

NOT FOR PUBLICATION

NOV 05 2007

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No.	CC-07-1053-PaBaK
)		
SHARI L. THOMAS,)	Bk. No.	ND 96-12129-RR
)		
Debtor.)		
_____)		
)		
SHARI L. THOMAS,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
JERRY NAMBA, Chapter 7 Trustee;)		
FARMER & READY,)		
)		
Appellees.)		
_____)		

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

Filed - November 5, 2007

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

Honorable Robin L. Riblet, Bankruptcy Judge, Presiding

Before: PAPPAS, BARDWIL² and KLEIN, Bankruptcy Judges.

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.

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

1 Chapter 7³ debtor Shari L. Thomas ("Thomas") appeals from the
2 bankruptcy court's final Order Allowing Administrative Claims,
3 Professional Fees and Expenses, Trustee's Fees and Expenses. We
4 hold that issue preclusion bars Thomas' arguments concerning the
5 propriety of the court-ordered sale of Thomas' property during the
6 bankruptcy case as a basis for attacking the award of fees to the
7 trustee and his attorney. We also determine that the bankruptcy
8 court did not abuse its discretion in approving the award of
9 compensation to the trustee. However, we VACATE the award of fees
10 to the trustee's attorneys and REMAND to the bankruptcy court for
11 a further review of the "lumped" billing entries on the attorneys'
12 Final Fee Application and for additional findings.

14 **FACTS**

15 Proceedings During the Bankruptcy Case

16 Thomas filed a petition for relief under chapter 11 of the
17 Bankruptcy Code on May 31, 1996. On October 5, 1996, the case was
18 converted to a case under chapter 7. Then, on January 8, 1997,
19 the chapter 7 case was dismissed at Thomas' request with a 180-day
20 bar to filing another chapter 11 petition.

21 In December 1994, certain real property located in Santa
22 Barbara, California (the "Property") had been purchased for
23 \$1,125,000.00 by Wanda Joy Woodruff ("Woodruff"), Thomas'
24 business associate and romantic partner. Their relationship

25
26 ³ Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
28 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.

1 deteriorated, eventually resulting in litigation, Thomas v.
2 Woodruff, et al., Case no. BC-171805 (Los Angeles Superior Court,
3 June 25, 1999). The state court found that Thomas had provided
4 all of the funds for the purchase of the Property, but that title
5 was placed in Woodruff's name to protect the Property from
6 judgments that had been entered in various courts against Thomas.
7 The state court therefore ordered Woodruff to execute a quitclaim
8 deed in favor of Thomas, transferring all of Woodruff's interest
9 in the Property to Thomas. Woodruff's appeal of the state court's
10 order was denied by the California Court of Appeals on March 9,
11 2000, and a deed was recorded.⁴

12 Given these developments, Thomas' bankruptcy case was
13 reopened on February 28, 2000, by Michael Kogan, the chapter 7
14 trustee, "so that the Trustee may administer the estate's interest
15 in certain real property." On June 16, 2000, the bankruptcy court
16 vacated its order dismissing the case at Kogan's request.

17 For reasons not appearing in the record on appeal, Kogan
18 resigned, and Jerry Namba was appointed chapter 7 trustee
19 ("Trustee") on June 28, 2000. The bankruptcy court approved
20 Trustee's request to employ David Y. Farmer and his law firm of
21 Farmer & Ready ("Farmer") to act as attorneys for Trustee on
22 August 18, 2000.

23
24 ⁴ Woodruff had filed her own chapter 7 case on July 16,
25 1999, Bankr. C.D. Cal. no. 99-12720. On her schedules B and C,
26 Woodruff claimed ownership of the Property. After denial of the
27 appeal in the state court action, Woodruff filed amended schedules
28 B and C eliminating her claim to the Property.

Although Thomas prevailed in the state court, she did not
emerge unscathed. The state court noted that Thomas' claim of
ownership of the Property was inconsistent with her position in
her bankruptcy case in which she did not claim ownership. In the
state court's words, "The Court is skeptical concerning [Thomas']
professed ignorance and naievété concerning her obviously improper
attempts to evade her creditors."

1 On May 3, 2000, Woodruff filed a creditor's proof of claim in
2 Thomas' reopened bankruptcy case, seeking \$753,465.00 for services
3 rendered, contribution to business, increase in value of real
4 estate purchased, and quantum meruit. The claim was amended on
5 December 15, 2001, to include additional increases in value of the
6 Property. Both Thomas and Trustee filed objections to allowance
7 of this claim.

8 At the February 14, 2001, hearing on Thomas' and Trustee's
9 objections, Woodruff was granted stay relief to liquidate her
10 claims against Thomas in the California state courts. Woodruff
11 filed an amended complaint in the state court action, asserting
12 the same claims she made in the bankruptcy court. Thomas
13 demurred, and the state court sustained the demurrer without leave
14 to amend on July 17, 2001. Woodruff appealed the state court's
15 ruling to the California Court of Appeals. It is not clear in the
16 record if the state court of appeals has ruled.

17 On June 21, 2001, Trustee filed a motion in the bankruptcy
18 court to sell the Property. Thomas filed an opposition on July 3,
19 2001, principally arguing that there was no sound business
20 justification for the sale.

21 On July 3, 2001, Woodruff filed an administrative expense
22 claim under § 503(b)(1)(A) for \$625,814.78. She sought the
23 "actual, necessary costs and expenses of preserving" the Property.
24 Thomas objected to Woodruff's administrative claim on August 13,
25 2001. Trustee joined in that objection on August 27, 2001. At a
26 hearing on the objections to Woodruff's administrative claim on
27 September 5, 2001, the bankruptcy court ruled that Thomas'
28 objection should be treated as an adversary proceeding. Trial in

1 that adversary proceeding was set for December 6, 2001.

2 On August 6, 2001, the bankruptcy court granted the motion
3 approving the sale of the Property for \$3,495,000 to James Nigro.
4 However, the court conditioned the sale order on failure of Thomas
5 to redeem the Property by August 31, 2001, through refinancing or
6 posting of a large bond.

7 Following the events of September 11, 2001, Nigro withdrew
8 his offer for the Property, which, according to Trustee and the
9 bankruptcy court, was within his rights under the court's order of
10 August 6, 2001.

11 The Property was again listed for sale by Trustee's realtor,
12 and on April 15, 2002, Trustee moved to sell the Property, this
13 time for \$2,700,000, to Robert K. Wolf. Thomas filed yet another
14 opposition, arguing once more that a "[s]ale of the [Property] is
15 completely unnecessary now that a loan has been obtained [by
16 Thomas to purchase the Property], subject solely to an Order
17 authorizing the Debtor to execute a Deed of Trust, the motion for
18 which is being concurrently heard." Thomas also objected that
19 sale of the Property would have disastrous tax consequences to
20 her.

21 The bankruptcy court conducted a hearing on the second sale
22 motion on May 29, 2002. Trustee and Thomas were present and
23 represented by counsel. Thomas' counsel argued:

- 24 • that Trustee had not asserted a sound business justification
25 for the sale. Tr. Hr'g 17:2-5 (May 29, 2002);
- 26 • that the \$2.7 million sale price was not fair market value
27 for the Property, and the sale was not at arms length because
the realtor represented both buyer and seller. Tr. Hr'g
17:6-8. and,
- 28 • that the Woodruff claim lacked merit, which meant that the
amount of legitimate creditor claims was relatively small and
a sale of the Property was not necessary. Tr. Hr'g 17:21.

1 The bankruptcy court ruled that Thomas' objection based on
2 lack of business justification and low market value were
3 speculative and not supported by evidence. Tr. Hr'g 17:9-12.
4 Regarding the last issue raised by Thomas, whether sale of the
5 Property was necessary, the court determined that the Woodruff
6 claim may have merit and that there were substantial other claims
7 against the estate. Tr. Hr'g 18:12-13, 25, 19:1-4. Finally, in
8 response to Thomas' offer to redeem the Property, the bankruptcy
9 court ruled that "With respect to the amount that Dr. Thomas could
10 raise for the estate, Mr. Farmer's response has made it clear that
11 that's not necessarily sufficient to pay the claims. So there is
12 a justification for selling the Property." Tr. Hr'g 17:22 - 18:1.

13 The bankruptcy court granted Trustee's motion and entered its
14 order on May 29, 2002, approving the sale (the "Sale Order").
15 Thomas appealed the Sale Order on June 7, 2001. On the same day,
16 Thomas sought a stay of the Sale Order pending appeal. The
17 bankruptcy court denied the motion for stay pending appeal on June
18 17, 2002. Trustee thereafter completed the sale transaction.

19 At oral argument before this Panel in the appeal of the Sale
20 Order, Trustee argued that since the sale had been completed, the
21 appeal should be dismissed as moot. Thomas argued that an issue
22 existed as to whether the buyer had acted in good faith, and
23 therefore, the exception to mootness in § 363(m) saved the appeal.
24 The Panel decided in a published opinion that when the issue of
25 the buyer's good faith in a sale arises for the first time on
26 appeal, it was appropriate to remand to the bankruptcy court to
27 decide the question. Thomas v. Namba (In re Thomas), 287 B.R.
28 782, 784 (9th Cir. BAP 2002). After a limited remand, the

1 bankruptcy court decided on March 7, 2003, that Wolf was indeed a
2 good faith purchaser of the Property, and the sale was conducted
3 by Trustee in good faith. An order memorializing that finding was
4 issued on April 10, 2003.

5 Thomas again appealed the bankruptcy court's order and the
6 Panel consolidated her second appeal with the original appeal. In
7 an unpublished decision, the Panel then determined that the
8 bankruptcy court's finding of good faith was not clearly
9 erroneous, and granted Trustee's motion to dismiss the original
10 appeal as moot, along with the consolidated appeal. Thomas v.
11 Namba (In re Thomas), BAP no. CC-02-1307/1237 (January 9, 2004).
12 Thomas appealed the Panel's decisions to the Ninth Circuit Court
13 of Appeals, which affirmed, concluding that "§ 363(m) renders moot
14 all of Thomas's challenges to the sale order." Thomas v. Namba
15 (In re Thomas), no. 04-55302 (9th Cir. November 23, 2005).

16 The Fee Applications

17 On April 10, 2001, Farmer filed its First Interim Application
18 for Payment of Fees, requesting \$38,350 in fees and \$2,772.62 in
19 expenses. Thomas objected in part to this application, arguing
20 that Trustee's efforts to sell certain property located in Studio
21 City⁵ were duplicative of the efforts of a broker whom Thomas had
22 engaged to sell that property. The U.S. Trustee filed a statement
23 of no objection to this application, and opposed Thomas' objection
24 because it considered it appropriate for Trustee to employ his own
25 broker. An order approving the full request in Farmer's first
26 interim fee application was entered on May 17, 2001.

27
28 ⁵ The Studio City property was the original residence of
Thomas before she purchased the Property. The Trustee sold the
Studio City property for \$660,000 on December 20, 2000.

1 Farmer submitted its Second Interim Application on October
2 16, 2002, requesting fees of \$62,650 and expenses of \$6,008.65.
3 It is not clear in the record if Thomas filed an objection to
4 Farmer's second application. The U.S. Trustee filed a statement
5 of no objection. A hearing on the second fee application (as well
6 as Trustee's First Interim Application reported in the next
7 paragraph) was held on November 20, 2002, in which Trustee and
8 Thomas were present. Although Thomas' counsel entered her
9 appearance at the hearing, she did not participate and there was
10 no objection raised at the hearing to the fee application. The
11 bankruptcy court approved the full request of Farmer's second
12 application for fees and expenses.

13 The Trustee filed his First Interim Application on October
14 16, 2002, requesting \$82,807.78 for services rendered and
15 \$1,588.78 in expenses. Thomas objected to Trustee's first
16 application, repeating her argument regarding duplicative
17 services, and also suggesting that Trustee's request equated to
18 \$532.52 per hour, an unreasonable request. The bankruptcy court
19 approved interim compensation to Trustee for his first application
20 in a reduced amount of \$30,000 for fees and the full amount of
21 expenses on November 20, 2002.

22 Farmer submitted its Third Interim Application on August 14,
23 2003, requesting \$47,336 in fees and \$5,349 in expenses. It
24 appears that Thomas did not file an objection to Farmer's third
25 application. The U.S. Trustee filed a statement of no objection.
26 The order approving Farmer's third application in full was entered
27
28

1 on October 1, 2003.⁶

2 Farmer's Fourth Interim Application was submitted on March
3 22, 2004, for \$46,027.50 in fees and \$5,349.03 in expenses.
4 Trustee noted that most of these fees were incurred for services
5 provided in litigation related to the Woodruff administrative
6 claim and the Thomas appeals of the Sale Order of the Property.
7 Thomas objected to the fourth application because there was no
8 business justification for the sale of the Property, and that the
9 charges for litigating the Woodruff administrative claim were
10 excessive. There was no submission from the U.S. Trustee. A
11 hearing was held on Farmer's fourth application on April 14, 2004.
12 Thomas and Trustee were present and represented by counsel.
13 Counsel for Thomas submitted on her written objections. The
14 bankruptcy court entered an order approving Farmer's fourth
15 application in full on April 15, 2004.

16 Farmer submitted his Fifth Interim and Final application on
17 April 25, 2006. He sought in his fifth application an additional
18 \$32,533.00 in fees and \$2,534.22 in expenses, for a total in the
19 Final Application of \$226,896.50 and expenses of \$20,284.39.

20 The Trustee submitted his Final Report and Application for
21 Trustee's Fee and Expenses on November 30, 2006. The Trustee
22 reported total receipts of \$3,494,349.99, total disbursements of
23 \$2,547,561.42, and cash on hand as of the Final Report date of
24 \$946,787.47. The Trustee calculated and requested the maximum
25 statutory fee of \$112,671.97, based on total disbursements of
26 \$2,980,732.30. Allowing for the \$30,000 interim payment, Trustee

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28 ⁶ There is no transcript in the record of the hearing on
Farmer's third application.

1 therefore sought additional compensation of \$82,671.97
2 (\$112,671.97 - \$30,000.00), and additional expenses of \$1,177.93.

3 An impressive "battle of the objections" ensued.

4 On December 27, 2006, Thomas filed an opposition to Farmer's
5 fifth and final applications and the Trustee's final application.
6 This 109-page objection argued that the bulk of all fees requested
7 by Farmer and Trustee were the result of sale of the Property, and
8 that sale was unnecessary and simply never should have happened.
9 Thomas also argued that the fee applications lacked specificity.

10 Farmer submitted his Reply to Thomas' opposition to the fee
11 applications on January 5, 2007. Farmer argued that this was the
12 most bitterly contested bankruptcy he had experienced in 36 years
13 as a trustee or trustee's attorney. He contended that sale of the
14 Property was appropriate, as were the fees attendant to the sale.
15 Regarding the specificity objection, Farmer noted that Thomas had
16 relied upon In re Garcia, 317 B.R. 810 (Bankr. S.D. Cal. 2004) for
17 support, and suggested that the Panel's subsequent decision on
18 appeal in that case, Ferrette & Slater v. United States Tr. (In re
19 Garcia), 335 B.R. 717 (9th Cir. BAP 2005), actually supported
20 Farmer's and Trustee's position.

21 In response to Farmer's reply, Thomas submitted a 161-page
22 document on January 16, 2007, including a line-item commentary
23 concerning Farmer's time sheets. Thomas added a 44-page
24 Supplemental Opposition to the Trustee's time sheets, again
25 criticizing any activity related to the sale of the Property, as
26 well as lodging attacks on the entries' lack of specificity,
27 Trustee's unnecessary travel and attendance at hearings, and
28 unnecessary communications.

1 Farmer then submitted a mercifully short "Further Reply" to
2 Debtor's objection to his fifth application. Among his other
3 points, Farmer noted that this fee application contained no less
4 detail than he had provided to the bankruptcy court in other
5 bankruptcy cases, and that he had never had fees denied for
6 inadequate itemization.

7 The bankruptcy court's hearing on approval of Farmer's Fifth
8 Interim and Final Fee Application and Trustee's Final Fee
9 Application occurred on January 26, 2007. Thomas, Farmer for
10 himself and for Trustee, and the attorney for the U.S. Trustee all
11 appeared and were heard.

12 The bankruptcy court recited its findings on the record. The
13 court found and concluded that:

- 14 • Thomas' arguments regarding sale of the Property were a "dead
15 horse. That one has been up and down the flagpole so many
16 times. . . . Some attorney for Dr. Thomas took it all the
way to the Ninth Circuit and the sale was upheld. We're not
going there anymore." Tr. Hr'g 3:21-25 (January 26, 2007).
- 17 • in response to a query from the court, the attorney for the
18 U.S. Trustee stated that it had no objection to the fee
applications.
- 19 • based upon the amount requested, and the time spent providing
20 the services, Trustee's fee request was the equivalent of
\$500 per hour, which the court would not allow. Instead, the
21 court allowed a reduced final fee of \$81,350, and allowed all
expenses of \$2,766.11.
- 22 • Thomas had "gotten in the way of the administration of this
23 case since it was reopened. . . . She hired a real estate
broker without court permission. Trustee had to intervene
24 into that. She refused the Trustee access to the [Property].
He had to evict her, her mother, her brother. She objected
25 to the retention of a realtor. . . . She objected to hiring
an accountant. She objected to the budget motion when the
26 Trustee wanted to pay income taxes." Tr. Hr'g 9:18 - 10: 6.
- 27 • Thomas originally filed and prosecuted the objections to
28 Woodruff's claims, but later asked Farmer to become more
involved. "He was lead counsel in the multi-day hearing on
the Woodruff administrative claim. That was a real trial.

1 We had 12 motions in limine. There's a lot of work involved
2 in this." Tr. Hr'g 11:12-17.

- 3 • "Once in a great while, Mr. Farmer would put two things
4 together [in his time sheets]. Oh my goodness he lumped
5 which he shouldn't do but it's few and far between." Tr.
6 Hr'g 11:19-21.
- 7 • Farmer's billing entries were consistent in terms of
8 particularity and specificity with those the court has
9 routinely approved in the past. Tr. Hr'g 12:1-8.
- 10 • "I have no qualms with any of the services of Mr. Farmer's
11 firm. I do not think he over billed. I do not think he
12 billed for unnecessary services." Tr. Hr'g 14:6-8.
- 13 • "I have no issues whatsoever with Mr. Farmer's fee. He is
14 entitled a reasonable fee under the totality of the
15 circumstances. The circumstances in this case render him a
16 total fee of \$231,804 and expenses of \$20,538.61." Tr. Hr'g
17 14:21-24.

18 The bankruptcy court overruled Thomas' objections to the fee
19 applications. It entered an order approving the final fee
20 application of Farmer, and of Trustee in the reduced amount, on
21 January 26, 2007. Thomas filed a timely notice of appeal on
22 February 2, 2007.

23 JURISDICTION

24 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
25 §§ 1334 and 157(b)(2)(A). We have jurisdiction pursuant to 28
26 U.S.C. § 158.

27 ISSUES

- 28 1. Whether Thomas is precluded from attacking the fee awards by
arguing that services provided by Trustee and Farmer in
connection with the court-ordered sale of the Property were
unnecessary.

1 2. Whether the bankruptcy court abused its discretion in
2 approving the fee applications.

3 4 **STANDARDS OF REVIEW**

5 Determining the preclusive effect of an order involves a
6 question of law reviewed de novo. Jacobs v. CBS Broad., Inc., 291
7 F.3d 1173, 1176 (9th Cir. 2002).

8 A bankruptcy court's award of attorney's fees will not be
9 disturbed on appeal absent an abuse of discretion or an erroneous
10 application of the law. Smith v. Edwards & Hale, Ltd. (In re
11 Smith), 317 F.3d 918, 923 (9th Cir. 2002). Factual findings made
12 in the course of awarding compensation are not disturbed unless
13 clearly erroneous. See Friedman Enters. v. B.U.M. Int'l Inc. (In
14 re B.U.M. Int'l, Inc.), 229 F.3d 824, 830 (9th Cir. 2000); Rule
15 8013. A finding is not "clearly erroneous" unless, based on the
16 entire evidence, the reviewing court is left with the definite and
17 firm conviction that a mistake has been committed. United States
18 v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

19 20 **DISCUSSION**

21 I.

22 Issue preclusion bars Thomas from arguing about the
23 necessity of the court-ordered sale of the Property as a
24 basis for attacking the award of fees to Trustee and his
25 attorney.

26 Thomas expends 12 pages in her Opening Brief attempting, in
27 effect, to re-litigate the Sale Order. In this respect, Thomas'
28 Opening Brief echoes the argument made to the bankruptcy court at
the January 26, 2007 hearing concerning the fee applications:

1 MS. LAWSON [attorney for Thomas] I think my client is
2 pretty legitimately angry.

3 THE COURT: Why?

4 LAWSON: Because no one investigated and made sure that
5 the Woodruff claim was worth anything before they sold
6 the [Santa Barbara] property.

7 THE COURT: We're getting back to we shouldn't have sold
8 the property. That's a dead horse. That one has been
9 up and down the flagpole so many times. . . . Some
10 attorney for Dr. Thomas took it all the way to the Ninth
11 Circuit and the sale was upheld. We're not going there
12 anymore."

13 Tr. Hr'g 3:21-25 (January 26, 2007).

14 While not doing so expressly, we interpret the bankruptcy
15 court's comments as invoking the doctrine of issue preclusion to
16 bar further arguments by Thomas concerning the necessity of the
17 court-ordered sale of the Property as a basis for attacking the
18 award of fees to Trustee and his attorney. The bankruptcy court
19 implies, quite forcefully, that this issue was fully litigated and
20 finally resolved in the prior contest about that sale. We agree.

21 The ruling by the bankruptcy court is consistent with the
22 requirements for issue preclusion in our Circuit. See Littlejohn
23 v. United States, 321 F.3d 915, 923 (9th Cir. 2003) (requirements
24 recently reaffirmed in Thacker v. FCC (In re Magnacom Wireless,
25 LLC), ___ F.3d ___, 2007 WL 2694717 * 8 (9th Cir. 2007)). Issue
26 preclusion requires that:

- 27 (1) the issue at stake is identical to an
- 28 issue raised in the prior litigation; (2) the
- issue was actually litigated in the prior
- litigation; and (3) the determination of the
- issue in the prior litigation must have been a
- critical and necessary part of the judgment in
- the earlier action.

29 Littlejohn, 321 F.3d at 923.

1 The first criterion for preclusion is satisfied here. The
2 issue of the necessity of the sale of the Property was at the
3 heart of Thomas' objections to that sale. Her argument in this
4 appeal, that Trustee and Farmer should not be compensated for
5 their services regarding the Property sale, is essentially the
6 same issue argued in opposition to the Sales Order before both the
7 bankruptcy court and later on appeal.

8 Thomas contends that the issue presented in this appeal is
9 not the same: whether Trustee's and Farmer's services were
10 necessary for purposes of allowing compensation for those services
11 under § 330(a)(1)(A) (providing that bankruptcy court may award
12 trustee or professional compensation only for "necessary
13 services") and 330(a)(3)(C) (in determining the amount of
14 compensation, bankruptcy court shall consider "whether the
15 services were necessary at the time at which the services were
16 rendered toward the completion of, a case under this title. . .
17 .") However, Thomas must concede that her argument that the
18 services provided by Trustee and Farmer were not necessary is
19 premised solely on her contention that the sale of the Property
20 was not necessary, precisely the same argument she made,
21 unsuccessfully in the bankruptcy court and on appeal, in opposing
22 that sale from 2001 through 2005.⁷ Because Thomas' challenge to
23

24 ⁷ Thomas devotes twelve pages of her Opening Brief to
25 linking the allegedly unnecessary sale with the lack of necessity
26 for services related to that sale. That her entire argument is
27 premised on the lack of necessity of the sale is demonstrated by
28 the three headings she assigns to her arguments in the brief:
"The Claims Existing at the Time of the Sale Did Not Justify the
Sale." Thomas Opening Br. at 8-9. "The Santa Barbara Property
Should Never Have Been Sold." Thomas Opening Br. at 9-15. "All
Fees and Costs Incurred in Connection With the Sale of the Santa
Barbara Property Should be Denied." Thomas Opening Br. at 15-20.

1 the compensation requests is predicated upon her belief that the
2 sale of the Property was not necessary, Thomas can not avoid the
3 preclusive effect of the courts' adverse decisions on that legal
4 question.

5 The second and third issue preclusion criteria, that the
6 issue be actually litigated and that it be necessary to the prior
7 order, are also met here. Thomas repeatedly in her pleadings and
8 in oral argument before the bankruptcy court stressed that there
9 was no need for sale of the Property because, if Woodruff's
10 administrative claim was not considered, there were sufficient
11 funds in the estate from the sale of other assets to satisfy
12 creditors without a sale of the Property. Thomas also argued that
13 she had obtained loans sufficient to redeem the Property, and thus
14 that was an alternate reason for not selling the Property.

15 At the hearing on sale of the Property on May 29, 2002, the
16 bankruptcy court explicitly rejected these arguments. It
17 determined that, as of the date that it approved the sale, the
18 Woodruff claim may have merit and that there were substantial
19 additional claims pending against the estate. Tr. Hr'g 18:12-13,
20 25, 19:1-4 (May 29, 2002). Regarding Thomas' offer to redeem the
21 Property, the bankruptcy court found and concluded that: "With
22 respect to the amount that Dr. Thomas could raise for the estate,
23 Mr. Farmer's response has made it clear that that's not
24 necessarily sufficient to pay the claims. So there is a
25 justification for selling the Property." Tr. Hr'g 17:22 - 18:1.

26 Both Thomas' and Trustee's appeal briefs discuss two
27 additional criteria for issue preclusion: that there be a final
28 judgment on the merits, and that the parties in the former

1 proceedings are the same as the parties in the current matter.
2 Silva v. Smith's Pacific Shrimp, Inc. (In re Silva), 190 B.R. 889,
3 892 (9th Cir. BAP 1995); Cogliano v. Anderson (In re Cogliano),
4 355 B.R. 792, 802-03 (9th Cir. BAP 2006). These criteria
5 complement the three criteria in Littlejohn. They are also
6 satisfied here.

7 The Sales Order was a final judgment because it resolved all
8 aspects of the dispute between Trustee and Thomas over sale of the
9 Property. It is no less final because, due to Thomas' failure to
10 obtain a stay on appeal and the subsequent completion of the sale
11 of the Property, the appeal of the Sales Order became moot. The
12 Sales Order was not reversed, modified or vacated on appeal.
13 Unless a final order is reversed, modified or vacated on appeal,
14 it has issue preclusive effect. Montana v. United States, 440
15 U.S. 147, 153 (1979).⁸ And it is uncontroverted that the parties
16 to the Sales Order are the same parties involved in the instant
17 dispute.

18 We conclude that the bankruptcy court did not err in deciding
19 that Thomas was precluded from making any further arguments
20 concerning the necessity of the court-ordered sale of the Property
21 as a basis for attacking the request for fees by Trustee and his
22 attorneys. Since Thomas has challenged the bankruptcy court's
23

24 ⁸ There is an appellate decision from another circuit
25 demonstrating this precise point. An appeal from the bankruptcy
26 court's order confirming sale of a debtor's property was dismissed
27 as moot because the sale had been completed pending appeal. The
28 debtor had failed to obtain a stay pending appeal, or any order
vacating or modifying the bankruptcy court's sale order. Though
the appeal was dismissed as moot, the court of appeals ruled that
the bankruptcy court's order remained a "judgment on the merits,
with preclusive effect." Plotner v. AT&T Corp., 224 F.3d 1161,
1169 (10th Cir. 2000).

1 decision awarding fees to Trustee solely because he should not
2 have sold the Property, and since, like the bankruptcy court, we
3 hold that Thomas is precluded from doing so, we AFFIRM the
4 bankruptcy court's order awarding of fees to Trustee.

5
6 II.

7 The bankruptcy court erred in finding that Farmer's fee
8 request was reasonable because Farmer did not properly
9 document his services, using lumped time entries in his
10 application.

11 Under § 330(a)(1)(A), the bankruptcy court may allow
12 compensation for a trustee and his professionals for "reasonable
13 compensation for actual, necessary services rendered by the
14 trustee . . . or attorney. . . ." In determining the amount of
15 reasonable compensation to be awarded to Trustee and his attorney,
16 the bankruptcy court was required to consider,

17 the nature, the extent and the value of such services,
18 taking into account all relevant factors, including -
19 (A) the time spent on such services;
20 (B) the rates charged for such services;
21 (C) whether such services were necessary to the
22 administration of, or beneficial at the time at which
23 the service was rendered toward the completion of a case
24 under this title;
25 (D) whether the services were performed within a
26 reasonable amount of time commensurate with the
27 complexity, importance, and nature of the problem,
28 issue, or task addressed; and
29 (E) whether the compensation is reasonable based on
30 customary compensation charged by comparably skilled
31 practitioners in cases other than cases under this
32 title.⁹

33 Section 330(a)(3).

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⁹ Section 330(a)(3) was substantially modified in 2005 by BAPCPA. However, as noted above, resolution of the issues in this bankruptcy case is governed by the pre-amendment statutes governing professional fees.

1 In our decision in Roberts, Sheridan & Kotel, P.C. v. Bergen
2 Brunswig Drug Co. (In re Mednet), 251 B.R. 103 (9th Cir. BAP.
3 2000), we outlined the methodology a bankruptcy court should
4 employ when examining the circumstances and manner in which
5 services are performed and results achieved to determine a
6 reasonable fee. Such an examination should include:

- 7 (a) Were the services authorized?
8 (b) Were the services necessary or beneficial to the
9 administration of the estate at the time they were rendered?
10 (c) Are the services adequately documented?
11 (d) Are the fees required reasonable, taking into
12 consideration the factors set forth in section 330(a)(3)?
13 (e) Did the professional or trustee exercise reasonable
14 billing judgment.

12 Mednet, 251 B.R. at 108 (cited with approval in Leichty v. Neary
13 (In re Strand), 375 F.3d 854, 858 (9th Cir. 2004)); Garcia, 335 at
14 724.

15 In this case, Farmer's services were authorized. Thomas does
16 not challenge this criterion and appears to concede it. Thomas'
17 Reply Br. at five.

18 The bankruptcy court found that Farmer's services were
19 necessary or beneficial to the administration of the estate at the
20 time they were rendered. Thomas' principal challenge here is to
21 the necessity of the attorneys' activities related to the sale of
22 the Property. As we discuss above, this argument is precluded.
23 Inasmuch as the bankruptcy court found that the sale of the
24 Property was necessary, it was the duty of Trustee and his
25 professionals to "reduce to money the property of the estate for
26 which such Trustee serves[.]" § 704(a)(1).

27 The bankruptcy court also determined that the total fees
28 requested by Farmer were reasonable considering the totality of

1 the circumstances. In doing so, the court made a series of
2 findings consistent with the requirements of § 330(a)(3). The
3 bankruptcy judge stated "I have no qualms with any of the services
4 of Mr. Farmer's firm. I do not think he overbilled. I do not
5 think he billed for unnecessary services." Tr. Hr'g 14:6-7
6 (January 26, 2007). The court noted that the U.S. Trustee had not
7 objected to any of Farmer's fee applications. The court
8 specifically found that Farmer's fee was in line with the local
9 market, that Trustee could have engaged more expensive attorneys,
10 and that Farmer's rates of \$250 (at the beginning of the case) to
11 \$325 per hour (near the end of the case) were reasonable. The
12 court observed that had Trustee engaged more costly counsel, it
13 was likely that the potential surplus of \$550,000 for Thomas would
14 have fallen to \$100,000 or even less.

15 The bankruptcy court also found that much of Farmer's fees
16 and expenses in the bankruptcy case were incurred as a direct
17 result of Thomas' obstructive activities in the bankruptcy:

18 [Thomas] hired a real estate broker without
19 permission. Trustee had to intervene in that.
20 She refused the Trustee access to the Santa
21 Barbara property. He had to evict her, her
22 mother, her brother. She object[ed] to the
23 retention of a realtor for the purpose of
24 selling the Santa Barbara property. She
25 objected to hiring an accountant. She
26 objected to the budget motion when the Trustee
27 wanted to pay income taxes. She objected to
28 three interim fee applications of Farmer &
Ready, and an interim fee application of the
accountant, Mr. Kloster. . . . It's been a
revolving door. The Woodruff claim Ms.
Bronstein [one of Thomas' earlier attorneys]
originally filed and proceeded with. She
[Thomas] asked Mr. Farmer to become more
involved. He was lead counsel in the multi-
day hearing on the Woodruff administrative
claim. That was a real trial. We had 12
motions in limine. There's a lot of work
involved in this.

1 And while we do not necessarily agree with the bankruptcy
2 court's conclusion, it determined that any arguably unnecessary
3 work resulting from the dismissal of the mooted appeal from the
4 Sale Order was caused by the court's own error. The court noted
5 that an attorney should not be penalized for the court's error.

6 Finally, the bankruptcy court found that Farmer's fees were
7 adequately documented and that Farmer had exercised reasonable
8 billing judgment. Simply put, in this regard, the bankruptcy
9 court found that Farmer did not overbill. While this may be shown
10 to be true, in our opinion, the bankruptcy court clearly erred in
11 so concluding because the documentation submitted by Farmer to
12 support its fee request was inadequate.

13 The test of good billing judgment in our circuit dictates
14 that "professionals employed under section 327 must make a good
15 faith effort to exclude from fee requests hours that are
16 excessive, redundant, unjustified, or otherwise unnecessary."
17 Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc., 924 F.2d
18 955, 961 (9th Cir. 1991). But an accurate assessment of whether
19 appropriate billing judgment has been employed by a professional
20 is, of course, dependent upon the bankruptcy court's ability to
21 analyze the professionals' bills. Although in this case the
22 bankruptcy court made general findings that the billing records
23 were acceptable, it made one finding that, based upon the record,
24 was a clear mistake.

25 In Exhibit 15 to her Opposition to the Final Fee Application
26 of Farmer, Thomas cited some 30 examples where Farmer had "lumped"
27 the description of travel-related services in its time sheets.
28 Lumping of services, or "block billing," is the practice of

1 listing multiple activities, often unrelated, in a single time
2 entry in the billing records. Lumping of services in line-item
3 entries in fee applications is universally discouraged by
4 bankruptcy courts,¹⁰ because it permits an applicant to claim
5 compensation for rather minor tasks which, if reported separately,
6 would not be compensable. In other words, lumping prevents the
7 bankruptcy court from determining whether individual tasks were
8 expeditiously performed within a reasonable period of time. In re
9 Auto. Warranty Corp., 138 B.R. 72, 74 (Bankr. D. Colo. 1991). We
10 have endorsed decisions by bankruptcy courts that have reduced or
11 eliminated requested fees because of lumping in time sheets. See,
12 e.g., In re Dutta, 175 B.R. 41, 46-47 (9th Cir. BAP 1994).

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14 ¹⁰ See, generally, 3 COLLIER ON BANKRUPTCY, ¶ 330.04[b] (Alan N.
15 Resnick & Henry J. Sommer, eds., 15th ed. rev. 1999). A partial
16 survey of recent bankruptcy court decisions shows the widespread
17 disapproval of this billing practice: 1st Circuit: In re ACT
18 Mfg., Inc., 281 B.R. 468, 483 (Bankr. D. Mass 2002); 2nd Circuit:
19 In re Brous, 370 B.R. 563, 576 (Bankr. S.D.N.Y. 2007); In re
20 Baker, 374 B.R. 489 (Bankr. E.D.N.Y. 2007); Kelsey v. Great Lakes
21 Higher Educ. Corp. (In re Kelsey), 272 B.R. 830, 834 (Bankr. D.
22 Vt. 2002). 3rd Circuit: In re Heffner, 2007 Bankr. LEXIS 1272 *
23 18-19 (Bankr. E.D.Pa. 2007). 4th Circuit: In re Ward, 190 B.R.
24 242, 246-48 (Bankr. D. Md. 1995). 6th Circuit: In re Williams, 357
25 B.R. 434, 440 (6th Cir. BAP 2007) (lumping of tasks made time
26 entries "highly suspect"). 7th Circuit: In re New Boston Coke
27 Corp., 299 B.R. 432, 443 (Bankr. E.D. Mich. 2003); In re Tak
28 Comm'ns, Inc., 154 B.R. 514, 519 (Bankr. W.D. Wisc. 1993); In re
Adventist Living Centers, Inc., 137 B.R. 701, 705-06 (Bankr. N.D.
Ill. 1991). 8th Circuit: In re Racing Servs., 2004 Bankr. LEXIS
1496 * 14-15 (Bankr. D.N.D. 2004); In re Nwfx, Inc., 267 B.R. 118,
294 (Bankr. W.D. Ark. 2001). 9th Circuit: In re Douglas, 349 B.R.
836, 844 (Bankr. E.D. Wash. 2006); In re Jones, 356 B.R. 39, 46
(Bankr. D. Idaho 2005); In re Wilber, 2005 Bankr. LEXIS 3107 * 48
(Bankr. D. Mont. 2005); In re Staggie, 255 B.R. 48, 55 (Bankr. D.
Idaho 2000); Wepsic v. Josephson (In re Wepsic), 238 B.R. 845, 848
(Bankr. S.D. Cal. 1999). 10th Circuit: In re Recycling
Industries, 243 B.R. 396, 406-07 (Bankr. D.Colo. 2000); In re
Reconversion Techs, 216 B.R. 46, 58 (Bankr. N.D. Okla. 1997); 11th
Circuit: Oscher v. The Solomon Tropp Law Group (In re Atlantic
Int'l Mortg. Co.), 373 B.R. 159, 161 (Bankr. M.D. Fla. 2007); In
re S. Diesel, 309 B.R. 810, 817-18 (Bankr. M.D. Ala. 2004); In re
Greater Miami Trading, 177 B.R. 1022, 1026 (Bankr. S.D. Fla.
1995).

1 (bankruptcy court's finding of severe lumping was correct and case
2 remanded for explanation of what portion of fee reduction was due
3 to this deficiency). In addition, the bankruptcy court's decision
4 to overlook this problem with Farmer's billings also contravenes
5 its own local rules, which provide that "Summaries [in line-items
6 of fee applications] that list a number of . . . services under
7 only one time period will generally not be satisfactory." Bankr.
8 C.D. Cal LBR 2016-1(E) (ii).

9 The bankruptcy court acknowledged that it was aware of the
10 lumping in Farmer's fee application, but observed that the
11 instances were "few and far between." We are particularly
12 sensitive to the bankruptcy court's familiarity with the facts of
13 this case, but we believe this finding was clearly erroneous. An
14 examination of the line items criticized by Thomas confirms that
15 Farmer clearly lumped the service descriptions.¹¹ The lumped
16 entries listed in her Exhibit 15 reflect a total of 139.20 hours
17 of time billed by Farmer at \$250-285 per hour, or at least
18 \$35,000. This sum amounts to about 15 percent of the total fees
19 charged by Farmer and approved by the bankruptcy court.

20 In addition, our own examination of Farmer's bills suggests
21 that Thomas may have significantly understated the extent of the
22 block billing. For example, we considered the entry for October
23 26, 2000, which lists,

24 DYF. Review motion; telephone call to client;
25 telephone call from Attorney Cohen; telephone

26 ¹¹ Just as an example, one entry shows: "7/18/01, DYF, Travel
27 to and from Santa Barbara; court appearance - motion; conference
28 with buyer, broker and attorneys; telephone calls to client (3)."
The billed time was 6.2 hours. From this entry, it is impossible
for the bankruptcy court, or this Panel, to determine what amounts
of time Farmer spent traveling, in court, in conference, or in
telephone conversations.

1 call to Attorney Ericson; review file;
2 research; prepare opposition brief and
3 declaration; telephone call from Attorney
Fahey. 5.3 hours.

4 ER at 2700. While we could assume that the 5.3 hours spent by Mr.
5 Farmer performing these several discrete tasks was appropriately
6 allocated, it would be a guess on our part to do so. This entry
7 is not an isolated example: we discovered over 50 lumped entries
8 in Farmer's second interim application alone, representing over
9 150 of the 404 total hours, or 37 percent of total hours in the
10 second fee application.

11 An estate professional is "required to maintain and present
12 to the bankruptcy court meticulously accurate time records of all
13 services rendered as a necessary prerequisite to the recovery of
14 attorney's fees." In re Nucorp Energy, Inc., 764 F.2d 655, 658
15 (9th Cir. 1985). "As the fact finder, the bankruptcy court must
16 evaluate the sufficiency of the evidence provided by the
17 professional in support of the application for compensation. . . .
18 In every case, a court should award fees only to the level proven
19 to be actual, necessary, and reasonable." First Interstate Bank
20 of Nev., N.A. v. CIC Inv. Corp. (In re CIC Inv. Corp.), 192 B.R.
21 549, 554 (9th Cir. BAP 1996). In light of § 330(a)(3)(A)'s
22 command that the bankruptcy court consider "the time spent on such
23 services," when a professional includes a significant number of
24 lumped time entries, the bankruptcy court can not properly
25 evaluate whether a professional's services were actual, necessary
26 and reasonable.

27 We emphasize that, when properly documented upon remand, it
28 may be that Farmer is entitled to the full amount of fees

1 requested in his application. However, Farmer's extensive use of
2 block billing entries deprived the bankruptcy court of the ability
3 to adequately assess whether the amounts requested were
4 reasonable, or whether Farmer had engaged in proper billing
5 judgment. We believe the bankruptcy court clearly erred when it
6 found that this documentation problem was insignificant. We will
7 therefore vacate Farmer's fee award and remand this matter to the
8 bankruptcy court for a further review of Farmer's Final Fee
9 Application and an examination of the block billing entries.¹²

10 As for the non-lumped entries, we find that the bankruptcy
11 court did not abuse its discretion when it determined that the
12

13 ¹² We note that Thomas also challenged Farmer's practice of
14 charging for its travel time at its full hourly rate, a practice
15 the bankruptcy court did not address and apparently endorsed.
16 Because nearly all these travel-related items are listed in lumped
17 entries, and the record therefore does not show the total amount
18 of travel time for which Farmer sought payment, it is impossible
19 for the Panel to analyze whether the bankruptcy court clearly
20 erred in authorizing full payment for this time. The bankruptcy
21 court should further consider Thomas' argument when it re-examines
22 Farmer's time records. While courts generally permit compensation
23 for an attorney's non-local travel time, the courts are not in
24 agreement with respect to the extent that travel time should be
25 compensable. 3 COLLIER ON BANKRUPTCY, ¶ 330.05[3][b][ii]. Compare In
26 re Frontier Airlines, Inc. 74 B.R. 973 (Bankr. D. Col. 1987)
27 (holding that time spent traveling should be compensated at the
28 professional's full hourly rate), with In re The Landing, Inc.,
122 B.R. 701 (Bankr. N.D. Ohio 1990) (reducing compensation for
travel time to 50 percent of a professional's normal billing rate,
focusing on the nonproductivity of travel).

23 Thomas has also challenged, in both the bankruptcy court and
24 in this appeal, whether Farmer has billed for services which
25 should properly have been performed by the Chapter 7 trustee. We
26 can not find in the record where the bankruptcy court addressed
27 this issue. Again, because of the lumped entries, we are also
28 unable to evaluate this objection. Presumably, with proper time
documentation, the bankruptcy court can assess the propriety of
Trustee's delegation of duties to his counsel. See, § 328(b)
(prohibiting compensation to an attorney "for performance of any
of the trustee's duties that are generally performed by a trustee
without the assistance of an attorney"); Garcia, 335 B.R.
at 725.

1 specificity and particularity of the entries were acceptable. In
2 this regard, the Panel defers to the decision of the bankruptcy
3 judge who has had the opportunity not only to preside over fee
4 application hearings, but also to observe the performance and
5 activities of Trustee's attorneys during the course of the
6 bankruptcy proceedings. Red Carpet Corp. of Panama City Beach v.
7 Miller (In re Red Carpet Corp. of Panama City), 902 F.2d 883, 891-
8 92 (11th Cir. 1990).

9
10 **CONCLUSION**

11 We AFFIRM the order of the bankruptcy court approving the
12 final fee application of Trustee.

13 We VACATE the bankruptcy court's order awarding fees to
14 Farmer, and REMAND this matter to the bankruptcy court for a
15 further review of Farmer's Final Fee Application after submission
16 of proper documentation of services.¹³

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22 ¹³ While we effectively endorse Thomas' challenge to Farmer's
23 fee award, her victory likely comes at a cost. Even though we
24 vacate and remand for a reexamination of a significant number of
25 Farmer's time entries, Trustee and Farmer have prevailed in their
26 defense against most of Thomas' arguments on appeal. Thus,
27 Trustee and Farmer may have a proper basis to seek supplemental
28 compensation and expenses for their efforts in this appeal. Smith
v. Edwards & Hale (In re Smith), 317 F.3d 918, 928 (9th Cir. 2002)
("Failure to grant fees for successfully defending challenges to
an authorized fee application would dilute fee awards, in
violation of section 330(a), and thus would reduce the effective
compensation of bankruptcy attorneys below the compensation
available to attorneys generally"); see also Nucorp, 764 F.2d at
661.