

MAY 07 2013

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	CC-12-1412-TaPaKi
	)		
RONALD ALVIN NEFF,	)	Bk. No.	SV 11-22424-VK
	)		
Debtor.	)	Adv. No.	SV 12-01101-VK
	)		
<hr/>	)		
MICHAEL D. KWASIGROCH; LAW	)		
OFFICES OF MICHAEL D.	)		
KWASIGROCH,	)		
	)		
Appellants,	)		
	)		
v.	)	<b>MEMORANDUM*</b>	
	)		
DOUGLAS J. DENOCE,	)		
	)		
Appellee.	)		
<hr/>	)		

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

Filed: May 7, 2013

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

The Honorable Victoria S. Kaufman, Bankruptcy Judge, Presiding

Appearances: Michael D. Kwasigroch of the Law Offices of  
Michael D. Kwasigroch on behalf of the Appellants  
and Patrick Laird Swanstrom of the Law Offices of  
Patrick Laird Swanstrom on behalf of the Appellee.

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 Appellants-Defendants Michael D. Kwasigroch and the Law  
3 Offices of Michael D. Kwasigroch (jointly, "Kwasigroch") removed  
4 a state court civil action to the bankruptcy court. Appellee-  
5 Plaintiff Douglas DeNoce ("DeNoce") sought remand and recovery of  
6 costs and expenses under 28 U.S.C. § 1447(c) ("§ 1447(c)"). The  
7 bankruptcy court granted DeNoce's motion and awarded him  
8 \$3,015.62 in costs and expenses. Kwasigroch appeals only from  
9 the order awarding costs and expenses. We AFFIRM.

10 During the appeal, DeNoce separately moved for sanctions  
11 against Kwasigroch. We GRANT in part DeNoce's sanctions motion.

12 Also during the appeal, Kwasigroch moved to supplement the  
13 record on appeal. We DENY this request.

14 **FACTS**

15 DeNoce and Kwasigroch have a long acrimonious history that  
16 began when Kwasigroch represented a party in unrelated litigation  
17 against DeNoce. It continued as Kwasigroch represented debtor  
18 Ronald Neff ("Debtor") as a defendant in a state court dental  
19 malpractice action and other litigation initiated by DeNoce and  
20 in three bankruptcy cases and six adversary proceedings where  
21 DeNoce was a creditor or adverse party. The present appeal  
22 arises in the most recent adversary proceeding and in Debtor's  
23 third bankruptcy case. It involves claims DeNoce now asserts  
24 against Kwasigroch personally.

25 Debtor was a licensed dentist,<sup>2</sup> and DeNoce was one of his  
26 patients. At some time prior to the bankruptcies, Debtor injured

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27  
28 <sup>2</sup> Apparently, the Dental Board of California revoked  
Debtor's dental license in January 2010.

1 DeNoce during dental surgery. DeNoce then filed two actions  
2 against Debtor in state court, the first for dental malpractice.<sup>3</sup>  
3 As this litigation continued, Debtor initiated a series of  
4 bankruptcy cases. The bankruptcy court dismissed the first case,  
5 a chapter 13 case, when Debtor failed to appear at his § 341(a)  
6 meeting of creditors.

7 The Debtor promptly filed a second chapter 13 case, and  
8 Kwasigroch, on behalf of Debtor, removed DeNoce's state court  
9 actions to the bankruptcy court. DeNoce immediately sought  
10 remand. The bankruptcy court remanded the dental malpractice  
11 action.

12 Concurrently, DeNoce moved to dismiss Debtor's second  
13 bankruptcy case as a bad faith filing and requested a 180-day bar  
14 against a subsequent filing. DeNoce also commenced an adversary  
15 proceeding against Debtor and Kwasigroch (the "2010 Adversary  
16 Proceeding"). The 2010 Adversary Proceeding asserted claims  
17 under bankruptcy and state law. At some point thereafter, the  
18 bankruptcy court instructed or suggested that DeNoce dismiss  
19 Kwasigroch as a named defendant to the 2010 Adversary Proceeding,  
20 and DeNoce did so. Kwasigroch, however, continued as Debtor's  
21 counsel and moved to dismiss the 2010 Adversary Proceeding.

22 This motion to dismiss came before the bankruptcy court on  
23 June 22, 2011. Kwasigroch represented Debtor at the hearing.  
24 The bankruptcy court indicated its intent to dismiss DeNoce's  
25 bankruptcy-based claims with leave to amend and to dismiss his  
26

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27 <sup>3</sup> The second action involved claims based on, among other  
28 things, alleged fraudulent transfers. Its disposition is not  
relevant to the disputes here.

1 state law causes of action with prejudice. In doing so, the  
2 bankruptcy court expressly stated to the parties:

3 [T]his is the way we're going to do it. This Court is  
4 abstaining from any state law causes of action. If you  
5 have a state law cause of action, this Court is  
6 abstaining. Focus -- so if it's not based on a  
7 Bankruptcy Code provision, don't include it in your  
8 complaint, because this Court's abstaining.

9 Hr'g Tr. (June 22, 2011) at 37:23-25; 38:1-3.

10 In reiterating that the bankruptcy court was not the proper  
11 forum for state law causes of action, it further stated:

12 The problem is when somebody who is not a bankruptcy  
13 lawyer . . . and doesn't understand what the Bankruptcy  
14 Code means, now wants to act as though we weren't in a  
15 bankruptcy case and wants to assert state law fraud  
16 causes of action in a complaint filed in a bankruptcy  
17 case, it just -- it just isn't -- it's just not right.

18 Id. at 45:1-2; 4-8.

19 DeNoce asserted his belief that state law causes of action  
20 were acceptable based on the pendency of Debtor's adversary  
21 proceeding seeking recovery against insurance companies based on  
22 state law claims. In response, the bankruptcy court stated: "if  
23 it had come to this judge, this Court might have abstained from  
24 those too if they were filed here."<sup>4</sup> Id. at 49:2-4.

25 DeNoce thereafter complied with the clear directives from  
26 the bankruptcy court; he filed an amended adversary complaint  
27 that solely alleged causes of action arising under the bankruptcy  
28 code. Debtor, still represented by Kwasigroch, filed his Answer  
to the amended complaint and included a counterclaim against  
DeNoce and cross-claims against Roe defendants based on state law

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<sup>4</sup> Another bankruptcy judge initially heard matters in the second bankruptcy case and related adversary proceedings.

1 causes of action. DeNoce moved to dismiss. The bankruptcy court  
2 set the dismissal motion for hearing and required the parties to  
3 brief the impact of Stern v. Marshall, 131 S.Ct. 2594 (2011), on  
4 the bankruptcy court's authority in relation to Debtor's state  
5 law causes of action.

6         Meanwhile, DeNoce actively participated in Debtor's second  
7 bankruptcy case; he filed objections to Debtor's proposed  
8 chapter 13 plan, Debtor's claimed exemptions, and various  
9 proposed settlements between Debtor and other creditors.

10         Approximately 14 months after DeNoce initially moved to dismiss,  
11 the bankruptcy court entered an order dismissing Debtor's second  
12 bankruptcy case. The order contained a 180-day bar against  
13 filing under chapters 11 or 13, but did not bar filing under  
14 chapter 7. The order further provided that all pending adversary  
15 proceedings were dismissed, including the 2010 Adversary  
16 Proceeding. Thus, the bankruptcy court dismissed the 2010  
17 Adversary Proceeding before the parties filed briefs regarding  
18 Stern.

19         Before the order dismissing the second bankruptcy case was  
20 entered, Debtor, still represented by Kwasigroch, filed a third  
21 bankruptcy case under chapter 7. DeNoce again commenced  
22 adversary proceedings against Debtor, one alleging the  
23 nondischargeability of his claims and the other seeking a denial  
24 of Debtor's discharge. Pursuant to the bankruptcy court's  
25 instructions, DeNoce pursued his state law causes of action  
26 outside of the bankruptcy court. He commenced an action in state  
27 court ("Torts Action") and solely named Kwasigroch as the  
28 defendant. DeNoce asserted nine causes of actions against

1 Kwasigroch: (1) defamation; (2) invasion of privacy; (3) false  
2 light; (4) malicious prosecution; (5) abuse of process; (6) fraud  
3 and deceit; (7) intentional and negligent interference with  
4 prospective business/economic advantage; (8) intentional/reckless  
5 infliction of emotional distress; and (9) preliminary and  
6 permanent injunction.

7 Kwasigroch, notwithstanding the bankruptcy court's clear  
8 instruction and his knowledge of the potential impact of the  
9 Stern decision, immediately removed the Torts Action to the  
10 bankruptcy court and promptly moved to dismiss the removed case.<sup>5</sup>  
11 In response, DeNoce moved for remand of the Torts Action or, in  
12 the alternative, for the bankruptcy court's abstention. He also  
13 moved for costs and expenses incurred as a result of the removal  
14 pursuant to § 1447(c).

15 The bankruptcy court heard DeNoce's remand motion on May 16,  
16 2012. After argument, it ordered remand and an award of costs  
17 and expenses to DeNoce under § 1447(c). Prior to establishing  
18 the amount of the award, it required evidence from DeNoce as to  
19 the amount of his costs and expenses and provided Kwasigroch with  
20 an opportunity to respond. The bankruptcy court later entered  
21

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22  
23 <sup>5</sup> Kwasigroch also filed a third-party cross-complaint  
24 against Debtor for indemnity and declaratory relief. In  
25 addition, Kwasigroch moved to consolidate the removed action with  
26 DeNoce's adversary proceedings in Debtor's third bankruptcy case;  
27 to intervene on Debtor's behalf; and for compulsory joinder of  
28 Debtor. He then re-filed his motion for compulsory joinder to  
remove the request for consolidation. On the eve of the remand  
hearing, Kwasigroch and Debtor filed a third-party cross-  
complaint against Debtor's bankruptcy estate for indemnity,  
contribution, and declaratory relief.

1 the order remanding the Torts Action.<sup>6</sup>

2 The bankruptcy court heard the § 1447(c) recovery request on  
3 July 11, 2012. Prior to the hearing, DeNoce filed a declaration  
4 with exhibits and Kwasigroch filed an opposition and evidentiary  
5 objections to DeNoce's declaration and exhibits. On July 31,  
6 2012, the bankruptcy court entered a memorandum opinion and order  
7 ("Award Order") awarding DeNoce \$915.62 in costs and \$2,100 in  
8 fees, for a total award of \$3,015.62. In its order, the  
9 bankruptcy court also overruled Kwasigroch's evidentiary  
10 objections as lacking merit.

11 Kwasigroch timely filed his appeal from the Award Order.

#### 12 JURISDICTION

13 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
14 §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C.  
15 § 158.

#### 16 ISSUE

17 Did the bankruptcy court err in awarding costs and expenses  
18 under § 1447(c)?

#### 19 STANDARD OF REVIEW

20 We review the bankruptcy court's legal conclusions de novo,  
21 and its findings of fact for clear error. Allen v. US Bank, N.A.  
22 (In re Allen), 472 B.R. 559, 564 (9th Cir. BAP 2012). We review  
23 an award of costs and expenses for abuse of discretion.  
24 Lussier v. Dollar Tree Stores, Inc., 518 F.3d 1062, 1065

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25  
26 <sup>6</sup> The remand order vacated the scheduled hearings on  
27 Kwasigroch's motion to dismiss the removed action and his motions  
28 to intervene and join. While it is not entirely clear, it  
appears that, following remand, the bankruptcy court did not rule  
on Kwasigroch's cross-claims.

1 (9th Cir. 2008).

2 An abuse of discretion evaluation involves a two-prong test;  
3 first, we determine de novo whether the bankruptcy court  
4 identified the correct legal rule for application. See United  
5 States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en  
6 banc). If not, then the bankruptcy court necessarily abused its  
7 discretion. See id. at 1262. Otherwise, we next review whether  
8 the bankruptcy court's application of the correct legal rule was  
9 clearly erroneous; we will affirm unless its findings were  
10 illogical, implausible, or without support in the record. See  
11 id.

## 12 DISCUSSION

### 13 **A. An Award of Costs and Expenses Under § 1447(c) is Available** 14 **in a Bankruptcy Case.**

15 Kwasigroch contends that the bankruptcy court erred as a  
16 matter of law by awarding costs and expenses under § 1447(c) and  
17 relies on Billington v. Winograde (In re Hotel Mt. Lassen,  
18 Inc.), 207 B.R. 935, 938 (Bankr. E.D. Cal. 1997) to support his  
19 position. We disagree. It is well settled that § 1447(c)  
20 applies to bankruptcy removals and remands. Miller v. Cardinale  
21 (In re Deville), 280 B.R. 483, 494 (9th Cir. BAP 2002) (citation  
22 omitted), aff'd on other grounds, 361 F.3d 539 (9th Cir. 2004).  
23 Contrary to Kwasigroch's assertion, 28 U.S.C. § 1452 is not the  
24 exclusive source of relief for a remand in a bankruptcy case.  
25 Id. In re Hotel Mt. Lassen does not compel a different result  
26 and, in fact, supports the same result. See 207 B.R. at 942-43  
27 (bankruptcy court remanded five civil actions removed under 28  
28 U.S.C. § 1452 back to state court pursuant to § 1447(c)). Thus,



1 we reject the argument that the bankruptcy court could not award  
2 fees and costs under § 1447(c).

3 **B. The Bankruptcy Court Did Not Abuse Its Discretion in**  
4 **Awarding Costs and Expenses Under § 1447(c).**

5 In relevant part, § 1447(c) provides that an order remanding  
6 a case to state court may include an award for costs and expenses  
7 incurred (including attorney's fees) that resulted from the  
8 removal. Under § 1447(c), whether the removal was "improper" or  
9 "defective" is neither dispositive nor the proper inquiry.

10 Gardner v. UICI, 508 F.3d 559, 562 (9th Cir. 2007). Instead, the  
11 proper inquiry turns on the reasonableness of the removal.

12 Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005).

13 Absent unusual circumstances, the court may award costs and  
14 expenses under § 1447(c) only if the removing party lacks an  
15 objectively reasonable basis for seeking removal. Id.

16 Conversely, if the removing party has an objectively reasonable  
17 basis for removal, costs and expenses should be denied. Id.

18 Here, the bankruptcy court determined that Kwasigroch could  
19 not have reasonably believed that the bankruptcy court had  
20 jurisdiction over the Torts Action. The bankruptcy court further  
21 determined that, even if it had jurisdiction, Kwasigroch could  
22 not have reasonably believed that it would exercise jurisdiction  
23 based on the bankruptcy court's prior statements to the parties.  
24 This included not just the bankruptcy court's clear statements at  
25 the hearing dismissing the 2010 Adversary Proceeding, but also  
26 the requirement that Kwasigroch brief the impact of Stern on  
27 state law-based counter- and cross-claims.

28 In so holding, the bankruptcy court recognized that its

1 decision turned on the reasonableness of Kwasigroch's removal.  
2 This encapsulates the proper standard for awarding costs and  
3 expenses pursuant to § 1447(c): whether Kwasigroch had an  
4 objectively reasonable basis for removing the Torts Action.  
5 Although the bankruptcy court stated that its determination was  
6 based an improper removal, on this record, it is a distinction  
7 without a difference. The record clearly supports that it  
8 assessed the reasonableness of Kwasigroch's removal in the  
9 context of awarding the costs and expenses. Thus, the bankruptcy  
10 court applied the correct legal rule.

11 The bankruptcy court then made several findings in rendering  
12 its decision to award costs and expenses. First, it found that  
13 DeNoce complied with its prior instructions with respect to state  
14 law causes of action; DeNoce filed an amended adversary complaint  
15 in the 2010 Adversary Proceeding based solely on bankruptcy law  
16 claims. DeNoce thereafter separately pursued his state law  
17 claims in state court and through the Torts Action. It then  
18 found that Kwasigroch, in the teeth of its prior instruction and  
19 direction, removed the Torts Action, and did so despite the fact  
20 that Debtor was not a named defendant in the action and despite  
21 the fact that it solely consisted of state law causes of action.  
22 In doing so, the bankruptcy court determined that Kwasigroch's  
23 removal typified the:

24 [L]atest step in what has become a pattern of delaying  
25 the resolution of matters properly initiated in state  
26 court and attempting to litigate before [the bankruptcy  
court] state law claims that, as the [bankruptcy court]  
has reiterated, belong in state court.

27 Award Order at 11.

28 The bankruptcy court determined that its prior statements as

1 to state law causes of action were clear: it would not hear any  
2 causes of action solely predicated on state law. We agree and  
3 note that its requirement of briefing on issues arising under  
4 Stern underscored the bankruptcy court's instruction. It is not  
5 significant that the bankruptcy court made these statements in a  
6 prior adversary proceeding.

7 At oral argument, Kwasigroch pointed out that he was no  
8 longer a party to the 2010 Adversary Proceeding at the pertinent  
9 hearing and argued that, consequently, the bankruptcy court's  
10 directives did not apply to him. While it is true that  
11 Kwasigroch was no longer a party, he represented Debtor in the  
12 2010 Adversary Proceeding and actively participated at the June  
13 2011 hearing. Kwasigroch's contention is disingenuous. We  
14 reject it. The issue here is not whether Kwasigroch violated a  
15 court order; it is whether, given the bankruptcy court's  
16 unambiguous directive, a litigant in Kwasigroch's position could  
17 have reasonably believed that the bankruptcy court would preside  
18 over the Tort Action after removal.

19 The bankruptcy court also supported its cost and expenses  
20 award with a determination that it lacked jurisdiction over the  
21 Torts Action. Kwasigroch emphatically contends that the  
22 bankruptcy court possessed "related to" jurisdiction based on  
23 indemnity provisions in retention agreements executed by Debtor.  
24 He asserts that the indemnity provision requires Debtor to  
25 indemnify Kwasigroch for any liabilities incurred as a result of  
26 representing Debtor. DeNoce alleges that the retention  
27 agreements allegedly providing indemnity to Kwasigroch were back-  
28 dated and manufactured.

1 A cursory review of the record supports the bankruptcy  
2 court's determination that it lacked "related to" jurisdiction  
3 over the Torts Action. Bankruptcy jurisdiction includes all  
4 civil proceedings that are "related to" bankruptcy cases. See 28  
5 U.S.C. § 1334(b). A civil proceeding is "related to" a  
6 bankruptcy case if the outcome of the proceeding could  
7 conceivably have any effect on the administration of the  
8 bankruptcy estate. Fietz v. Great W. Sav. (In re Fietz), 852  
9 F.2d 455, 457 (9th Cir. 1988) (adopting the test in Pacor, Inc.  
10 v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984) (hereafter,  
11 "Fietz/Pacor").

12 Here, the bankruptcy court rejected Kwasigroch's alleged  
13 indemnity claim against Debtor and the bankruptcy estate as a  
14 basis for jurisdiction. It found that the possibility of an  
15 indemnity or contribution claim against Debtor or the estate,  
16 which existed only to the extent that Kwasigroch was first  
17 determined liable, was insufficient to establish jurisdiction.  
18 It noted that Kwasigroch's argument was precisely the argument  
19 rejected by the Pacor court.

20 In Pacor, the court determined that an action between non-  
21 debtor third parties had no effect on the debtor's bankruptcy  
22 estate. 743 F.2d at 995. It concluded that although the outcome  
23 of the subject action *potentially* gave rise to an indemnity claim  
24 against the estate, in the absence of contractual liability on  
25 the debtor's part, the outcome in the action would not  
26 definitively bind the debtor or determine its rights,  
27 liabilities, or next course of action. Id.

28 As the bankruptcy court here further noted, demonstrating

1 that Debtor was contractually obligated to indemnify Kwasigroch  
2 might have established "related to" jurisdiction. Kwasigroch,  
3 however, never presented the bankruptcy court with evidence of  
4 the retention agreements establishing such contractual liability.  
5 He referenced the potential indemnity claim in various papers,  
6 but did not refer to or attach any such retention agreements.

7 At the July 2012 hearing on the § 1447(c) award, Kwasigroch  
8 stated that he had a retention agreement with an indemnity  
9 provision. The record shows that he filed an amended proof of  
10 claim in Debtor's third bankruptcy case on the same day as the  
11 hearing, and he attached three copies of retention agreements  
12 executed by Debtor. Kwasigroch included the same copies in his  
13 excerpts of record. At the hearing, Kwasigroch advised the  
14 bankruptcy court that he amended his claim. The record, however,  
15 establishes that he never presented the bankruptcy court with the  
16 retention agreements directly and never otherwise provided  
17 evidence of their specific terms. Thus, notwithstanding that the  
18 retention agreements are part of Kwasigroch's excerpts of record,  
19 we do not consider them on appeal because Kwasigroch did not  
20 properly present them to the bankruptcy court. See Harkins  
21 Amusement Enters., Inc. v. Gen. Cinema Corp., 850 F.2d 477, 482  
22 (9th Cir. 1988) (only documents properly presented to the trial  
23 court are part of the record on appeal and, thus, subject to  
24 consideration on appeal). Therefore, the bankruptcy court  
25 correctly concluded based on the only actual evidence before it  
26 that Kwasigroch's alleged indemnity claim was insufficient to  
27 establish "related to" jurisdiction under Fietz/Pacor as there  
28 was no evidence establishing actual contractual liability.

1           The bankruptcy court also determined, and we agree, that the  
2 Torts Action exclusively consisted of state law causes of action  
3 solely between non-debtor parties. Only one cause of action -  
4 for malicious prosecution - contained allegations involving  
5 Kwasigroch's acts in the bankruptcy proceedings. That cause of  
6 action, however, is based on state law, not bankruptcy law, and  
7 related to an adversary proceeding in Debtor's second bankruptcy  
8 case. This does not, in and of itself, satisfy the test for  
9 "related to" jurisdiction under Fietz/Pacor. Neither does the  
10 fact that DeNoce is a personal injury creditor of Debtor or that  
11 Kwasigroch is Debtor's bankruptcy counsel. Therefore, the record  
12 supports the bankruptcy court's determination that it lacked  
13 jurisdiction over the Torts Action.

14           Even if jurisdiction existed, however, the result under  
15 these facts would be the same; and the bankruptcy court expressly  
16 so stated. Kwasigroch erroneously equates bankruptcy  
17 jurisdiction with an objectively reasonable basis for removal.  
18 In many instances, jurisdiction may supply an objectively  
19 reasonable basis for seeking removal. Here, however, "related  
20 to" jurisdiction would not justify removal. Kwasigroch is an  
21 attorney. He was an active participant at the hearing where the  
22 bankruptcy court expressly stated that it would not hear state  
23 court claims. He was aware of the Stern decision. The Torts  
24 Action involved only non-debtor parties and only state court  
25 causes of action. On this record, we find nothing illogical,  
26 implausible, or unsupported by the record in relation to the  
27 bankruptcy court's determination to award a modest amount of fees  
28 and costs under § 1447(c). Therefore, we affirm the Award Order.

1 **C. Kwasigroch Waived Issues and Arguments By Failing To**  
2 **Adequately Advance Them In His Opening Brief.**

3 In his opening brief, Kwasigroch made one brief reference to  
4 the bankruptcy court's evidentiary ruling. He states that  
5 DeNoce's declaration and exhibits were "not properly  
6 authenticated and [that] the declaration [was] full of argument,  
7 conjecture, speculation, and completely unfounded and lacking in  
8 personal knowledge as to the charges claimed." Apl't Op. Br. at  
9 20-21. He did not elaborate on this point.

10 We do not consider matters not specifically and distinctly  
11 raised and argued in an opening brief, or arguments and  
12 allegations raised for the first time on appeal. See Padgett v.  
13 Wright, 587 F.3d 983, 985 n.2 (9th Cir. 2009) (per curiam). As  
14 such, we do not consider the bankruptcy court's evidentiary  
15 ruling because Kwasigroch did not specifically or distinctly  
16 raise and argue that issue in his opening brief. We also note  
17 that much of the briefing and record on appeal involve a  
18 concerted effort by both parties to make irrelevant points about  
19 the nefarious nature of the other party. Nothing in the record  
20 shows that the bankruptcy court relied on such evidence in  
21 relation to the Award Order. As a result, any error in this  
22 regard would be harmless. See Van Zandt v. Mbunda (In re  
23 Mbunda), 484 B.R. 344, 355 (9th Cir. BAP 2012).

24 Kwasigroch also advances a number of arguments in his reply  
25 brief that he did not raise in his opening brief. We deem those  
26 arguments waived. See Alaska Ctr. for the Env't v. U.S. Forest  
27 Serv., 189 F.3d 851, 858 n.4 (9th Cir. 1999) ("Arguments not  
28 raised in [an] opening brief are waived.").

1 **D. Motions Filed by the Parties During the Appeal.**

2 After Kwasigroch filed his reply brief, DeNoce filed a  
3 separate motion seeking sanctions ("Sanctions Motion")<sup>7</sup> against  
4 Kwasigroch under various theories,<sup>8</sup> including Rule 8020.<sup>9</sup>  
5 Kwasigroch timely opposed the Sanctions Motion, and DeNoce  
6 replied.

7 On March 20, 2013, only two days prior to oral argument,  
8 Kwasigroch filed a motion to supplement the record on appeal  
9 ("Motion to Supplement"). He attached 14 exhibits to this  
10 motion, including documents filed in Debtor's adversary  
11 proceedings and documents filed in state court. DeNoce opposed  
12 prior to oral argument, and Kwasigroch replied thereafter on  
13 March 26, 2013.

14 This appeal was deemed submitted on March 22, 2013.  
15 Following submission, DeNoce filed a supplemental motion for  
16 sanctions to include fees incurred in responding to the Motion to  
17 Supplement. Kwasigroch then filed an opposition, and DeNoce  
18 filed a reply. In response, this Panel entered an order on April  
19 11, 2013, barring either party from filing any additional papers.  
20

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21 <sup>7</sup> After considering the motion and filed responses, this  
22 Panel issued an order advising that the Sanctions Motion would be  
23 considered with the merits of the present appeal.

24 <sup>8</sup> In addition, DeNoce moved for sanctions under 28 U.S.C.  
25 § 1927. We do not consider sanctions under this statute.  
26 Pursuant to In re DeVille, 361 F.3d at 546, bankruptcy courts are  
not courts of the United States. Consequently, we do not have  
the authority to impose sanctions under 28 U.S.C. § 1927.

27 <sup>9</sup> All "Rule" references are to the Federal Rules of  
28 Bankruptcy Procedure and all "Appellate Rule" references are to  
the Federal Rules of Appellate Procedure.



1 We address these motions as follows.

2 **1. Kwasigroch's Motion to Supplement the Record on Appeal.**

3 Parties to an appeal may supplement the record if there is a  
4 newly discovered fact or if it assists in clarifying the claims  
5 on appeal. See Morgan v. Safeway Stores, Inc., 884 F.2d 1211,  
6 1213 (9th Cir. 1989); Pl.'s Class Claimants in N.J. Action v.  
7 Elsinore Corp. (In re Elsinore Corp.), 228 B.R. 731, 733 n.1 (9th  
8 Cir. BAP 1998).

9 Kwasigroch contends that he filed the Motion to Supplement  
10 in response to DeNoce's "opposition brief" (presumably, DeNoce's  
11 opening brief) and the Sanctions Motion. Kwasigroch, however,  
12 had the opportunity to respond to DeNoce's opening brief and to  
13 the Sanctions Motion. In fact, Kwasigroch did so. The exhibits  
14 attached to his Motion to Supplement do not contain "newly  
15 discovered evidence" or documents that assist us in clarifying  
16 his arguments on appeal. The documents simply re-hash the  
17 litigation history between the parties. Moreover, Kwasigroch  
18 filed his motion and exhibits just two days prior to oral  
19 argument. There was nothing in the motion or exhibits that  
20 Kwasigroch could not have addressed in his reply brief or in his  
21 opposition to the Sanctions Motion. Therefore, we deny  
22 Kwasigroch's Motion to Supplement.

23 **2. DeNoce's Request for Sanctions Under Rule 8020.**

24 DeNoce primarily moves for sanctions based on the frivolous  
25 nature of Kwasigroch's appeal and pursuant to Rule 8020 and  
26 Appellate Rule 38. He contends that a reasonable practitioner  
27 would know that an appeal challenging the Award Order under an  
28 abuse of discretion standard would fail. Thus, he argues that

1 the appeal is frivolous and that sanctions are warranted. In his  
2 initial timely opposition, Kwasigroch states that the appeal is  
3 not frivolous in a single heading and that he stands on his  
4 briefs on appeal.

5 Rule 8020<sup>10</sup> provides that we may award damages and "single  
6 or double costs to the appellee" upon determining that an appeal  
7 is frivolous. An appeal is frivolous when the result is obvious  
8 or the appellant's arguments of error wholly lack merit. George  
9 v. City of Morro Bay (In re George), 322 F.3d 586, 591 (9th Cir.  
10 2003) (citation omitted).

11 Sanctions are also appropriate where the appellant simply  
12 seeks to re-litigate the trial court's factual findings without  
13 mounting a meritorious appeal. See DeWitt v. W. Pac. R.R. Co.,  
14 719 F.2d 1448, 1451 (9th Cir. 1983); Convergence Corp. v. Sony  
15 Corp. of Am., 681 F.2d 622, 623 (9th Cir. 1982) (per curiam);  
16 United States ex. rel. Ins. Co. of N. Am. v. Santa Fe Eng'rs,  
17 Inc., 567 F.2d 860, 861 (9th Cir. 1978) (per curiam). Sanctions  
18 may also be appropriate where the appellant pursues appeal for an  
19 improper purpose. This includes using the appellate process as a  
20 means to harass the appellee, see Oliver v. Mercy Med. Ctr.,  
21 Inc., 695 F.2d 379, 382 (9th Cir. 1982); Franchise Tax Bd. v.  
22 Roberts (In re Roberts), 175 B.R. 339, 345 (9th Cir. BAP 1994);

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24 <sup>10</sup> Rule 8020 is based on Appellate Rule 38. See Advisory  
25 Committee Notes to Rule 8020, 1997 Amendment (by conforming to  
26 the Appellate Rule 38 language, Rule 8020 recognizes that the BAP  
27 has authority to award damages and costs in connection with  
28 frivolous appeals). Thus, we consider DeNoce's request under  
Rule 8020 and not Appellate Rule 38. See Marino v. Classic Auto  
Refinishing, Inc. (In re Marino), 234 B.R. 767, 770 (9th Cir. BAP  
1999).

1 Young v. Beugen (In re Beugen), 99 B.R. 961, 966 (9th Cir. BAP  
2 1989), or as a dilatory tactic. See DeWitt, 719 F.2d at 1451;  
3 Santa Fe Eng's, 567 F.2d at 861.

4 Finally, sanctions may be appropriate based on submission of  
5 a substantively deficient appellate brief. This includes an  
6 incomprehensible brief, see Hamblen v. Cnty. of Los Angeles, 803  
7 F.2d 462, 464 (9th Cir. 1986) (per curiam), or citations to  
8 authority that fail to support the appellant's argument. See Mir  
9 v. Little Co. of Mary Hosp., 844 F.2d 646, 653 (9th Cir. 1988).

10 We determine that sanctions under Rule 8020 are appropriate.  
11 Kwasigroch's briefs on appeal are substantively deficient.  
12 Portions are incomprehensible. Kwasigroch makes allegations with  
13 little or no reference to the record or relevant legal authority.  
14 He copied and pasted several sections of a bankruptcy treatise  
15 into his opening brief without legal analysis of the pasted  
16 provisions. He presented several arguments for the first time in  
17 his reply brief and attached four exhibits; documents that were  
18 not part of the record on appeal and are not relevant to the  
19 appeal. After filing timely documents that were deficient, he  
20 apparently attempted to rectify the situation by filing the  
21 Motion to Supplement two days prior to oral argument. It  
22 attached 14 exhibits, consisting of 219 pages. The lengthy  
23 Motion to Supplement also did not comply with the applicable  
24 rules and did not contain newly discovered evidence or authority.

25 Kwasigroch has also mischaracterized Debtor's involvement in  
26 the removed Torts Action and in the present appeal. Some of his  
27 documents appear to indicate that Debtor was a co-defendant in  
28 the removed Torts Action or a co-appellant in the instant

1 appeal.<sup>11</sup> But neither assertion is true.<sup>12</sup>

2       Were Kwasigroch a pro se litigant, his work product might be  
3 explainable. But Kwasigroch is a licensed attorney. He, indeed,  
4 acknowledges that he is a seasoned attorney of 25 years with no  
5 prior disciplinary issues. Accepting this assertion as true, we  
6 conclude that there is no excuse for the deficiencies in  
7 Kwasigroch's filings.

8       Taken together, these facts suggest that Kwasigroch filed  
9 the present appeal, as the bankruptcy court aptly noted, as  
10 another step in a persistent pattern of improper litigation  
11 tactics. We do not make any determination as to the culpability  
12 of either party in any of the bankruptcy proceedings or state  
13 court matters. Our determination, however, is not made in a  
14 vacuum and, by definition, a pattern is a combination of acts or  
15 events forming a consistent arrangement. The quality of  
16 Kwasigroch's filings before us falls below that of a seasoned  
17 attorney who genuinely seeks to avail himself of the protection  
18 of the law. It is clear that Kwasigroch's goal was not to  
19 properly prosecute an appeal in relation to a small cost and fees  
20 award, but to inflict costs of appeal on DeNoce. The filing of  
21 the Motion to Supplement, in particular, evidences such intent.

22 \_\_\_\_\_

23       <sup>11</sup> The Notice of Appeal identifies the parties appealing as  
24 "Michael D Kwasigroch and Ronald Neff."

25       <sup>12</sup> We also recognize DeNoce's contention that Kwasigroch  
26 otherwise misrepresented the record on appeal in his reply brief.  
27 While there may be a basis for his assertion, it involves a  
28 matter in Debtor's second bankruptcy case. Neither the pertinent  
order nor hearing transcript are part of the record on appeal.  
While we could exercise our discretion to review those documents,  
we choose not to.

1 Kwasigroch, as a self-represented attorney, was in a position to  
2 cause DeNoce significant costs and expenses in relation to this  
3 appeal. Therefore, sanctions under Rule 8020 are appropriate.

4 Having determined that sanctions are warranted, we award  
5 DeNoce damages in the form of attorneys' costs and expenses  
6 incurred in defending against the appeal. See In re Roberts,  
7 175 B.R. at 345. He seeks approximately \$38,475 in attorneys'  
8 fees, plus costs.<sup>13</sup> We decline to award the full amount  
9 requested given the small award amount at issue on this appeal,  
10 and the fact that DeNoce also includes significant irrelevant  
11 material in his documents. Therefore, sanctions in the amount of  
12 \$10,000 are appropriate.

13 **3. DeNoce's Request for Sanctions for Noncompliance with**  
14 **Procedural Rules.**

15 DeNoce also moves for sanctions based on Kwasigroch's  
16 failure to comply with various federal rules of procedure,  
17 including the Rules, the BAP Rules, and the Appellate Rules.

18 In relevant part, Rule 8006 provides that an appellant must  
19 file a designation of items to be included in the record on  
20 appeal; the record on appeal then includes these designated items  
21 and certain items delineated in the rule. Rule 8009 requires the  
22 appellant to provide an excerpt of record as an appendix to its  
23 brief. Fed. R. Bankr. P. 8009(b); see also 9th Cir. R. 30-1  
24 (describing contents of excerpt of record). Once the record on  
25 appeal is complete, the parties to the appeal may supplement the  
26

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27 <sup>13</sup> DeNoce submitted the declaration of appellate counsel and  
28 counsel's time invoices, which detail the fees incurred in  
defending the appeal.

1 record only by motion or formal request. Lowry v. Barnhart,  
2 329 F.3d 1019, 1025 (9th Cir. 2003). A party to the appeal may  
3 not unilaterally supplement the record, particularly with  
4 documents that were not presented to the trial court. Id.

5 Failure to comply with the rules typically results in  
6 striking the extraneous documents. Id. In cases involving  
7 particularly serious violations, however, the court may impose  
8 monetary sanctions. Id. (citing 9th Cir. R. 30-2(d)).

9 In Lowry, the Ninth Circuit imposed monetary sanctions on  
10 the appellee when it included a document in its excerpts of  
11 record that did not exist when the trial court rendered its  
12 decision or when the appellant filed his opening brief. Id. at  
13 1025. In doing so, the court noted that monetary sanctions may  
14 not be proper for less serious violations. Id. at 1026 n.7.  
15 This includes violations where the document improperly included  
16 entails a very small portion of the excerpts of record or the  
17 issue is one of first impression. Id. (citations omitted). But  
18 see N/S Corp. v. Liberty Mut. Ins. Co., 127 F.3d 1145, 1146  
19 (9th Cir. 1997) (appellant's briefs were struck and appeal was  
20 dismissed based on appellant's failure to comply with briefing  
21 rules); Kano v. Nat'l Consumer Coop. Bank, 22 F.3d 899, 899 (9th  
22 Cir. 1994) (monetary sanction for non-compliance with formatting  
23 rules).

24 In his Designation of Record on Appeal ("Designation of  
25 Record"), Kwasigroch identified a number of papers and exhibits,  
26 including most of the docket in the removed adversary proceeding,  
27 certain proofs of claim, and various documents and orders entered  
28 in the other bankruptcy cases and adversary proceedings. None of

1 the four exhibits attached to Kwasigroch's reply brief, however,  
2 were included in his Designation of Record. Two of the exhibits  
3 were entered in Debtor's second bankruptcy case. The other two  
4 exhibits have absolutely no bearing on the appeal. Kwasigroch  
5 did not properly request leave to supplement the record prior to  
6 attaching the documents to his reply brief.

7 We agree that this behavior warrants sanctions.  
8 Nonetheless, given that we are imposing sanctions against  
9 Kwasigroch under Rule 8020, we decline to impose additional  
10 monetary sanctions for improperly supplementing the record.  
11 Instead, the exhibits attached to his reply brief are stricken,  
12 and we determine that this behavior provides a further basis for  
13 the sanctions already assessed.

14 **CONCLUSION**

15 Based on the foregoing, we AFFIRM the bankruptcy court's  
16 order awarding costs and expenses under § 1447(c). We GRANT in  
17 part DeNoce's motion for sanctions under Rule 8020, and we DENY  
18 Kwasigroch's motion to supplement the record on appeal.