

APR 15 2013

NOT FOR PUBLICATION

SUSAN M SPRAUL, 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-12-1479-TaPaKi  
2 )  
3 MERUELO MADDUX PROPERTIES, ) Bk. No. 09-13356-VK  
4 INC., )  
5 )  
6 Reorganized Debtor. )  
7 )  
8 )  
9 EVOQ PROPERTIES, INC., f/k/a )  
10 MERUELO MADDUX PROPERTIES, )  
11 INC., )  
12 )  
13 Appellant, )  
14 )  
15 v. ) M E M O R A N D U M \*  
16 )  
17 JOHN CHARLES MADDUX, )  
18 )  
19 )  
20 Appellee. )  
21 )

Submitted and Argued on March 22, 2013  
at Pasadena, California

Filed - April 15, 2013

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

Honorable Victoria S. Kaufman, Bankruptcy Judge, Presiding

Appearances: Christopher E. Prince of Lesnick Prince & Pappas  
LLP for Appellant Evoq Properties, Inc., formerly  
known as Meruelo Maddux Properties, Inc.; David  
Shemano of Peitzman Weg LLP for Appellee John  
Charles Maddux

Before: TAYLOR, PAPPAS, and KIRSCHER, Bankruptcy Judges.

\* 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.

1 **INTRODUCTION**

2 Appellant EVOQ Properties, Inc., formerly known as Meruelo  
3 Maddux Properties, Inc. ("MMPI"), is the reorganized debtor in  
4 jointly administered chapter 11 cases<sup>1</sup> ("Reorganized Debtor").  
5 It appeals from a bankruptcy court order allowing John Charles  
6 Maddux ("Maddux") to pursue enforcement of the advancement  
7 provisions of a pre-petition indemnity agreement ("Indemnity  
8 Agreement") in a non-bankruptcy forum. Maddux seeks advancement  
9 of defense costs in connection with post-confirmation litigation  
10 based on allegations of Maddux's pre- and post-petition wrongful  
11 conduct as an officer and director of MMPI.<sup>2</sup> Having first  
12 concluded that appellate jurisdiction is proper, we AFFIRM.

13 **PROCEDURAL AND FACTUAL BACKGROUND**

14 On or about March 26, 2009, MMPI and fifty-three related  
15 entities filed voluntary petitions under chapter 11. On  
16  
17  
18

---

19 <sup>1</sup> We exercised our discretion and independently reviewed  
20 certain imaged documents from the bankruptcy court's electronic  
21 docket. See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert,  
22 Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989); Atwood v. Chase  
23 Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th  
24 Cir. BAP 2003). In so doing, we determined that on April 7,  
2009, the bankruptcy court ordered joint administration of MMPI's  
bankruptcy case with 53 related cases under MMPI's case no.  
09-13356 ("Joint Administration Order").

25 <sup>2</sup> Procedurally, the confusing record required that we  
26 analyze whether the order on appeal is final or interlocutory.  
27 By order filed March 6, 2013, we required that the parties  
28 further brief finality issues in advance of oral argument and  
instructed the parties to be prepared to argue finality at oral  
argument.

1 September 23, 2009, Maddux<sup>3</sup> filed proofs of claim, each in the  
2 amount of \$8.5 million, in the MMPI case and in another  
3 affiliated case.<sup>4</sup> Maddux also filed a proof of claim in a third  
4 affiliated case, but in the amount of \$8 million. Maddux  
5 attached an identical 5-page "Addendum" to each proof of claim  
6 that describes the bases for the aggregated claim amount,  
7 including: a contribution agreement; the Indemnity Agreement;  
8 subrogation; and an employment agreement. The Addendum contains  
9 a "Reservation of Rights" that includes a statement that the  
10 documents supporting the claims "are too voluminous to attach,"  
11 along with an offer to make copies available upon appropriate  
12 request (hereinafter, we refer to Maddux's filed proofs of claim  
13 collectively as the "Proofs of Claim"). Maddux never attached  
14 copies of the referenced documents to the Proofs of Claim.

15 On June 24, 2011, after trial on competing proposed plans,  
16 the bankruptcy court entered an order confirming the plan of  
17 reorganization (the "Charlestown Plan") proposed by two of MMPI's  
18  
19  
20

---

21 <sup>3</sup> Maddux, individually and as trustee of the John Charles  
22 Maddux Trust U/D/T ("Trust"), and Sunstone Bella Vista, LLC  
23 ("Sunstone") each filed a proof of claim in the amount of  
24 \$8.5 million in two of the affiliated cases. As only Maddux,  
individually, appealed from the order at issue here, we do not  
further discuss the Trust or Sunstone.

25 <sup>4</sup> The Joint Administration Order directed claimants to file  
26 proofs of claim in the case directly related to their claims and  
27 to use the caption and case number for that case when so doing.  
It also, however, directed use of the MMPI case number, caption,  
28 and docket in connection with all other filings in the  
administratively consolidated cases.

1 minority shareholders (the "Plan Proponents").<sup>5</sup> Very generally  
2 stated, the Charlestown Plan provided for payment in full to  
3 holders of undisputed unsecured claims on the Effective Date<sup>6</sup> and  
4 for payment to holders of secured claims either by surrender of  
5 collateral or through payment over a four-year period. In  
6 addition, the Charlestown Plan provides for retention of: "All  
7 claims against the Debtors' Insiders, employees, and/or agents  
8 relating to pre-confirmation and/or pre-petition conduct,  
9 including without limitation, claims for fraud, breach of  
10 fiduciary duty or negligence." Charlestown Plan at 116:8-10.

11 After confirmation, the Reorganized Debtor formed a new  
12 board of directors, and, at some point not clear on this record,  
13 Maddux lost his positions as an officer and director.

14 **Claim Objection.**

15 On January 23, 2012, the Reorganized Debtor filed an  
16 objection to and Motion for Disallowance of the Proofs of Claim,  
17 seeking disallowance to the extent the claims were based on the  
18 contribution agreement and the Indemnity Agreement (the  
19

---

20 <sup>5</sup> The parties did not include in the record on appeal the  
21 final version of the confirmed Charlestown Plan. The Reorganized  
22 Debtor, however, included a copy of the Order Confirming the  
23 Charlestown Plan ("Confirmation Order"). Exhibit 1 to the  
24 Confirmation Order refers to docket number 3223, which is the  
25 Notice of Filing of Third Modified Fourth Amended Chapter 11 Plan  
of Reorganization Dated October 14, 2010. We exercised our  
discretion to independently review the Charlestown Plan. Fegert,  
887 F.2d at 957-58.

26 <sup>6</sup> The Amended Notice of Entry of Confirmation Order,  
27 Occurrence of Effective Date and Bar Date for Administrative  
28 Claims, which we located on the bankruptcy court docket at #3317,  
gives notice that the Effective Date occurred on July 25, 2011.

1 "Disallowance Motion").<sup>7</sup> Maddux filed a Notice of Qualified Non-  
2 Objection, but expressly reserved his right to seek  
3 reconsideration for cause under 11 U.S.C. § 502(j)<sup>8</sup> if the  
4 Reorganized Debtor later asserted claims against him where he had  
5 a contractual right to contribution or indemnity. After hearing,  
6 the bankruptcy court entered an order granting the Disallowance  
7 Motion without prejudice to Maddux's rights under section 502(j)  
8 ("Disallowance Order").

9 **Reconsideration Motion.**

10 The same day that the bankruptcy court entered the  
11 Disallowance Order, the Reorganized Debtor sued Maddux and others  
12 in the California Superior Court ("State Court Action"). In  
13 response, Maddux filed a Motion for Reconsideration of the  
14 Disallowance Order based on section 502(j) and Rules 3008 and  
15 9023 ("Reconsideration Motion"). Maddux stated therein that:  
16 "Maddux is not requesting the Court to adjudicate the validity of  
17 his indemnity Claims but is simply asking the Court to reconsider  
18 its order *disallowing* those Claims." Reconsideration Motion at  
19 8:25-27 (emphasis in original). He attached a copy of the  
20 Indemnity Agreement as Exhibit A to the Reconsideration Motion.

21 \_\_\_\_\_  
22 <sup>7</sup> In the Objection, the Reorganized Debtor mentions that it  
23 had already objected to certain "employment related wage claims  
24 of Maddux" [presumably including those contained in the filed  
25 proofs of claim]. Neither party, however, addresses the legal  
26 implications and effect, if any, of this apparent piecemeal  
27 manner of litigating objections to the Proofs of Claim.

28 <sup>8</sup> Unless otherwise specified, all chapter and section  
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
all "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037.

1           The Reorganized Debtor opposed the Reconsideration Motion,  
2 primarily on the grounds that Maddux's claim for indemnity  
3 remained contingent. The Reorganized Debtor argued that unless  
4 and until Maddux prevailed in the State Court Action, he could  
5 not establish a right to indemnification.

6           In his reply ("Reply"), Maddux argued that the Indemnity  
7 Agreement provided him with a current, non-contingent, liquidated  
8 right to enforce his claim for advancement of attorney's fees  
9 that he incurred in defending against the State Court Action  
10 ("Advancement Claim"). He also argued that the bankruptcy court  
11 should "abstain from adjudicating the pending claim objection and  
12 instead permit Maddux to seek relief in Delaware concerning his  
13 entitlement to advancement of expenses and other indemnity  
14 rights." Reply at 5:1-4. Maddux based his request for  
15 abstention on the governing law provision in the Indemnity  
16 Agreement, the bankruptcy court's limited post-confirmation  
17 jurisdiction, and the alleged lack of effect on MMPI's 100%  
18 payout estate. Thus, Maddux requested that the bankruptcy court  
19 not only vacate the Disallowance Order, but also exercise its  
20 discretion under 28 U.S.C. § 1334(c)(1) to abstain from  
21 adjudicating the Advancement Claim and all other Indemnity  
22 Agreement-based claims.

23           The Reorganized Debtor sought authorization from the  
24 bankruptcy court on an emergency basis to file a sur-reply  
25 ("Sur-reply"); the bankruptcy court granted this request. In the  
26 Sur-reply, the Reorganized Debtor argued that Maddux improperly  
27 included new substantive legal arguments in the Reply;  
28 inappropriately included the separate Advancement Claim as part

1 of Maddux's claim for indemnification; and inaccurately argued  
2 that the determination would have no effect on the Reorganized  
3 Debtor such that a Delaware court should be allowed to determine  
4 whether Maddux's newly asserted Advancement Claim was timely,  
5 time barred, discharged, or otherwise not allowable as a matter  
6 of bankruptcy law. The Reorganized Debtor finally argued that  
7 the Charlestown Plan preserved jurisdiction in the bankruptcy  
8 court over all such issues, and, in any event, that the  
9 Charlestown Plan discharged the alleged Advancement Claim.

10 At the initial hearing on the Reconsideration Motion, the  
11 bankruptcy court addressed indemnification, continued the hearing  
12 as to the Advancement Claim, and allowed Maddux to submit an  
13 order pending final resolution. The bankruptcy court entered an  
14 order after the hearing granting the Reconsideration Motion in  
15 part (the "First Order"). In the First Order, the bankruptcy  
16 court initially vacated the Disallowance Order as to claims by  
17 Maddux for "indemnity, contribution or reimbursement, including a  
18 claim or right to advancement of expenses arising from or  
19 relating to" the State Court Action, defined therein as an  
20 "Indemnity Claim." First Order (Bk. Dkt. #3800) at 3:4-7.  
21 Second, the bankruptcy court abstained therein from "all matters  
22 and proceedings relating to any dispute concerning an Indemnity  
23 Claim, including allowance or disallowance . . . pursuant to  
24 section 502(b), (c), or (e). . . ." Id. at 3:11-14. Third, and  
25 specifically notwithstanding its abstention, the First Order  
26 provided that: "this Court shall not abstain and shall retain  
27 jurisdiction to determine whether any claim or right of Maddux to  
28 advancement of expenses pursuant to paragraph 5 of the Indemnity

1 Agreement or otherwise is time-barred and discharged pursuant to  
2 any bar date order entered in the Debtors' bankruptcy cases or  
3 the [Charlestown Plan]." Id. at 3:17-21. Finally, the First  
4 Order established deadlines for additional briefing regarding the  
5 Advancement Claim.

6 **Advancement Claim.**

7 At the hearing on the Advancement Claim and in its briefing,  
8 the Reorganized Debtor argued that the Advancement Claim was an  
9 entirely new claim, not merely a new argument. It asserted that  
10 Maddux failed to timely assert the Advancement Claim because  
11 Maddux did not attach a copy of the Indemnity Agreement to the  
12 Proofs of Claim and did not specifically identify the Advancement  
13 Claim in the Addendum to the Proofs of Claim. Relying on  
14 Delaware case authority that characterized a claim for  
15 advancement of expenses as a claim for relief separate from a  
16 claim for indemnification, Majkowski v. Am. Imaging Mgmt. Servs.,  
17 LLC, 913 A.2d 572, 586-87 (Del. Ch. 2006), the Reorganized Debtor  
18 argued that Maddux's assertion of a contingent claim for  
19 indemnity was insufficient to assert a claim for advancement of  
20 expenses. Further, the Reorganized Debtor argued that Maddux  
21 should not be allowed to amend the Proofs of Claim to add the  
22 Advancement Claim after the bar date, post-confirmation, and  
23 after disallowance of the claim, and that Maddux had not and  
24 could not satisfy the standards for amendment. The Reorganized  
25 Debtor argued that to force it to advance the costs of Maddux's  
26 defense represented a huge and present liability risk to the  
27 estate.

28 Maddux argued that his right to advancement was based upon



1 paragraph 5 of the Indemnity Agreement. He argued that he  
2 satisfied all requirements of Rule 3001 and preserved all claims  
3 based on the Indemnity Agreement when he referred to it in the  
4 Addendum. Alternatively, Maddux argued that he should be allowed  
5 to amend the Proofs of Claim, if deemed necessary by the  
6 bankruptcy court.

7 The bankruptcy court found that the Advancement Claim was  
8 not time barred. It reasoned that advancement was a contractual  
9 right under the Indemnity Agreement that was incorporated into  
10 the Proofs of Claim by reference to the Indemnity Agreement in  
11 the Addendum. The bankruptcy court rejected the argument that  
12 the Advancement Claim was time barred just "because the word  
13 'advancement' wasn't in the proof of claim." Hr'g Tr. (July 30,  
14 2012) at 54:1-3. The bankruptcy court acknowledged that  
15 indemnification and advancement are separate rights, but noted  
16 that "they're both provided in the agreement." Id. at 55:3-4.  
17 And, near the conclusion of the hearing, the bankruptcy court  
18 clarified the extent of its relief and stated that "it's just now  
19 - the advancement in particular is also included . . . ." Id. at  
20 54:12-19. The bankruptcy court then stated that "this Court  
21 isn't going to be deciding the issues about advancement any more  
22 than it's deciding issues about indemnification." Id. at  
23 54:23-25.

24 The order entered after the hearing (the "Second Order"),  
25 stated that the Advancement Claim was not time barred, and "in  
26 accordance with the Reconsideration Order, Maddux and the  
27 Reorganized Debtors may seek adjudication of any dispute  
28 concerning Maddux's claim for advancement of expenses with

1 respect to the Indemnity Claim in any forum or venue permitted  
2 under applicable non-bankruptcy law." Second Order (Bk. Dkt.  
3 #3847) at 3:5-8. The Reorganized Debtor filed a timely Notice of  
4 Appeal from the Second Order.

#### 5 JURISDICTION

6 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
7 §§ 1334 and 157(b)(1) and (b)(2)(B) & (O).

8 We have jurisdiction under 28 U.S.C. § 158(a) and (b) to  
9 hear appeals from final judgments, orders, and decrees; and with  
10 leave of the Panel, from interlocutory orders and decrees of  
11 bankruptcy judges. The burden of demonstrating jurisdiction lies  
12 with the party asserting it. Kokkonen v. Guardian Life Ins. Co.  
13 of Am., 511 U.S. 375, 379-80 (1994). Here, the Reorganized  
14 Debtor failed to include a statement of the basis for appellate  
15 jurisdiction in its Opening Brief and we required additional  
16 briefing in advance of oral argument regarding finality.

#### 17 Finality of the Second Order.

18 The Reorganized Debtor appeals from the Second Order. As  
19 stated above, in the Second Order the bankruptcy court found that  
20 the Advancement Claim was not time barred. Ordinarily, an order  
21 regarding the timeliness of a proof of claim is not a final order  
22 as allowance or disallowance of the proof of claim remains to be  
23 determined. New Life Health Ctr. Co. v. IRS (In re New Life  
24 Health Ctr. Co.), 102 F.3d 428 (9th Cir. 1996). Here, however,  
25 the bankruptcy court also abstained from further consideration of  
26 the Advancement Claim and instructed that the parties should have  
27 the merits of the Advancement Claim determined, along with all  
28 other claims for indemnification, in a non-bankruptcy forum. This

1 decision to abstain is a final order as "its impact is to send  
2 [the claim] effectively out of court." Ernst & Young v.  
3 Matsumoto (In re United Ins. Mgmt., Inc.), 14 F.3d 1380, 1383  
4 (9th Cir. 1994). Therefore, we have jurisdiction to hear this  
5 appeal as to the Second Order pursuant to 28 U.S.C. § 158.

6 **Scope of our review of issues.**

7 Maddux argues that we lack jurisdiction to review the  
8 abstention and reconsideration decisions. He bases this argument  
9 on his assertions that the First Order was final as to these two  
10 issues, even if not final as to the timeliness of the Advancement  
11 Claim, and that the Reorganized Debtor failed to timely seek  
12 appeal from the First Order.

13 The First Order, through which the bankruptcy court vacated  
14 disallowance and abstained as to indemnification, specifically  
15 reserved ruling as to the Advancement Claim and was clearly  
16 interlocutory. Ordinarily abstention would render an order  
17 final, but the carve out as to abstention with respect to the  
18 Advancement Claim renders the First Order not final. The  
19 bankruptcy court did not allow any particular claim and the First  
20 Order did not resolve all issues related to the interaction  
21 between the Indemnification Agreement and the State Court Action.  
22 Even under the flexible pragmatic approach to finality of  
23 bankruptcy court orders in the Ninth Circuit, the First Order was  
24 not final. See In re Frontier Props., Inc., 979 F.2d 1358, 1363  
25 (9th Cir. 1992) ("a bankruptcy court order is appealable where it  
26 1) resolves and seriously affects substantive rights and  
27 2) finally determines the discrete issue to which it is  
28 addressed."). Entry of the Second Order, however, resolved all

1 issues related to the Advancement Claim, allowed the entire  
2 dispute regarding the Indemnity Agreement to be decided by the  
3 state court, and resulted in the First Order becoming final. See  
4 Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d  
5 1110, 1114 (9th Cir. 2000).

6 The Reorganized Debtor did not directly appeal from the  
7 First Order; however, it included in its Statement of Issues on  
8 Appeal: "Whether the Bankruptcy Court erred in granting John  
9 Charles Maddux's (and affiliated entities') motion for  
10 reconsideration with respect to the court's prior order  
11 disallowing his purported claim for advancement of expenses."  
12 Stmt. of Issues, Bk. Dkt. #3868 at 1:8-10. By inclusion of this  
13 issue related to the earlier order that became reviewable based  
14 on the Second Order, we conclude that the Reorganized Debtor  
15 adequately preserved this issue.

16 "[A]n appeal from the final judgment draws in question all  
17 earlier non-final orders and all rulings which produced the  
18 judgment." Munoz v. Small Bus. Admin., 644 F.2d 1361, 1364, 1363  
19 (9th Cir. 1981) ("the rule is well settled that a mistake in  
20 designating the judgment appealed from should not result in loss  
21 of the appeal as long as the intent to appeal from a specific  
22 judgment can be fairly inferred from the notice and the appellee  
23 is not misled by the mistake.") Here, Maddux was not misled by  
24 the alleged mistake, as the issue raised by the First Order has  
25 been fully briefed. Moreover, the Second Order necessarily  
26 involved the bankruptcy court's reconsideration of the  
27 Disallowance Order. The propriety of its consideration of  
28 whether the Advancement Claim constituted a part of the Proofs of

1 Claim, therefore, is properly before this Panel.

2 Almost in passing, Maddux argues on appeal that the  
3 Reorganized Debtor waived the abstention issue pursuant to  
4 Rule 8006. Rule 8006, however, does not limit a party's appeal  
5 from a bankruptcy court's judgment. See Gertsch v. Johnson &  
6 Johnson, Fin. Corp., 237 B.R. 160, 166 (9th Cir. BAP 1999). We  
7 may consider arguments not specified in the Rule 8006 statement  
8 of issues "when a complete understanding of the case can be  
9 discerned from the briefs and the record." Id. Here, we have a  
10 complete understanding of the case from the briefs and the  
11 record, including the key role and timing of the bankruptcy  
12 court's abstention ruling. And, Maddux has not identified any  
13 prejudice from the Reorganized Debtor's failure to confine its  
14 arguments to the issues stated in the Statement of Issues on  
15 Appeal. The Second Order contained the bankruptcy court's  
16 decision to abstain as to the Advancement Claim and review of the  
17 abstention decision is appropriately within the scope of our  
18 review here.

19 **ISSUES**

20 1. Did the bankruptcy court abuse its discretion when it  
21 reconsidered the Disallowance Order?

22 2. Did the bankruptcy court err when it found that the  
23 Advancement Claim was not time-barred and discharged?

24 3. Did the bankruptcy court abuse its discretion when it  
25 abstained from further consideration of the Advancement Claim?

26 **STANDARD OF REVIEW**

27 We review the bankruptcy court's legal conclusions de novo,  
28 and its findings of fact for clear error. See Allen v. US Bank,

1 NA (In re Allen), 472 B.R. 559, 564 (9th Cir. BAP 2012) ["An  
2 order overruling a claim objection can raise legal issues (such  
3 as the proper construction of statutes and rules) which we review  
4 de novo, as well as factual issues (such as whether the facts  
5 establish compliance with particular statutes or rules), which we  
6 review for clear error."]. A bankruptcy court's grant of a  
7 motion for reconsideration is reviewed for abuse of discretion.  
8 Arrow Elecs., Inc. v. Justus (In re Kaypro), 218 F.3d 1070, 1073  
9 (9th Cir. 2000).

10 We review the bankruptcy court's contract interpretation de  
11 novo. Simpson v. Burkart (In re Simpson), 366 B.R. 64, 70-71  
12 (9th Cir. BAP 2007). The bankruptcy court's interpretation of  
13 the confirmed plan is an interpretation of its own order, which  
14 we review under the abuse of discretion standard. JCB, Inc. v.  
15 Union Planters Bank, N.A., 539 F.3d 862, 869 (8th Cir. 2008); and  
16 see Marciano v. Fahs (In re Marciano), 459 B.R. 27, 35 (9th Cir.  
17 BAP 2011) ("We owe substantial deference to the bankruptcy  
18 court's interpretation of its own orders . . . .") (citation  
19 omitted). Likewise, we review the bankruptcy court's decision to  
20 abstain for an abuse of discretion. Bethlahmy v. Kuhlman (In re  
21 ACI-HDT Supply Co.), 205 B.R. 231, 234 (9th Cir. BAP 1997).

## 22 DISCUSSION

23 **A. The bankruptcy court did not abuse its discretion by**  
24 **considering the Advancement Claim in the context of**  
25 **reconsideration of the Disallowance Order and then**  
**abstaining from a consideration of the merits.**

26 The Reorganized Debtor argues that the bankruptcy court  
27 abused its discretion by improperly considering Maddux's newly  
28 asserted claim, based on a separate legal right for advancement,

1 in connection with reconsideration of the Disallowance Claim. It  
2 also argues that Maddux's request made in the Reconsideration  
3 Motion that the bankruptcy court abstain was not properly before  
4 the bankruptcy court. We disagree.

5 The bankruptcy court generally has discretion in deciding  
6 whether to reconsider its prior orders. Elias v. U.S. Trustee  
7 (In re Elias), 188 F.3d 1160, 1161 (9th Cir. 1999). At oral  
8 argument in this appeal, the Reorganized Debtor argued that the  
9 Disallowance Motion required Maddux to clarify the grounds for  
10 all possible claims, notwithstanding his concession regarding the  
11 propriety of disallowance based on the then-contingent nature of  
12 the claims. The Reorganized Debtor then asserted that Maddux  
13 cannot now assert the Advancement Claim as he did not  
14 specifically identify the potential claim for advancement of  
15 expenses in connection with his response to the Disallowance  
16 Motion. The Reorganized Debtor closed this argument with the  
17 assertion that the bankruptcy court, thus, improperly vacated the  
18 Disallowance Order when it did so based on an allegedly new and  
19 previously unstated Advancement Claim.

20 The Disallowance Order, however, was not based on the merits  
21 as to the validity of the indemnification rights or Advancement  
22 Claim; Maddux conceded the contingent status of these issues and  
23 the bankruptcy court disallowed the claims based only on their  
24 contingent status. It was entered without prejudice to Maddux's  
25 rights and clearly contemplated possible future reconsideration.  
26 And, as discussed below, the bankruptcy court found that the  
27 Advancement Claim is not a new claim introduced first in Maddux's  
28 reply papers. Rather it is part and parcel of the

1 indemnification claim, triggered specifically by the Reorganized  
2 Debtor's filing of the State Court Action, and an appropriately  
3 cited new circumstance that supported reconsideration.

4 Having reconsidered and vacated the Disallowance Order, the  
5 bankruptcy court's decision to consider abstention also was  
6 appropriate. A bankruptcy court has the power to permissively  
7 abstain from hearing any matter, sua sponte. Gober v. Terra +  
8 Corp. (In re Gober), 100 F.3d 1195, 1207 (5th Cir. 1996). As  
9 long as the parties have an opportunity to be heard, the decision  
10 to abstain is left up to the sound discretion of the bankruptcy  
11 court. Underwood v. United Student Aid Funds, Inc. (In re  
12 Underwood), 299 B.R. 471, 476 (Bankr. S.D. Ohio 2003). Here, the  
13 bankruptcy court allowed the Reorganized Debtor to be heard, by  
14 allowing it to file its Sur-reply, which addressed abstention,  
15 and to argue at the scheduled hearing. We find no abuse of the  
16 bankruptcy court's discretion in its decision to consider  
17 abstention in connection with the Reconsideration Motion.

18 **B. The Advancement Claim was not barred.**

19 **1. The Advancement Claim is a subpart of Maddux's**  
20 **Indemnity Agreement-based claim.**

21 The Reorganized Debtor, in essence, argues that Maddux was  
22 required to file a separate proof of claim for advancement  
23 because, under Delaware state law, advancement is a right  
24 separate from a right to indemnity. The bankruptcy court  
25 concluded that this argument was unavailing, and we agree.

26 The Indemnity Agreement, by its terms, is governed by  
27 Delaware law. Under Delaware law, a corporation may pay the  
28 "[e]xpenses (including attorneys' fees) incurred by an officer or



1 director defending any civil, criminal, administrative or  
2 investigative action, suit or proceeding . . . in advance of the  
3 final disposition of such action, suit or proceeding upon receipt  
4 of an undertaking by or on behalf of such director or officer to  
5 repay such amount if it shall ultimately be determined that he is  
6 not entitled to be indemnified by the corporation as authorized  
7 in this Section." Del. Gen'l Corp. Law § 145(e). This  
8 advancement provision is permissive. See Homestore, Inc. v.  
9 Tafeen, 888 A.2d 204, 212 (Del. 2005).

10 The Indemnity Agreement here provides the following:

11 5. Advancement of Expenses. In the event of any  
12 action, suit or proceeding against Indemnitee which may  
13 give rise to a right of indemnification from the  
14 Company pursuant to this Agreement, within five days  
15 following written request to the Company by the  
16 Indemnitee, the Company shall advance to Indemnitee  
17 amounts to cover expenses incurred by Indemnitee in  
18 defending the action, suit or proceeding whether prior  
19 to or after final disposition of such action, suit or  
20 proceeding (unless there has been a final determination  
21 that Indemnitee is not entitled to indemnification for  
22 these expenses) upon receipt of (i) an undertaking by  
23 or on behalf of the Indemnitee to repay the amount  
24 advanced in the event that it shall be ultimately  
25 determined in accordance with Section 3 of this  
26 Agreement that such Indemnitee is not entitled to  
27 indemnification by the Company, and (ii) satisfactory  
28 evidence and documentation as to the amount of such  
expenses. Indemnitee's written certification together  
with a copy of the statement paid or to be paid by  
Indemnitee shall constitute satisfactory evidence.  
Such advances are deemed to be an obligation of the  
Company to the Indemnitee hereunder, and shall in no  
event be deemed a personal loan.

24 Reconsideration Motion, Ex. A at 14.

25 The bankruptcy court determined that the Advancement Claim,  
26 because it was provided for specifically in the Indemnity  
27 Agreement itself, was included within Maddux's timely filed  
28 Proofs of Claim which were based, in part, on the Indemnity

1 Agreement. The bankruptcy court also determined that Maddux was  
2 not required to identify the advancement provision specifically,  
3 or to mention the word advancement in particular, in order to  
4 preserve his claim for all contractual rights under the Indemnity  
5 Agreement. We find no error in this reasoning or the bankruptcy  
6 court's ultimate conclusion.

7 Nor is the bankruptcy court's conclusion inconsistent with  
8 the Reorganized Debtor's argument that indemnification and  
9 advancement are not synonymous, but are two distinct and  
10 different legal rights. As explained by the Delaware Supreme  
11 Court:

12 Advancement is an especially important corollary to  
13 indemnification as an inducement for attracting capable  
14 individuals into corporate service. Advancement  
15 provides corporate officials with immediate interim  
16 relief from the personal out-of-pocket financial burden  
17 of paying the significant on-going expenses inevitably  
18 involved with investigations and legal proceedings.

19 Homestore, Inc., 888 A.2d at 211. "[T]he advancement decision is  
20 essentially simply a decision to advance credit." Advanced  
21 Mining Sys., Inc. v. Fricke, 623 A.2d 82, 84 (Del. Ch. 1992). As  
22 advancement authority is permissive, the Delaware courts have  
23 required that the terms and conditions for advancement must be  
24 expressly provided by bylaw or contract. Homestore, Inc.,  
25 888 A.2d at 212; Advanced Mining Sys., Inc., 623 A.2d at 84.

26 Here, the Indemnity Agreement expressly states the terms and  
27 conditions for advancement of expenses. Nothing in the cases  
28 cited by the Reorganized Debtor or that our research uncovered,  
however, requires that advancement be provided for in a contract  
separate from other indemnification provisions. We conclude that  
the bankruptcy court was correct on the law and in its factual

1 finding that the Advancement Claim is included in the Indemnity  
2 Agreement-based claim.

3 **2. Maddux's Proofs of Claim sufficiently included the**  
4 **claim for advancement of expenses notwithstanding the**  
5 **lack of attachment of a copy of the Indemnity**  
6 **Agreement.**

7 The Reorganized Debtor also argues that the Proofs of Claim  
8 did not preserve the Advancement Claim where they did not attach  
9 the Indemnity Agreement or specifically disclose the advancement  
10 provision. We disagree and find no error by the bankruptcy  
11 court.

12 A failure to attach writings to a proof of claim does not  
13 require a bankruptcy court to disallow a claim on that basis  
14 alone. Ashford v. Consol. Pioneer Mortg. (In re Consol. Pioneer  
15 Mortg.), 178 B.R. 222, 226 (9th Cir. BAP 1995). Objections  
16 asserting lack of documentation may deprive the claim of prima  
17 facie validity, but the objector has the burden to present  
18 "evidence of equally probative value." In re Falwell, 434 B.R.  
19 779, 784 (Bankr. W.D. Va. 2009). The Reorganized Debtor here  
20 must demonstrate that the Advancement Claim should not be allowed  
21 based on one of the grounds listed in section 502(b). See  
22 In re Lasky, 362 B.R. 385, 387 (Bankr. C.D. Cal. 2007).

23 In effect, the Reorganized Debtor here relied solely on  
24 section 502(b)(9), which provides grounds for disallowance where  
25 a proof of claim was not timely filed.<sup>9</sup> It does not object to  
26 the timeliness of the Proofs of Claim; instead, it argues that

---

27 <sup>9</sup> The Reorganized Debtor has not cited any specific plan  
28 provision or other order entered in the bankruptcy case as a bar  
applicable to the Advancement Claim.

1 they do not sufficiently evidence a claim for advancement such  
2 that assertion of advancement rights at this time is not timely.  
3 As discussed above, the bankruptcy court properly found that the  
4 Advancement Claim was a part of the Indemnity Agreement-based  
5 claim, and therefore, also timely.

6 As stated by the bankruptcy court, the fact that the Proofs  
7 of Claim do not refer to every paragraph contained in the  
8 Indemnity Agreement is of no import:

9 If somebody had to refer to every paragraph of their  
10 agreement, then there would be no point in having a  
11 one-page proof of claim form. I mean they refer to the  
12 agreement. He incorporates the agreement. He just  
13 said if you want to get a copy of the agreement, you  
14 can. Everybody knew what the agreement said.

15 And to now say that because he didn't say  
16 advancement in particular, I mean there are probably a  
17 lot of words in that agreement that weren't stated in  
18 particular on the face of the proof of claim. It  
19 doesn't mean he doesn't get those rights anymore.

20 Hr'g Tr. (July 30, 2012) at 14:12-22.

21 Maddux identified the Indemnity Agreement and offered to  
22 provide a copy. The record reflects no request made by the  
23 Reorganized Debtor for a copy. MMPI, the Plan Proponents, and,  
24 thus, the Reorganized Debtor had access to the Indemnity  
25 Agreement. In effect, the bankruptcy court found that the Proofs  
26 of Claim gave sufficient notice of theories of recovery that  
27 included the Advancement Claim. In so doing, the bankruptcy  
28 court did not err.

**C. The Bankruptcy Court did not abuse its discretion by  
abstaining.**

29 Abstention is governed by 28 U.S.C. § 1334(c). A bankruptcy  
30 court may abstain from hearing a matter under 28 U.S.C.  
31 § 1334(c)(1), which states in relevant part: "[N]othing in this

1 section prevents a district court in the interest of justice, or  
2 in the interest of comity with State courts or respect for State  
3 law, from abstaining from hearing a particular proceeding arising  
4 under title 11 or arising in or related to a case under  
5 title 11."

6       The Ninth Circuit has provided guidelines for consideration  
7 by bankruptcy courts to determine if permissive abstention is  
8 appropriate. The factors a bankruptcy court should consider in  
9 deciding permissive abstention are: (1) the effect or lack  
10 thereof on the efficient administration of the estate if a Court  
11 recommends abstention, (2) the extent to which state law issues  
12 predominate over bankruptcy issues, (3) the difficulty or  
13 unsettled nature of the applicable law, (4) the presence of a  
14 related proceeding commenced in state court or other  
15 nonbankruptcy court, (5) the jurisdictional basis, if any, other  
16 than 28 U.S.C. § 1334, (6) the degree of relatedness or  
17 remoteness of the proceeding to the main bankruptcy case, (7) the  
18 substance rather than form of an asserted "core" proceeding,  
19 (8) the feasibility of severing state law claims from core  
20 bankruptcy matters to allow judgments to be entered in state  
21 court with enforcement left to the bankruptcy court, (9) the  
22 burden of [the bankruptcy court's] docket, (10) the likelihood  
23 that the commencement of the proceeding in bankruptcy court  
24 involves forum shopping by one of the parties, (11) the existence  
25 of a right to a jury trial, and (12) the presence in the  
26 proceeding of nondebtor parties. Christensen v. Tucson Estates  
27 (In re Tucson Estates), 912 F.2d 1162, 1167 (9th Cir. 1990).

28       The Ninth Circuit also held that "[a]bstention can exist

1 only where there is a parallel proceeding in state court. That  
2 is, inherent in the concept of abstention is the presence of a  
3 pendent state action in favor of which the federal court must, or  
4 may, abstain." Sec. Farms v. Int'l Bhd. Of Teamsters, 124 F.3d  
5 999, 1009 (9th Cir. 1997) (abstention not applicable to removed  
6 action).

7 Here, the bankruptcy court expressed its reasons for  
8 exercising its discretion to abstain primarily during the initial  
9 hearing on the Reconsideration Motion, and only in passing during  
10 the hearing on the Advancement Claim. The bankruptcy court  
11 stated that: "if we're just talking about whether or not [Maddux  
12 is] entitled to indemnification - it should be decided by a  
13 Delaware court because it's based on Delaware law." Hr'g Tr.  
14 (May 25, 2012) at 2:11-13.<sup>10</sup> It further noted that:  
15 "Advancement, if it is time barred, because it's separate, that's  
16 based on a Bankruptcy Code provision and this Court should decide  
17 whether it's time barred." Id. at 2:14-16. The bankruptcy court  
18 stated that it seemed "kind of pointless" to require the  
19 Reorganized Debtor to bring a separate objection to the  
20 Advancement Claim on "time barred grounds," and therefore

---

21  
22 <sup>10</sup> As reflected in the transcript for the May 25, 2012  
23 hearing, after the bankruptcy court heard oral argument on this  
24 matter, it held a status conference on what appears to be then-  
25 pending claims objections regarding severance claims asserted by  
26 Maddux and others. At one point the bankruptcy court, again in  
27 the context of consideration of abstention, discussed its  
28 sensitivity to issues regarding its post-confirmation  
jurisdiction. It is not clear whether this discussion was  
intended by the bankruptcy court also to indicate that it had  
considered post-confirmation jurisdiction questions applicable to  
the litigation regarding the Indemnity Agreement here.

1 continued the hearing with additional briefing allowed. Id. at  
2 14:6-7.

3 The bankruptcy court outlined how the two issues should be  
4 addressed:

5 So that's my - and so my thought would be for the  
6 indemnification - of this particular litigation,  
7 because other litigation may be different if the  
8 debtors are co-liable, for this particular litigation,  
9 that this Court would abstain on the indemnification  
rights, except the Court would first decide - or maybe  
nothing would happen on advancement until the Court  
decided if it was time barred, this Court.

10 Id. at 3:5-12. When the bankruptcy court ruled that the state  
11 court "could resolve at least whether [Maddux is] entitled to  
12 indemnity" (Hr'g Tr. (May 25, 2012) 20:16-17), the Reorganized  
13 Debtor did not disagree. Id. at 20:18-19.

14 After the bankruptcy court heard oral argument on July 30,  
15 2012, on the Advancement Claim, the bankruptcy court summarized  
16 its ruling and stated that: "All I'm doing is saying that those  
17 contractual terms are going to govern, that they're not time  
18 barred because he didn't put the word 'advancement' in his proof  
19 of claim. . . . The Court thinks every right that the debtor has  
20 under that contract should be asserted." Hr'g Tr. (July 30,  
21 2012) 18:3-5; 18:18-19. Then, apparently referring to its  
22 abstention, the bankruptcy court stated: "But this Court isn't  
23 going to be deciding the issues about advancement any more than  
24 it's deciding issues about indemnification." Id. at 19:23-25.

25 We find no abuse of the bankruptcy court's exercise of its  
26 discretion to abstain on this record as indemnification and  
27 advancement rights are governed by state law, the dispute  
28 concerns post-confirmation litigation brought after the Effective

1 Date of the plan, and the Reorganized Debtor failed to articulate  
2 any effect or lack thereof on the efficient administration of the  
3 estate and cannot do so as the estate no longer exists post-  
4 confirmation.

5 On appeal, the Reorganized Debtor argues that the bankruptcy  
6 court did not properly exercise its discretion, because by  
7 abstaining the bankruptcy court inappropriately "refused to  
8 consider, or allow argument about, other bankruptcy-related or  
9 state law reasons to disallow the claim." Apl't Opening Br. at  
10 19. The Reorganized Debtor also argues that the bankruptcy court  
11 is the only proper tribunal to allow or disallow a claim. Id. at  
12 20.

13 The allowance or disallowance of claims is a core proceeding  
14 under 28 U.S.C. § 157(b)(2)(B). Bankruptcy courts, however,  
15 generally have concurrent jurisdiction under 28 U.S.C. § 1334(b),  
16 not exclusive jurisdiction, unless there is some applicable  
17 exception. The Reorganized Debtor did not cite to any applicable  
18 exception here, and we located none. Nor has the Reorganized  
19 Debtor identified any other bankruptcy issue implicated here as  
20 to which the bankruptcy court has exclusive jurisdiction, and we  
21 know of none.

22 In its Reply Brief on appeal, the Reorganized Debtor argues  
23 that if it establishes (apparently in the State Court Action)  
24 that Maddux acted inequitably, then the Reorganized Debtor should  
25 be allowed to request that the bankruptcy court equitably  
26 subordinate Maddux's claims. Apl't Reply Brief at 13. But  
27 pursuant to the Charlestown Plan, undisputed unsecured creditors  
28 were paid in full on the Effective Date. Subordination in this



1 100% payout chapter 11 case is of doubtful, if any,  
2 applicability. Moreover, the Reorganized Debtor's generalized  
3 reference to the possibility of equitable subordination is  
4 insufficient to cause us to question the propriety of the  
5 bankruptcy court's exercise of its discretion to abstain.

6 **CONCLUSION**

7 For all the reasons set forth above, we AFFIRM the orders of  
8 the bankruptcy court.

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28