

**DEC 27 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**NOT FOR PUBLICATION**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**

1 In re: ) BAP No. CC-04-1552 PaBK  
 2 )  
 3 LITFUNDING CORPORATION, a )  
 4 Nevada corporation; ) Bk. Nos. LA 03-19005-ES  
 5 CALIFORNIA LITFUNDING, a ) LA 04-11622-ES  
 6 Nevada corporation, ) (Substantively consolidated)  
 7 )  
 8 Debtors. )  
 9 )

10 \_\_\_\_\_ )  
 11 BARBARA ROGERS and )  
 12 LAWRENCE SEIDMAN, )  
 13 )  
 14 Appellants, )  
 15 )

16 v. ) **MEMORANDUM<sup>1</sup>**

17 LITFUNDING CORPORATION, a )  
 18 Nevada corporation; )  
 19 CALIFORNIA LITFUNDING, a )  
 20 Nevada corporation, )  
 21 )  
 22 Appellees. )  
 23 \_\_\_\_\_ )

24 Argued and Submitted on November 17, 2005  
at Los Angeles, California

25 Filed - December 27, 2005

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

27 Honorable Erithe Smith, Bankruptcy Judge, Presiding.

28 Before: PAPPAS, BRANDT AND KLEIN, Bankruptcy Judges.

\_\_\_\_\_ )  
<sup>1</sup> This disposition is not appropriate for publication and may not be cited except when relevant under the doctrine of law of the case and the rules of res judicata, including claim preclusion and issue preclusion. See 9th Cir. BAP Rule 8013-1.

1 This is a consolidated appeal of an interlocutory order of  
2 the bankruptcy court disallowing certain creditor claims. The  
3 Panel granted leave to appeal on July 7, 2005. We AFFIRM.

4  
5 **FACTS**

6 Morton Reed ("Reed") and Lawrence Weisdorn ("Weisdorn")  
7 founded Litfunding Corp., a California corporation ("Original  
8 Litfunding" or, generally, "Litfunding") on November 17, 2000.<sup>2</sup>  
9 Debtor California Litfunding is the successor in interest by  
10 merger to Original Litfunding. The other Debtor, Litfunding, a  
11 Nevada corporation, is not directly related to Original  
12 Litfunding. At all relevant times, Reed was an officer and  
13 director of both corporations.

14 Before its founding, Reed sought funding sources for Original  
15 Litfunding. Reed contacted Appellants Barbara Rogers and Lawrence  
16 Seidman and asked them to introduce Reed to potential investors or  
17 partners.<sup>3</sup> Sometime in early October 2000, Reed and Appellants  
18 reached an understanding regarding payment of finder's fees to  
19 Appellants. This arrangement was documented in a series of  
20 writings and communications sometimes referred to by the parties  
21 and herein as the "Reed Contract." Among its provisions, in  
22 exchange for introducing Reed to investors, the Reed Contract

23  
24 

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<sup>2</sup> Unless otherwise noted, all section and chapter references  
25 are to the Bankruptcy Code, 11 U.S.C. §§101-1330 and all Rule  
26 references are to the Federal Rules of Bankruptcy Procedure. The  
27 bankruptcy court's Findings of Fact and Conclusions of Law are  
28 abbreviated "FOF" or "COL".

<sup>3</sup> The record indicates that Reed first approached Appellant  
Seidman, and through Seidman, contacted Appellant Rogers.

1 allegedly provides that Seidman would receive cash compensation in  
2 the amount of \$300,000, and Rogers would receive cash compensation  
3 in an amount equal to five percent of any funds invested.

4 On or about October 25, 2000, Appellants introduced Reed to  
5 Lawrence Weisdorn. Reed and Weisdorn discussed a new business  
6 venture and went on to form Original Litfunding in November 2000.  
7 Under Appellants' view, once they made this introduction, their  
8 contractual performance under the Reed Contract was complete.

9 Thereafter, on November 27, 2000, Appellants, Reed and  
10 Weisdorn met at a café (the "Café Meeting"). The parties agree  
11 that the fees to be paid to Appellants were discussed at this  
12 meeting. The following day, November 28, 2000, Seidman sent a  
13 letter to Rogers outlining his understanding of the terms of the  
14 agreement reached by the parties at the Café Meeting concerning  
15 Appellants' fees (the "Seidman Letter"). On December 14, 2000,  
16 Rogers sent a memo to Weisdorn, Reed and Seidman, acknowledging  
17 the terms to which the parties had agreed at the Café Meeting  
18 (the "Rogers Letter"). Neither the Seidman Letter nor the Rogers  
19 Letter contains any provision indicating that Appellants were to  
20 be paid any cash compensation. Instead, both Letters evidence an  
21 arrangement whereby Appellants would receive stock in the new  
22 corporation for their services.

23 Sometime in early 2001, Seidman moved to Arizona and provided  
24 services to Original Litfunding through his own corporation,  
25 Empire Star. The terms of his employment were stated in an  
26 Independent Contractor Agreement and Authorization. Seidman  
27 signed the Independent Contractor Agreement on or about April 23,  
28 2001, but did not sign the Authorization.

1 Appellants allege that, commencing in April 2001, Original  
2 Litfunding raised \$27 million "directly or indirectly" as a result  
3 of Weisdorn and his resources. But relations among the parties  
4 deteriorated in 2001. Rogers filed suit against Litfunding, Reed  
5 and Weisdorn in Los Angeles Superior Court, Case No. BC 257023.  
6 Original Litfunding terminated the services of Empire Star and  
7 Seidman on October 31, 2001. Seidman then also sued Litfunding,  
8 Reed and Weisdorn in Los Angeles, Case No. BC 274200.

9 The lawsuits were stayed when an involuntary chapter 7  
10 petition was filed against Litfunding on April 2, 2003. The  
11 bankruptcy case was converted to a voluntary chapter 11 on  
12 November 11, 2003. Seidman filed four proofs of claim in this  
13 bankruptcy case. Three of those claims were for shares of stock;  
14 one was for cash compensation in the amount of \$300,000. Rogers  
15 filed two proofs of claim in the bankruptcy case. One claim was  
16 for shares of stock, and the other was for cash compensation of  
17 \$1,350,000 (based upon 5% of the total \$27 million raised for  
18 Debtors).

19 The Debtors filed objections to all of the Rogers and Seidman  
20 claims on April 22, 2004. The bankruptcy court conducted a  
21 consolidated hearing on May 24, 2004 concerning all the Rogers and  
22 Seidman claims and the Debtors' objections. Both Appellants and  
23 Appellees were represented by their attorneys and had an  
24 opportunity to be heard. Most of the attention of the parties and  
25 the court during the hearing was directed to the stock claims.  
26 However, at the conclusion of the hearing, the bankruptcy court  
27 also stated its findings and conclusions on the record regarding  
28 the cash claims.

1 With respect to Seidman's cash claim for \$300,000, the  
2 bankruptcy court stated:

3 [B]ased on the evidence presented I cannot  
4 find that the corporation [Litfunding]  
5 ratified any of the agreements that would have  
6 required payment of cash to Mr. Seidman either  
7 in connection with the introduction of Mr.  
8 Weisdorn or for any other services. And I say  
9 this with, with the caveat that to the extent  
10 that Mr. Seidman has any claims against Mr.  
11 Reed or Mr. Weisdorn that that -those claims  
12 may very well exist, but as far as Litfunding  
13 Corporation is concerned, Litfunding's  
14 ratification of those agreements, if they did  
15 exist, simply hasn't been demonstrated here.

16 Transcript of hearing, 49-50, lines 18-25, 1-3, May 24, 2004.

17 With respect to Rogers' cash claim for \$1,350,000, the court  
18 found:

19 Again, with respect to the cash claim [of  
20 Rogers] of one million three hundred fifty  
21 thousand dollars (\$1,350,000), to the extent  
22 that there ever was an agreement between Ms.  
23 Rogers and Mr. Reed and/or Mr. Weisdorn - but  
24 I think this one was probably with Mr. Reed -  
25 for a five percent cash fee, there is no  
26 evidence that Litfunding either ratified that  
27 prior agreement or entered into a similar  
28 agreement upon its incorporation.

Transcript of hearing, 58, lines 13-20.

Following the hearing, the bankruptcy court memorialized its  
decision in written Findings of Fact, which included the following  
regarding the cash claims:

2.7 The Seidman claims are based upon an alleged  
finders fee agreement that Seidman contends he  
entered into with Reed in October of 2000. . . .  
According to Seidman, Reed promised to pay him both  
stock and cash compensation if he introduced him to  
Weisdorn, and these two individuals later formed a  
company.

2.9 The Rogers claims are based upon an alleged finders  
fee arrangement that Rogers contends she entered  
into with Reed in October of 2000. . . . According

1 to Rogers, Reed promised to pay her both stock and  
2 cash compensation if she introduced him to  
3 Weisdorn, and these two individuals later formed a  
4 company.

5 2.10 Original Litfunding and Debtors were not parties to  
6 either the Seidman October Agreement or the Rogers  
7 October Agreement.

8 2.18 There is no credible evidence before the court  
9 indicating that Original Litfunding, or either of  
10 the Debtors, ever ratified, assumed, or otherwise  
11 accepted responsibility for the cash portion of the  
12 finders fees alleged by Seidman in his claims.

13 2.19 [Seidman wrote the Seidman Letter.]

14 2.20 There is no reference in the Seidman Letter to any  
15 right to cash compensation as claimed in the  
16 Seidman Claims.

17 2.22 [Rogers wrote the Rogers Letter].

18 2.23 Both the Seidman Letter and the Rogers Letter  
19 describe the terms of a finders fee agreement for  
20 stock ratified by Debtor[s] at a meeting held on  
21 November 27, 2000 by and among Seidman, Rogers,  
22 Reed and Weisdorn.

23 2.24 The finders agreement for stock ratified by  
24 Debtor[s] and described in the Seidman Letter and  
25 the Rogers Letter does not provide for the payment  
26 of any monetary compensation. . . . Moreover, the  
27 finders agreements described in the Rogers Letter  
28 and the Seidman Letter was [sic] entered into after  
Seidman October Agreement referenced in the Seidman  
Claims and in Rogers October Agreement referenced  
in the Rogers Claims.

2.30 The admissible evidence before the Court indicates  
that Seidman and Rogers['] claims against the  
Debtors are limited to claims for shares of common  
stock.

2.31 The bankruptcy court adopted the following Conclusions of Law  
concerning the cash claims of Rogers and Seidman:

2.32 2.1 Seidman failed to establish that Original  
Litfunding, or either of the Debtors, ratified,  
assumed, or otherwise incurred liability for any of  
the cash fees described in the Seidman Claims.

2.33 2.2 Rogers failed to establish that Original  
Litfunding, or either of the Debtors, ratified,

1 assumed, or otherwise incurred liability for any of  
2 the cash fees described in the Rogers Claims.

3 2.3 Other than his claim for common stock fees, Seidman  
4 does not have any debt or monetary claims (claims  
5 giving rise to a right of payment) against Original  
6 Litfunding, or either of the Debtors. Accordingly,  
7 the claim . . . (for a \$300,000 cash fee) is  
8 permanently disallowed.

9 2.5 Rogers does not have any debt or monetary claims  
10 (claims giving rise to a right of payment) against  
11 Original Litfunding, or either of the Debtors.  
12 Accordingly, the claim . . . (for a \$1,350,000  
13 finders fee) is permanently disallowed.

14 The Findings of Fact and Conclusions of Law were entered on  
15 October 27, 2004; an order disallowing Appellants' cash claims was  
16 filed on October 28, 2004. The court deferred a final ruling on  
17 the stock claims, thus rendering its ruling interlocutory. With  
18 leave of the Panel, this timely appeal followed.

#### 19 JURISDICTION

20 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
21 and 157(b) (2) (A). We have jurisdiction under § 158(a) (3) and  
22 (b) (1).

#### 23 STANDARDS OF REVIEW

24 The Panel reviews the legal conclusions of the bankruptcy  
25 court de novo, its factual findings for clear error, and mixed  
26 questions of law and fact de novo. Fed. R. Bankr. P. 8013; Murray  
27 v. Bammer (In re Bammer), 131 F.3d 788, 791-92 (9th Cir. 1997).

28 The bankruptcy court's finding that the only contract between  
the parties ratified by Original Litfunding was the finders fee  
agreement entered into at the Café Meeting on November 27, 2000,  
was a determination of fact and is reviewed for clear error. 18

1 AM.JUR.2D, CONTRACTS, § 125 ("Whether the doing of certain acts by  
2 an officer of a corporation after its incorporation was with  
3 intent to adopt the promoter's contract is a question of fact for  
4 the determination of the jury. [Citations omitted.]" (cited in  
5 WITKIN, SUMMARY OF CALIFORNIA LAW (10th ed. 2005), CONTRACTS § 62); 18  
6 AM.JUR.2D, TRIAL, § 776 ("Questions as to whether facts given in  
7 evidence amount to a ratification of an act or contract usually  
8 are to be determined by the jury as questions of fact, and not by  
9 the court as questions of law."). California case law treats the  
10 issue of whether a pre-incorporation contract has been ratified by  
11 a corporation as a question of fact. See Smith v. Glo-Fire Co.,  
12 94 Cal.App.2d 154 (4th App. Dist. 1949) (although evidence was  
13 conflicting, there was sufficient evidence in the record for court  
14 to find that corporation ratified the pre-incorporation  
15 contract); Abbott v. Ltd. Mut. Compensation Ins. Co., 30  
16 Cal.App.2d 157 (1st App. Dist. 1938) (to prove adoption of a pre-  
17 incorporation contract, evidence must show an affirmative post-  
18 incorporation act by corporation from which it may be inferred);  
19 Scadden Flat Gold Mining Co. v. Scadden, 121 Cal. 33 (1898) (facts  
20 in record, including testimony of officers and entries in  
21 corporate minute book, proved acceptance of pre-incorporation  
22 contract).<sup>4</sup>

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26 <sup>4</sup> In the case law, the terms "ratification," "adoption" and  
27 "acceptance" are used to describe the act by which a corporation  
28 agrees to accept the benefits, and be bound to the obligations, of  
a pre-incorporation contract. While there may be subtle  
differences in the precise meanings of these terms, such  
differences are not meaningful for purposes of this appeal.



1 **ISSUES PRESENTED**

- 2 1. Was the bankruptcy court's finding that the only contract  
3 between the parties ratified by Original Litfunding was the  
4 finders fee agreement entered into at the Café Meeting on  
5 November 27, 2000, as described in the Seidman Letter and the  
6 Rogers Letter, clearly erroneous?
- 7 2. Did the bankruptcy court err in concluding that Appellants  
8 hold no enforceable monetary claims, except stock claims,  
9 against the Debtors?<sup>5</sup>

10 **DISCUSSION**

- 11
- 12 1. The bankruptcy court's finding that the only contract  
13 ratified by Original Litfunding or the Debtors was the  
14 finders fee agreement entered into by Appellants, Reed and  
Weinsdorn at the Café Meeting on November 27, 2000 was not  
clearly erroneous.

15 Appellants base their cash claims in the bankruptcy case on  
16 rights allegedly granted them in a series of written and oral  
17 communications among the parties that together formed an  
18 enforceable agreement known as the Reed Contract. Appellants  
19 argue that Original Litfunding, which was not organized until  
20 after the Reed Contract was negotiated, later ratified that  
21 contract. According to Appellants, the bankruptcy court found

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22 <sup>5</sup> Appellants proposed five issues on appeal; they have been  
23 consolidated and restated here. As discussed below, three of  
24 Appellants' proposed issues assume that the Debtors partially  
25 ratified the original Reed Contract, a premise at odds with the  
26 bankruptcy court's findings, and which the Panel does not accept.  
27 Appellants' fifth proposed issue suggests that "Appellants' stock  
28 claims should not be subordinate to those of other shareholders"  
by virtue of § 510(b). The Panel need not consider this issue  
because the bankruptcy court made no final ruling on Appellants'  
stock claims and the applicability § 510(b), but instead  
explicitly reserved such a determination for a future hearing and  
later determination. COL 2.3 and 2.5.

1 that Original Litfunding partially ratified the terms of the Reed  
2 Contract regarding Appellants' stock claims. But Appellants  
3 argue that under California law, ratification of a pre-  
4 incorporation contract is an "all or nothing" proposition.  
5 Therefore, Appellants contend, the Reed Contract was not subject  
6 to modification in this fashion, and all of the original terms of  
7 the Reed Contract became enforceable against the corporation. In  
8 the alternative, even if a partial ratification is not enough,  
9 Appellants argue that the monetary compensation provisions of the  
10 Reed contract were ratified by the pre- and post-incorporation  
11 acts of Original Litfunding's founders when they knowingly  
12 accepted the benefits of the Reed Contract.

13 Appellees, the Debtor-corporations, counter that there is no  
14 evidence to support that Original Litfunding ever ratified the  
15 Reed Contract, in whole or in part. Rather, Appellees argue that  
16 the only contract enforceable against Debtors is that reached on  
17 November 27, 2000 at the Café Meeting and described in the Rogers  
18 Letter and the Seidman Letter. That later contract makes no  
19 provision for cash compensation to Appellants.

20 Appellants' first argument is flawed in its assumption that  
21 the bankruptcy court decided that the stock provisions of the Reed  
22 Contract were ratified by Original Litfunding. This is an  
23 incorrect reading of the bankruptcy court's decision, and as a  
24 result, the Panel need not entertain Appellants' "all or nothing"  
25 ratification arguments.

26 Appellants define the Reed Contract by reference to the  
27 declarations of Barbara Rogers and Lawrence Seidman who discussed  
28 three written documents: (i) a written Non-Circumvention Agreement

1 between Rogers and Reed, dated October 12, 2000, signed by Reed  
2 only, and purporting to bind Reed, any organization with which he  
3 was associated and any of his assigns, etc.; (ii) the Seidman  
4 October Agreement, between Seidman and Reed, dated October 13,  
5 2000, signed by Seidman and Reed; and (iii) the Rogers October  
6 Agreement, a memo from Reed to Rogers.

7         The bankruptcy court demonstrated it was acquainted with the  
8 documents allegedly comprising the Reed Contract. The bankruptcy  
9 court made specific findings of fact concerning what it called the  
10 "Seidman October Agreement" and the "Rogers October Agreement":  
11 FOF 2.7 ("the Seidman claims are based on" the Seidman October  
12 Agreement); FOF 2.9 ("the Rogers claims are based on" the Rogers  
13 October Agreement); FOF 2.17 ("the Seidman October Agreement was  
14 entered into, if at all, prior to the formation of Original  
15 Litfunding"); FOF 2.24 (the agreement referenced in the Seidman  
16 Letter and the Rogers Letter were entered into after the Seidman  
17 October Agreement and the Rogers October Agreement).

18         The bankruptcy court was likewise cognizant of the terms  
19 contained in the Seidman Letter and the Rogers Letter circulated  
20 among the parties after the November 27 Café Meeting. In its  
21 Findings of Fact and Conclusions of Law, the bankruptcy court  
22 quoted extensively from both of these documents. In FOF 2.20, the  
23 bankruptcy court quoted from several paragraphs in the Seidman  
24 Letter, including the opening paragraph:

25             This shall serve as confirmation of the agreement made  
26             within and between myself, you [Rogers], Lawrence  
27             Weisdorn, and Morton Reed regarding the manner of the  
28             payment of your fee for arranging introduction of Morton  
              Reed and Lawrence Weisdorn, with the agreement made on  
              November 27, 2000. . . .

1 In FOF 2.22, the court then quoted extensively from the  
2 Rogers Letter, including the following excerpt:

3 It was agreed by all parties that as a fee for my  
4 participation in the introduction and founding of  
5 Litfund [sic], or any company, financial entity or  
6 organization participating directly or indirectly in the  
7 operating and marketing of funding litigation [sic] of  
8 any kind, between Mort Reed or his representative, agent  
9 or resources I, Barbara Rogers am to be remunerated by  
10 the following two part compensation. . . .<sup>6</sup>

8 Although it was aware of the Reed Contract, the bankruptcy  
9 court did *not* rule that any of its terms had been ratified by  
10 Original Litfunding or Appellees. Correctly viewed, the record  
11 shows that the bankruptcy court instead ruled that Original  
12 Litfunding and Debtors ratified the stock compensation provisions  
13 set forth in the Seidman Letter and Rogers Letter. Indeed, when  
14 counsel for Appellees submitted proposed findings of fact to the  
15 bankruptcy court after the hearing, the bankruptcy judge altered  
16 them to provide that the Debtor corporations had ratified the  
17 stock provisions of the finders fee agreement as described in the  
18 Seidman and Rogers Letter, not the Reed Contract. FOF 2.23, as  
19 originally proposed by Appellees, reads as follows:

20 2.23 Both the Seidman Letter and the Rogers Letter  
21 describe the terms of a finders fee agreement reached by  
22 and among Seidman, Rogers, Reed and Weisdorn at a  
23 meeting held on November 27, 2000.

23 In her own handwriting and initialed in the margins, the  
24 bankruptcy judge changed this proposed finding to read:

25 2.23 Both the Seidman Letter and the Rogers Letter  
26 describe the terms of a finders fee agreement ~~reached by~~

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27 <sup>6</sup> The bankruptcy court's FOF 2.22 had several immaterial  
28 typographical errors. We have quoted here from the original text  
of the letter that was excerpted by the court (and which, as  
noted, also contained several typographical errors).

1 ~~and among Seidman, Rogers, Reed and Weisdorn~~ for stock  
2 ratified by Debtor at a meeting held on November 27,  
3 2000 by and among Seidman, Rogers, Reed and Weisdorn.

4 The bankruptcy court also altered proposed FOF 2.24 by adding  
5 the following:

6 2.24 The finders agreement for stock ratified by Debtor  
7 and described in the Seidman Letter and in the Rogers  
8 Letter does not provide for the payment of any monetary  
9 compensation.

10 A summary of the bankruptcy court's findings regarding the  
11 Debtor's ratification of the finders fee agreement is as follows:

12 (i) Original Litfunding and the Debtors were not parties to either  
13 the Rogers October Agreement or the Seidman October Agreement (the  
14 elements of the Reed Contract) (FOF 2.10); (ii) the Seidman  
15 October Agreement was entered into, if at all, prior to the  
16 formation of Original Litfunding (FOF 2.17); (iii) although the  
17 court made no explicit finding that the Rogers October Agreement  
18 was entered into prior to the formation of Original Litfunding,  
19 the bankruptcy court was aware that the Rogers October Agreement  
20 was signed on October 19, 2000, almost one month before the  
21 incorporation of Original Litfunding on November 17, 2000; (iv)  
22 the Seidman Letter and the Rogers Letter were entered into after  
23 the Seidman October Letter and the Rogers October Letter (FOF  
24 2.24).

25 As can be seen by its changes to the proposed findings and  
26 conclusions, the bankruptcy judge emphasizes the court's  
27 determination that Debtors had ratified only the stock provisions  
28 of the finders fee agreement as reflected in the Rogers and  
29 Seidman Letters, and not any terms of the Reed Contract.  
30 Considered in total, the bankruptcy court amply supported its

1 finding that the Debtors ratified only the agreement reached at  
2 the Café Meeting on November 27, 2000, as evidenced by the Rogers  
3 and Seidman Letters in the findings of fact and conclusions of  
4 law.

5 Despite the court's clear ruling, Appellants insist that the  
6 bankruptcy court decided that the stock components, but not the  
7 monetary components, of the *Reed Contract* were ratified. Because  
8 this reading of the record is incorrect, the Panel need not  
9 address Appellant's arguments that the Reed Contract was not  
10 subject to partial novation or modification under California law.

11 Alternatively, Appellants argue that Original Litfunding  
12 ratified the Reed Contract through the pre- and post-incorporation  
13 acts of its founders, in this case, Reed and Weisborn, who  
14 allegedly knowingly accepted the benefits of the Reed Contract.  
15 In the bankruptcy court and here, Appellants rely heavily on Jones  
16 v. Allert, 161 Cal. 234, 118 P. 794 (Cal. 1911) for support.

17 In that case, Annie and B.L. Jones (collectively, "Jones")  
18 owned several mining claims which they agreed to sell with  
19 associated property rights to Engle. At the time of the sale, the  
20 parties understood that Engle would incorporate a mining company  
21 to develop and work the claims. The agreement between Jones and  
22 Engle provided that cash payments and stock in the mining company  
23 be given to Jones in exchange for the properties. Jones executed  
24 a deed to the property and put it into escrow with directions that  
25 it be delivered to Engle or his assigns when the terms of the  
26 agreement were satisfied. Engle, along with his associates,  
27 organized and incorporated the Continental Mining Company. Jones  
28 then surrendered possession of the property to Engle, his

1 associates and the Continental Mining Company. Jones received the  
2 stock in the mining company and all cash payments except the last  
3 one for \$4,500. Before the last payment was due, Engle and his  
4 associates, acting in their capacities as directors and officers  
5 of the mining company, induced Jones to execute another deed  
6 directly to the mining company corporation. In return, Engle and  
7 his associates gave Jones a promissory note in the name of the  
8 corporation for the \$4,500 final payment.

9       When the mining company defaulted on the promissory note,  
10 Jones sued the mining company for a money judgment, and asserted a  
11 vendor's lien on the property. The trial court granted judgment  
12 against the corporation and secured it with the vendor's lien.  
13 The California Supreme Court affirmed the judgment but denied the  
14 vendor's lien.<sup>7</sup> In rejecting the corporation's argument that it  
15 never assumed the obligations of the Jones-Engle contract, the  
16 California Supreme Court noted:

17               Without elaborating on the facts which  
18               justified the court's judgment in this regard,  
19               the agreement and course of conduct of the  
20               parties gave evidence that Engle was a mere  
21               intermediary and that the real party in  
22               interest was the corporation, that the  
23               officers of this corporation solicited and  
24               obtained from [Jones] a deed to the property  
25               directly to [the corporation]. . . that they  
26               proposed to [Jones] to accept for the last  
27               payment the note of the corporation; that they  
28               delivered to [Jones] on behalf of the  
                corporation, the security note above  
                discussed. . . . and in many ways, through its  
                officers, made recognition of its personal  
                obligation to make the money payments in  
                accordance with the terms of the Engle  
                contract.

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27               <sup>7</sup> The issues related to the vendor's lien are not relevant  
28 to the instant appeal.

1 Jones, 161 Cal. at 237.

2 Jones does not stand for the proposition offered by  
3 Appellants that a corporation that merely accepts the benefits of  
4 a pre-incorporation contract is thereby deemed to have ratified  
5 that contract. Instead, the California Supreme Court in Jones  
6 cited multiple affirmative actions taken by the corporation that  
7 evidenced the ratification: the corporation took possession of  
8 real property and developed it; the corporation induced Jones to  
9 revoke the deed to the corporation and the Engle associates and  
10 replace it with a deed solely to the corporation; and the  
11 corporation executed a promissory note in its own name in  
12 fulfillment of the final term of the contract.

13 The other authority Appellants cite to support their argument  
14 that a corporation will be deemed to have ratified the pre-  
15 incorporation contract of its promoters if it accepts the benefits  
16 of those contracts is Stickel v. Harris, 196 Cal.App.3d 575 (1st  
17 App. Dist. 1988). But Stickel does not deal with ratification of  
18 a pre-incorporation contract.

19 In December 1980, Nancy Stickel agreed to loan money to a  
20 joint venture to be formed by Robert Buttici, a real estate  
21 broker, and his associates, Joseph Atencio and Joseph Harris, to  
22 purchase real estate and construct condominiums. Stickel lent  
23 Buttici \$74,000 for the project. Stickel later advanced an  
24 additional \$30,000 which was secured by a promissory note executed  
25 on April 15, 1981 by Butticci, Atencio and Harris. The joint  
26 venture, a limited partnership, was formed thereafter and was  
27 comprised of entities controlled by Butticci, Atencio and Harris.  
28 Stickel then agreed to extend the term of the loans, first to



1 November and then to December 1981. In December 1981, Stickel  
2 agreed to a further extension of the loan at an increased interest  
3 rate. While she received interest payments on the loans from May  
4 1981 through November 1982, during the latter months of 1982, the  
5 interest payments to Stickel were drastically reduced. Stickel  
6 sued one of the entities serving as a general partner in the  
7 limited partnership and Harris for recovery of amounts due on the  
8 note. The trial court entered judgment in favor of Stickel. The  
9 California Appellate Division affirmed.

10 On appeal, the defendants argued that Butticci could not have  
11 acted for the joint venture when he negotiated the original loans  
12 from Stickel because the limited partnership did not yet exist.  
13 The appeals court rejected this argument. In discussing  
14 applicable law, the court analogized to that involving  
15 corporations. Like a corporation adopting a pre-incorporation  
16 contract, the court reasoned, a limited partnership that knowingly  
17 accepts the benefits of a pre-partnership-formation agreement  
18 becomes obligated on that agreement. Stickel, 196 Cal.App.3d at  
19 586.

20 However, in applying the law to the facts, as was the case in  
21 Jones, the Stickel court did not rely upon a mere acceptance of  
22 benefits by the limited partnership, but instead cited three  
23 different affirmative actions by the joint venture demonstrating  
24 its intent to be bound by the loan agreement:

25 The issue then becomes whether [the joint  
26 venture parties] ratified Buttici's actions.  
27 Clearly, ratification did occur. This is  
28 evident from (1) the interest payments  
apparently made by partners Atencio and  
Butticci on behalf of the joint venture; (2)  
the imperative need of both the partnership

1           and the joint venture to obtain the lots  
2           purchased with plaintiff's money and subject  
3           to her deed of trust; and (3) the assumption  
4           by the joint venture of the ultimate  
5           responsibility to discharge all obligations.  
6           Stickel, 196 Cal.App.3d at 587. In other words, while the court  
7           indicates that a corporation may be bound to a pre-incorporation  
8           contract by merely accepting the benefits of that agreement, the  
9           court did not rely upon mere acceptance of alleged benefits by the  
10          joint venture as a basis for finding that a ratification had  
11          occurred.<sup>8</sup>

12          Other California cases hold that, as a condition to binding a  
13          company to a pre-incorporation contract, the corporation must have  
14          performed some affirmative act of ratification. Abbott, 30 Cal  
15          App.2d at 163 ("Appellant is not liable to respondent upon such  
16          promoters' contract unless it adopted such contract after its  
17          incorporation. . . . To prove such adoption, the evidence must  
18          show some affirmative act by the corporation from which it may be  
19          inferred. . . . Knowledge of a director directly interested in  
20          the contract is insufficient to charge the corporation."); Biggart  
21          v. Lewis, 183 Cal. 660, 667, 192 P. 437 (Cal. 1920) ("Acts of  
22          promoters performed prior to the existence of the corporation are  
23          not binding upon the corporation, unless made so by the act under

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24          <sup>8</sup> Of course, Stickel's value as precedent in deciding  
25          whether a corporation has ratified a pre-incorporation contract of  
26          a promoter may be questionable. As noted, Stickel involved a joint  
27          venture, not a corporation. The appeals court in Stickel  
28          "analogized" to a situation involving a corporate ratification.  
Fairly read, Stickel announced no rule for corporations, and as a  
result, it is not binding, nor perhaps even informative, here. At  
best, Stickel holds that an entity's acceptance of the benefits of  
an agreement negotiated before its formal organization, *when*  
*accompanied by affirmative acts of ratification by the managers of*  
*that entity*, will serve to bind the new entity.

1 which the incorporation took place or adopted by the corporation  
2 after it comes into existence.") In our opinion, these cases  
3 present the most reasoned approach to resolving ratification  
4 issues.

5 In this case, the bankruptcy court did not find that Original  
6 Litfunding or the Debtors had performed any affirmative acts  
7 showing their intent to ratify the cash compensation provisions of  
8 the Reed Contract. To the contrary, the bankruptcy court found  
9 that the explicit stock provisions of the November 27 agreement  
10 reached at the Café Meeting of the parties had been ratified.  
11 There is no basis in this record to find a ratification of the  
12 Reed Contract by any "affirmative act."

13 Appellants also assert that Original Litfunding ratified the  
14 Reed Contract by the post-incorporation statements of its  
15 officers, directors and sole shareholders, Reed and Weisdorn. In  
16 support of its contention that Reed and Weisdorn repeatedly  
17 ratified the Reed Contract with post-incorporation statements,  
18 Appellant cites to the deposition testimony of Elliott Kalt, as  
19 well as the depositions of Reed and Weisdorn.

20 The bankruptcy court considered whether the deposition  
21 testimony of Kalt was hearsay and inadmissible. Ultimately, the  
22 court found that a ruling was unnecessary because Kalt's testimony  
23 only implicated the liability of Reed and Weisdorn, not Original  
24 Litfunding.

25 As to Reed's deposition testimony, far from showing a  
26 ratification of any agreement for cash compensation, Reed instead  
27 testified "No. On the contrary I said, 'You'll get your three  
28 percent [of the stock] and I'll get you eight for Barbara.'" Reed

1 Deposition at 556. The eight percent of stock for Barbara  
2 [Rogers] Reed refers to in his deposition is a term negotiated at  
3 the November 27 Café Meeting, not in the Reed Contract.

4 The Weisdorn deposition testimony amounts to little more than  
5 his admission that Reed had shown him the Rogers October  
6 Agreement, one component of the Reed Contract, sometime in mid-  
7 2001. There is no indication in this testimony that either Reed  
8 or Weisdorn ratified the Reed Contract.<sup>9</sup> In fact, Weisdorn  
9 characterized Rogers' claim to five percent of stock and five  
10 percent of funds in the Rogers October Agreement as "very  
11 excessive, very greedy, and thank God it no longer existed."  
12 Weisdorn Deposition at 392.

13 In summary, the bankruptcy court did not find that the Reed  
14 Contract had been partially ratified by Original Litfunding as  
15 Appellants urge. As a result, Appellants' arguments that, based  
16 upon a partial ratification, all the terms of that contract may be  
17 enforced against the corporation lack merit. Instead, the  
18 bankruptcy court found that only the stock provisions of the

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20 <sup>9</sup> By citing to the record of Weisdorn's deposition,  
21 Appellants actually weaken their argument that Reed and Weisdorn,  
22 as officers and directors of Litfunding, could have ratified the  
23 Reed Contract. For a corporation to ratify a pre-incorporation  
24 contract, the corporate directors must know all the material facts  
25 with respect to the transaction. White v. Kaiser-Frazer Corp.,  
26 100 Cal.App.2d 754 (2nd App. Dist. 1950); Frye & Smith Ltd. v.  
27 Foote, 113 Cal.App.2d 907 (3rd App. Dist. 1952); Chapman v. Sky  
28 L'Onda Mut. Water Co., 69 Cal.App.2d 667 (1st App. Dist. 1945).  
The existence of a written Rogers October Agreement was  
unquestionably one of the material facts that Weisdorn, a director  
and officer of Litfunding, needed to know before he could "ratify"  
the Reed Contract. Weisdorn's deposition excerpt cited by  
Appellants suggests that Weisdorn did not know of the existence of  
a written Rogers October Agreement until June or July 2001, more  
than half a year after the Café Meeting and at least two months  
after Weisdorn allegedly began generating benefits for Litfunding.

1 parties' Café Meeting on November 27, 2000 were ratified, and that  
2 those terms are described in the Seidman and Rogers Letters. This  
3 was not clear error because there is ample factual support in the  
4 record for the bankruptcy court's findings. Finally, there is no  
5 support in the record that Original Litfunding or Appellees  
6 ratified the Reed Contract by either an affirmative act or the  
7 statements or conduct of their officers.

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9 2. The bankruptcy court did not err in concluding that  
10 Appellants hold no monetary claims, except stock claims,  
11 against the Debtors.

12 The bankruptcy court found that Seidman's claims, including  
13 his \$300,000 cash claim, were based on the Seidman October  
14 Agreement. FOF 2.7. The court found that Debtors effectively  
15 ratified the November 27, 2000 agreement, not the Seidman October  
16 Agreement. FOF 2.23, 2.24. The bankruptcy court found that there  
17 was no credible evidence indicating that Original Litfunding, or  
18 either of the Debtors, ever ratified, assumed or otherwise  
19 accepted responsibility for the cash portion of the finders fees  
20 sought by Seidman in the claims. FOF 2.18. The finders fee  
21 agreements ratified by the Debtors do not provide for the payment  
22 of any monetary compensation. FOF 2.24. Based upon these  
23 findings, the bankruptcy court did not err in concluding that  
24 Seidman failed to establish that Original Litfunding, or either of  
25 the Debtors, ratified, assumed, or otherwise incurred liability  
26 for any of the cash fees described in the Seidman claims. COL  
27 2.1.

28 The transcript of the hearing on May 24, 2004, demonstrates  
that the bankruptcy court spent considerable time examining the

1 evidence of Appellant Seidman's \$300,000 cash compensation claim.  
2 Transcript of hearing, pp. 29-34. Unlike the Rogers October  
3 Agreement, the Seidman October Agreement does not include any  
4 reference to a cash finders fee. Seidman alleges that there was a  
5 simultaneous oral agreement to pay him \$300,000. As evidence of  
6 this oral agreement, Seidman submits an alleged business plan that  
7 was exchanged between Weisdorn and Reed in October 2000.  
8 According to Appellants, Weisdorn told Seidman that a fee of  
9 \$300,000 would need to be stretched out in 36 monthly payments.  
10 Seidman agreed and confirmed the terms with Reed. Reed and  
11 Weisdorn then built these payments into their business plan.

12 The "business plan" is in the form of a chart. One line of  
13 the chart is labeled "Arizona" and lists monthly payments to  
14 Arizona of \$8,000 for 36 months. It appears from the record that  
15 Arizona was a "code name" for Seidman, who had agreed to be the  
16 principal sales representative for Litfunding in Arizona.

17 However, there are numerous problems with reliance upon this  
18 business plan as evidence of Reed's or Weisdorn's intent to bind  
19 Original Litfunding to a cash payment to Seidman. First, there is  
20 no heading, caption or identification on the chart tying it to  
21 Litfunding or any of the parties. Second, the business plan  
22 contains no signatures or any written proof that Reed or Weisdorn  
23 intended that it be a binding document. Third, the \$8,000 monthly  
24 payment to Arizona is listed in the plan immediately below the  
25 same \$8,000 fee for 36 months for the president/CEO's salary.  
26 Such placement might imply that the figure was a salary rather  
27 than a finder's fee. Fourth, 36 payments of \$8,000 amounts to  
28 \$288,000, not \$300,000, and Seidman never explains this disparity.

1 Finally, Appellant's attorney conceded at the hearing that he had  
2 no evidence of a post-incorporation acknowledgment by Weisdorn,  
3 the chief financial officer, that the monthly payment was ever  
4 made to Seidman. Transcript of hearing at 44, lines 13-15.

5 To engraft a \$300,000 oral promise onto the written terms of  
6 the Seidman October Agreement runs afoul of California's parol  
7 evidence rule. Where a term or agreement is of a kind that  
8 "certainly would have been included in the writing" between the  
9 parties, a later attempt to import such a term or agreement into  
10 the final writing will be barred. Cal. Civ. Code § 1856;  
11 Masterson v. Sine, 68 Cal.2d 222, 226 (1968); Software Design &  
12 Application, Ltd. v. Price Waterhouse, 49 Cal.App.4th 464 (1st  
13 App. Dist. 1996).

14 The bankruptcy court found that Rogers' claims, including her  
15 \$1,350,000 cash claim, were based on the Rogers October Agreement.  
16 FOF 2.9. The Debtors ratified the November 27, 2000 Café Meeting  
17 agreement, not the Rogers October Agreement. The Café Meeting  
18 agreement ratified by Debtors does not provide for the payment of  
19 any monetary compensation. FOF 2.24. Consequently, the  
20 bankruptcy court did not err in concluding that Rogers failed to  
21 establish that Original Litfunding, or either of the Debtors,  
22 ratified, assumed or otherwise incurred liability for any of the  
23 cash fees described in the Rogers claims. COL 2.2.

24 Unlike the Seidman cash claim for \$300,000, the bankruptcy  
25 court spent no appreciable time at the hearing discussing the  
26 Rogers cash claim for \$1,350,000. The court found that there was  
27 no evidence that Original Litfunding either ratified the Rogers  
28 October Agreement or entered into a similar agreement upon its

1 incorporation. The court, however, did opine that, to the extent  
2 there may have been an agreement for a 5 percent cash fee to  
3 Rogers, such an agreement would probably have been with Reed and  
4 not Weisdorn or Original Litfunding. Transcript of hearing at 58,  
5 lines 13-20.

6 The comment by the bankruptcy court that there may have been  
7 an agreement to pay a cash finders fee between Rogers and Reed is  
8 of no moment in this appeal. The question presented here is  
9 whether the Debtors ratified, assumed or otherwise incurred some  
10 liability to Rogers or Seidman for their cash claims. The  
11 bankruptcy court properly determined in COL 2.6 that Rogers failed  
12 to establish any debt or monetary claims, with the exception of  
13 stock claims, against the Debtors.

14 **CONCLUSION**

15 For the above reasons, the judgment of the bankruptcy court  
16 is AFFIRMED.

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