayette was to direct its payments under the Agreement; if Farrington was entitled to receive any compensation under the Agreement, he was entitled to all of the compensation.[18]

Trustee took no position on Farrington's motion to compel, advising the court that he had not had time to review the

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[17](...continued)
Farrington, Chuck P.
PFP Plan Administrators Inc.
DBA The 412i Company
12501 Bel Red Rod. Ste. 215-A
Bellevue, WA 98005

[18]In various declarations filed with the bankruptcy court, Paleveda contended that Farrington committed fraud against PFP when he purported to sign the Agreement individually as the Independent Marketing Organization. Whether or not such allegations have merit, they are irrelevant to a determination of whether the Agreement required Lafayette to pay the compensation directly to Farrington. If Farrington defrauded PFP, the Trustee has independent causes of action against Farrington (assuming such claims are not precluded by the state court judgment).

documents and transcripts relating to the arbitration. The court denied the motion without prejudice and advised Trustee to file a motion with respect to the funds held by Lafayette once he had formed an opinion as to the proper disposition of those funds.

On November 30, 2007, in the main case, the Trustee filed a motion for order determining that the Lafayette proceeds were not property of the estate and directing Lafayette to turn over all commissions due to Farrington. Alternatively, Trustee sought an order granting relief from the stay to allow parties to litigate the dispute over the funds in state court. In his motion, the Trustee stated that his counsel "has reviewed every transcript from the arbitration in addition to exhibits and deposition transcripts." The Trustee summarized the testimony of Farrington at the arbitration and opined that he was bound by the decision of the arbitrator.

ARIS filed an objection to Trustee's motion.[19] Paleveda simply filed a declaration joining ARIS's response. In its objection, ARIS contended that the arbitrator did not award all of the commissions held by Lafayette to Farrington; rather, the arbitrator (and thus the state court) held that Farrington was entitled to commissions with respect to "policies written in his name and issued by Lafayette." Paleveda's declaration contended that the Agreement was written in PFP's corporate name and PFP/Debtor was thus the party entitled to the compensation under it.

[19]The objection was made by ARIS jointly with Marjorie Ewing, not an appellant here.

Lafayette filed a response to Trustee's motion indicating that it has "never contended that Farrington is not entitled to all of the commissions arising under the Agreement or that it was confused internally as to whom the funds actually belong." Rather, Lafayette contended that it was holding the funds because the state court order was ambiguous as to what amounts should be turned over to Farrington (given that not all of the funds were attributable to contracts written by Farrington). "Lafayette correctly recognized that, regardless of its own internal beliefs, it would be exposed to claims from the debtor's principals if it paid funds to Farrington. Lafayette has consistently advised all parties that it was willing to disburse the funds to whomever the court unambiguously directs and has simply asked not to be put in a position where, after disbursing the funds, it would remain in peril of having to defend against adverse claimants."

Farrington filed a reply to the "oppositions of Ewing, Paleveda et al.," even though Paleveda had not filed a formal opposition. The Trustee joined in Farrington's reply. Further responses and supplemental responses were filed by Farrington and ARIS. No one objected to the standing of ARIS, Ewing or Paleveda.

According to Farrington's supplemental brief, the bankruptcy court directed the parties at a hearing on March 7, 2008, to "submit briefing strictly limited to the issue of who, as between Farrington and the Debtor, was the rightful owner/recipient of the Lafayette commissions and whether Farrington is the owner of those funds or a mere creditor of the estate."

On March 21, 2008, the bankruptcy court issued its oral ruling on the Trustee's motion and the "final issue which was of concern to the Court, and that is who owned these things originally":

> Let's take a look first at the arbitrator's decision. He seems to indicate that Farrington owned these particular policy rights to commissions and that he never assigned them. Then, unfortunately, the arbitrator put forth what I would consider, I wouldn't say loose language, but language that is - you know, sometimes create [sic] more problems than it's worth. That happens to us on the bench from time to time.
>
> When he's then ta[l]king about policies written in Farrington's name as if, you know, where you'd go out and Farrington is the guy who's out selling the policy. And certainly, it could mean that. But it's irrelevant to the analysis. It doesn't match up as a sensible conclusion, because it doesn't match the agreements and what the arbitrator's already said. If the arbitrator has already said that he never assigned any of this, why, then, how could he then limit it to the policies that have been written by this particular person?
>
> If that's not enough, we need to look to the agreements involved here. First, there's an agreement with PFP, the predecessor of the debtor, that initially does look like a corporate agreement. And then there are ensuing agreements, one signed by Farrington and a later one by Lafayette, and they say "individual." And I don't find them to be ambiguous in terms of who the parties are to them, as far as the contracting parties are concerned. Certainly, Bellingham Insurance's predecessor is named, but boy, these sure look like individual contracts to me, supporting the arbitrator's ruling.
>
> 1099 is a strong decision by someone. And in this case, why, it runs to Farrington. Granted, we have the check and I, you know , realize the arguments that are there, and there's some suggestion of a prior course of dealing. But you know, we could try this thing for another 10 days. And I'm telling you, it's going to come out the same way.
>
> The Court's decision is that the bankruptcy estate of Bellingham Insurance has no interest in these funds, and an immediate order should ensue directing that they are payable, rightfully, to Mr. Farrington as his contract provides that he owns those particular funds.

On April 4, 2008, after the court issued its oral ruling but before it entered its order, Paleveda filed a motion to reconsider. Among other things, Paleveda argued that the Lafayette commissions were not pled or at issue in the arbitration and that determination of who owned the income stream was "not ripe for summary judgment."[20] The bankruptcy court denied this request on April 14, 2008. On May 20, 2008, Paleveda filed a second motion for reconsideration before an order was signed granting Trustee's motion. According to the court's minutes from a hearing held on June 6, 2008, the court denied the motion for reconsideration and barred Paleveda from filing further papers in the bankruptcy case absent advance approval from the court.

On June 10, 2008, the bankruptcy court entered an order determining that the funds held by Lafayette did not constitute property of the estate, directing the funds to be turned over to Farrington and barring Paleveda from filing further pleadings absent prior court approval. According to the bankruptcy court's

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[20]The Trustee's motion was not presented as a motion for summary judgment. Nothing in the record indicates that Paleveda or any other objector ever requested an evidentiary hearing. It appears that, until the motion for reconsideration, the parties treated the court's ruling as a final disposition on the merits.

The local rules for the bankruptcy court require a party desiring an evidentiary hearing with live testimony on a motion to "obtain a special setting from the judge's secretary or scheduling clerk." L.B.R. 9013-1(b)(3). Local Bankruptcy Rule 9013-1(e)(2), entitled "Motion Calendars Shall Not Include Oral Testimony," states that "the court will not hear oral testimony on the regularly-scheduled motion calendars unless approved in advance by the court." Nothing in the record indicates that any party sought to invoke this rule.

docket, Paleveda filed his notice of appeal on June 6, 2008. Under Rule 8002(a), the premature notice of appeal is deemed filed as of the date of entry of the order and is timely.[21]

II. ISSUE

Did the bankruptcy court err in holding that the estate had no interest in the funds held by Lafayette and in directing Lafayette to pay those funds to Farrington?

III. STANDARD OF REVIEW

"We review rulings regarding rules of res judicata, including claim and issue preclusion, de novo as mixed questions of law and fact in which legal questions predominate." Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817, 823 (9th Cir. BAP 2006), aff'd, 506 F.3d 956 (9th Cir. 2007) (citing Alary Corp. v. Sims (In re Associated Vintage Group, Inc.), 283 B.R. 549, 554 (9th Cir. BAP 2002)). "Once it is determined that preclusion

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[21]On November 25, 2008, Farrington filed a motion to supplement the record designations. In particular, Farrington wants to supplement the document at Tab 38 of his excerpts to add the full transcript of the state court hearing on PFP's motion to vacate/reconsider the arbitration award. Supplementation is not necessary, as the limited excerpts reflect that the state court addressed many of the issues raised by Paleveda on this appeal, such as the arbitrator's purported conflict of interest. We will therefore enter a separate order denying this motion to supplement.

In a motion to continue the oral argument in this appeal, counsel for Farrington (Mr. Zimbelman) alleged that Paleveda had filed frivolous complaints against various individuals. On February 5, 2009, Paleveda filed a request for judicial notice asking us to consider an email from the Nevada Bar Association that he has not filed a complaint in that state against Mr. Zimbelman and others. As the allegation regarding the purportedly frivolous complaints are irrelevant to the disposition of this appeal, we will deny the request for judicial notice.

doctrines are available to be applied, the actual decision to apply them is left to the trial court's discretion." Khaliqh, 338 B.R. at 823.

We review the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. Hansen v. Moore (In re Hansen), 368 B.R. 868, 874-75 (9th Cir. BAP 2007). We review mixed questions of law and fact de novo. Eastman v. Eastman (In re Eastman), 188 B.R. 621, 624 (9th Cir. BAP 1995).

IV. JURISDICTION

Farrington contends that we should dismiss this appeal as moot and for lack of standing by Paleveda. We disagree.

Farrington asserts that because Lafayette has already remitted the funds to him pursuant to the bankruptcy court's order, the appeal is moot. We lack jurisdiction to hear an appeal that is constitutionally moot. I.R.S. v. Pattullo (In re Pattullo), 271 F.3d 898, 901 (9th Cir. 2001). "'However, while a court may not be able to return the parties to the status quo ante . . . , an appeal is not moot if the court can fashion some form of meaningful relief.'" United States v. Arkison (In re Cascade Rds.), 34 F.3d 756, 759 (9th Cir. 1994) (quoting Church of Scientology v. United States, 506 U.S. 9, 12 (1992)); Northwest Envtl. Defense Ctr. v. Gordon, 849 F.2d 1241, 1244-45 (9th Cir. 1988) (an action is not moot if "there can be any effective relief" between the parties). The party asserting mootness has a heavy burden to establish that there is no effective relief remaining for a court to provide. Northwest Envtl., 849 F.2d at 1244-45.

Here, the bankruptcy court could fashion effective relief if we reversed. Farrington has appeared here as appellee; he is not a third party whose rights have vested as a result of a non-stayed order. We could reverse and direct the bankruptcy court to order Farrington to return the funds to the estate. The appeal is therefore not moot.

Farrington also contends that Paleveda lacks standing to pursue this appeal, noting that the bankruptcy trustee has filed an adversary proceeding to avoid Paleveda's judgment lien. The bankruptcy schedules indicate that Paleveda holds two unsecured claims: one for unpaid wages and benefits and another under the judgment. Paleveda has filed a separate proof of claim. While the trustee seeks to avoid the judgment and to subordinate Paleveda's claims, no judgment has been entered. Paleveda therefore holds a disputed claim and is a creditor under 11 U.S.C. § 101(5)(A) and (10).

As a creditor, Paleveda has a direct and pecuniary interest in the bankruptcy order declaring that the bankruptcy estate has no interest in property; the order decreases assets available to pay creditors. "Only a party who is 'directly and adversely affected pecuniarily' by an order of the bankruptcy court may appeal. To provide standing, 'the order must diminish the appellant's property, increase its burdens, or detrimentally affect its rights.'" Debbie Reynolds Hotel & Casino, Inc. v. Calstar Corp, Inc. (In re Debbie Reynolds Hotel & Casino, Inc.), 255 F.3d 1061, 1066 (9th Cir. 2001)(quoting Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.), 177 F.3d 774, 777 (9th Cir. 1999)). A creditor has "a direct pecuniary interest

in a bankruptcy court's order transferring assets of the estate." P.R.T.C., 177 F.3d at 778.

V. DISCUSSION

A. Issue Preclusion

The arbitrator and state court found Lafayette had properly paid commissions to Farrington and that Farrington did not assign to PFP his rights to commissions from Lafayette. Farrington contends that, based on this finding, the principles of res judicata and collateral estoppel[22] preclude Paleveda from asserting that the estate holds an interest in the funds. We agree that the doctrine of issue preclusion applies here.[23]

Issue preclusion forecloses relitigation of factual matters that have already been decided in prior proceedings. Paine, 283 B.R. at 39; see also Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001); Christopher Klein, et al, Principles of Preclusion & Estoppel in Bankruptcy Cases, 79 Am. Bankr. L.J. 839, 852 (2005). Here, since the question involves the issue-preclusive effect of a Washington state court's judgment, we

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[22]These often-coupled, familiar phrases are more accurately expressed as issue preclusion and claim preclusion respectively. See Paine v. Griffin (In re Paine), 283 B.R. 33, 38 (9th Cir. BAP 2002) (noting that "issue preclusion" includes the doctrines of direct estoppel and collateral estoppel while "claim preclusion" has "often been called 'res judicata' in a non-generic sense") (citing Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984)). We will use these more modern terms in this memorandum.

[23]Claim preclusion does not apply here since the tenor of the proceeding used below – turnover, or more properly, abandonment – is not the same set of rights as were at issue in the state arbitration.

apply Washington preclusion law. 28 U.S.C. § 1738; Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985).

In order to invoke the doctrine of issue preclusion under Washington state law, a party must show that (1) the issue decided in the prior adjudication was identical to the one presented in the second; (2) the prior adjudication ended in a final judgment on the merits; (3) the party against whom the doctrine is asserted was a party or in privity with a party to the prior litigation; and (4) application of the doctrine must not work an injustice. MacGibbon v. MacGibbon (In re MacGibbon), 383 B.R. 749, 764 (Bankr. W.D. Wash. 2008)(citing Hadley v. Maxwell, 144 Wash.2d 306, 311, 27 P.3d 600, 602 (2001)).

Here, the memorandum filed by Farrington prior to the arbitration indicated that PFP's (and Farrington's) entitlement to the proceeds from the Agreement with Lafayette would be at issue during the arbitration. While Farrington did not file a complaint against Lafayette seeking the withheld funds prior to the arbitration, Farrington's counsel stated during the arbitration that the issue of whether Farrington assigned such funds should be decided by the arbitrator. Thereafter, the arbitrator and counsel for Farrington and PFP queried Farrington about his entitlement to and assignment of the funds. Finally, the arbitrator specifically referred to title to the funds in his final ruling. Clearly, the issue of whether Farrington had an interest in the funds and whether he assigned such an interest was at issue before the arbitrator (and thus the state court). The bankruptcy court faced the same issue. Farrington has thus

established that the first element of issue preclusion under Washington law has been satisfied.

The Washington state court judgment is final and was rendered on merits; when Paleveda requested the bankruptcy court to vacate the state court judgment and arbitrator's award, he acknowledged that the award was final. All appeals from the state court judgment are over, thus indicating that the second element is met.

The third prong of the Washington analysis requires that the party against whom preclusion is asserted be the same, or in privity with, a party in the prior litigation. Here, the party against whom issue preclusion is asserted (the Debtor) is the successor-in-interest to the plaintiff (PFP) in the arbitration and state court action, thus satisfying the third element.

Given that Trustee (who represents the Debtor's estate) filed a motion conceding that collateral estoppel applied against the estate, we are convinced that the application of the doctrine does not work an injustice. Accordingly, the four elements for invocation of issue preclusion under Washington law exist here.

As a result, the bankruptcy court did not err in relying on the state court judgment and the arbitrator's award in determining that the estate had no interest in the funds held by Lafayette, that Farrington had a right to compensation under the Agreement, and that Farrington had not assigned to PFP his rights in that compensation. While the state court judgment and arbitration award may have been ambiguous in stating that Farrington was entitled to any and all commissions "with respect to policies written in his name," they did explicitly resolve the

issue of whether the Lafayette annuity commissions were properly paid to Farrington (yes) and whether his right to commissions had been assigned to PFP (no). As the Agreement provides that all compensation would be payable to the Independent Marketing Organization, the finding by the arbitrator that any of the commissions were properly paid to Farrington necessarily means that all of the compensation due under the Agreement was payable to Farrington. The doctrine of issue preclusion thus prohibits relitigation of these issues.

B. The Bankruptcy Court Independently Determined that the Estate Had No Interest in the Commissions

The bankruptcy court's ruling can be read to hold, in the alternative, that even if issue preclusion did not apply, Farrington had established on the merits that he, and not the Debtor's estate, was entitled to the commissions and payments due under the Agreement. In addition to relying on the arbitrator's award, the bankruptcy court placed weight on other evidence in concluding that Farrington, in the first instance, had ownership rights in the commissions generated under the Agreement. We cannot say that the court clearly erred. A quick overview of the court's analysis demonstrates this point.

First, the court observed that the Agreement was signed by Farrington as an individual. Second, the court noted that Lafayette issued 1099s showing Farrington as the recipient of these commissions; these 1099s showed a social security number (and not a corporate identification number) as the tax identification number of the recipient. These facts, in addition to the arbitrator's findings, support the bankruptcy court's

conclusion that the estate had no interest in the funds. The bankruptcy court relied on the full record before it[24] and came to a reasonable and justifiable conclusion based upon that record. We find no error by the bankruptcy court.

C. Other Issues Raised by Paleveda

In his opening brief, Paleveda raised other issues in support of his contention that Farrington should not receive the commissions payable by Lafayette. These issues include breach of fiduciary duty and diversion of corporate property and opportunities. PFP identified and briefed these issues in its pre-hearing memorandum to the arbitrator and the arbitrator addressed these issues in his reasoned award (incorporated by the state court). The doctrine of issue preclusion applies to these arguments as well.

Paleveda also contends that the state court judgment and the arbitration award should be disregarded because the arbitrator had a conflict of interest. The state court, however, ruled against Paleveda on this point. In its oral ruling supporting its denial of PFP's motion to vacate the judgment on the arbitrator's award, the state court dismissed allegations that the arbitrator's decision should be vacated because of his conflict of interest. The state court's ruling on that motion is final, and thus the doctrine of issue preclusion applies to this theory advanced by Paleveda as well.

[24]The bankruptcy court's ruling contained a 2-1/2 page listing of documents and filings consulted by the bankruptcy court in reaching its decision.

Even if the state court had not addressed this issue, we could not modify or reverse the final judgment of the state court. See D.C. Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983) (district court does not have jurisdiction "over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional"); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16 (1923) (state court ruling on federal constitutional questions in the state court action could not be modified or reversed by district court); Exxon Mobil v. Saudi Basic Inds. Corp., 544 U.S. 280, 284 (2005) (while narrowing the doctrine of Rooker-Feldman, the Supreme Court held that it applied to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments").

VI. CONCLUSION

For the foregoing reasons, we AFFIRM.