

AUG 25 2005

NOT FOR PUBLICATION

**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.	NC-04-1401-SPB
)		
SILICON VALLEY TELECOM AND)	Bk. No.	01-55156-ASW
INTERNET EXCHANGE, LLC,)		
)		
Debtor.)		
_____)		
CORPORATE BUILDERS, INC.,)		
)		
Appellant,)		
)		
v.)		
)		
SILICON VALLEY TELECOM AND)		
INTERNET EXCHANGE, LLC; FRED)		
RUBIO; KAREN RUBIO,)		
)		
Appellees.)		
_____)		

M E M O R A N D U M¹

Argued and Submitted on
May 19, 2005 at San Jose, California

Filed - August 25, 2005

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

Honorable Arthur S. Weissbrodt, Bankruptcy Judge, Presiding

Before: SMITH, PERRIS and BRANDT, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

1 Corporate Builders, Inc. ("CBI") appeals the court's order
2 finding Fred and Karen Rubio ("the Rubios") to be in contempt of
3 the court's remuneration order. We AFFIRM.

4
5 **FACTS**

6 Background

7 Fred Rubio owns and manages Rubio & Associates, a commercial
8 real estate brokerage company. In 1998, Rubio & Associates
9 developed a business plan to lease certain commercial property
10 ("the Property"), upgrade the Property and sublet the space.
11 Rubio & Associates entered into a twenty-five year lease on the
12 Property and began making the upgrades and marketing the space.
13 Fred Rubio formed Silicon Valley Telecom Exchange, LLC ("SVTX") to
14 manage the Property and had the lease assigned to SVTX, in
15 exchange for SVTX's assumption of Rubio & Associates' liabilities
16 incurred in connection with the Property. CBI contracted with
17 either SVTX or Rubio & Associates to renovate the Property.²

18 In March 2001, Fred Rubio formed Silicon Valley Telecom &
19 Internet Exchange ("SVTIX" or "Debtor") which in turn entered into
20 a ten year oral sub-lease with SVTX for space in the Property. In
21 June 2001, CBI sued Rubio & Associates, SVTX, SVTIX and others in
22 state court for contract damages and to foreclose on its
23 mechanic's lien. Rubio & Associates, SVTX and Debtor all filed

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26 _____
27 ² CBI claims that its contract was with Debtor, not SVTX,
28 while Debtor claims that the contract was with SVTX because the
name "Rubio & Associates" was stricken out on the contract and the
name "Silicon Valley Telecom Exchange" was written in.

1 voluntary chapter 11³ petitions on October 22, 2001. Fred Rubio
2 has been designated the Responsible Individual to act on behalf of
3 all debtors.

4 The Remuneration Order

5 Debtor and CBI submitted several competing plans but by May
6 7, 2003, no chapter 11 plan had yet been confirmed. At a hearing
7 on that date, the court ordered the Rubios, as principals of
8 Debtor, to limit their total remuneration from the estates of all
9 three debtors (Rubio & Associates, SVTX and SVTIX) to \$14,000 per
10 month collectively.⁴ On May 19, Karen Rubio wrote checks in the
11 amount of \$13,000, drawn on Debtor's account to herself and her
12 husband, Fred, for management and bookkeeping fees for April
13 2003.⁵ Three days later, on May 22, Karen wrote checks totaling
14 \$26,000, drawn on Debtor's account, to herself and her husband,
15 for fees for May and June 2003. And on June 1, 2003, Karen wrote
16 checks totaling \$13,000, drawn on Debtor's account to herself and
17 her husband, for fees - again for June 2003. The Rubios admit
18 that there was a double payment of compensation in May 2003, but
19 maintain that it was to make up for an earlier missed monthly
20 payment. Fred Rubio claims that once he received the court's May
21 2003 remuneration order, he thought the double payment might be a
22 violation thereof so his wife refunded SVTIX \$26,000 from their

23
24 ³ Unless otherwise indicated, all chapter, section and rule
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

26 ⁴ The written order was entered on May 20, 2003.

27 ⁵ Both pre- and post-petition, Debtor paid Fred \$8,000 per
28 month for management fees, and Karen \$5,000 per month for
accounting fees.

1 personal account and new checks were issued for a total payment of
2 \$13,000.

3 In addition to the \$13,000 per month the Rubios received for
4 services performed, they also received additional payments for
5 their personal vehicles and health insurance premiums. These
6 payments, according to the United States Trustee ("UST"),
7 constitute additional compensation to the Rubios. Debtor did not
8 report these payments as compensation in their MORs, but rather as
9 administrative expenses.

10 In September 2003, the Rubios wrote from Debtor's account,
11 without court authority, checks for over \$73,000 to the California
12 Franchise Tax Board to cover their personal 2001 income taxes.⁶

13 On February 6, 2004, CBI filed an ex parte application for
14 issuance of an order to show cause why Debtor and its insiders,
15 the Rubios, should not be held in contempt for willful disregard
16 of a court order ("OSC"). In support of its application, CBI
17 submitted the declaration of Guillermo Lopez who stated that
18 charges on the Rubios' credit card statements, which appeared to
19 be for personal expenses, were paid for by Debtor. Lopez also
20 noted that Debtor had been paying the Rubios' car payments and
21 health insurance premiums in violation of the remuneration order.
22 Last, CBI argued that it was improper for the Rubios to receive
23 the benefit of the thousands of frequent flyer miles they received

24
25 ⁶ On October 15, 2003, the UST filed a motion to appoint a
26 chapter 11 trustee based on other grounds. CBI joined in the
27 motion. At the time the UST's motion was argued, the Rubios had
28 not yet filed Debtor's September monthly operating report - CBI
maintains the delay was intentional - so the court did not know
about the payments to the Franchise Tax Board when it denied the
UST's motion.

1 by using their personal credit card to pay for business expenses
2 of the debtors, including SVTIX.

3 The court issued an OSC on February 10. In the first
4 instance, Debtor responded on behalf of itself and the Rubios.
5 Debtor argued that the Rubios had already addressed these
6 allegations when they responded to questions raised earlier by the
7 UST. According to Debtor, the charges on the Rubios' personal
8 credit card statement were incurred for goods and services
9 provided to Debtor. Debtor argued that CBI's claim are
10 "outrageous" because after CBI demanded the production of the
11 Rubios' personal credit card statements, the Rubios produced the
12 statements in question and that resolved the issue. With respect
13 to the car payments and health insurance premiums, Debtor claimed
14 that the Rubios mistakenly paid themselves \$1,608 over the amount
15 allowed for in the remuneration order, but that amount was repaid
16 when the Rubios learned that these payments constituted
17 "compensation". Debtor further explained that while it is true
18 that Debtor paid taxes on behalf of the Rubios, the payment was
19 not a violation of the court's order because "remuneration" is
20 payment for services, while payment of the taxes was not payment
21 for services but payment of taxes on income attributed to SVTX and
22 SVTIX.

23 After two continuances, the court held the OSC hearing on May
24 20. Debtor's counsel attempted to represent both Debtor and the
25 Rubios. When CBI objected to the dual representation, the court
26 continued the hearing to June 17 to allow the Rubios to obtain
27 separate counsel and to file a written opposition.

28 In their subsequently filed response to the OSC, the Rubios

1 argued that they had substantially complied with the remuneration
2 order, that the order was ambiguous and that they had acted in
3 good faith. Karen Rubio stated, in her supporting declaration,
4 that she did not intentionally violate the court's order, that she
5 had been communicating regularly with the UST to ensure compliance
6 with the order. She also stated that any money erroneously
7 received by the Rubios had been reimbursed to Debtor. Karen
8 admitted that she had Debtor pay taxes to the California Franchise
9 Tax Board but stated that she did so on the advice of a CPA who
10 told her that the tax liability was created by income of Debtor
11 and SVTX which had passed through to her.

12 In response, the UST filed a declaration by bankruptcy
13 analyst Nancy Dennison stating that Karen Rubio's statement that
14 she had regular communications with Ms. Dennison was false. Nancy
15 Dennison further stated,

16 Between January 15, 2002 and January 9, 2004 I have sent
17 debtor's counsel seven separate letters regarding
18 problems with the debtor's monthly operating reports.
19 More specifically, my correspondence was regarding
20 reporting irregularities, commingled funds, payments
made on the Rubio's personal credit cards, compensation
to owners, large payments made to the Franchise Tax
Board on behalf of owners, late reports, and missing
bank documents.

21 Declaration of Nancy G. Dennison, dated June 10, 2004, 2:14-2:19.

22 Dennison attached to her declaration a letter, dated April 5,
23 2002, wherein she reminded the Rubios and Debtor's counsel that,
24 as she had already advised Fred Rubio at the 2001 initial debtor
25 interview, post-petition funds from the three related entities
26 should not be commingled and money from one business could not be
27 used to pay the debts of another. Despite her earlier admonition,
28 the commingling of funds was still ongoing as of April 2002 and

1 Dennison again warned that "this type of activity is not
2 acceptable and must stop immediately."

3 At the June 17 OSC hearing, the court found that the frequent
4 flyer miles were not remuneration and that Debtor's payment of the
5 Rubios' credit card bills was not a violation of the order because
6 the Rubios explained, plausibly and without challenge, that the
7 payments were made for the Debtor's expenses incurred in the
8 ordinary course of business. The court further determined that
9 the salary overpayments, car payments and health insurance
10 payments were reimbursed to Debtor when the errors were discovered
11 and, thus, the original violations were cured with no apparent
12 harm to the estate.

13 Last, the court found that the Rubios had failed to cite any
14 law suggesting that the tax liability properly belonged to Debtor,
15 rather than to them. Therefore, the Rubios violated the order
16 insofar as they received compensation where there was no benefit
17 provided to Debtor. The court held that whether the violation was
18 intentional or unintentional was irrelevant because the standard
19 for a contempt order is one of strict liability. After citing
20 Debtor and the Rubios for contempt for payment of the taxes, the
21 court commented --

22 Now, frankly, the Court doesn't know whether LLCs
23 typically pay the taxes of their members, or whether
24 that taxable compensation - no, the Court doesn't know
25 whether LLCs typically pay taxes of their member. If
26 the debtors want to move for an order retroactively
27 increasing the \$14,000 remuneration to an amount that
28 would offset Mr. And Mrs. Rubio's tax liability based on
the debtor's income, they can seek such relief on proper
notice. I'm not making any suggestions that that would
or would not be granted.

28 Transcript of Proceedings, June 17, 2004, 11:23-12:6.

1 And elsewhere, the court added --

2 There's no apparent bad faith. CBI says deliberate
3 attempts were made to hide the payments, but CBI also
4 complains about sloppy bookkeeping and late monthly
5 reports. And there's no indication that this isn't part
6 of the same problem about which CBI [complains] rather
7 than some kind of malicious intent.

8 The sanction for this contempt is that they have to
9 return the funds to the estate, which is in keeping with
10 the remedial nature of the remedy, not punishment.

11 Now if they want to defer making the reimbursement for a
12 month or so while they seek a new order that permits
13 remuneration to include these and future tax payments
14 there's no apparent reason not to let them do that, but
15 I don't say that that will be granted. I just don't
16 have that before me at this time.

17 Transcript of Proceedings, June 17, 2004, 14:17-15:6.

18 The court ordered the Rubios to refund Debtor \$73,558.15
19 within sixty days. However, the order was "without prejudice to
20 the Rubios' request for the court to retroactively increase the
21 remuneration they are entitled to under the order to account for
22 this tax obligation." Since then, the Rubios have twice moved the
23 court to amend the remuneration order to increase their
24 compensation to include payment of their 2001 and 2002 personal
25 income taxes. The court granted both motions.

26 CBI appeals only that portion of the court's order holding
27 that the benefits received by the Rubios, other than the tax
28 payments, did not violate the remuneration order.

29

30 JURISDICTION

31 The panel has jurisdiction to hear appeals of final orders,
32 and, where the panel grants leave, interlocutory appeals. 28
33 U.S.C. § 158(b). The denial of a request for civil contempt is an
34 appealable final order. See Reorganized Solomat Enters., Inc. v.

1 Ibar, Bierce, Bierce & Kenerson, P.C. (In re Solomat Partners,
2 L.P.), 231 B.R. 149 (2d Cir. BAP 1999) (citing Barry v. United
3 States, 865 F.2d 1317, 1324 (D.C. Cir. 1989)).

4 A final order is one that finally determines the rights of
5 the parties in securing the relief sought. In re Moberg Trucking,
6 Inc., 112 B.R. 362, 363 (9th Cir. BAP 1990). Interlocutory orders
7 are not appealable as of right; an appellant must first seek leave
8 to appeal. See, Rule 8003(a). If an order is interlocutory, and
9 no motion for leave to appeal has been filed, the panel can
10 consider a timely notice of appeal to be a motion for leave under
11 Rule 8003(c). In re Xebec, 147 B.R. 518, 522 (9th Cir. BAP 1992).
12 To the extent the order at issue here might be considered
13 interlocutory, leave is granted to appeal.

14

15 **ISSUE**

16 Whether the court erred in finding that the Rubios did not
17 violate the court's remuneration order by receiving compensation
18 from Debtor, aside from the tax payments.⁷

19 _____

20 ⁷ Though not listed in the "Issues Presented for Review,"
21 CBI's opening brief includes an allegation that the "court erred
22 by providing legal advice so that Debtor and its insiders could
23 circumvent the order of contempt." Therefore, CBI contends, the
24 court violated Canons 1 and 2 of the Judicial Code of Conduct,
25 calling for preserving the integrity of the judiciary and avoiding
26 impropriety and the appearance of impropriety. By turning a blind
27 eye towards illegal activity, CBI alleges, the court permitted
28 insiders to loot the bankruptcy estate for their own benefit.
From the panel, CBI seeks "[a] ruling that the actions of the
Bankruptcy court, if not improper, offer the appearance of
impropriety."

26 CBI has not explicated its reasoning, nor provided any
27 specifics as to what "illegal activities" the court was
28 overlooking. "Our circuit has repeatedly admonished that we cannot
'manufacture arguments for an appellant' and therefore we will not
(continued...)

1 **STANDARDS OF REVIEW**

2 We review civil contempt orders for abuse of discretion. FTC
3 v. Affordable Media, LLC, 179 F.3d 1228, 1239 (9th Cir. 1999). A
4 bankruptcy court abuses its discretion if it bases its ruling upon
5 an erroneous view of the law or a clearly erroneous assessment of
6 the evidence. Caldwell v. Farris (In re Rainbow Magazine, Inc.),
7 136 B.R. 545, 550 (9th Cir. BAP 1992). The panel also finds an
8 abuse of discretion if it has a definite and firm conviction that
9 the bankruptcy court committed a clear error of judgment in the
10 conclusion it reached. Beatty v. Traub (In re Beatty), 162 B.R.
11 853, 855 (9th Cir. BAP 1994). Findings of fact in connection with
12 civil contempt adjudication are reviewed for clear error. 179
13 F.3d at 1239.

14
15 **DISCUSSION**

16 Contempt must be established by clear and convincing
17 evidence. Powers, 629 F.2d at 626 n.6. The standard is higher
18 than the preponderance of the evidence standard, applicable to
19 most civil cases. Id.

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21 _____
22 ⁷(...continued)
23 consider any claims that were not actually argued in appellant's
24 opening brief." Independent Towers of Wash. v. State of Wash.,
25 350 F.3d 929-30 (9th Cir. 2003) citing Greenwood v. Fed. Aviation
26 Admin., 28 F.3d 971, 977 (9th Cir. 1994). Rather, we "review only
27 issues which are argued specifically and distinctly in a party's
28 opening brief." Id. Because CBI failed to articulate or argue
its position adequately, we do not consider it here. "Issues
raised in a brief which are not supported by argument are deemed
abandoned. Acosta-Huerta v. Estelle, 7 F.3d 139, 144 (9th Cir.
1992). "We will only review an issue not properly presented if
our failure to do so would result in manifest injustice." Id.
(quoting Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988)). We
see none here.

1 Based on the evidence before it, the court found:

2 1. The frequent flyer miles the Rubios received by using
3 their personal credit card to charge business expenses of Debtor
4 are not compensation from Debtor because they were not given by
5 the Debtor. Debtor had no frequent flyer miles to give; they were
6 not an asset belonging to Debtor, nor did Debtor trade any of its
7 assets in exchange for miles being made available to the Rubios.

8 2. The Rubios presented unrefuted evidence that the credit
9 card payments for which Debtor reimbursed them were for Debtor's
10 business expenses incurred in the ordinary course of business, not
11 for the benefit of the Rubios.

12 3. The Rubios reimbursed to Debtor salary overpayments, as
13 well as car payments and health insurance premiums once the errors
14 were discovered, thereby curing any apparent harm. Additionally,
15 the court noted, the remuneration order did not define
16 "remuneration" and there was no discussion at that hearing with
17 respect to frequent flyer miles, taxes, car payments, or health
18 insurance. On appeal, CBI largely repeats the arguments it made
19 to the court, without any legal authority supporting its charges
20 that the court erred. In fact, aside from the Standard of Review
21 section on page 2, CBI's opening brief does not cite to a single
22 case.

23 Debtor and the Rubios argue, correctly, that CBI has failed
24 to show that the court abused its discretion or committed clear
25 error with respect to its factual findings. More specifically,
26 CBI has not pointed to any evidence in the record calling into
27 question the credibility of the Rubios' explanations about the
28 overpayments, and their subsequent reimbursements. Instead, the

1 argument focuses on the fact that the overpayments occurred in the
2 first instance, thereby providing the Rubios with improper
3 "interest-free loans" in violation of the remuneration order.
4 While technically such a benefit *could* be interpreted as a
5 violation of the remuneration order, as the court pointed out, the
6 term "remuneration" was not clearly defined within the order and
7 is, therefore, subject to more than one interpretation.

8 Although some of the statements in the UST's declaration
9 suggest that the Rubios may not be sufficiently thorough or
10 conscientious in their accounting and bookkeeping procedures, the
11 court apparently reviewed the evidence supporting the specific
12 alleged violations of its order and determined the Rubios had
13 adequately accounted for funds and explained all overpayments. On
14 balance, we do not find the court's findings in this regard to be
15 clearly erroneous. Additionally, we are not persuaded that the
16 court abused its discretion in finding that the benefit of any
17 short-term, interest-free loan the Rubios may have received by way
18 of their inadvertent overpayments violated the court's order.

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CONCLUSION

Based on the foregoing, we AFFIRM.