

DEC 09 2008

HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

6	In re:	)	
7	GTI CAPITAL HOLDINGS, LLC,	)	BAP No.: AZ-08-1079-MkEMO
8	dba ROCKLAND MATERIALS,	)	BK Nos.: 03-07923
9		)	03-07924
10	Debtor.	)	(Jointly Administered)
11		)	Adv. No.: 07-00031
12	_____	)	
13	TRIAD COMMERCIAL CAPTIVE CO.;	)	
14	STIRLING BRIDGE, LLC,; NEW	)	
15	YORK-NEWPORT ASSURANCE CO.;	)	
16	TERI and GRANT H. GOODMAN,	)	
17	Appellants,	)	
18	v.	)	<b>MEMORANDUM<sup>†</sup></b>
19		)	
20	DAVID M. REAVES, Trustee;	)	
21	MICHAEL W. CARMEL, LTD.;	)	
22	COMERICA BANK; GREENBERG	)	
23	TRAURIG, LLP,	)	
24	Appellees.	)	
25	_____	)	

Argued and Submitted on October 17, 2008  
at Phoenix, Arizona

Filed - December 9, 2008

Appeal from the United States Bankruptcy Court  
for the District of Arizona

Hon. Sarah Sharer Curley, U.S. Bankruptcy Judge, Presiding

Before: MARKELL, EFREMSKY,\* and MONTALI, Bankruptcy Judges.

<sup>†</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.

\* Hon. Roger L. Efremsky, United States Bankruptcy Judge for the Northern District of California, sitting by designation.

1 **I. SUMMARY**

2 This appeal is from the bankruptcy court's approval of a  
3 settlement between Comerica Bank-California ("Comerica"), the  
4 defendant in several adversary proceedings associated with these  
5 cases, and the estates of the debtors, GTI Capital Holdings,  
6 LLC, and GH Goodman Investment Cos., LLC ("Debtors"). The  
7 appellants are Grant H. Goodman, the former principal of the  
8 Debtors, who also represents Triad Commercial Captive, Stirling  
9 Bridge LLC, New York-Newport Assurance Co. and Teri Goodman  
10 ("Appellants").

11 Appellants challenge the bankruptcy court's approval of a  
12 settlement entered into between the estates and Comerica on  
13 February 20, 2008 (the "Settlement Agreement"). Appellants also  
14 appeal the court's treatment of an expert witness report  
15 prepared by the chapter 7 trustee's accountant and expert  
16 witness, Navigant Consulting, and the retention of the trustee's  
17 special counsel, Michael M. Carmel, Ltd. ("Carmel").<sup>1</sup> Finally,  
18 Appellants object to the court's approval of fees paid to both  
19 Navigant Consulting and Carmel.<sup>2</sup>

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21 <sup>1</sup> Unless otherwise indicated, all chapter, section, and rule  
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*,  
23 as enacted and promulgated prior to the effective date of the  
24 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
Pub. L. 109-8, 119 Stat. 23, and to the Federal Rules of  
Bankruptcy Procedure, Rules 1001-9037.

25 <sup>2</sup> After oral argument, Appellants filed a "Motion and  
26 Application Lodging Supplemental Record and Brief," reiterating  
27 prior objections to the settlement and fees awarded, and  
28 asserting additional objections. The motion also called for  
sanctions against Appellees' counsel. The panel finds this motion  
to be both procedurally improper and substantively without merit.  
Appellee filed a response, complaining about Appellants' motion  
and offering to submit a substantive response if we require one;

(continued...)

1 The trustee, David M. Reaves ("Trustee"), Carmel, Comerica,  
2 and Comerica's counsel, Greenberg Traurig, LLP ("Appellees")  
3 respond to this appeal, arguing for the propriety of the  
4 settlement approval, the court's treatment of the expert witness  
5 report, the court's approval of the Trustee's retention of  
6 Carmel, and all fees approved by the court for Navigant  
7 Consulting and Carmel.

8 Based on a review of the record and for the reasons stated  
9 below, the panel finds that the bankruptcy court did not abuse  
10 its discretion in approving the Settlement Agreement, improperly  
11 treat the expert witness report, or abuse its discretion in  
12 either approving the Trustee's retention of Carmel or in  
13 awarding fees to Carmel. The panel also finds that Appellants  
14 have not properly appealed the issue of fees awarded to Navigant  
15

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16 <sup>2</sup>(...continued)  
17 we do not.

18 The panel only has jurisdiction to hear appeals from final  
19 judgments, orders, and decrees. 28 U.S.C. § 158. To the extent  
20 that the post-argument motion raises issues unrelated to properly  
21 appealed orders, the panel does not have jurisdiction to decide  
22 those issues. To the extent that the issues raised in the post-  
23 argument motion do relate to properly appealed orders, the motion  
24 is still improper. Pursuant to Rule 8009, an appellant may file a  
25 brief and a reply brief. The rule states that "[n]o further  
26 briefs may be filed except with leave of . . . the bankruptcy  
27 appellate panel." We have not given such authorization.  
28 Therefore, Appellants' motion is improper as an unauthorized  
brief.

Even if the panel were to reach the merits of Appellants'  
post-argument motion, we would deny all relief requested. Nothing  
in the record demonstrates that Appellees' counsel has committed  
sanctionable conduct. Further, for the reasons set forth in this  
opinion, the other relief requested by Appellants' is not  
warranted.

Therefore, all relief requested in the motion is denied.

1 Consulting, and that even if Appellants had properly appealed  
2 the order awarding fees to Navigant, their failure to object to  
3 the motion seeking Navigant's fees bars their appeal.

4 The panel therefore AFFIRMS.

5 **II. FACTS**

6 Both Debtors in these jointly administered cases filed  
7 petitions under chapter 11 of the Bankruptcy Code on May 8,  
8 2003. The Debtors, then controlled by Grant H. Goodman, were in  
9 the business of manufacturing and supplying aggregate and ready-  
10 mix concrete for use in residential and commercial construction  
11 projects. During the administration of these cases, the Debtors  
12 ceased operations, and all assets were liquidated by order of  
13 the court for \$8 million. An examiner, Edward M. McDonough  
14 ("Examiner"), was appointed by the court on June 19, 2003. The  
15 Examiner was charged with ensuring that any legal claims owned  
16 by the estates were fully prosecuted.

17 **1. Adversary Proceedings Dismissed by the Settlement Agreement**

18 During the administration of the case, the parties filed  
19 several adversary proceedings. These proceedings, as named by  
20 the parties, were the "DePrizio Litigation" (adversary  
21 proceeding number 03-00583); the "Rolling Stock Adversary  
22 Proceeding" (adversary proceeding number 04-00676), and the  
23 "Subordination Litigation" (adversary proceeding number 07-  
24 00031).<sup>3</sup>

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25  
26 <sup>3</sup> As a result of the Subordination Litigation (which is  
27 referred to in some parts of the record as the Surcharge  
28 Litigation), the bankruptcy court ordered Comerica's collateral  
to be surcharged to pay administrative expenses either consented  
(continued...)

1 The DePrizio Litigation alleged that Comerica received  
2 preferences and a fraudulent transfer. The remedy sought was the  
3 avoidance of a lien that Comerica held on certain personal  
4 property of the Debtors. Before trial, the bankruptcy court  
5 dismissed the preference claims, with prejudice.

6 In early 2004, the Examiner filed the Rolling Stock  
7 Adversary Proceeding against Comerica, seeking to avoid  
8 Comerica's lien on certain vehicles or "rolling stock." The  
9 Examiner was successful in avoiding Comerica's lien. This  
10 decision was affirmed by the Bankruptcy Appellate Panel of the  
11 Ninth Circuit ("BAP").<sup>4</sup>

12 On April 30, 2007, the main cases were converted to chapter  
13 7 and a trustee was appointed. The Trustee went forward with the  
14 fraudulent transfer claim and appealed the dismissal of the  
15 preference claims to the BAP (BAP No. AZ-07-1302). Under the  
16 Settlement Agreement, the DePrizio Litigation was dismissed.

17 The Subordination Litigation was filed January 19, 2007.  
18 After the Examiner was appointed in 2003, he began negotiations  
19 with various administrative claimants, seeking to reduce the  
20 claims made by these claimants. As part of these negotiations,  
21 on July 1, 2004, Comerica and the Examiner executed a term sheet  
22 in settlement of Comerica's administrative claims. A  
23 disagreement arose between these parties, and the Examiner

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24  
25 <sup>3</sup>(...continued)  
26 to by Comerica or for which Comerica had benefitted and caused to  
27 be undertaken. This decision was affirmed by the Bankruptcy  
28 Appellate Panel of the Ninth Circuit.

<sup>4</sup> No party to this appeal has raised further issues with  
regard to the Rolling Stock Litigation.

1 brought the Subordination Litigation against Comerica, alleging  
2 a breach of contract with regard to the term sheet and asking  
3 that Comerica's claims be equitably subordinated to other  
4 creditors for its conduct in the cases. The Subordination  
5 Litigation was set for a two-day trial, scheduled for March 11  
6 and 12, 2008.

## 7 **2. The Settlement Agreement**

8 Prior to the trial on the Subordination Litigation, the  
9 parties participated in a settlement conference. This settlement  
10 conference was held on February 20, 2008, and was presided over  
11 by the Honorable Randolph J. Haines. At this session, the  
12 parties reached an agreement, which was later memorialized and  
13 signed on February 27, 2008. A hearing seeking approval of the  
14 Settlement Agreement was scheduled for March 11, 2008, before  
15 the bankruptcy court.<sup>5</sup>

16 The Settlement Agreement accomplished three objectives: It  
17 dismissed the Trustee's claims in the Subordination Litigation,  
18 dismissed the Trustee's appeal in the DePrizio Litigation, and  
19 effected a broad, mutual release of all claims between the  
20 estates and Comerica. In exchange for these dismissals and the  
21 release, Comerica would release its claim to \$638,959 in  
22 proceeds held by the Trustee and pay \$311,041 to the estates.<sup>6</sup>

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24 <sup>5</sup> The court decided to hold the hearing on the Settlement  
25 Agreement on March 11 because the Subordination Litigation trial  
26 had been set for that date. Notice of the March 11 hearing was  
27 given February 22, 2008 (Appellants received notice on that day  
by electronic mail).

28 <sup>6</sup> Before the settlement conference, the estates' most recent  
(continued...)

1 At the hearing seeking approval of the Settlement  
2 Agreement, the court found that there was sufficient evidence to  
3 approve the settlement. The court issued its "Memorandum  
4 Decision Re Settlement of Claims of the Estate with Comerica  
5 Bank-California" approving the Settlement Agreement on March 17,  
6 2008 ("Settlement Memorandum"). The court's findings are  
7 discussed further in Part VI.1.A. of this memorandum.

### 8 **3. Navigant Consulting**

9 Navigant Consulting, Inc. ("Navigant") was the accountant  
10 for the Trustee in the Subordination Litigation. It also  
11 provided the Trustee with consulting services and expert witness  
12 analysis/testimony. As part of these services, Navigant prepared  
13 a report analyzing the estates' expected recovery from Comerica  
14 ("Damage Report"). A copy of the Damage Report was given to  
15 opposing counsel, but no copy was filed with the court, in  
16 accordance with the bankruptcy court's procedures.

17 After the settlement, the court approved a motion filed by  
18 the Trustee seeking compensation for Navigant in the amount of  
19 \$79,016 for services performed from November 28, 2007 through  
20 February 22, 2008. There was no opposition to the motion, and  
21 the court awarded the requested fees.

### 22 **4. Appointment of Michael M. Carmel, Ltd., and Fees Awarded**

23 Debtors' original counsel, John Hebert, of Hebert Schenk  
24 P.C., sought to withdraw from representing the debtors in a  
25 motion filed July 12, 2006. At the court's request, Hebert  
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27 <sup>6</sup>(...continued)  
28 settlement offer was \$1,500,000. Comerica's most recent offer  
before the conference was approximately \$550,000.

1 assisted the Debtors in their search for new counsel. Hebert  
2 filed a "Motion for Substitution of Counsel for Debtors"  
3 ("Substitution Motion"), which proposed Carmel for appointment  
4 as Debtors' new counsel. The Substitution Motion set out the  
5 terms of proposed counsel's employment as follows: (1) a one-  
6 third contingency on collections of all pending adversary  
7 proceedings, paid on a super-priority basis to all other chapter  
8 11 administrative expenses; (2) reimbursement of costs on a  
9 priority basis of funds currently held in trust; (3)  
10 administrative functions billed at Carmel's hourly rate; and (4)  
11 guaranteed appointment by the chapter 7 trustee on the same  
12 terms should the case be converted to chapter 7.

13 The hearing on the Substitution Motion was held on  
14 September 5, 2006. At this hearing, Carmel made it clear that  
15 based on the current posture of the case, he would accept  
16 appointment as Debtors' counsel only under the terms laid out in  
17 the Substitution Motion. The court then continued the matter to  
18 September 19, 2006, the date when a hearing on a pending motion  
19 to convert was scheduled, reasoning that the court's decision on  
20 whether to approve Carmel's employment terms might be affected  
21 by a decision to convert the case. At that hearing, the court  
22 denied the motion to convert and appointed Carmel as counsel for  
23 the Debtors ("Fee Order"). This appointment was on the terms  
24 stated in the Substitution Motion.<sup>7</sup> Appellant Goodman appeared  
25 at the hearing and raised no objection to the appointment of  
26

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27 <sup>7</sup> The court found that there were no attorneys available who  
28 were willing to represent the Debtors on terms more favorable  
than those proposed by Carmel.

1 Carmel.

2 In accordance with the Fee Order, when the cases were  
3 converted on April 30, 2007, the Trustee retained Carmel.<sup>8</sup> At  
4 the hearing on the settlement on March 11, 2008, the Trustee  
5 testified about Carmel's fees. The Trustee testified that the  
6 court's award of \$316,666 in fees and \$1,929.76 in costs was  
7 appropriate, especially given the "extremely complex" nature of  
8 the case. He further testified that his opinion was affected by  
9 the fact that, at the time of the retention, there was a bona  
10 fide risk that Carmel would be unable to effect any recovery for  
11 the estates and would therefore receive no fees for his  
12 services. Even after this testimony and notwithstanding the  
13 prior approval, the court directed Carmel to file an affidavit  
14 of fees so it could ensure that there were no "exceptional  
15 circumstances" to consider. Carmel complied with this order the  
16 same day. The court reviewed this affidavit, found Carmel's fees  
17 were reasonable, and approved them.

18 **5. Post-Settlement Approval Matters**

19 Appellants filed a Notice of Appeal on March 17, 2008, the  
20 same day the bankruptcy court released its Settlement Memorandum  
21 and entered orders approving the Settlement Agreement and  
22 Carmel's Fees. Also on March 17, 2008, Appellants filed a  
23 "Request for Stay Pending Appeal - Mandamus and Request for  
24 Expedited Stay Hearing, Or Sua Sponte Order." The bankruptcy  
25 court denied this motion in a memorandum decision dated April 4,  
26 2008 ("Stay Denial Memorandum"). On April 17, 2008, Appellants

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28 <sup>8</sup> It does not appear the Trustee raised any objection to the  
provision of the Fee Order *requiring* him to retain Carmel as  
special counsel. The panel expresses no opinion as to the  
propriety of this order.

1 filed a "Motion to Alter or Amend Judgment," which the  
2 bankruptcy court also denied. Appellee filed a "Motion to  
3 Dismiss Appeal" under Rule 8011(a), contending that the appeal  
4 was moot. The BAP denied the motion on May 27, 2008.<sup>9</sup>

### 5 **III. JURISDICTION**

6 The bankruptcy court had jurisdiction under 28 U.S.C.  
7 §§ 1334, 157(b)(2)(A), (F), (H), (K), (O) and 157(c)(1). The  
8 Order Approving Settlement Agreement, the Order Authorizing  
9 Payment of Attorneys' Fees and Costs, and the order approving  
10 fees for Navigant are all final orders. See Brown v. Wilshire  
11 Credit Corp. (In re Brown), 484 F.3d 1116, 1120 (9th Cir. 2007).  
12 We have jurisdiction under 28 U.S.C. § 158. Notice of appeal was  
13 timely filed in accordance with FED. R. BANKR. P. 8002(a).

### 14 **IV. ISSUES<sup>10</sup>**

15 1. Was it proper for the bankruptcy court to approve the  
16 Settlement Agreement?

17 2. Did the bankruptcy court improperly prevent Appellants'  
18 access to the Damage Report?

19 3. Was Carmel properly retained by the Trustee and was the  
20

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21 <sup>9</sup> The panel finds there is no cause to revisit this order.  
22 The motion to dismiss claimed that the appeal was moot because  
23 the Settlement Agreement dismissed BAP No. AZ-07-1302 and the  
24 settlement has been completed. As the May 27, 2008 BAP order  
25 explained, Appellees' arguments are incorrect - there is  
effective relief that could be ordered in this appeal, and  
therefore the issues raised in this appeal are not moot.

26 <sup>10</sup> Appellants raised several additional issues in their  
27 "Appellants/Petitioners Designation of Record & Statement of  
28 Issues on Appeal." To the extent these issues were not addressed  
in Appellants' opening brief, they are waived. See Kim v. Kang,  
154 F.3d 996, 1000 (9th Cir. 1998).

1 court's approval of fees paid to Carmel proper?

2 4. Was the court's approval of fees for Navigant proper?

3 **V. STANDARDS OF REVIEW**

4 "We review the bankruptcy court's conclusions of law and  
5 questions of statutory interpretation de novo." Village  
6 Nurseries v. Gould (In re Baldwin Builders), 232 B.R. 406, 410  
7 (9th Cir. BAP 1999) (citations omitted).

8 We review findings of fact for clear error, giving due  
9 regard to the opportunity of the bankruptcy court to judge the  
10 credibility of the witnesses. FED. R. BANKR. P. 8013. "A factual  
11 finding is clearly erroneous if the appellate court, after  
12 reviewing the record, has a firm and definite conviction that a  
13 mistake has been committed." Wall Street Plaza, LLC v. JSJF  
14 Corp. (In re JSJF Corp.), 344 B.R. 94, 99 (9th Cir. BAP 2006).

15 We review a bankruptcy court's approval of a settlement  
16 agreement for an abuse of discretion. Galina Andreyev v. First  
17 National Bank of Omaha (In re Andreyev), 313 B.R. 302, 304 (9th  
18 Cir. BAP 2004). "A court abuses its discretion if it bases its  
19 ruling on either an erroneous view of the law or a clearly  
20 erroneous assessment of the evidence. . . . Under the abuse of  
21 discretion standard, we must have a definite and firm conviction  
22 that the bankruptcy court committed a clear error of judgment to  
23 reverse." Wall Street, 344 B.R. at 99.

24 We review the bankruptcy court's decision to award fees to  
25 an attorney or other professional for an abuse of discretion and  
26 erroneous application of the law. Friedman Enters. v. B.U.M.  
27 Int'l, Inc. (In re B.U.M. Int'l, Inc.), 229 F.3d 824, 828 (9th  
28 Cir. 2000); Boldt v. Crake (In re Riverside-Linden Inv. Co.),

1 945 F.2d 320, 322 (9th Cir. 1991).

2 **VI. DISCUSSION**

3 **1. Was it proper for the bankruptcy court to approve**  
4 **the Settlement Agreement?**

5 Appellants challenge the propriety of the settlement  
6 process and the court's approval of the Settlement Agreement.  
7 Appellants' objections to the court's approval of the Settlement  
8 Agreement comprise two general categories: (A) objections to the  
9 court's approval of the settlement of all claims between the  
10 estates and Comerica for a total of \$950,000, and (B) objections  
11 to the court's approval of the release.

12 **A. Objections to the Court's Approval**  
13 **of the Settlement Agreement**

14 In its Settlement Memorandum, the bankruptcy court made  
15 several findings regarding its decision to approve the  
16 Settlement Agreement. It made these findings in the context of  
17 applying the four criteria for approval of a settlement set out  
18 in Woodson v. Fireman's Fund Insurance Company (In re Woodson),  
19 839 F.2d 610, 620 (9th Cir. 1988). These factors are:

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

25 Id. (citing Martin v. Kane (In re A & C Properties), 784 F.2d  
26 1377, 1381 (9th Cir. 1986)). The bankruptcy court's Settlement  
27 Memorandum acknowledged, but ultimately rejected, Appellants'  
28 concerns that the Settlement Agreement was not in the best

1 interests of creditors and therefore did not meet the Woodson  
2 criteria for settlement approval. The court addressed each of  
3 the Woodson elements.

4 The first Woodson factor is the estates' probability of  
5 success in the pending litigation. The court credited testimony  
6 of the Trustee that the estates' chances of success in the  
7 DePrizio Litigation were low and, although the chances of  
8 success in the Subordination Litigation were somewhat higher,  
9 there were substantial impediments that might block any  
10 recovery. The Trustee estimated that, based on Navigant's Damage  
11 Report, if the estates were successful on the latter two  
12 matters, the recovery would be \$1.4 million. However, this  
13 assumed that on appeal a court would agree that the breach of  
14 the "term sheet" entered into by the parties was the breach of a  
15 contract and that the Trustee could prove the necessary  
16 egregious behavior required for a favorable judgment on the  
17 subordination claim.

18 The court gave less treatment to the second and third  
19 factors, but it did adequately consider them. The Trustee  
20 testified that the second Woodson factor - the difficulty to be  
21 encountered in the matter of collection - was "not a factor."  
22 There was no reason to perceive a difficulty in collection from  
23 Comerica, a financial-services firm with substantial assets.

24 The third factor is the complexity or difficulty of the  
25 litigation. The Trustee testified that the issues affecting the  
26 estates' chances of success in the litigation were sufficiently  
27 intricate for the litigation to be classified as complex. The  
28 court recognized that the litigation had taken a number of years

1 and had been very expensive.

2 The fourth factor is the interests of creditors. The  
3 Trustee testified that if Comerica prevailed on both the  
4 DePrizio Litigation and the Subordination Litigation, chapter 11  
5 administrative expense claimants would receive approximately 65  
6 percent of their allowed claims. If the Trustee was successful  
7 on all litigation claims, administrative creditors would be paid  
8 in full, and unsecured creditors (such as Appellants) would  
9 receive either no distribution or a *de minimus* distribution.

10 Under the Settlement Agreement, chapter 7 administrative  
11 claimants would be paid in full, and chapter 11 administrative  
12 claimants would receive about 90 percent of their allowed  
13 claims. The settlement also ended a prolonged history of  
14 litigation between the estates and Comerica, and, through the  
15 release, ensured that there would be no further litigation  
16 between the parties. The court therefore concluded that the  
17 settlement was in the best interests of creditors.

18 The court found that the Settlement Agreement satisfied all  
19 of the Woodson factors. It found that the Trustee had properly  
20 used his business judgment, considering the probability of  
21 success in the pending litigation, the expense already incurred,  
22 and the benefit to creditors achieved by the settlement. The  
23 court found the agreement to be fair and equitable and in the  
24 best interests of the estates. Based on all these factors, the  
25 bankruptcy court determined the Settlement Agreement was in the  
26 range of reasonableness and therefore approved it.

27 The panel finds that the bankruptcy court properly  
28 considered all relevant factors in approving the Settlement

1 Agreement. In deciding that the settlement fell within the range  
2 of reasonableness, the court conducted a full and fair hearing  
3 on the settlement and allowed all interested parties, including  
4 Appellants, to be heard. Nothing in a review of the record gives  
5 the panel a definite and firm conviction that the bankruptcy  
6 court committed any errors in judgment or misapplied the law.  
7 Therefore, based on a review of the record, the panel finds the  
8 court's approval of the Settlement Agreement was not an abuse of  
9 discretion.

10 **B. Release of Claims**

11 Appellants contend that the release drafted by Comerica's  
12 counsel, Greenberg Traurig, was improper. Appellants believe  
13 that the release of claims between the estates and Comerica will  
14 effect a "de facto discharge of objecting unsecured creditor  
15 claims." Based on Goodman's objections at the settlement  
16 hearing, the panel takes this to mean Appellants believe that  
17 the release will affect claims owned by the Appellants (as  
18 opposed to claims owned by the estates). Additionally,  
19 Appellants believe that the release is particularly improper  
20 with regard to one of Comerica's employees, Cyndee Herles. They  
21 allege that she perjured herself and should not have been  
22 relieved of any potential liability by the release. We address  
23 Appellants' perjury allegations first.

24 Appellants allege that Comerica's attorney, John Clemency,  
25 suborned perjury by fabricating the contents of Herles's  
26 affidavit. Allegedly, Herles signed the declaration without  
27 reading it. According to Appellants, Herles's perjury was  
28 concealed until February 2008, when Appellants became aware of a

1 deposition she had given.

2 Appellants' allegations are not supported by the record.  
3 Herles testified at her deposition that counsel prepared the  
4 affidavit in question and that before she signed it, she  
5 reviewed each of the statements contained in the affidavit and  
6 verified that they were true and correct. She also testified  
7 that she understood that signing the affidavit was the  
8 equivalent of her testimony at a deposition or in court.  
9 Additionally, Goodman questioned the Trustee about Herles'  
10 deposition at the hearing on the approval of the settlement. The  
11 Trustee testified that he considered the veracity of Comerica's  
12 potential trial witnesses when he made a decision to enter into  
13 the Settlement Agreement. Therefore, the panel concludes that  
14 Appellants' claims that Herles perjured herself are not  
15 supported by the record and that the Trustee considered the  
16 possibility that Herles perjured herself as one factor in  
17 deciding to enter into the Settlement Agreement and release  
18 Comerica and its employees from any liability in this case.

19 Next, we turn to Appellants' more general objections to the  
20 release. The Trustee testified that he had no intent to release  
21 any claims held by any of the Appellants. The court discussed  
22 the release and heard the concerns of all interested parties,  
23 including Goodman. The court was very clear that the release  
24 affected only claims owned by the parties to the Settlement  
25 Agreement - that is, the estates and Comerica.

26 Based on a review of the record, the panel finds  
27 Appellants' objections to the release are without merit. The  
28 plain language of the release states that it merely extinguishes

1 claims between the estates and Comerica. It has no effect on  
2 claims held by any of the Appellants. Therefore, the panel finds  
3 that the court did not abuse its discretion by approving the  
4 release as part of its approval of the Settlement Agreement.

5 **2. Did the bankruptcy court improperly prevent**  
6 **Appellants' access to the Damage Report?**

7 Appellants raise an issue regarding the Damage Report  
8 prepared by Navigant. Appellants believe the bankruptcy court  
9 improperly prevented access to the Damage Report by not  
10 requiring that the report be filed on the docket.

11 At the hearing, Goodman questioned the Trustee about the  
12 procedure he followed with respect to the Damage Report. Carmel  
13 represented that the report was served on opposing counsel and  
14 that, under the court's rules, it did not have to be filed with  
15 the court. The court agreed with Carmel's statements as to the  
16 propriety of the procedures taken with respect to the Damage  
17 Report and overruled any objection that Goodman had to those  
18 procedures.

19 Rule 7026 makes FED. R. CIV. P. 26 ("Rule 26") applicable in  
20 adversary proceedings. Under Rule 26(a)(2) and (4), a party must  
21 serve an expert witness report on opposing counsel. However, the  
22 party has no obligation to file that report with the court or to  
23 make it generally available to all interested parties unless and  
24 until the report is used in the proceeding or the court orders  
25 the filing of the report. FED. R. CIV. P. 5(d)(1); see FED. R.  
26 CIV. P. 5 Advisory Committee's Notes to the 2000 Amendment ("The  
27 rule supersedes and invalidates local rules that forbid, permit,  
28 or require filing of these materials before they are used in the

1 action. . . . The former Rule 26(a)(4) requirement that  
2 disclosures under Rule 26(a)(1) and (2) be filed has been  
3 removed.”). Therefore, the panel finds that the court properly  
4 overruled Goodman’s objection to the procedures followed with  
5 respect to the Damage Report.

6 **3. Was Carmel properly retained by the Trustee and was the**  
7 **court’s approval of fees paid to Carmel proper?**

8 Appellants challenge both the court’s approval of the  
9 Trustee’s retention of Carmel as improper and object to the fees  
10 awarded to Carmel. We first address Appellants’ objections to  
11 the Trustee’s retention of Carmel, which have been alleged by  
12 Appellants as a breach of fiduciary duty.

13 Appellants complain that Carmel has breached his fiduciary  
14 duty to his client by “side-switching.” Appellants appear to be  
15 referring to Carmel’s representation of the estates when Goodman  
16 was the principal of the debtor(s)-in-possession (“DIP”) and  
17 Carmel’s representation of the estates after conversion to  
18 chapter 7 and appointment of a trustee. Under different  
19 circumstances, the Trustee’s retention of counsel for the DIP  
20 could create a conflict of interest that would be a breach of  
21 the fiduciary duties an attorney owes to a client. But under the  
22 circumstances of this case, there was no conflict of interest  
23 and no breach of fiduciary duty. Thus, the court’s approval of  
24 Carmel’s retention by the Trustee was proper.

25 Carmel did not become involved in the case until mid-to-  
26 late 2006. At the time of Carmel’s retention, the Examiner,  
27 appointed in 2003, in conjunction with the Debtors’ former  
28 counsel, Hebert, had been pursuing claims against Goodman

1 individually and as principal for companies other than the  
2 Debtors while Goodman was the principal of the DIP. When Carmel  
3 was employed, the bankruptcy court recognized that there was a  
4 potential conflict of interest in his representation of the  
5 Debtors, considering the interests of the Debtors were adverse  
6 to Goodman, their principal. However, Goodman represented that  
7 he understood that he was a fiduciary for the estates and would  
8 not interfere with the Debtors' attorney's prosecution of claims  
9 against him personally. Therefore, from and before Carmel's  
10 appointment, Appellants' counsel understood that Carmel would be  
11 taking legal positions adverse to Appellants to the extent that  
12 Carmel's representation of the estates required him to do so.  
13 Moreover, as principal of the DIP, Goodman knew that the  
14 estates' employment of Carmel contemplated his retention by the  
15 Trustee if the cases were converted to chapter 7, based on the  
16 hearing on the Substitution Motion and the court's subsequent  
17 Fee Order.

18 Before addressing the substance of Appellants' breach of  
19 fiduciary duty contentions, the panel considers whether it would  
20 be inequitable to allow Appellants to object to Carmel's  
21 retention so long after Carmel's retention was approved by the  
22 bankruptcy court. Appellants had notice of Carmel's employment  
23 and contingent fee arrangement for years before they sought  
24 appeal on this issue. Appellants participated in the hearing at  
25 which Carmel was appointed, and they made no objection to the  
26 retention. Under the circumstances, it would be inequitable for  
27 the court to hear an appeal of Carmel's appointment after such a  
28 long delay. Stanley v. S.S. Retail Stores Corp. (In re S.S.

1 Retail Stores Corp.), 216 F.3d 882, 885 (9th Cir. 2000) (citing  
2 Michel v. Federated Dep't Stores, Inc. (In re Federated Dep't  
3 Stores, Inc.), 44 F.3d 1310, 1320 (6th Cir. 1995)). Therefore,  
4 even if Appellants' objection to Carmel's retention had merit,  
5 Appellants would be estopped from making those objections at  
6 this point. Nonetheless, we will address Appellants' contentions  
7 that the retention of Carmel was improper.

8         Given the circumstances, the Trustee's retention of Carmel  
9 was neither in violation of any ethical rules, nor was it a  
10 violation of Carmel's fiduciary duties owed to his clients, the  
11 estates. Arizona has adopted the American Bar Association's  
12 Model Rules of Professional Conduct and enacted them as Rule 42  
13 of the Arizona Supreme Court Rules. Under these rules, there are  
14 two provisions governing conflicts of interest: (1) Arizona Rule  
15 of Professional Conduct 1.7, Duties to Current Clients ("Rule  
16 1.7"), and (2) Arizona Rule of Professional Conduct 1.9, Duties  
17 to Former Clients ("Rule 1.9"). Appellants do not claim that an  
18 attorney-client relationship ever existed between any of the  
19 Appellants and Carmel. The only clients that Carmel has  
20 represented in this proceeding are the estates. The estates have  
21 merely had a change in principals - Goodman having been replaced  
22 by the Trustee. Therefore, there is no former client, making a  
23 violation of Rule 1.9 impossible, and there is no possibility of  
24 a violation of Rule 1.7(a)(1), since the estates are not adverse  
25 to each other, and there is no other current client.

26         The only possible rule violation is a violation of Rule  
27 1.7(a)(2), which prohibits the representation of a client if  
28 "there is a significant risk that the representation of [the

1 clients] will be materially limited by the lawyer's  
2 responsibilities to . . . a third person."

3 In this case there is no such risk that Carmel's  
4 representation of the clients will be materially limited by his  
5 responsibilities to Goodman, the estates' former principal.  
6 Goodman's knowledge of the adverse relationship between himself,  
7 individually, and the interests of the estates is itself an  
8 adequate safeguard against the risk that information provided to  
9 Carmel while Goodman was the estates' principal will now create  
10 a concurrent conflict of interest in violation of Rule  
11 1.7(a)(2).<sup>11</sup> Goodman's statements at the hearing on the  
12 substitution eliminate any concern that Goodman thought he  
13 personally was the client and might have revealed confidential  
14 information on that basis. Therefore, the Trustee's retention of  
15 Carmel was not a violation of any applicable rule of  
16 professional conduct.

17 Likewise, Carmel did not violate any fiduciary duties owed  
18 to his client, and he did not owe any fiduciary duties to  
19 Goodman. Under Arizona law, "[a]ttorneys are fiduciaries with  
20 duties of loyalty, care, and obedience, whose relationship *with*  
21 *the client* must be one of utmost trust." Webb v. Gittlen, 217  
22 Ariz. 363, 367 (Ariz. 2008) (emphasis added). There is no  
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24 <sup>11</sup> It is unclear what responsibilities Carmel might have to  
25 Goodman that could not be waived by the estates. Arizona Rule of  
26 Professional Conduct 1.6 gives the client(s) control over the use  
27 of confidential information learned by the attorney that is  
28 related to the representation. Once the cases were converted, the  
Trustee controlled the use and/or release of confidential  
information that Carmel received in the course of the  
representation of his clients, the estates.

1 allegation that Carmel violated a duty owed to the estates by  
2 accepting employment offered by the Trustee. Under the  
3 circumstances, Carmel did not owe any fiduciary duties to the  
4 principal of the estates independent of duties owed to the  
5 estates themselves. This is so for the same reasons that  
6 attorneys do not owe fiduciary duties to the shareholders of  
7 companies they represent when they are retained under  
8 circumstances that demonstrate an intent that they represent  
9 only the company. See, e.g., Navellier v. Sletten, 262 F.3d 923,  
10 934-35 (9th Cir. 2001) (applying analogous California law,  
11 finding no duty to shareholders when an attorney's employment by  
12 an independent trustee was clearly not intended to be for the  
13 benefit of the shareholders).

14 Therefore, based on Appellants' lack of objection to  
15 Carmel's potentially conflicting representation before this  
16 appeal, taking into account that there was not a conflict of  
17 interest under the circumstances, and considering that Goodman  
18 understood that under the terms of Carmel's initial employment,  
19 Carmel did not owe Goodman any duties independent of duties owed  
20 the estates and was likely to take legal positions adverse to  
21 Goodman personally, the panel finds it was not an error for the  
22 bankruptcy court to approve Carmel's employment by the Trustee.

23 We now turn to the court's approval of Carmel's attorneys'  
24 fees. The Fee Order entered October 5, 2006, when Carmel was  
25 first retained, provides for a one-third contingency fee on all  
26 adversary proceedings. Appellants argue that this fee was  
27 impermissible and was not reviewed by the court. Appellants'  
28 contentions are without merit.

1           There is nothing per se impermissible about a preapproved  
2 contingent fee arrangement. Section 328 provides: "(a) The  
3 trustee . . . with the court's approval, may employ or authorize  
4 the employment of a professional person under section 327 . . .  
5 on any reasonable terms and conditions of employment, including  
6 . . . on a contingent fee basis." Preapproval is desirable from  
7 an attorney's point of view because once fees have been approved  
8 under section 328(a), the court may revisit the terms and  
9 conditions of the attorney's employment only if, "after the  
10 conclusion of such employment, [] such terms and conditions  
11 prove to have been improvident in light of developments not  
12 capable of being anticipated at the time of the fixing of such  
13 terms and conditions." 11 U.S.C. § 328(a); Circle K Corp. v.  
14 Houlihan, Lokey, Howard & Zukin, Inc. (In re Circle K Corp.),  
15 279 F.3d 669, 671 (9th Cir. 2002).

16           However, in the Ninth Circuit, if an attorney's application  
17 for employment does not unambiguously specify that it seeks  
18 approval under section 328, it is subject to review under  
19 section 330.<sup>12</sup> Circle K, 279 F.3d at 671. Section 330(a)(1)  
20 provides that a court may award an attorney (or other  
21 professional) only "reasonable compensation for actual,  
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24           <sup>12</sup> Carmel has argued that his fees could still be  
25 interpreted to have been approved under section 328. We disagree.  
26 In other circuits, a fee application does not have to reference  
27 section 328 for section 328 to apply. Nischwitz v. Miskovic (In  
28 re Airspect Air, Inc.), 385 F.3d 915, 920-21 (6th Cir. 2004);  
Peele v. Cunningham (In re Texas Securities, Inc.), 218 F.3d 443,  
445-46 (5th Cir. 2000). This circuit, along with the Third  
Circuit, has consciously decided that for section 328 to apply, a  
specific reference to section 328 must be made. Circle K, 279  
F.3d at 671. Zolfo, Cooper & Co. v. Sunbeam-Oster Co., Inc., 50  
F.3d 253, 261-62 (3d Cir. 1995).

1 necessary services rendered." Neither the Substitution Motion  
2 nor the attached letter from Carmel states that the application  
3 was being made under section 328. Therefore, Carmel's fees were  
4 subject to a reasonableness determination by the bankruptcy  
5 court.

6 Appellants essentially contend that no contingent fee  
7 agreement is reasonable. This is incorrect. First, as a matter  
8 of logic, contingent fees must be reasonable to be approved in  
9 the first instance. Section 328 would not authorize an  
10 unreasonable fee arrangement. The fact that approval would occur  
11 at the beginning of the case would not affect this proposition.  
12 Moreover, it would be a violation of relevant ethical rules for  
13 a court to approve an unreasonable contingent fee arrangement.  
14 See Arizona Rule of Professional Conduct 1.5.

15 Second, as a matter of law, the fact that Carmel sought  
16 compensation under a contingent fee arrangement did not affect  
17 the ability of the bankruptcy court to make a section 330  
18 determination that the fee was reasonable. Yermakov v.  
19 Fitzsimmons (In re Yermakov), 718 F.2d 1465, 1470-71 (9th Cir.  
20 1983) ("We agree . . . that nothing inherent in a contingency  
21 fee agreement between a debtor and his attorney prevents it from  
22 being enforceable in bankruptcy. . . . The claim must be  
23 disallowed, however, to the extent that it exceeds the  
24 reasonable value of services rendered by the attorney.").

25 In its Stay Denial Memorandum, the bankruptcy court  
26 reviewed Carmel's fees. The court examined the affidavits filed  
27 by Carmel in support of his request for \$316,666.00 in  
28 attorneys' fees and \$1,929.76 in costs. Taking into account all

1 relevant factors, the court concluded that Carmel's fees were  
2 reasonable.<sup>13</sup> After a review of the record, the panel concludes  
3 that the bankruptcy court's approval of Carmel's fees was not an  
4 abuse of discretion and did not involve an erroneous application  
5 of the law.<sup>14</sup> The panel therefore affirms the bankruptcy court's  
6 fee award.<sup>15</sup>

7 **4. Was the court's approval of fees for Navigant proper?**

8 Appellants challenge the court's approval of approximately  
9 \$80,000 in fees awarded to Navigant for preparing the Damage  
10 Report and performing other work in connection with this  
11 proceeding. Appellants' appeal of this matter is dismissed for  
12 two reasons: (1) Appellants failed to properly appeal the order  
13 awarding fees; and (2) Appellants failed to object to the fees  
14 for Navigant when the Trustee made a motion for Navigant to be  
15 paid.

16 For this panel to properly hear the appeal of an order, a  
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18 <sup>13</sup> In making its reasonableness determination, the  
19 bankruptcy court relied on Pitrat v. Reimers (In re Reimers), 972  
20 F.2d 1127 (9th Cir. 1992). This case discusses both sections 330  
21 and 328, but given our review of the record and the language used  
22 by the bankruptcy court, we are satisfied that the court made the  
proper inquiry under section 330(a) in determining Carmel's fees  
were reasonable.

23 <sup>14</sup> On October 14, 2008, Appellees filed an emergency motion  
24 to supplement their excerpts of the record with a previously  
25 omitted page from Carmel's fee affidavit. The panel hereby grants  
the motion, and will receive the omitted page into the record.

26 <sup>15</sup> Having determined that the bankruptcy court applied the  
27 law correctly and did not abuse its discretion, the panel need  
28 not reach Appellees' argument that Appellants are judicially  
estopped from arguing that Carmel is not entitled to fees per the  
court's order. The panel also dismisses Appellants' claims that  
the amount of Carmel's fees constitute an ethical violation.

1 Notice of Appeal must be filed within 10 days of the entry of  
2 that order (or within such other time as specified by Rule  
3 8002). FED. R. BANKR. P. 8001. The "Order Granting Trustee's First  
4 and Final Application For Approval and Payment of Compensation  
5 for Navigant Consulting, Inc." ("Navigant Fee Order") was  
6 entered April 10, 2008 (docket no. 1514 in the main case). No  
7 Notice of Appeal was ever filed in the main case after that  
8 date. Before the Navigant Fee Order, the Appellants filed, on  
9 March 17, 2008, a Notice of Appeal in adversary proceeding 07-  
10 00031. Appellants filed an Amended Notice of Appeal on April 17,  
11 2008 (docket no. 74 in 07-00031). This amended notice does not  
12 reference the Navigant Fee Order. The amended notice references  
13 Appellants' Motion to Alter or Amend Judgment ("Motion to  
14 Alter/Amend"), which was filed concurrently with the amended  
15 notice (docket no. 71 in 07-00031). The Motion to Alter/Amend  
16 likewise does not reference the Navigant Fee Order except to  
17 state, "The Appellants were not allowed to contest the  
18 \$80,000.00 'damage analysis', but by a memory test of the  
19 trustee." Motion to Alter/Amend at 11:14-17.

20 Therefore, it does not appear that Appellants have filed a  
21 Notice of Appeal with regard to the Navigant Fee Order, meaning  
22 that the Navigant Fee Order is not properly before the panel,  
23 and, since the period stated in FED. R. BANKR. P. 8002 has passed,  
24 the Navigant Fee Order is no longer appealable. Therefore the  
25 panel will not address the propriety of the Navigant Fee Order  
26 because Appellants failed to appeal the order.

27 Even if the panel were to find a proper appeal of the  
28 Navigant Fee Order was taken, Appellants' failure to oppose the

1 Trustee's motion for Navigant's fees bars the Appellants from  
2 now objecting to those fees. In this circuit, the law is clear  
3 that a party may not raise an issue for the first time on  
4 appeal. Franchise Tax Bd. v. Roberts (In re Roberts), 175 B.R.  
5 339, 344-45 (9th Cir. BAP 1994) (citing Rothman v. Hosp. Serv.  
6 of S. Cal., 510 F.2d 956, 960 (9th Cir. 1975)). A party must  
7 raise an objection to a matter in the lower court. Id. There is  
8 no "bright-line rule" for what constitutes raising an issue.  
9 O'Rourke v. Seaboard Surety Co. (In re E.R. Fegert, Inc.), 887  
10 F.2d 955, 957 (9th Cir. 1989). However, the Court of Appeals has  
11 instructed that "[a] workable standard . . . is that the  
12 argument must be raised sufficiently for the trial court to rule  
13 on it." Id.

14 Here, the Trustee filed his "First and Final Application  
15 for Approval and Payment of Compensation for Navigant  
16 Consulting, Inc., Accountants for Chapter 7 Trustee" ("Navigant  
17 Fee Motion") on March 5, 2008 (docket no. 1501 in 07-00031). The  
18 court granted the Navigant Fee Motion after reviewing it and  
19 receiving no objection. Therefore, Appellants have failed to  
20 preserve the issue of the Navigant Fee Order for purposes of  
21 this appeal. Additionally, there is no evidence in the record  
22 that the bankruptcy court failed to make a proper determination  
23 under section 330. Therefore, because it does not appear that  
24 the appeal of the Navigant Fee Order is properly before the  
25 panel, combined with the fact that the issue of the entry of the  
26 Navigant Fee Order is being raised for the first time on appeal,  
27 the panel dismisses any objection by Appellants to the fees  
28 awarded to Navigant.

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**VII. CONCLUSION**

The panel affirms the bankruptcy court's approval of the Settlement Agreement. The Trustee's decision to settle and release any claims against Comerica was a proper exercise of his business judgment, and therefore the court's approval, in light of the Woodson factors, was not an abuse of discretion. The court's treatment of the Damage Report was also proper and therefore not an abuse of discretion.

The panel also affirms the bankruptcy court's approval of the Trustee's retention of Carmel and the court's approval of fees paid to Carmel, as this was neither an abuse of discretion nor an erroneous application of the law.

Finally, the panel dismisses any objection to the fees paid to Navigant, as that issue is not properly before the panel and the Appellants did not properly preserve the issue for appeal.