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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	NC-08-1073-DJuMk
)		
DIMAS, LLC,)	Bk. No.	02-51420
)		
Debtor.)		
<hr/>			
ADRIENNE RAKITIN; PETER)		
RAKITIN; PAUL RAKITIN;)		
DIMAS, LLC,)		
)		
Appellants,)		
)		
v.)	MEMORANDUM¹	
)		
BERLINER COHEN,)		
)		
Appellee.)		

Argued and Submitted on November 20, 2008
at San Francisco, California

Filed - February 25, 2009

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

Honorable Marilyn Morgan, Bankruptcy Judge, Presiding

Before: DUNN, JURY, and MARKELL, Bankruptcy Judges

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have, FRAP 32.1, it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 This appeal challenges the bankruptcy court's approval of a
2 total of \$663,446.61 in fees and expense reimbursements for the
3 law firm Berliner Cohen, special counsel to the debtor and debtor
4 in possession. Appellants, the debtor in possession and its
5 limited liability company members, assert that more than \$200,000
6 of this amount was approved improperly in violation of the
7 bankruptcy court's own guidelines.² The appellee, Berliner
8 Cohen, responds that the bankruptcy court examined all of its
9 charges and expense reimbursement requests in detail, disallowed
10 a substantial amount, found the rest to be reasonable and of
11 benefit to the estate, and entered appropriate approving orders.

12 We conclude that the bankruptcy court applied appropriate
13 legal standards and did not abuse its discretion in approving
14 expense reimbursements and, for the most part, in approving the
15 fees that it awarded to Berliner Cohen. Accordingly, we AFFIRM
16 the bankruptcy court's expense reimbursements and the bulk of the
17 fees that it awarded to Berliner Cohen.

18 In one category--fees for preparing Berliner Cohen's fee
19 applications themselves, section I.6--the Guidelines impose a 5%
20 cap that was exceeded by the bankruptcy court in its fee award to
21 Berliner Cohen without explanation. We conclude that in this one
22 area, the bankruptcy court abused its discretion, and we REVERSE
23 the bankruptcy court's fee award for preparation of fee

24
25 ² See Guidelines for Compensation and Expense Reimbursement
26 of Professionals and Trustees for the United States Bankruptcy
27 Court for the Northern District of California (the "Guidelines"),
28 [available at
http://www.canb.uscourts.gov/procedures/dist/guidelines/guideline
s-compensation-and-expense-reimbursement-professional-and-truste.](http://www.canb.uscourts.gov/procedures/dist/guidelines/guideline-s-compensation-and-expense-reimbursement-professional-and-truste)

1 applications in excess of the mandatory cap, in the amount of
2 \$35,363.17.

3 Finally, in their briefs and at oral argument, the
4 Appellants noted that although Berliner Cohen received expense
5 reimbursements on an interim basis totaling \$22,454.38, the final
6 award of expense reimbursements totaled only \$16,515.61.
7 Appellants argue that the difference of \$5,938.77 was not netted
8 against Berliner Cohen's final award of compensation and should
9 be disgorged. The record before us is unclear on this issue, and
10 we REMAND for a determination of whether Berliner Cohen should be
11 ordered to disgorge the amount of interim expense reimbursements
12 that it received in excess of the final amount awarded.

13
14 **FACTS**³

15 Dimas, LLC ("Dimas"), filed for chapter 11 protection on
16 March 13, 2002, to stop a foreclosure sale with respect to its
17 single asset, a parcel of 24.5 acres of real property in
18 Milpitas, California (the "Property").⁴ At the time of Dimas's
19 bankruptcy filing, the Property was encumbered by three trust
20 deeds controlled by a "hard money" lender ("IGL"), a fourth deed

21
22 ³ The following factual background information comes
23 largely from the Bankruptcy Court's Memorandum Decision, entered
24 on December 29, 2006 (the "2006 Memorandum Decision").

25 ⁴ Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
28 enacted and promulgated prior to the effective date (October 17,
2005) of most of the provisions of the Bankruptcy Abuse
Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,
April 20, 2005, 119 Stat. 23.

1 of trust in the amount of \$1,200,000 in favor of a joint venture
2 investor with Dimas, and a lis pendens recorded by an individual
3 who had provided financing for development of the Property.

4 On May 8, 2002, on Dimas's application, the bankruptcy court
5 appointed Berliner Cohen as special counsel for Dimas in
6 connection with claims Dimas might have against its creditors.
7 The application for employment stated that Dimas "is involved
8 with ongoing litigation involving breach of contract, fraud, and
9 a complex real estate contract dispute." The employment
10 application also provided that Berliner Cohen's professional
11 services would include:

12 To provide [Dimas] with legal advice regarding any
13 claims for contractual breach and fraud applicant may
14 have against its creditors;
15 To take all necessary steps to determine if there is
16 liability on the part of [Dimas's] creditor[s] for
17 breach of contract and fraud;
18 To investigate and institute litigation, through trial
19 and judgment, and/or settle or compromise any such
20 claim on behalf of [Dimas].

21 A. Litigation and other proceedings concerning Dimas and the
22 Property

23 Dimas commenced an adversary proceeding on May 31, 2002 to
24 void the fourth deed of trust on the Property, asserting claims
25 for misrepresentation, negligence and interference with
26 prospective economic advantage, among other things. Berliner
27 Cohen litigated the adversary proceeding to a stipulated
28 resolution, resulting in reconveyance of the fourth deed of trust
on the Property.

Berliner Cohen also substituted in as counsel for Dimas in
the California state court litigation to defend against the
claims of the filer of the lis pendens against the Property.

1 Dimas ultimately prevailed in that litigation on a motion to
2 expunge the lis pendens and was awarded attorneys' fees.
3 Berliner Cohen obtained an agreed dismissal of the lis pendens
4 action.

5 In the meantime, Dimas was unable to obtain additional
6 financing, and it defaulted on its obligation to make a \$3.285
7 million escrow deposit required by a stipulation with IGL. On
8 September 9, 2002, the bankruptcy court granted relief from stay
9 to allow IGL to foreclose on the Property. On September 10,
10 2002, IGL's representative conducted a foreclosure sale of the
11 Property under its third deed of trust. On the date of the
12 foreclosure sale, Dimas tendered \$150,000 to the trustee's agent,
13 which amount Dimas estimated was sufficient to exercise its
14 equity of redemption under the third deed of trust. That tender
15 was rejected as inadequate, and the foreclosing creditor
16 proceeded with the foreclosure sale and later filed an unlawful
17 detainer action to evict Ms. Adrienne Rakitin ("Ms. Rakitin"),
18 Dimas's managing member, from the Property, where she had been
19 living.

20 On November 18, 2002, Berliner Cohen commenced an adversary
21 proceeding (the "IGL Adversary Proceeding") against IGL and
22 others to set aside the foreclosure sale and recorded a lis
23 pendens against the Property. Berliner Cohen successfully
24 defended two motions to dismiss the IGL Adversary Proceeding.
25 Following further preliminary proceedings and discovery in the
26 IGL Adversary Proceeding, the bankruptcy court granted partial
27 summary judgment in Dimas's favor.

1 Berliner Cohen filed a second motion for summary
2 adjudication in the IGL Adversary Proceeding in February 2004.
3 The ultimate result, after two hearings and supplemental
4 briefing, was that the bankruptcy court granted a further partial
5 summary judgment in Dimas's favor on its claim for relief based
6 on redemption, set aside the foreclosure sale and restored title
7 to the Property to Dimas, but reserved ruling on damages and
8 other issues. Trial on the remaining issues in the IGL Adversary
9 Proceeding was set for January 2005.

10 After title to the Property was restored to Dimas, IGL's
11 representative renewed its motion for relief from stay to proceed
12 with foreclosure because Dimas's obligations to IGL secured by
13 deeds of trust on the Property remained in default. The
14 evidentiary hearing on IGL's motion for relief from stay was
15 consolidated with the trial of the open issues in the IGL
16 Adversary Proceeding.

17 In January 2005, Dimas and IGL participated in a two-day,
18 judicially supervised settlement conference, and after extensive
19 negotiations, the parties entered into a settlement agreement
20 premised on the formation of a new limited liability company to
21 develop the Property. Berliner Cohen prepared the settlement
22 agreement. The settlement never was consummated, however,
23 because IGL's representative could not obtain lender approval for
24 an acceptable project manager.

25 Thereafter, Dimas and IGL's representative reconvened to
26 discuss possible settlement alternatives. After further
27 extensive negotiations, Dimas and IGL entered into a second
28 settlement agreement. The terms of the second settlement

1 provided that IGL would release its trust deeds on the Property
2 upon receipt of \$3.1 million from the proceeds of a loan to be
3 obtained by Dimas. IGL would receive an additional \$900,000 from
4 the proceeds of lot sales from the Property, but IGL refused to
5 subordinate its right to receive such proceeds to the interests
6 of the new lender, necessitating a "carve-out" from the new
7 lender's security. Berliner Cohen expended considerable efforts
8 addressing the complexities of the "carve-out" issue in
9 documenting the settlement. The settlement terms further
10 provided that if Dimas could not make the first required
11 settlement payment by the agreed deadline, IGL would receive
12 title to the Property upon payment of \$1.8 million to Dimas.

13 The parties subsequently negotiated several extensions and a
14 reduction in the payoff to IGL. Nevertheless, Dimas ultimately
15 failed to obtain a loan that would enable it to perform its
16 obligations under the second settlement. Upon Dimas's failure
17 timely to perform, IGL's representative deposited \$1.8 million in
18 escrow. In accordance with the terms of the second settlement
19 agreement, the \$1.8 million was disbursed to Dimas in October
20 2005, and Dimas conveyed title to the Property to IGL's
21 representative. On November 13, 2005, Dimas's chapter 11 plan
22 was confirmed, with the proceeds from the sale of the Property to
23 be distributed to pay Dimas's creditors in full, with a surplus
24 to be distributed to Dimas's members.

25 The bankruptcy court noted that, "When [Berliner Cohen]
26 undertook this representation [as special counsel to Dimas],
27 there was no guarantee of success and a substantial risk of non-
28 payment." 2006 Memorandum Decision, at p. 9. The litigation

1 that Berliner Cohen was called upon to undertake was complex and
2 contentious. Berliner Cohen benefitted from working with Dimas's
3 managing member, Ms. Rakitin, who was "well-informed,
4 sophisticated, proactive, and engaged in developing the strategy
5 for the litigation." Id. at pp. 9-10. However, she also was a
6 very demanding client.

7 [Ms. Rakitin's] telephone contacts with the attorneys
8 occurred on a near-daily basis, and often included
9 weekends and holidays. Other times, [Ms.] Rakitin
10 attended lengthy meetings at the law offices of
Berliner Cohen. The attorneys sought to accommodate
[Ms.] Rakitin by participating in both scheduled and
unscheduled meetings with her.

11 Memorandum Decision, entered on February 28, 2008 (the "2008
12 Memorandum Decision").

13 Ms. Rakitin did not always agree with the strategies
14 proposed by Berliner Cohen, and over time, the attorney-client
15 relationship between Dimas and Berliner Cohen eroded. Berliner
16 Cohen withdrew from representing Dimas as special counsel by
17 order entered on January 4, 2006.

18 B. Compensation issues between Berliner Cohen and Dimas

19 Berliner Cohen voluntarily wrote off \$50,000 in fees to
20 Dimas in December 2003 to reduce the account receivable on its
21 books. Berliner Cohen filed four interim fee applications and
22 was awarded \$496,789.40 in fees and \$22,454.38 in expense
23 reimbursements on an interim basis. In its final application
24 ("Final Application") for allowance of fees and expenses,
25 Berliner Cohen requested approval of \$727,673.50 in fees and
26 \$34,347.15 in expense reimbursements.

27 Dimas objected to Berliner Cohen's Final Application on a
28 number of bases, including "the fees sought were inadequately

1 described, were clumped, were for clerical services, involved
2 duplication of services, were excessive, and billed large amounts
3 of time for telephone calls with the managing member of debtor
4 [Ms. Rakitin] which were either substantially inflated or never
5 occurred." Appellants' Opening Brief, at p. 2. Following
6 extensive briefing and evidentiary submissions, the bankruptcy
7 court allowed Berliner Cohen, on a final basis, compensation of
8 \$586,207 and expense reimbursements of \$16,515.61. The
9 bankruptcy court set forth the background and stated its reasons
10 for its allowance of fees and expenses in the 66-page 2006
11 Memorandum Decision. Requested fees totaling \$64,152.50 were
12 disallowed, with \$8,549 of said total being denied without
13 prejudice, and requested fees of \$77,314 were reserved for a
14 later determination.

15 Following further briefing and evidentiary submissions and a
16 trial in 2007, the bankruptcy court allowed Berliner Cohen
17 further fees in the amount of \$60,724 on a final basis, and
18 disallowed fees totaling \$19,637.50. The bankruptcy court stated
19 its reasons for its allowance of further fees in the 18-page 2008
20 Memorandum Decision.

21 The appellant members of Dimas filed a timely notice of
22 appeal on March 7, 2008. An amended notice of appeal, adding
23 Dimas as an appellant, was filed on the same date.

24 25 **JURISDICTION**

26 The bankruptcy court had jurisdiction under 28 U.S.C.
27 §§ 1334 and 157(b) (2) (A). The panel has jurisdiction under 28
28 U.S.C. § 158.

1 **ISSUES**

2 1. Did the bankruptcy court abuse its discretion in its award of
3 fees and expense reimbursements to Berliner Cohen?

4 2. Did the bankruptcy court abuse its discretion in awarding
5 fees to Berliner Cohen for preparation of fee applications in
6 excess of the mandatory percentage cap specified in the
7 Guidelines?

8 3. Should the case be remanded for a determination as to whether
9 Berliner Cohen should be required to disgorge interim expense
10 reimbursements that it received in excess of the final expense
11 reimbursements award?

12
13 **STANDARDS OF REVIEW**

14 In the Ninth Circuit, "We review the factual determinations
15 underlying an award of attorneys' fees for clear error and the
16 legal premises a district court uses to determine an award de
17 novo." Ferland v. Conrad Credit Corp., 244 F.3d 1145, 1147-48
18 (9th Cir. 2001) (per curiam) (citations omitted). "If we
19 conclude that the district court applied the proper legal
20 principles and did not clearly err in any factual determination,
21 then we review the award of attorneys' fees for an abuse of
22 discretion." Id. at 1148.

23 A bankruptcy court necessarily abuses its discretion if it
24 bases its decision on an erroneous view of the law or clearly
25 erroneous factual findings. Cooter & Gell v. Hartmarx Corp., 496
26 U.S. 384, 405 (1991). Under the abuse of discretion standard, we
27 must have a definite and firm conviction that the bankruptcy
28 court committed a clear error of judgment in the conclusion it

1 reached before reversal is proper. In re Black, 222 B.R. 896,
2 899 (9th Cir. BAP 1998).

3
4 **DISCUSSION**

5 A. The bankruptcy court applied appropriate legal standards and
6 did not clearly err in its factual determinations in awarding
7 expense reimbursements and the bulk of fees to Berliner
8 Cohen.

9 Section 330 provides that a bankruptcy court "may award" to
10 professionals employed by the estate "reasonable compensation for
11 actual, necessary services rendered" and "actual, necessary
12 expenses." The applicant must demonstrate that the services
13 rendered were "reasonably likely" to benefit the bankruptcy
14 estate at the time that they were performed. Roberts, Sheridan &
15 Kotel, P.C. v. Bergen Brunswick Drug Co. (In re Mednet MPC Corp.),
16 251 B.R. 103, 108 (9th Cir. BAP 2000). "A bankruptcy court also
17 must examine the circumstances and the manner in which services
18 are performed and the results achieved in order to arrive at a
19 determination of a reasonable fee allowance." Id.

20 In this case, the bankruptcy court described the standards
21 applicable to its consideration of Berliner Cohen's applications
22 for compensation as follows:

23 In determining the amount of reasonable compensation,
24 the court considers the nature, extent, and value of
25 the professional's services, taking into account all
26 relevant factors, including whether the services were
27 necessary to the administration of, or beneficial at
28 the time at which the service was rendered toward the
completion of, a case and whether the services were
performed within a reasonable amount of time
commensurate with the complexity, importance, and
nature of the problem, issue, or task addressed.

2006 Memorandum Decision, at p. 9. In addition, the bankruptcy

1 court clearly recognized that Berliner Cohen bore the burden of
2 establishing its entitlement to compensation and demonstrating
3 that the compensation requested was reasonable. See 2006
4 Memorandum Decision, at p. 9; and 2008 Memorandum Decision, at p.
5 4. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

6 Appellants do not appear to question that the bankruptcy
7 court was guided by these general principles, but rather focus in
8 this appeal on what they argue are inappropriate departures from
9 the Guidelines. The preamble to the Guidelines states the
10 following:

11 The following guidelines are promulgated pursuant to
12 B.L.R. 9029-1 and govern the most significant issues
13 related to applications for compensation and expense
14 reimbursement. The guidelines cover the narrative
15 portion of an application, time records and expenses.
16 They apply in their entirety to professionals seeking
17 compensation under 11 U.S.C. § 330 and, where
18 indicated, to chapter 7 and chapter 11 trustees. The
19 guidelines are not intended to cover every situation.
20 The court is advised that compliance with these
21 guidelines will satisfy the requirements of the United
22 States Trustee. (emphasis added)

23 The Guidelines are aspirational, and the bankruptcy courts of the
24 Northern District of California clearly intend that they be
25 followed. But, for the most part, they are not written in
26 mandatory language. They are guidelines.

27 In addition to their excerpts of record, the Appellants have
28 submitted dozens of pages of what they contend are inadequately
described time entries; charges for clerical services and clumped
entries; charges for phone conferences that they argue were not
held; unnecessary billings for services of more than one lawyer
present at hearings and conferences; and excessive billings. In
effect, they invite us to consider anew the allegedly offending

1 billings that they specify, apart from overall consideration of
2 Berliner Cohen's fee applications.

3 We decline the invitation. We have reviewed carefully the
4 voluminous record presented in this appeal, and we particularly
5 have focused our attention on the bankruptcy court's 2006
6 Memorandum Decision and 2008 Memorandum Decision. The record
7 reflects that the bankruptcy court carefully and painstakingly
8 reviewed Berliner Cohen's fee applications in light of the
9 numerous objections raised by the Appellants. The bankruptcy
10 court made detailed findings in response to those objections,
11 supported in many cases by multiple examples of the types of time
12 entries that the bankruptcy court approved and those that it did
13 not approve. As Berliner Cohen argues, the bankruptcy court's
14 approvals, in part, of its requested fees and expense
15 reimbursements were "the culmination of countless hours of
16 laborious review of time entries, legal briefs and a full day of
17 evidentiary hearing." Appellee's Opening Brief, at p. 1.

18 The bankruptcy court found that,

19 This proceeding has presented particular challenges to
20 the lawyers for the parties as well as for the court.
21 Having presided over multiple hearings on a motion to
22 expunge lis pendens, two dismissal motions, a motion
23 for preliminary injunction to enjoin a sale of the
24 [Property], and two motions for summary adjudication in
25 which special counsel was involved, it appears that,
26 throughout this litigation, [Berliner Cohen] produced a
27 quality work product, acted professionally, and
28 vigorously advocated the interests of its client. The
adversary proceeding progressed at an appropriate pace
considering discovery and research conducted.

26 2006 Memorandum Decision, at p. 9. Yet, these findings did not
27 prevent the bankruptcy court from critically evaluating the fees
28 and expense reimbursements requested by Berliner Cohen, and the

1 bankruptcy court ultimately disallowed \$80,742.50 of the fees and
2 \$17,831.54 of the cost reimbursements requested by Berliner
3 Cohen.

4 We do not perceive evidence of clear error in the bankruptcy
5 court's fact findings, and we do not have a definite and firm
6 conviction that the bankruptcy court committed any clear errors
7 of judgment in the fee and expense reimbursement awards that it
8 approved for Berliner Cohen, with one exception discussed infra.
9 Viewed in isolation, whether any particular itemized time entry
10 complies fully with the Guidelines may be reflected differently
11 in the eye of the beholder. However, the bankruptcy court's
12 consideration of Berliner Cohen's fee applications was informed
13 by its observation as the trial court of Berliner Cohen's
14 representation of Dimas over the more than three and one-half
15 years that Berliner Cohen served as Dimas's special counsel.
16 That is a record of first-hand experience that we simply cannot
17 match in reviewing an appeal. That is also why the abuse of
18 discretion standard is particularly appropriate to our review of
19 cases such as this. We conclude that the bankruptcy court's
20 awards of \$611,567.83 in fees and \$16,515.61 in expense
21 reimbursements should be affirmed.

22 B. The bankruptcy court erred in approving fees for preparation
23 of fee applications in excess of the 5% cap in the
Guidelines.

24 In one category, regarding preparation of fee applications,
25 the Guidelines include a mandatory percentage cap.

26 Fees for preparation of a fee application may not
27 exceed five percent of the total amount of fees and
28 costs requested in the application. This five percent
guideline is a ceiling rather than a floor; preparation
expenses equaling five percent are not presumptively

1 reasonable.... (emphasis in original)
2 Guidelines, § I.6. This is an exception to the generally
3 discretionary language of the Guidelines. Nonetheless, the
4 bankruptcy court approved fees for Berliner Cohen's preparation
5 of fee applications in excess of ten percent of Berliner Cohen's
6 entire fee and expense reimbursement applications, excluding fee
7 requests for preparation of fee applications.

8 The bankruptcy court did not articulate any particular
9 circumstances that would justify approving fees in this category
10 in excess of the five percent cap. We can envision circumstances
11 that would justify an award of fees for preparing fee
12 applications in excess of the five percent limitation, but in
13 light of the mandatory language of this particular Guideline, if
14 the bankruptcy court approves fee application preparation fees in
15 excess of the five percent cap, it must state why. As no
16 explanation was provided in this case, it was an abuse of
17 discretion to approve fees for preparation of fee applications in
18 excess of the five percent Guideline. Five percent of the total
19 non-preparation fees and expense reimbursements requested is
20 \$33,659.83, which Berliner Cohen may retain, but it must disgorge
21 the excess over five percent in the amount of \$35,363.17 to
22 Dimas.

23 C. The treatment of interim cost reimbursements paid in excess
24 of the final allowance is unclear.

25 As noted at the outset of this Memorandum, Berliner Cohen
26 received expense reimbursements on an interim basis totaling
27 \$22,454.38, while its final award of expense reimbursements
28 totaled only \$16,515.61. Appellants argued in their briefs and

1 at oral argument that Berliner Cohen should be required to
2 disgorge the \$5,938.77 difference.

3 It is unclear to us from the record how the difference
4 between interim expense reimbursements paid and final expense
5 reimbursements allowed was treated in the final awards to
6 Berliner Cohen. If Berliner Cohen retained the excess cost
7 reimbursements in addition to the total fees awarded to it, the
8 excess expense reimbursements should be disgorged to Dimas, and
9 we remand to the bankruptcy court for resolution of this
10 accounting issue.

11
12 **CONCLUSION**

13 The bankruptcy court applied appropriate legal standards to
14 its consideration of Berliner Cohen's applications for approval
15 of fees and expense reimbursements. It is not for this panel to
16 second-guess the bankruptcy court's fact findings, which were not
17 clearly erroneous. Ultimately, we conclude that the bankruptcy
18 court appropriately exercised its discretion in approving
19 Berliner Cohen's expense reimbursements and the bulk of its fee
20 awards. The bankruptcy court devoted considerable time to
21 reviewing Berliner Cohen's fee applications, and it fully
22 understood the difficulties of the special counsel representation
23 that Berliner Cohen undertook. As a result, the bankruptcy
24 court's approval of Berliner Cohen's fees and expense
25 reimbursements is AFFIRMED on all points, except for its fee
26 allowance for preparation of fee applications.

27 In light of the mandatory five percent cap contained in the
28 Guidelines concerning fees for the preparation of fee

1 applications, and the lack of an explanation by the bankruptcy
2 court for allowing the cap to be exceeded, we REVERSE and require
3 disgorgement of fees in the amount of \$35,363.17.

4 We further REMAND for a determination as to whether Berliner
5 Cohen should be required to disgorge the \$5,938.77 in interim
6 expense reimbursements it received in excess of the final expense
7 reimbursement award.

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