**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY APPELLATE PANEL**

**OF THE NINTH CIRCUIT**

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| In re: | BAP No. CC-07-1092 PaBaK |
| | CC-07-1115 PaBaK |
| INTEGRATED KNOWLEDGE MARKETING, INC., | (related appeals) |
| | Bk. No. LA 05-35241-AA |
| Debtor. | |
| EZRA \| BRUTZKUS \| GUBNER LLP; JENKINS MULLIGAN & GABRIEL, L.L.P., | |
| Appellants, | |
| v. | **M E M O R A N D U M**[1] |
| INTEGRATED KNOWLEDGE MARKETING, INC.; DANNY KLEIN; BRIAN NEWBERRY, | |
| Appellees. | |

Argued and Submitted on October 24, 2007
at Los Angeles, California

Filed – November 6, 2007

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

Honorable Alan M. Ahart, Bankruptcy Judge, Presiding

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[1] 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.

Before: PAPPAS, BARDWIL[2] and KLEIN, Bankruptcy Judges.

In No. CC-07-1092, Appellants Ezra | Brutzkus | Gubner LLP, and Jenkins, Mulligan & Gabriel, L.L.P. ("Appellants") appeal the bankruptcy court's order dismissing a chapter 7[3] bankruptcy case (the "Dismissal Order"). We DISMISS the appeal because Appellants lack standing to appeal.

In No. CC-07-1115, Appellants appeal the bankruptcy court's order allowing their administrative claim for serving as special counsel to the chapter 7 trustee in the amount of $20,812.50 for attorney fees and $3,125.91 for costs (the "Fee Order"). We AFFIRM.

**FACTS**

Integrated Knowledge Marketing, Inc. ("IKM") was formerly in the consulting business; Brian Newberry ("Newberry") and Danny Klein ("Klein") were its sole officers and directors.[4] In 2004,

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[2] Hon. Robert Bardwil, United States Bankruptcy Judge for the Eastern District of California, sitting by designation.

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

[4] Newberry and Klein were the principals of IKM at the time of its bankruptcy filing. The third of the initial principals, Kurt Langer ("Langer"), left the company in 2004. Newberry and Klein are also principals in a separate business venture now known as Plastic Cash International ("Plastic Cash"). Appellees contend that the business operations of Plastic Cash are not affiliated or connected to the prior business of IKM in any way.

IKM suffered severe business reverses, closing its business offices in December.

On October 3, 2005, IKM filed a chapter 7 petition. Elissa D. Miller ("Trustee") was appointed to serve as trustee on the same date. Shortly thereafter, on November 23, 2005, Trustee filed an application to employ Appellants as joint special counsel to prosecute adversary proceedings to recover several alleged transfers of value or assets out of IKM prior to its chapter 7 filing. Appellants agreed to represent Trustee based upon a contingent fee arrangement. The bankruptcy court granted this application by order entered January 6, 2006 (the "Employment Order").

On January 30, 2006, Trustee, represented by Appellants, commenced an adversary proceeding against Newberry, Klein, Susan Gretchko[5] ("Gretchko"), and Plastic Cash. In the complaint, Trustee alleged that the defendants had engineered fraudulent transfers of IKM's assets, breached fiduciary duties to IKM, and were unjustly enriched. A short time later, on February 2, 2006, IKM converted its case to one under chapter 11. IKM, now acting as debtor-in-possession, dismissed the adversary proceeding.

Three weeks later, on February 23, 2006, Trustee moved to re-convert the bankruptcy case to chapter 7. The U.S. Trustee joined in this motion. The bankruptcy court granted the motion on April 5, 2006, and Trustee was re-appointed. On April 21, 2006, Trustee commenced a new adversary proceeding against Newberry, Klein, Gretchko, and Plastic Cash. The complaint in

[5] Susan Gretchko is a co-founder of Plastic Cash.

the new adversary proceeding was identical to Trustee's prior complaint.

Newberry, Klein, and Plastic Cash each moved to dismiss the action. On July 19, 2006, Trustee filed oppositions to the motions to dismiss, and also filed an amended complaint. Newberry, Klein, and Plastic Cash then filed motions to dismiss the amended complaint. Newberry and Klein later stipulated to withdraw their motions and the bankruptcy court denied Plastic Cash's motion. At that point, Newberry, Klein, and Plastic Cash filed answers to Trustee's amended complaint.

During the time these maneuvers were occurring, the parties engaged in settlement negotiations. With respect to Newberry, Klein, and Plastic Cash, these discussions were futile. However, a settlement agreement was reached between Trustee and Gretchko, whereby the bankruptcy estate received $62,500 in exchange for dismissing the claims against Gretchko with prejudice. The bankruptcy court approved that settlement agreement on November 6, 2006.

Having reached an impasse in their settlement negotiations, Newberry and Klein pursued other methods of resolving the controversy and adversary proceeding. They filed objections to the proofs of claim of Langer and several other creditors in the bankruptcy case. As a result of these objections, the bankruptcy court disallowed a significant portion (over $26.5 million) of Langer's claim, and disallowed three other creditor claims entirely.

In addition, Newberry set out to acquire many of the claims of IKM's creditors by paying them agreed-upon sums directly in

return for an assignment of those claims. Notices of each of these claim transfers to Newberry were filed in accordance with Rule 3001(e). No objections to these assignments were made by Trustee or other parties.

A few of the creditors holding valid claims declined to assign their claims. In exchange for payments from Newberry, these creditors withdrew their claims. All told, only a handful of creditors did not agree to either assign their claims to Newberry, or withdraw them, in exchange for payment.

On January 4, 2007, Appellees filed a motion to dismiss the IKM bankruptcy case for cause pursuant to § 707(a). In the motion, they pledged to pay sufficient funds to Trustee, in addition to those funds already in the bankruptcy estate, to satisfy all remaining pre-petition creditor claims, all allowed administrative expenses, and to withdraw any claims held by Newberry. Trustee and the U.S. Trustee filed conditional oppositions to the motion to dismiss. In her limited opposition, Trustee indicated that she had no objection to dismissal provided that all allowed administrative and general unsecured claims were paid in full before the court entered any order of dismissal. The U.S. Trustee joined in Trustee's conditional opposition.

A hearing on the motion to dismiss was held on February 21, 2007, at which the bankruptcy court granted the motion with the understanding that no order would be entered until Trustee submitted a declaration that Appellees had paid sufficient monies to Trustee to satisfy all remaining creditors' claims and allowed administrative expenses. Following payment to Trustee and submission of Trustee's declaration, the Dismissal Order was

entered and the case dismissed on March 6, 2007.

On January 26, 2007, Appellants filed a motion for approval of their administrative expense claim for attorney fees and costs incurred in representing Trustee. While suggesting three alternative methods for calculating their fees, Appellants sought an approval of up to $1,000,000 in fees and $3,125.91 in costs. IKM, Newberry and Klein objected to the application. A hearing on Appellants' fee request was conducted on February 21, 2007, the same day as the hearing on the motion to dismiss. At its conclusion, the bankruptcy court decided that Appellants should be paid a contingent fee calculated solely on the amount actually recovered by the bankruptcy estate in the adversary proceeding from Gretchko. It therefore awarded Appellants $20,812.50 in fees and their costs of $3,125.91. The Fee Order was entered on March 8, 2007.

Appellants filed a timely notice of appeal of the Dismissal Order on March 9, 2007, commencing appeal No. CC-07-1092. Appellants filed a timely notice of appeal of the Fee Order, also on March 9, 2007, commencing appeal No. CC-07-1115.

**JURISDICTION**

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

**ISSUES**

1. Whether Appellants have standing to appeal the Dismissal Order.
2. Whether there was "cause" under § 707(a) to dismiss the

bankruptcy case.

3. Whether adequate notice of the motion to dismiss, and of the hearing on that motion, was given.

4. Whether the bankruptcy court erred in its interpretation and application of the Employment Order.

5. Whether the bankruptcy court abused its discretion by refusing to alter the terms of the Employment Order pursuant to § 328(a), and by declining to award Appellants additional compensation.

**STANDARDS OF REVIEW**

Standing is a jurisdictional issue that we may raise sua sponte and that we address de novo. Menk v. LaPaglia (In re Menk), 241 B.R. 896, 903 (9th Cir. BAP 1999).

We review the bankruptcy court's grant of a motion to dismiss a bankruptcy case for abuse of discretion. Sherman v. SEC (In re Sherman), 441 F.3d 794, 813 (9th Cir. 2006); Mendez v. Salven (In re Mendez), 367 B.R. 109, 113 (9th Cir. BAP 2007). "A bankruptcy court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law. The panel also finds an abuse of discretion if it has a definite and firm conviction the court below committed a clear error of judgment in the conclusion it reached." Id. (citing Lopez v. Specialty Rest. Corp. (In re Lopez), 283 B.R. 22, 26 (9th Cir. BAP 2002)) (quoting Palm v. Klapperman (In re Cady), 266 B.R. 172, 178 (9th Cir. BAP 2001)).

A bankruptcy court's award of attorney's fees will not be disturbed on appeal absent an abuse of discretion or an erroneous

application of the law. Smith v. Edwards & Hale, Ltd. (In re Smith), 317 F.3d 918, 923 (9th Cir. 2002). The reasonableness of an award of attorneys' fees or costs is a question of fact. Renfrow v. Draper, 232 F.3d 688, 696 (9th Cir. 2000) (citing Sockwell v. Phelps, 20 F.3d 187, 192 (5th Cir. 1994)); Golden v. Chicago Title Ins. Co. (In re Choo), 273 B.R. 608, 610-11 (9th Cir. BAP 2002). Whether a fee agreement has become improvident due to unanticipated developments is also a question of fact. Pitrat v. Reimers (In re Reimers), 972 F.2d 1127, 1128-29 (9th Cir. 1992); Unsecured Creditors' Comm. v. Pelofsky (In re Thermadyne Holdings Corp.), 283 B.R. 749, 754 (8th Cir. BAP 2002).

We review the bankruptcy court's conclusions of law de novo and its factual findings for clear error. Vacation Village, Inc. v. Clark County, Nev., 497 F.3d 902, 910 (9th Cir. 2007). Thus, "we accept findings of fact made by the bankruptcy court unless these findings leave the definite and firm conviction that a mistake has been committed by the bankruptcy judge." Id.

## DISCUSSION

### I.
### No. CC-07-1092 – The Dismissal Order

#### A.

Appellants lack standing to appeal the Dismissal Order.

As our court of appeals explained in Ductor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.), 177 F.3d 774, 777 (9th Cir. 1999):

> [t]o prevent unreasonable delay, courts have created [a] prudential standing requirement in

> bankruptcy cases: The appellant must be a "person aggrieved" by the bankruptcy court's order. See Brady v. Andrew (In re Commercial W. Fin. Corp.), 761 F.2d 1329, 1334 (9th Cir. 1985) ("We have adopted the 'person aggrieved' test as the appropriate standard for determining standing to appeal under the Code."); In the Matter of Andreuccetti, 975 F.2d 413, 416-17 (7th Cir. 1992) ("Its purpose is to insure that bankruptcy proceedings are not unreasonably delayed by protracted litigation by allowing only those persons whose interests are directly affected by a bankruptcy order to appeal.") (citation and internal quotation marks omitted). An appellant is aggrieved if "directly and adversely affected pecuniarily by an order of the bankruptcy court"; in other words, the order must diminish the appellant's property, increase its burdens, or detrimentally affect its rights. Fondiller v. Robertson (In re Fondiller), 707 F.2d 441, 442 (9th Cir. 1983).

Case law instructs that the direct and adverse pecuniary effect required to confer appellate standing must be immediate. Fondiller, 707 F.2d at 443; Tippett, 111 B.R. at 305 ; In re Combustion Eng'g, Inc., 391 F.3d 190, 236 (3d Cir. 2005) (future event does not rise "to the level of 'direct and pecuniary' harm"). Further, appellate standing can not be asserted derivatively; an appellant must have standing in its own right. Linda R. S. v. Richard D., 410 U.S. 614, 617 (1973) ("The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action."); Tippett v. Umpqua Shopping Ctr. (In re Umpqua Shopping Center, Inc.), 111 B.R. 303, 305 (9th Cir. BAP 1990)(appellant cannot rest its claim to relief on legal

rights or interests of third parties).

We conclude that Appellants lack standing to appeal the Dismissal Order. Under that order, Appellants' allowed administrative expense claim for fees and costs will be paid in full. Trustee did not appeal the Dismissal Order, and Appellants cannot assert Trustee's rights as a representative of the bankruptcy estate. Appellants also can not assert the right to protect the rights of other creditors in the bankruptcy estate, even if it could be shown that the creditors may benefit from the appeal.[6]

Instead, Appellants assume an altruistic pose, arguing that, in appealing the bankruptcy court's decision to dismiss the case, they serve to protect the estate's assets and facilitate further proceedings:

> This Appeal is brought as a precautionary measure to protect the assets of the Estate and alleviate the need to reopen the Case and pursue such assets if Special Counsel is successful in its appeal of the Admin [sic] Claim Order. The assets at issues [sic] are those transferred to Plastic Cash (defined below) with a value believed to be in excess of $20,000,000, which Special Counsel was pursuing up until Newberry and Klein dismissed the Adversary Action subsequent to the dismissal order being entered.

Appellants' Opening Br. at 1.

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[6] It is doubtful such a benefit could be shown to exist. All creditors holding allowed claims have either voluntarily assigned those claims to Newberry, withdrawn them in exchange for payment, or will be paid in full by Trustee from the funds disbursed under the Dismissal Order. It is therefore difficult to understand how these parties could "benefit" even if Trustee and Appellant were able to obtain a further recovery from the adversary proceeding.

Regardless of Appellants' motives in pursuing this appeal, we fail to see how the Dismissal Order has detrimentally affected Appellants' rights. Because Appellants have not suffered any direct, adverse, immediate pecuniary harm from the Dismissal Order, they lack standing to appeal that order. This appeal must therefore be dismissed.

B.

The bankruptcy court did not abuse its discretion in dismissing the bankruptcy case.

Even if Appellants could somehow demonstrate they have standing to appeal the Dismissal Order, we conclude that the bankruptcy court did not abuse its discretion in deciding to dismiss the bankruptcy case.

Newberry, Klein, and IKM moved to dismiss the bankruptcy case for cause under § 707(a) because "all valid pre-petition claims would be paid or otherwise satisfied in full." In their submissions to the bankruptcy court, they represented that all but $7,102.36 of the pre-petition claims had been paid, assigned to them, or withdrawn, and that they were prepared to satisfy the unpaid claims, as well as all of the allowed administrative expenses, prior to the case being dismissed.[7] We agree with the bankruptcy court that, under such circumstances, there was no practical reason for the bankruptcy case to continue, and that good cause for dismissal was shown.

[7] In Trustee's Final Report in Dismissed Case, she states that all claims have been satisfied, except for the administrative claim of Appellants. Trustee reserved $21,138.86, approximately the amount required to pay that claim in full as allowed, pending the outcome of the appeals.

Section 707(a) provides:

> The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including –
> (1) unreasonable delay by the debtor that is prejudicial to creditors;
> (2) nonpayment of any fees and charges required under chapter 123 of title 28 [28 U.S.C. §§ 1911 et seq.]; and
> (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

The list of "causes" set forth in § 707(a) is illustrative, not exhaustive. Neary v. Padilla (In re Padilla), 222 F.3d 1184, 1191 (9th Cir. 2000); § 102(3) (defining "including," for purposes of Title 11, to be "not limiting").

In this case, the bankruptcy court awarded $20,812.50 in fees and $3,125.91 in costs to Appellants. Newberry, Klein and IKM agreed to pay those fees and costs, along with all other allowed administrative expenses, as well as satisfy in full all remaining creditors' claims and withdraw the claims they acquired through purchase. The bankruptcy court granted the motion to dismiss, but indicated that no order would be entered until Trustee submitted a declaration that the monies had been received by Trustee to pay the claims. Newberry withdrew the assigned claims in contemplation of the dismissal, and submitted payment to Trustee. Trustee then submitted a declaration to the court to show that the estate had sufficient funds to satisfy all allowed

administrative and creditor claims.

All allowed claims having been satisfied or withdrawn, the bankruptcy court did not err in dismissing the bankruptcy case. Schroeder v. Int'l Airport Inn P'ship (In re Int'l Airport Inn P'ship), 517 F.2d 510, 512 (9th Cir. 1975)("unless dismissal will cause some plain legal prejudice to creditors, it normally will be proper"); see also, Gill v. Hall (In re Hall), 15 B.R. 913, 917 (9th Cir. BAP 1981)(ruling that the "plain legal prejudice" to creditors standard in Schroeder remained good law and applicable to dismissals in cases filed under the Bankruptcy Code). The Ninth Circuit has interpreted "plain legal prejudice" as "just that-- prejudice to some legal interest, some legal claim, some legal argument." Westlands Water Dist. v. United States, 100 F.3d 94, 97 (9th Cir. 1996).

The vast majority of creditors agreed to assign their claims to Newberry in exchange for present payments.[8] Three creditors, which had internal policies against assigning claims, agreed to withdraw their claims in exchange for a Newberry payment. Newberry withdrew the claims which had been assigned to him, and made sufficient payment to Trustee to satisfy all remaining creditors and administrative expenses. Effectively, all creditors, other than those who elected to accept less, were paid in full. In other words, no plain legal prejudice to creditors resulted from the Dismissal Order.

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[8] Although some of the creditors that assigned their claims to Newberry were able to negotiate full payment of their claims, the majority of creditors apparently agreed to assign the claims to Newberry for less than the full amount due. Presumably, in dealing with Newberry, these creditors exercised their own business judgment.

To the Panel, it appears that the only reason to leave the bankruptcy case open would be to allow Appellants to attempt to secure a larger recovery in the adversary proceeding, thereby allowing the law firms to collect additional fees under the contingent fee arrangement. Like the bankruptcy court, we doubt Congress intended the bankruptcy system to serve solely as a vehicle to enhance the compensation payable to administrative expense claimants.

The bankruptcy court did not abuse its discretion in deciding to dismiss the bankruptcy case.

C.

Notice of the motion to dismiss was adequate.

Appellants argue that service of the notice of the motion to dismiss was inadequate because it did not include all parties on the original mailing matrix.

Rule 2002(a)(4) requires at least twenty days notice of the hearing to consider dismissal of a chapter 7 case to be given to "the debtor, the trustee, all creditors and indenture trustees" (emphasis added). In this case, the motion to dismiss and notice of hearing was served upon Trustee, Appellants, the U.S. Trustee, and the ten creditors that had not either assigned their claims to Newberry or withdrawn those claims. Because the motion was not served on the twenty-eight creditors that assigned their claims to Newberry, Appellants contend that notice was inadequate under the Rules. This argument has no merit.

With respect to each of the claims assigned to Newberry, a notice of transfer of claim had been filed in accordance with Rule 3001(e)(2). No objections to the transfers were filed. In

the absence of any objections, under the Rule, "the transferee shall be substituted for the transferor." Rule 3001(e)(2). As the Eighth Circuit observed:

> The language of the rule is mandatory and directs the court to substitute the name of the transferee for that of the transferor in the absence of a timely objection from the transferor. Further, the Advisory Committee Note (1991) states that the purpose of the amended rule is "to limit the court's role to the adjudication of disputes regarding transfers of claims." The text of the rule makes clear that the existence of a "dispute" depends upon an objection by the transferor. Where there is no dispute, there is no longer any role for the court.

Viking Associates, L.L.C. v. Drewes (In re Olson), 120 F.3d 98, 102 (8th Cir. 1997). Simply put, the Rule contemplates that, absent an objection, the transfer of a claim and substitution of the transferee in the place of the original creditor is designed to be self-executing.

Here, no objections were made to the Newberry assignments, and hence there was no "dispute" about the transfer process. Under the Rules, the bankruptcy court was therefore required to recognize that Newberry held the assigned claims in place of the transferring creditors. In other words, for purposes of this Rule, the assigning parties were no longer "creditors," and accordingly, notice of the motion to dismiss the bankruptcy case need not be given to them.[9]

[9] Even if the creditors that assigned claims to Newberry should have received notice, we would find that the failure in notice was harmless pursuant to Rule 9005. It is doubtful that failing to give notice to the assigning creditors affected any substantial rights.

## II.

## No. CC-07-1115 – The Fee Order

### A.

Interpretation and Application of the Employment Order

Appellants argue that, in awarding them a contingent fee only, the bankruptcy court misinterpreted and misapplied the terms of the Order Authorizing Employment of Ezra | Brutzkus | Gubner LLP, and Jenkins, Mulligan & Gabriel, L.L.P. as Joint Special Counsel to Chapter 7 Trustee (the "Employment Order"). The Employment Order authorizing Trustee's retention of Appellants provided that:

> Joint Special Counsel will be employed on a contingent fee basis to prosecute the Litigation; Joint Special Counsel will be paid 33.3% of the gross amount recovered by the Estate from the Litigation up through 60 days before trial, and 40% thereafter (the "Contingency Fee"), plus allowed costs advanced. Joint Special Counsel will share the Contingency Fee on a 50/50 basis. Other than the Contingency Fee and costs to be deducted from monies recovered by the Estate at the time of said recovery, Joint Special Counsel shall have no claims against the Estate.

The Trustee's application to employ Appellants as special counsel contained identical language concerning the proposed fee arrangement. No separate employment or representation agreement between Trustee and Appellants has been provided in the record on appeal, and we presume that none exists.[10]

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[10] At oral argument, in responses to questions from the Panel, Appellants' counsel indicated that an employment contract did indeed exist, and that he believed it was attached to Trustee's application for Appellants' employment in the record. He could not provide a precise citation to the record where such (continued...)

Notably, the employment application represented that Trustee sought to retain Appellants:

> to prosecute all claims related to or arising out of the transfer of value or assets out of [IKM] prior to the filing of the bankruptcy petition, including without limitation any fraudulent conveyance actions or potential actions against officers and directors of the Debtor (collectively, the "Litigation").

Id. The Employment Order included identical language regarding the scope of Appellants' employment.

Applying what it determined to be the express terms of the Employment Order, the bankruptcy court awarded Appellants $20,812.50 in fees, which represents 33.3 percent of the $62,500 settlement proceeds paid to Trustee by Gretchko. The bankruptcy court's order explains:

> The Court, having considered the Motion, the documents filed in support thereof and in opposition thereto, and the arguments and statements of counsel, and good cause appearing, for the reasons stated on the record, hereby:
>
> **FINDS** that the Applicants are bound by the terms of their employment order entered by this Court on January 6, 2006, as the present circumstances of the IKM case, based upon the evidence submitted in the moving papers, are not developments which were incapable of being anticipated by Applicants as of the time of their employment; and

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[10](...continued)
agreement could be found. The Panel is not obligated to search the entire record for information supporting Appellants' arguments unaided by a proper citation. Tevis v. Wilke, Fleury, Hoffelt, Gould & Birney, LLP (In re Tevis), 347 B.R. 679, 686 (9th Cir. BAP 2006). Nevertheless, the Panel did examine those sections of the record, as well as various entries in the bankruptcy court's docket, related to the employment of Appellants. No employment agreement, or even a reference to the existence of an employment agreement other than the application presented to the bankruptcy court, was located.

> **FINDS** that the terms of Applicants' employment were not improvident with regard to the bankruptcy estate; and
>
> **HOLDS** that even if the circumstances were incapable of being anticipated by Applicants and/or improvident, 11 U.S.C. § 328 does not require the Court to alter the terms of employment nor exercise its discretion to alter the terms; and
>
> **HOLDS** that it would not exercise its discretion under the present circumstances to alter the terms of employment; and
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> **ORDERS** that the Applicants' motion is denied, except as specifically stated herein. In accord with the Court's order dated January 6, 2006, Applicants are awarded $20,812.50 in fees as compensation for their services, pursuant to 11 U.S.C. § 328 and the terms of their employment order, and reimbursement of expenses in the amount of $3,125.91. Said fees and reimbursement of expenses are awarded in connection with the contemporaneous dismissal of the IKM chapter 7 bankruptcy case.

Appellants contend that, in calculating the amount of the contingent fee based solely upon the compromise amount received by the estate from Gretchko, the bankruptcy court interpreted the term "gross amount recovered by the Estate from the Litigation" too narrowly. Rather, Appellants argue that this phrase in the Employment Order should be read to encompass the entirety of any benefit to the bankruptcy estate resulting from Appellants' efforts in prosecuting the adversary proceeding.[11] Appellants

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[11] Appellants' calculation of the amount they should be paid reflects their extremely broad reading of the terms of the Employment Order. They advanced three different approaches to the bankruptcy court in fixing its fees. First, Appellants alleged they should be paid $1,003,125.91, based upon a contingency fee of 40% of the amount needed to satisfy the claims "scheduled" in IKM's bankruptcy schedules in full, together with other administrative expenses, plus $3,125.91 in costs. Apart

(continued...)

insist that had they not undertaken the representation of Trustee in filing the adversary proceedings, the bankruptcy estate would have been insolvent, and none of the unsecured creditors would have received anything. However, Appellants continue, because of the pressure brought to bear on the adversary proceeding defendants via the lawsuit, Newberry was presumably forced to come up with funds to purchase or satisfy the allowed creditor claims in the bankruptcy case, which resulted in substantial payments to unsecured creditors. According to Appellants, in interpreting the "amount recovered" terms of the Employment Order, the bankruptcy court should have considered all amounts paid to creditors, whether from the Gretchko settlement or Newberry payments.

We do not agree that the bankruptcy court erred. The bankruptcy court was interpreting the terms of its own order. Based upon the court's extensive oversight of, and experience with, all aspects of the bankruptcy case, we give deference to its construction of the terms of its own orders. Officers for Justice v. Civil Serv. Comm'n of City and County of San Francisco, 934 F.2d 1092, 1094 (9th Cir. 1991); see also, Zinchiak v. CIT Small Bus. Lending Corp. (In re Zinchiak), 406 F.3d 214, 224 (3rd Cir. 2005) (noting that the bankruptcy court

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[11](...continued)
from the fact that this approach presumes something that in fact did not occur, the basis of Appellants' unconventional arithmetic escapes the Panel. Second, Appellants sought fees in the amount of $388,272.91 based upon a lodestar calculation for the service provided, plus a 50 percent bonus, because of the outstanding result Appellants assert they have achieved in this case. Finally, Appellants would presumably have accepted fees based solely upon the lodestar approach, or $259,890.91.

is well suited to "provide the best interpretation of its own order.") (citations omitted); Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1203 (7th Cir. 1989) ("Few persons are in a better position to understand the meaning of a [court order] than the [bankruptcy] judge who oversaw and approved it."); Brown v. Neeb, 644 F.2d 551, 558 n. 12 (6th Cir. 1981).

The broad reading of "gross amount recovered by the Estate from the Litigation" proposed by Appellants would potentially encompass any arguable benefits enjoyed by creditors of the estate from whatever source derived, so long as that benefit was arguably linked, even indirectly, to the "Litigation." Even so, it would be a stretch under these facts to include, for example, the amounts paid by Newberry in purchasing creditors' claims within that definition.

In contrast, the bankruptcy court's reading of its order provides certainty in calculating Appellants' fees, and ensures that the funds from which the fees are to be paid were actually derived from Appellants' efforts. Because it represents a fair reading of its own order, we decline to second-guess the bankruptcy court.

B.

Modification of the Employment Order under § 328

Section 328(a) provides:

> The trustee . . . with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis.

> Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

§ 328(a) (emphasis added).

Appellants argue that the bankruptcy court erred when it decided that the terms of the Employment Order had not proven to be improvident, and that the developments in this bankruptcy case were not capable of being anticipated by Appellants, such that the terms of Appellants' employment could be altered under § 328(a). We also disagree with this argument.

The term "unanticipated developments" is subject to a broad interpretation. In re Confections by Sandra, Inc., 83 B.R. 729, 733 (9th Cir. BAP 1987). However, the standard is high. See Daniels v. Barron (In re Barron), 325 F.3d 690, 693 (5th Cir. 2003) (noting that "the intervening circumstances must have been incapable of anticipation, not merely unanticipated") (emphasis in original).

Appellants are, as near as the Panel can tell, sophisticated, experienced, and knowledgeable law firms with extensive experience in bankruptcy law. For the same reasons that Trustee sought Appellants' representation — their expertise — Appellants' lawyers could be expected to have foreseen that the adversary defendants would pursue a resolution of the issues in the adversary proceeding and bankruptcy case in some manner other than by agreeing to pay the Trustee the amount demanded, or by enduring the expense and delay associated with

further contesting the adversary proceeding. The bankruptcy court did not clearly err in declining to find that the outcome of this case was not capable of being anticipated.

Additionally, the Panel declines to disturb the bankruptcy court's finding that the terms of the Employment Order have not proven improvident under the circumstances. It is a difficult task, indeed, for Appellants to persuasively argue that the terms of their fee arrangement became improvident given the obvious risks inherent in any contingent fee. For example, it is conceivable the adversary proceeding may have proceeded to trial, requiring the Appellants to expend even more time and money than they did, only to be unsuccessful in generating any cash for the bankruptcy estate, therefore, earning no fees at all. Is the contingent fee arrangement any more improvident because the bankruptcy case was dismissed? We think not.

In nearly all contingent fee situations the possibility exists that there may be a large recovery, and as a result, a large fee award. Accompanying that possibility is the risk of little, or no, award as well. City of Burlington v. Dague, 505 U.S. 557, 565 (1992) ("An attorney operating on a contingency-fee basis pools the risks presented by his various cases; cases that turn out to be successful pay for the time he gambled on those that did not."). See also, Gaskill v. Gordon, 160 F.3d 361, 363 (7th Cir. 1998) (noting that contingent fee agreements shift part of the risk of loss from client to lawyer); Goodman v. Phillip R. Curtis Enter., Inc., 809 F.2d 228, 235 (4th Cir. 1987) ("[a] contingency fee arrangement has an element of risk for any attorney . . ."") (Hall, concurring); In re A.H Robins Co., Inc.,

222 B.R. 775, 777 (Bankr. E.D. Va. 1998) ("[A]ll contingent fee arrangements carry certain risks and it is not the duty of this Court to insulate attorneys from such risks.").

Under the contingent fee arrangement, Appellants assumed a risk that there would be little or no recovery from this particular adversary proceeding. It was this contingency that likely motivated Trustee to retain Appellants on a contingent basis in the first place. Trustee's employment application highlights that "Funds available on hand in the Estate to pay administrative claims are limited, and the value to the Estate of the Litigation is at the present time uncertain. For this reason, the Trustee wishes to pursue the Litigation on a contingent fee basis only." The possibility that the litigation might yield a minimal, if any, recovery, and that Appellants would receive a very small fee award, if any, was acknowledged from the beginning. Under these circumstances, the bankruptcy court did not clearly err in deciding that the terms of the contingent fee arrangement did not become improvident.

The bankruptcy court has substantial discretion to alter fee agreements under § 328(a) when circumstances so warrant. Confections by Sandra, 83 B.R. at 733. However, absent a finding that the original terms of Appellants' employment became "improvident in light of developments not capable of being anticipated" at the time the terms were fixed, the bankruptcy court should award fees in accord with the original contingent fee agreement. In re Reimers, 972 F.2d at 1129. Here, the bankruptcy court did not abuse its discretion in declining to adjust the terms of Appellants' fee arrangement.

Finally, Appellants contend that the bankruptcy court's decision not to adjust their fee pursuant to § 328 under these circumstances violates public policy. They characterize the conduct of Newberry and Klein as underhanded and deceitful. Appellants argue that the adversary defendants resisted the Trustee's efforts to recover their allegedly fraudulent transfer at every turn. Appellants contend it was only when it became apparent that Trustee and his attorneys would not back down, that Newberry resorted to buying up the claims in an underhanded and deceitful manner in order to get the bankruptcy case dismissed. Appellants argue that the bankruptcy court's minimal fee award effectively condones this bad behavior, and therefore, violates public policy.

Appellants cite no authority to support this contention. Moreover, the bankruptcy court had made no finding that any fraudulent transfers of IKM's property in fact occurred. While Appellants remain committed to Trustee's theory and claims, the allegations of wrongdoing against Newberry and others remain unresolved allegations.

In addition, there is no evidence in the record that there was "deceitful or underhanded" methods employed in the way Newberry acquired the creditor claims. Appellants seem to suggest that, in this context, the very practice of claims acquisition is offensive. However, the Bankruptcy Rules suggest otherwise. See Rule 3001(e); Bevan v. Social Commc'ns Sites, LLC (In re Bevan), 327 F.3d 994, 998 n. 2 (9th Cir. 2003) ("No doubt, transfer of claims can be proper."); Viking Assocs., L.L.C. v. Drewes (In re Olson), 120 F.3d 98, 102 n. 4 (8th Cir. 1997)

("[Purchasers] simply pursued their own economic self-interest. If they made misrepresentations to their assignors, the wronged parties could have objected to the Bankruptcy Court . . . ."). The procedure required by the Rules to recognize the assignment of a creditor's claim was followed, and when notice of the assignments were given to Trustee, U.S. Trustee, and others in the bankruptcy case, they did not object.

Appellants allege that the assigning creditors were unaware that the actual purchaser of their claims was one of the defendants in the adversary proceeding, but that allegation has been denied. In addition, there was no proof produced that had creditors known it was Newberry buying their claims, they would have rejected the offer. While Appellants imply there was mischief afoot, the bankruptcy court was given no evidence to support that the outcome of this case resulted from any fraud or wrongdoing.

In contrast to Appellants' unsupported allegations of improper motive, the adversary defendants offer a reasonable justification for their actions. They explain that it was simply less expensive and more cost-effective to purchase the claims of creditors than to contest Trustee's action and proceed to trial. They also represent that as long as the adversary proceeding was ongoing, their ability to obtain financing to pursue their new corporate endeavors was hindered. We can not criticize this economical approach to what is, at bottom, a financial issue, and we decline to declare that, under these facts, public policy has been abused.

**CONCLUSION**

We DISMISS the appeal of the Dismissal Order (No. CC-07-1092) because Appellants lack standing.

We AFFIRM the Fee Order (No. CC-07-1115).

KLEIN, Bankruptcy Judge, concurring:

Although I join the decision in its entirety, there is one aspect of this situation that gives pause: the prosecution of the litigation appears to have been the main cause of the election by the defendants to acquire virtually all the claims in a manner that was in the nature of a capitulation.

The ultimate purpose of the employment of appellant counsel was to recover funds sufficient to pay all the legitimate claims under the chapter 7 distribution scheme set forth at 11 U.S.C. § 726(a). While we do not know the precise amount of the net claims, the briefs suggest that they totaled about $615,000. In round (oversimplified) numbers, this sum would have resulted from a recovery of between about $920,000 and $1,025,000 at the applicable 33.3 and 40 percent contingencies (ignoring costs), yielding a contingency fee between about $303,000 and $410,000. There is merit to the notion that the ultimate purpose of payment of creditors actually was accomplished when appellees capitulated and purchased the outstanding undisputed claims, which likely would not have occurred but for the efforts of appellant counsel.

If I had been the trial judge, I might have strained to shoehorn the net result into the Employment Order's concept of

"the gross amount recovered by the Estate from the Litigation" and treat it as the recovery of the equivalent of the sums outlined above. But it unquestionably would have been a stretch.

The stratagem of a defendant acquiring the opponent's underlying interest in a manner that moots litigation is too well understood to satisfy the § 328(a) requirement that alternative compensation be limited to developments that were incapable of being anticipated at the time the Employment Order was entered.

Moreover, a classic risk for counsel in contingency fee engagements is the client who decides to dismiss the lawsuit. In the nonbankruptcy arena, the counsel has no choice but to acquiesce. That reality is one of the justifications used to explain the attractive fees reaped in successful litigation.

As it is, the court was interpreting its own Employment Order and plainly had the stage, the plot, and the dramatis personae well in view. It is entitled to sufficient deference that I cannot say that the court erred or abused its discretion.