

JUL 17 2008

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-07-1415-MoDMk
)		
KAVEH LAHIJANI,)	Bk. No.	SV 98-15561-GM
)		
Debtor.)		
_____)		
FUCHS & ASSOCIATES, INC.,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM ¹	
)		
JOHN M. WOLFE, Chapter 7)		
Trustee,)		
)		
Appellee.)		
_____)		

Argued and Submitted on May 22, 2008
at Pasadena, California

Filed - July 17, 2008

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

Honorable Geraldine Mund, Bankruptcy Judge, Presiding

Before: MONTALI, DUNN and MARKELL, Bankruptcy Judges.

¹This 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.

1 A law firm sought an award of attorneys' fees and costs
2 pursuant to 11 U.S.C. §§ 105 and 503(b)(3) and (b)(4).² The
3 bankruptcy court denied the motion and the law firm appealed. We
4 AFFIRM.

5 I. FACTS

6 In April 1998, Kaveh Lahijani ("Debtor") filed his chapter 7
7 petition, valuing his assets at \$1,600.00 and his liabilities at
8 \$3,846,600.79. He did not list Kamiar Simantob, Kamran Simantob
9 or Nasser Lahijani (the "Simantob Creditors") on his schedules.³
10 Debtor received a discharge on August 7, 1998, and his case was
11 closed on August 3, 1999.

12 In May 2000, the Simantob Creditors filed a state court
13 complaint alleging intentional misrepresentation, fraudulent
14

16 ²Unless otherwise indicated, all chapter, section and rule
17 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
18 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as
19 enacted and promulgated prior to the effective date of The
20 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
21 Pub. L. 109-8, 119 Stat. 23.

22 ³In an unpublished memorandum, the bankruptcy court
23 described how the claims of the Simantob creditors against Debtor
24 arose:

25 The Debtor had a preexisting business relationship with
26 the Plaintiffs in connection with two real estate
27 developments financed by Plaintiffs in 1987 and 1988
28 for which Debtor served as developer and manager.
29 Plaintiffs allege that Debtor engaged in fraud and
embezzlement and that his conduct resulted in
approximately \$7 million worth of losses to Plaintiffs.

Simantob v. Lahijani (In re Lahijani), 2005 WL 4658490 (Bankr.
C.D. Cal. 2005).

1 concealment, and conversion against Debtor.⁴ In March 2002,
2 Debtor filed a motion to reopen his case so that he could
3 schedule and prosecute a prepetition claim that he held against
4 the Simantob Creditors. The court reopened the case on June 6,
5 2002.

6 Following the reopening of Debtor's case, the Simantob
7 Creditors filed an action to revoke Debtor's discharge under
8 section 727(a)(4) and to determine dischargeability of debt under
9 section 523. The bankruptcy court dismissed the section 727
10 claim as untimely, but allowed an amendment of the section 523
11 claims. The Simantob Creditors amended their complaint to add
12 five new causes of action -- including claims to avoid transfers
13 under sections 542 and 548 -- and to add several nondebtor
14 defendants. The bankruptcy court thereafter dismissed with
15 prejudice the claims for conspiracy to defraud, conspiracy to
16 convert and breach of fiduciary duty and dismissed without
17 prejudice the section 542 and 548 claims.⁵ The bankruptcy court
18 also dismissed all nondebtor defendants.

19 After the bankruptcy court dismissed the avoidance and fraud
20

21 ⁴The Simantob Creditors removed the state court action to
22 the bankruptcy court, but the bankruptcy court abstained and
23 remanded the proceeding. In 2004, the state court entered a
24 judgment disposing of all claims in favor of Debtor and other
25 defendants and providing that the Simantob Creditors take nothing
26 and pay costs and attorneys' fees.

27 ⁵In its 2003 order dismissing the section 542 and 548
28 claims, the bankruptcy court noted that the claims belonged to
the estate, that the chapter 7 trustee (and not the Simantob
Creditors) had standing to pursue these claims and that the
Simantob Creditors had not obtained the requisite authorization
to prosecute these claims.

1 claims of the Simantob Creditors, they filed in the same
2 adversary proceeding a motion for substantive consolidation of
3 Debtor's estate with two nondebtor corporations: Elan
4 Enterprises, Inc. ("Elan") and Vista Lane, LLC ("Vista").
5 Contending that Debtor had transferred valuable assets before
6 filing his bankruptcy petition with the intent of retrieving them
7 after obtaining his discharge, the Simantob Creditors also
8 alleged that Debtor controlled and acted as the alter ego of Elan
9 and Vista. Debtor purportedly transferred funds and assets into
10 and out of these corporations, including a residence in Laguna
11 Beach, California.

12 On October 3, 2005, the bankruptcy court entered its
13 Memorandum of Opinion re Plaintiffs' Motion for Substantive
14 Consolidation, setting forth the facts supporting the claims of
15 the Simantob Creditors. The court concluded that "Debtor used
16 Elan's assets as if they were his own with the purpose of
17 shielding them from creditors," and that "Debtor treated Vista's
18 asset [sic] as his own and that Vista was used as a vehicle to
19 shield Debtor's assets from creditors." After noting that Debtor
20 "engaged in asset transfers which appear to have been
21 orchestrated to prevent any possible recovery by creditors and
22 are potentially fraudulent," the court granted the Simantob
23 Creditors' motion for substantive consolidation.

24 The Simantob Creditors assert that they presented the
25 various trustees⁶ appointed in Debtor's case with information

26 _____
27 ⁶Three different trustees have been appointed in this case.
28 The initial trustee, Peter C. Anderson, was replaced by John P.
Pringle as interim trustee on July 31, 2006. In September 2007,
(continued...)

1 about the potential fraudulent transfers, but that the trustees
2 took no action until a former trustee sold all assets (including
3 avoidance actions) for \$175,000 to an entity ("Claims Prosecutor,
4 LLC") owned by Debtor's brother-in-law (and transferee).⁷ The
5 Simantob Creditors appealed the order approving that sale, and we
6 reversed and remanded.⁸

7 Thereafter, in light of the acquisition of new assets via
8 the substantive consolidation with Elan and Vista, the interim
9 chapter 7 trustee filed a new motion to sell all assets of the
10 estate for \$3.5 million. The Simantob Creditors opposed the sale
11 and sought an order requiring the trustee to accept their overbid
12 (valued at approximately \$175,000) in the prior sale of all
13 assets. The bankruptcy court denied their request and the
14 Simantob Creditors appealed, arguing that the bankruptcy court
15 had not complied with this panel's mandate in Lahijani I. On
16 June 11, 2008, we issued a decision in that appeal (CC-07-1416-
17 MoDMk) affirming the bankruptcy court.

18 Because of its clients' efforts to uncover assets and
19 transfers of estate property and to recover property through,

20
21 ⁶(...continued)
22 the Simantob Creditors, contending that they were the only
23 unsecured creditors entitled to vote for any replacement trustee,
24 filed a motion to appoint the current chapter 7 trustee and
25 appellee, John M. Wolfe ("Wolfe"), as permanent trustee. The
26 court granted that motion on October 17, 2007.

27
28 ⁷That trustee initially filed a motion to assign avoiding
actions to the Simantob Creditors, but the court allowed other
interested parties to submit overbids for all assets of the
estate.

⁸The opinion reversing and remanding that sale order can be
found at Simantob v. Claims Prosecutor, LLC (In re Lahijani), 325
B.R. 282, 284 (9th Cir. BAP 2005) ("Lahijani I").

1 inter alia, the substantive consolidation motion, Fuchs &
2 Associates, Inc. ("Appellant"), counsel for the Simantob
3 Creditors, filed a motion for attorneys' fees and costs (the
4 "Section 503(b) Motion"). Appellant sought administrative
5 priority for its fees and costs under section 503(b) (4), which
6 permits such recovery by an attorney for a creditor who falls
7 within the ambit of section 503(b) (3).⁹ Appellant contended that
8 it was entitled to fees and costs in the amount of \$188,319.11
9 because the Simantob Creditors satisfied section 503(b) (3) (A)
10 (granting administrative priority to the expenses of a creditor
11 that files a petition under section 303), section 503(b) (3) (B)
12 (permitting an award of administrative expenses to a creditor
13 that recovers, after the court's approval, for the benefit of the
14 estate any property transferred or concealed by the debtor) and
15 section 503(b) (3) (D) (granting administrative priority to the
16 expenses of a creditor making a substantial contribution in a
17 chapter 9 or 11 case). Appellant further contended that it was
18 entitled to an award of its fees and costs under section 105.

20
21 ⁹In order for a law firm to obtain administrative expense
22 status for its fees and costs under section 503(b) (4), it merely
23 has to show that its client (the creditor) could qualify for an
24 award of administrative expenses under section 503(b) (3). The
25 client/creditor need not have expenses that actually have been
allowed under section 503(b) (3). Salomon North America v.
Knupfer (In re Wind n' Wave), 328 B.R. 176, 182 (9th Cir. BAP
2005), rev'd on other grounds, 509 F.3d 938 (9th Cir. 2007).

26 The issue presented in this appeal is whether the Simantob
27 Creditors would have qualified for an award of expenses under
28 section 503(b) (3), thereby enabling Appellant to assert its claim
under section 503(b) (4). For convenience, we will refer to the
applicable parts of section 503(b) (3) without further separate
reference to section 503(b) (4).

1 In the Section 503(b) Motion, Appellant acknowledged that
2 the Simantob Creditors had not obtained court approval before
3 pursuing asset recovery as required by section 503(b)(3)(B), but
4 nonetheless cited authority from outside the Ninth Circuit for
5 the proposition that retroactive approval should be granted.
6 Even though Appellant contended that the Simantob Creditors were
7 "therefore entitled to retroactive nunc pro tunc authorization of
8 their conduct and efforts" to recover assets for the estate, it
9 did not explain how and why such retroactive authorization could
10 be granted under governing Ninth Circuit standards.

11 The former chapter 7 trustee, Debtor and another creditor
12 opposed the Section 503(b) Motion. The bankruptcy court issued
13 a tentative decision indicating that it would deny the motion,
14 observing that the "general scope of [Appellant's] argument is
15 that over the past several years, [the Simantob Creditors and
16 Appellant] have successfully transformed this case from a no
17 asset case to a case where the present interim trustee is now
18 seeking approval of a settlement which, if approved, could bring
19 in at least \$3.5 million to the estate (however, the court notes
20 that [the Simantob Creditors] are opposing that sale and seeking
21 fees for opposing that sale)."

22 The court stated that Appellant could not obtain
23 administrative priority for its fees and costs under section
24 503(b)(3)(D), because only creditors (and thus their counsel) who
25 provide substantial contributions in a chapter 11 or 9 case can
26 claim such a priority, and Debtor's case was filed as and
27 continues to be a chapter 7 case. The court denied Appellant's
28 request for fees under this subsection with prejudice.

1 The court further denied Appellant's request for fees and
2 costs under section 503(b) (3) (B) with prejudice, as the Simantob
3 Creditors had not obtained court approval before purportedly
4 recovering assets of the estate. In addition, comparing
5 Appellant's efforts to a bull in a china shop, the court noted
6 that Appellant and the Simantob Creditors had wasted the time and
7 resources of the court and all parties by filing insufficient and
8 improper pleadings. Finally, the court observed that at the time
9 the Section 503(b) Motion was heard, the court could not
10 determine what (if any) benefits the Simantob Creditors had
11 provided the estate as they have objected to the sale and
12 settlement that could provide the estate with \$3.5 million and
13 "no assets have flowed into the estate and been liquidate[d]."

14 The court denied (without prejudice) as premature
15 Appellant's request for administrative fees and expenses under
16 section 503(b) (3) (A) and under section 105. Noting that the
17 substantive consolidation motion could be the equivalent of an
18 involuntary petition under section 303, especially if section 105
19 was applied jointly with section 503(b) (3) (A), the court refused
20 to grant such a remedy because the order granting substantive
21 consolidation was still on appeal. As such, application of
22 sections 105 and 503(b) (3) (A) was premature.

23 At a hearing on the Section 503(b) Motion, Appellant
24 acknowledged that its motion was premature "and probably should
25 have been withdrawn." "We would request the Court deny
26 everything as without prejudice and premature subject to being
27 revisited at a later date when there are assets of the estate and
28 a proper determination can be made."

1 Following the hearing and for the reasons set forth in its
2 tentative ruling, the court entered an order denying the Section
3 503(b) Motion on October 18, 2007. Appellant filed a timely
4 notice of appeal on October 26, 2007.

5 II. ISSUES

6 1. Did the bankruptcy court err in denying with prejudice
7 Appellant's request for fees and costs under section
8 503(b) (3) (B)?

9 2. Did the bankruptcy court err in denying with prejudice
10 Appellant's request for fees and costs under section
11 503(b) (3) (D)?

12 3. Did the bankruptcy court err in denying without
13 prejudice Appellant's request for fees and costs under section
14 503(b) (3) (A)?

15 III. JURISDICTION

16 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
17 and § 157(b) (1), (2) (A) and (B). We have jurisdiction under 28
18 U.S.C. § 158.

19 IV. STANDARD OF REVIEW

20 We review the bankruptcy court's interpretation of
21 section 503(b) de novo. Cellular 101, Inc. v. Channel
22 Communications, Inc. (In re Cellular 101, Inc.), 377 F.3d 1092,
23 1095 (9th Cir. 2004); Gill v. Tishman Constr. Corp. of Cal. (In
24 re Santa Monica Beach Hotel, Ltd.), 209 B.R. 722, 725 (9th Cir.
25 BAP 1997). "The bankruptcy court has broad discretion to
26 determine whether to grant a section 503 claim." Santa Monica
27 Beach Hotel, 209 B.R. at 725.

1 **V. DISCUSSION**

2 Appellant sought an award of fees and expenses under section
3 503(b)(4), which grants administrative priority for "reasonable
4 compensation for professional services rendered by an attorney"
5 of a creditor whose expenses are allowable under subsections (A)-
6 (E) of section 503(b)(3). In other words, legal fees and costs
7 incurred by a creditor are allowable as administrative expenses
8 under section 503(b)(4) if the requesting entity is able to
9 demonstrate a qualifying occurrence under section 503(b)(3), such
10 as the recovery of property under subparagraph (B) or the making
11 of a substantial contribution in a chapter 9 or 11 case under
12 subparagraph (D).

13 Here, Appellant contended that its clients were entitled to
14 compensation and reimbursement of expenses under subsections (A),
15 (B) and (D) of section 503(b)(3) and that therefore it was
16 entitled to reasonable compensation under section 503(b)(4). For
17 the reasons set forth below, the bankruptcy court did not err in
18 denying Appellant's fee request.

19 A. Section 503(b)(3)(B) Is Inapplicable

20 Section 503(b)(3)(B) allows a creditor "that recovers, after
21 the court's approval, for the benefit of the estate any property
22 transferred or concealed by the debtor." Appellant contends that
23 its efforts and those of its clients resulted in the recovery of
24 such property for the benefit of the estate. Appellant, though,
25 admits that the Simantob Creditors did not obtain court approval
26 before recovering any such property. Wolfe contends that the
27 absence of prior court approval is fatal to Appellant's section
28 503(b)(3)(B) claim, while Appellant asserts that the court could

1 grant retroactive approval. While we acknowledge that the clear
2 statutory language supports Wolfe's position, we need not decide
3 that issue now as Appellant has not demonstrated that it could
4 satisfy the requisites for retroactive approval even if
5 retroactive approval were available.

6 In Lahijani I, we noted that section 503(b)(3) requires
7 prior court approval: that section codified "the judge-made rule
8 that the creditor obtain permission before recovering property
9 for the benefit of the estate." Lahijani I, 325 B.R. at 291
10 (emphasis added). In making this observation, we cited favorably
11 In re Godon, Inc., 275 B.R. 555 (Bankr. E.D. Cal. 2002), in which
12 the bankruptcy court stated:

13 When the authorization for creditors to sue on behalf
14 of the estate to recover property transferred or
15 concealed by the debtor was carried forward into the
16 1978 Bankruptcy Code as §§ 503(b)(3)(B) and (4),
17 Congress resolved the former ambiguity by making
mandatory the judge-made requirement of prior
permission as part of the continuing authorization for
administrative expenses[.]

18 Id. at 562 (emphasis added).¹⁰ The Godon court further
19 emphasized the importance of prior approval under section
20 503(b)(3)(B):

21 In addition to prior judicial permission, successful
22 recovery is an essential element to the creditor's
§ 503(b)(3)(B) eligibility. This follows from the

23 _____
24 ¹⁰Section 64(a) of the former Bankruptcy Act, which was the
25 predecessor to section 503(b)(3)(B), did not specifically require
26 prior court approval for a creditor to recover property for the
27 estate and obtain an administrative expense. The "general rule
28 of statutory construction . . . that a change in the language of
a statute indicates that a departure was intended," supports a
conclusion that Congress intended to require prior court
approval. In re Cent. Idaho Forest Prods., 317 B.R. 150, 158 n.
9 (Bankr. D. Id. 2004) (quotations and citations omitted).

1 statutory language "a creditor that recovers, after the
2 court's approval" in that section. 11 U.S.C.
§ 503(b)(3)(B).

3 In turn, such creditor eligibility, i.e. actual
4 recovery plus prior judicial permission, is
5 prerequisite to § 503(b)(4) compensation for a
6 professional by virtue of the language "attorney . . .
of an entity whose expense is allowable under"
subparagraph (b)(3). 11 U.S.C. § 503(b)(3)(4).

7 Id. at 567 (emphasis added).

8 Wolfe, citing Central Idaho Forest Products, argues that we
9 must defer to the statutory language and follow its plain
10 meaning. "To allow an administrative expense to a party for the
11 recovery of a transferred or concealed asset without that party
12 obtaining prior Court approval, would be tantamount to deleting
13 the phrase from the statute[,]” thereby altering its plain
14 language.¹¹ In re Cent. Idaho Forest Prods., 317 B.R. at 157.

15 Appellant, in contrast, argues that retroactive approval
16 satisfies the requisites of section 503(b)(3), citing Xifaras v.
17 Morad (In re Morad), 328 B.R. 264 (1st Cir. BAP 2005), and
18 Pergament v. Maghazeh Family Trust (In re Maghazeh), 315 B.R. 650
19 (Bankr. E.D.N.Y. 2004). Noting that courts allow nunc pro tunc
20 employment of professionals under section 327 under

21
22 ¹¹Appellant cites Gurney v. Ariz. Dept. of Revenue (In re
23 Gurney), 192 B.R. 529, 535 (9th Cir. BAP 1996) for the
24 proposition that we should not follow the literal words of
25 section 503(b)(3)(B). Gurney and similar cases are
26 distinguishable, as they state that in the "rare cases" where the
27 "literal application of a statute will defeat the objects and the
28 policy of the law, the intention of the drafters rather than the
strict language controls." Here, no evidence exists that the
language requiring prior approval was contrary to the intent and
object of the law. To the contrary, the addition of the
requirement in 1978 demonstrates that Congress intended to make
this a requisite for administrative priority compensation under
that section. Cent. Idaho Forest Prods., 317 B.R. at 158 n. 9.

1 "extraordinary circumstances," the Morad court held that a
2 creditor may be able to obtain ex post facto approval of its
3 recovery of estate assets for the purposes of section
4 503(b) (3) (B), but only where those extraordinary circumstances
5 exist:

6 Prior approval is preferable because it permits the
7 bankruptcy court to supervise the administration of the
8 estate more closely, and minimizes the chance that the
9 court will be confronted with a fait accompli. To
10 achieve these desirable ends, the prior approval
11 requirement must have teeth. A relatively strict
12 standard, such as extraordinary circumstances, serves
13 this purpose. At the same time, it encourages
14 compliance with the statute and eliminates
15 opportunities for manipulation.

12 Morad, 328 B.R. at 271. The Morad panel noted that the delay in
13 seeking court approval must result from extraordinary
14 circumstances and that "tardiness occasioned merely by oversight
15 cannot qualify as an extraordinary circumstance . . ." Id.

16 While the Morad approach holds considerable appeal, we need
17 not decide now whether a strict construction of section
18 503(b) (3) (B) permits such retroactive approval.¹² Even if
19 retroactive approval could occur under the statute, Appellant has
20 not shown that it could satisfy the requisites for obtaining such
21 approval under governing Ninth Circuit authority. In the Ninth
22 Circuit, nunc pro tunc approval of employment of professionals
23 for the estate and a retroactive award of fees for services

24
25 ¹²We do note, however, that in holding that nunc pro tunc
26 approval was possible under extraordinary circumstances, the
27 Morad court relied on cases that permitted retroactive approval
28 of the employment of estate professionals under sections 327 and
330. Those sections do not contain the specific temporal
limitation of section 503(b) (3) (B), which provides that expenses
are recoverable by creditors who recover assets "after the
court's approval."

1 rendered without court approval is limited to "exceptional
2 circumstances where an applicant can show both a satisfactory
3 explanation for the failure to receive prior judicial approval
4 and that he or she has benefited the bankruptcy estate in some
5 significant manner." Okamoto v. THC Fin. Corp. (In re THC Fin.
6 Corp.), 837 F.2d 389, 392 (9th Cir. 1988); see also Atkins v.
7 Wain, Samuel & Co. (In re Atkins), 69 F.3d 970, 975-76 (9th Cir.
8 1995); In re Gutterman, 239 B.R. 828, 830 (Bankr. N.D. Cal.
9 1999).

10 Here, Appellant did not provide any explanation for failing
11 to obtain prior court approval, much less a satisfactory one.
12 The Simantob Creditors had been placed on notice as early as 2003
13 (in the court's order dismissing their section 542 and 548
14 claims) that they needed authorization to pursue those claims on
15 behalf of the estate. At that point, they could have sought
16 court approval to pursue other avenues of recovery on behalf of
17 the estate. They did not do so, and they have not attempted to
18 justify their delay in doing so. As such, the "exceptional
19 circumstances" for nunc pro tunc approval do not exist here.

20 Appellant acknowledged to us at oral argument that it had
21 requested nunc pro tunc approval from the bankruptcy court. In
22 doing so, Appellant did not establish that grounds existed for
23 this approval. While the bankruptcy court denied the section
24 503(b)(3)(B) request because Appellant had not obtained prior
25 authority to proceed, we need not go that far. We can simply
26 rely on the record in holding that Appellant did not demonstrate
27 that it was entitled to retroactive approval. Therefore, whether
28 or not retroactive approval is sufficient for section

1 503(b) (3) (B) purposes, Appellant has not satisfied the requisites
2 for such approval. We therefore affirm the denial with prejudice
3 of compensation under section 503(b) (3) (B).¹³

4 Even if Appellant had obtained prior court approval, we
5 agree with the bankruptcy court that an award of fees under
6 section 503(b) (3) (B) would be premature, as Applicant has not
7 shown that the Simantob Creditors have recovered property "for
8 the benefit of the estate." The estate's assets have not been
9 sold, the substantive consolidation order is still on appeal, and
10 the Simantob Creditors have objected to a compromise and sale
11 that could result in the estate recovering \$3.5 million. Until
12 the estate is able to liquidate (and thus value) its assets, the
13 Section 503(b) Motion is premature. Even Appellant acknowledged
14 the prematurity of the motion at the motion hearing.

15 B. Section 503(b) (3) (D) Is Inapplicable

16 Section 503(b) (3) (D) allows a creditor to recover the actual
17 and necessary expenses incurred "in making a substantial
18 contribution in a case under chapter 9 or 11 of this title."
19

20
21 ¹³That said, the bankruptcy court could still possibly
22 authorize Appellant's clients to pursue future avoidance actions
23 for the benefit of the estate. In such an event, Appellant
24 should not be precluded from seeking fees arising from the
25 recovery of transferred or concealed property through those
26 avoidance actions (unless they have assumed the costs of
27 litigating those claims or unless the recovery does not benefit
28 the estate). Moreover, our affirmance of the denial with
prejudice does not preclude relief under Rule 9024 (incorporating
Federal Rule of Civil Procedure 60(b)), if grounds exist for this
relief. See Standard Oil Co. of Cal. v. U.S., 429 U.S. 17 (1976)
(after a judgment has been affirmed on appeal, a party seeking
relief from that judgment under Rule 60(b) ordinarily may file
the motion in the trial court without securing permission to do
so from the appellate court).

1 This is not a chapter 9 or 11 case. Appellant has cited no
2 authority that would permit the bankruptcy court and us to
3 disregard the clear statutory language and allow recovery of
4 expenses for making a substantial contribution in a chapter 7
5 case. Instead, courts have uniformly denied requests under
6 section 503(b)(3)(D) for expenses incurred while a case was
7 pending in a chapter other than 9 or 11. See, e.g., In re United
8 Container LLC, 305 B.R. 120, 128 (Bankr. M.D. Fla. 2003)
9 (“administrative expense status under § 503(b)(3)(D) is available
10 only for contributions in chapter 9 or chapter 11 cases, but not
11 in chapter 7 cases”); In re Blount, 276 B.R. 753, 763-64 (Bankr.
12 M.D. La. 2002) (“[M]aking a substantial contribution to a case is
13 grounds for reimbursement of expenses to a creditor only when the
14 case is a case under chapter 9 or 11 of the Bankruptcy Code. As
15 § 503(b)(3)(D) is expressly limited to cases under chapters 9 or
16 11 of the Bankruptcy Code, and this is a case under chapter 7 of
17 the Bankruptcy Code, the substantial contribution ground of
18 recovering expense reimbursement does not apply.”); U.S. Trustee
19 v. Farm Credit Bank of Omaha (In re Peterson), 152 B.R. 612, 614
20 (D.S.D. 1993) (reversing section 503(b)(3)(D) award in chapter 12
21 case, applying various tenets of statutory construction, noting
22 that Congress chose not to include chapters 7, 12, and 13 in that
23 subsection, and observing that courts do not have authority to
24 rewrite statute even in the interest in equity).

25 We will apply the statute as written. Because this case is
26 not a chapter 9 or 11 case, Appellant is not entitled to
27 administrative priority for fees incurred in providing a
28 “substantial benefit” to the estate. The bankruptcy court did

1 not err in denying this request with prejudice.

2 C. The Request Under Section 503(b) (3) (A) Is Premature

3 Without addressing or deciding whether section 503(b) (3) (A)
4 could be used where a motion for substantive consolidation has
5 been filed instead of an actual involuntary petition under
6 section 303, we affirm the bankruptcy court's conclusion that any
7 award under section 503(b) (4) and (b) (3) (A) is premature, as
8 Wolfe has thus far -- because of the objections of the Simantob
9 Creditors -- been unable to liquidate (through sale or
10 compromise) estate assets. Appellant even acknowledged that its
11 motion was premature at the hearing on the Section 503(b) Motion.
12 The court therefore did not err in denying without prejudice the
13 request for administrative fees and costs under sections 105 and
14 503(b) (3) (A) .

15 D. Section 105 Cannot Relieve Appellant From the Statutory
16 Requirements of Section 503(b) (3) (B) & (D)

17 Finally, Appellant argues that the bankruptcy court should
18 have used its equitable powers under section 105(a) to excuse it
19 from strict compliance with the language of sections 503(b) (3) (B)
20 and 503(b) (3) (D). We disagree. A bankruptcy court may not use
21 its equitable powers "to defeat clear statutory language, nor to
22 reach results inconsistent with the statutory scheme established
23 by the Code.'" Missoula Fed. Credit Union v. Reinertson (In re
24 Reinertson), 241 B.R. 451, 455 (9th Cir. BAP 1999), quoting
25 Committee of Creditors Holding Unsecured Claims v. Koch Oil Co.
26 (In re Powerine Oil Co.), 59 F.3d 969, 973 (9th Cir. 1995). See
27 also Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988)
28 ("whatever equitable powers remain in bankruptcy courts must and

1 can only be exercised within the confines of the Bankruptcy
2 Code").

3 **VI. CONCLUSION**

4 For the foregoing reasons, we AFFIRM.

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28