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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NOT FOR PUBLICATION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. WW-10-1037-HJuMk
)
 6 MICHAEL R. MASTRO,) Bk. No. 09-16841
)
 7 Debtor.)
)
 8 _____)
)
 9 ANTHONY PETRARCA; ART MAZZOLA,)
)
 10 Appellants,)
)
 11 v.) **M E M O R A N D U M**¹
)
 12 JAMES RIGBY, Chapter 7)
 Trustee; UNITED STATES)
 13 TRUSTEE,)
)
 14 Appellees.)
 _____)

Submitted Without Oral Argument on January 21, 2011
at Seattle, Washington

Filed - April 20, 2011

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Samuel J. Steiner, Bankruptcy Judge, Presiding

Appearances: Jerome Shulkin of Shulkin Hutton, Inc., P.S. on
 brief for Appellants
 Christine M. Tobin of Bush, Strout & Kornfeld on
 brief for Appellee James F. Rigby, Chapter 7
 Trustee
 Thomas A. Buford III on brief for Appellee United
 States Trustee

Before: HOLLOWELL, JURY, and MARKELL, Bankruptcy Judges.

¹ This disposition is not appropriate for publication.
 Although it may be cited for whatever persuasive value it may
 have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

1 Appellants Anthony Petrarca and Art Mazzola (Petrarca and
2 Mazzola) appeal the bankruptcy court's order that resolved a
3 disputed chapter 7 trustee election by determining that an
4 insufficient percentage of creditors' claims requested the
5 election. The appellants' only challenge on appeal is to the
6 bankruptcy court's ruling that undersecured creditors were
7 eligible to vote the unsecured portions of their claims. Because
8 the outcome of the election would be the same even if the
9 undersecured creditors were excluded from the calculations, we
10 DISMISS the appeal as moot.

11 I. FACTS

12 Michael Mastro (the Debtor) is a large real estate developer
13 and investor. An involuntary chapter 7 bankruptcy petition was
14 filed against him on July 10, 2009, by three of his secured
15 creditors. The Debtor consented to the petition on August 20,
16 2009. On August 21, 2009, James Rigby was selected to serve as
17 the interim chapter 7 trustee (the Trustee).

18 Many of the Debtor's creditors, mostly banks, held real
19 property as collateral and were undersecured (the Undersecured
20 Creditors). Mastro's bankruptcy schedules show he had over
21 \$240,000,000.00 of unsecured debt and over \$100,000,000.00 of
22 undersecured debt. Petrarca and Mazzola are part of a group of
23 unsecured creditors consisting of friends and family of Mastro
24 who invested money with him (the F&F Group) and who are
25 collectively represented by Mr. Jerome Shulkin and his co-counsel
26 Mr. Dominick V. Driano (collectively, Shulkin).

27 The § 341 meeting of creditors was held on October 25, 2009.
28 At the meeting, Shulkin requested the election of a permanent

1 chapter 7 trustee pursuant to § 702(a). He proposed to elect
2 Mr. Brian Ward (Ward). The § 341 meeting was continued to
3 October 28, 2009. At the continued meeting, the trustee election
4 was held. Shulkin proffered 80 proxies from the F&F Group
5 holding over \$45,500,000.00 in unsecured claims casting votes for
6 Ward (the Proxies).

7 The United States Trustee (UST) presided over the election.
8 Shulkin and the Trustee reserved their rights to object to the
9 requests for the election and to the ballots cast.

10 On November 6, 2009, the UST filed a report of disputed
11 election (the Election Report). The Election Report presented
12 the UST's tabulations of the requests made and votes cast. He
13 determined that the required 20% in creditors' claims needed to
14 call for an election under § 702(b) was not met, and even if it
15 had been met, there were not enough votes cast to replace the
16 Trustee with Ward.

17 The UST calculated the pool of eligible claims as
18 \$180,717,663.32, which was based on two hundred proofs of
19 unsecured claims that were not objected to and that were filed in
20 the bankruptcy case prior to the date of the § 341 meeting. The
21 UST included in the calculation of eligible claims the unsecured
22 portions of the Undersecured Creditors' claims, totaling
23 \$51,498,544.39. With the Undersecured Creditors' claims
24 included, \$36,143,532.66 in claims had to vote in order to meet
25 the 20% threshold of § 702(b).

26 All of the submitted votes amounted to 33.7% of allowable
27 unsecured claims. However, in calculating the requests and
28 votes, the UST determined that the Proxies (\$45,532,262.91) had

1 been improperly solicited and, therefore, the UST did not include
2 them in the final total. With the Proxies excluded (and several
3 other adjustments that have not been challenged), only
4 \$18,934,153.89 in eligible unsecured claims requested an
5 election, falling well short of the \$36,143,532.66 needed to
6 satisfy § 702(b).

7 On November 16 and 19, 2009, Shulkin filed motions for the
8 resolution of the disputed election and objections to the
9 Election Report on behalf of several of the F&F Group, but not on
10 behalf of Petrarca and Mazzola². Shulkin contended that the
11 UST's calculation of the universe of claims was not accurate. He
12 made numerous objections to specific claims, asserted the Proxies
13 were valid, and argued that the Undersecured Creditors' claims
14 could not be included as eligible claims because the unsecured
15 interests were not liquidated or fixed. Shulkin asserted that
16 the correct universe of claims totaled \$81,820,669.90, and that
17 \$53,041,841.68 made the request for an election of trustee,
18 overwhelmingly choosing Ward.

19 Other parties objected to the Election Report as well. On
20 December 1, 2009, the Trustee filed a memorandum regarding the
21 disputed election. The Trustee contended the Proxies were
22 improperly solicited and were correctly disqualified, resulting
23 in insufficient votes to call and hold an election. The Trustee
24

25
26 ² The objection to the Election Report was filed on behalf
27 of the Italian Club, Inc., Zacri, Inc., Lucille Schweitzer, Lisa
28 Schweitzer, and the Italian Community Hall. It did not purport
to file an objection for the entire "ad hoc" Friends and Family
Group.

1 also contended that the Undersecured Creditors were allowed to
2 vote the unsecured portion of their proofs of claim when the
3 value of their collateral was listed in the Debtor's schedules or
4 established by submitted appraisals or tax assessments. The
5 Trustee asserted that the interests of the Undersecured Creditors
6 with regard to the unsecured portion of their claims was the same
7 as the interests of the unsecured creditors, and therefore, were
8 not materially adverse to the other unsecured creditors.

9 On December 5, 2009, the bankruptcy court held a hearing to
10 resolve the election. At the hearing the bankruptcy court
11 determined that the solicitation of the Proxies was improper and
12 disqualified them. Accordingly, the bankruptcy court ruled that
13 the amount of the claims voted by the proxy holders could not be
14 counted in whether 20% of the eligible claims requested the
15 election. The bankruptcy court also determined that the
16 Undersecured Creditors were entitled to vote the unsecured
17 portion of their proofs of claim provided that the value of their
18 collateral had been previously listed in the Debtor's schedules
19 or demonstrated by submitted appraisals or assessments. Finally,
20 the bankruptcy court found that the Undersecured Creditors did
21 not have an interest materially adverse to the other unsecured
22 creditors because they shared an interest in maximizing
23 distributions, and thus held eligible claims pursuant to
24 § 702(a).

25 Based on its rulings regarding the Proxies and the allowance
26 of the votes by the Undersecured Creditors, the bankruptcy court
27 found that there was an insufficient number of eligible claims to
28 request an election under § 702(b). It affirmed the Election

1 Report and entered an Order Re: Disputed Trustee Election
2 (Election Order) on January 15, 2010, naming the Trustee as the
3 permanent bankruptcy trustee. Petrarca and Mazzola timely
4 appealed.

5 **II. JURISDICTION**

6 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
7 § 157(b)(2)(A). We address our jurisdiction under 28 U.S.C.
8 § 158 below.

9 **III. ISSUES**

10 1. Do we have jurisdiction of the appeal?

11 2. If we have jurisdiction, did the bankruptcy court err
12 in entering the Election Order?

13 3. Is the appeal frivolous?

14 On February 19, 2010, Petrarca and Mazzola filed a
15 designation of the record and statement of issues on appeal.
16 They assigned error to the bankruptcy court's ruling regarding
17 the disqualification of the Proxies as well as its ruling
18 regarding the Undersecured Creditors' eligibility to be included
19 in the threshold necessary to call for an election and to cast
20 votes. However, in their Opening Brief on appeal, Petrarca and
21 Mazzola stated that they have abandoned the challenge to the
22 bankruptcy court's ruling regarding the Proxies.

23 **IV. STANDARDS OF REVIEW**

24 Our jurisdiction is a question of law that we address de
25 novo. Menk v. Lapaqlia (In re Menk), 241 B.R. 896, 903 (9th Cir.
26 BAP 1999). Additionally, standing is a jurisdictional issue,
27 which is reviewed de novo. Caudill v. N.C. Mach., Inc. (In re
28 Am. Eagle Mfg., Inc.), 231 B.R. 320, 327 (9th Cir. BAP 1999).

1 The bankruptcy court's conclusions of law regarding disputed
2 trustee elections are reviewed de novo, and its findings of fact
3 are reviewed for clear error. Berg v. Esposito (In re Oxborrow),
4 104 B.R. 356, 360 (E.D. Wash. 1989), aff'd, 913 F.2d 751 (9th
5 Cir. 1990); In re Am. Eagle Mfg., Inc. 231 B.R. at 328. A
6 bankruptcy court's calculation of whether the 20% requesting and
7 voting requirements of § 702 have been met is reviewed for an
8 abuse of discretion. Id. (citing In re Oxborrow, 913 F.2d at
9 754).

10 De novo review requires that we consider a matter anew, as
11 if it had not been heard before, and as if no decision had been
12 rendered previously. B-Real, LLC v. Chaussee (In re Chaussee),
13 399 B.R. 225, 229 (9th Cir. BAP 2008). A bankruptcy court abuses
14 its discretion when it applies the incorrect legal rule or its
15 application of the correct legal rule is "(1) illogical,
16 (2) implausible, or (3) without support in inferences that may be
17 drawn from the facts in the record." United States v. Loew,
18 593 F.3d 1136, 1139 (9th Cir. 2010) (quoting United States v.
19 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc)); see
20 also Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 577
21 (1985). Likewise, a bankruptcy court's factual finding is
22 clearly erroneous if it is illogical, implausible, or without
23 support in the record. United States v. Hinkson, 585 F.3d at
24 1262.

25 V. DISCUSSION

26 A. Trustee Elections

27 Section 702 sets forth the process for electing a permanent
28 trustee in a chapter 7 bankruptcy proceeding. In order to be

1 eligible to vote for a trustee, a creditor must hold an
2 allowable, fixed, liquidated, and unsecured claim, must not hold
3 an interest materially adverse to other eligible creditors, and
4 must not be an insider. 11 U.S.C. § 702(a). Under § 702(b), an
5 election is not valid unless creditors holding 20% of the
6 eligible claims request an election. A candidate is elected
7 trustee if creditors holding 20% of the eligible claims actually
8 vote and a majority of such claims is voted for the candidate.
9 11 U.S.C. § 702(c).

10 Rule 2003 charges the UST with presiding over the election
11 and filing a report of the election with the bankruptcy court.
12 Rule 2003(b), (d). If a party disputes the election and files a
13 motion with the bankruptcy court, the bankruptcy court will
14 resolve the dispute. Rule 2003(d).

15 B. Jurisdictional Issues

16 1. Standing

17 The Trustee and UST argue that because Petrarca and Mazzola
18 did not file objections to the Election Report or participate in
19 the hearing to resolve the disputed election, they do not have
20 standing to appeal the Election Order.

21 The Ninth Circuit has adopted the "person aggrieved" test
22 for determining whether a party has appellate standing. J.P.
23 Morgan Inv. Mgmt., Inc. v. United States Trustee (In re Martech
24 USA, Inc.), 188 B.R. 847, 850 (9th Cir. BAP 1995) (citing
25 Fondiller v. Robertson (Matter of Fondiller), 707 F.2d 441, 442
26 (9th Cir. 1983)). The test limits appellate standing to "those
27 persons who are directly and adversely affected pecuniarily by an
28

1 order of the bankruptcy court." Matter of Fondiller, 707 F.2d at
2 442.

3 The Ninth Circuit has held that a party's attendance and
4 objection at the bankruptcy court proceedings "should usually" be
5 prerequisites to fulfilling the "person aggrieved" standard to
6 appeal an order from that proceeding, unless the party received
7 insufficient notice. Brady v. Andrew (In re Commercial W. Fin.
8 Corp.), 761 F.2d 1329, 1335 (9th Cir. 1985); see also Weston v.
9 Mann (In re Weston), 18 F.3d 860, 864 (10th Cir. 1994) (creditors
10 lacked standing to appeal bankruptcy court's order resolving
11 trustee election because they did not participate in resolution
12 of disputed election). The rationale to support the holding was
13 a desire to promote economy and efficiency in the bankruptcy
14 system. In re Commercial W. Fin. Corp., 761 F.2d at 1334-35.
15 Attendance and objection in the bankruptcy court as a standing
16 requirement ensures that "the bankruptcy court is made aware of
17 all available evidence and objections when making its
18 determination . . . and prevent[s] a party in interest from
19 'lying in the weeds' during bankruptcy court proceedings . . .
20 only to appeal and generate additional unnecessary proceedings."
21 White v. Virginia (In re Urban Broadcasting Corp.), 304 B.R. 263,
22 272 (E.D. Va. 2004) (concluding participation and objection were
23 required for standing), aff'd on other grounds, 401 F.3d 236, 244
24 (4th Cir. 2005) (non-participation is an issue of waiver not
25 standing).

26 In this case, there is no dispute that the Appellants
27 received notice of the UST's Election Report and the hearing to
28 resolve the disputed election. Furthermore, the Appellants' same

1 arguments concerning the eligibility of the Undersecured
2 Creditors' claims and the validity of the Proxies were presented
3 to the bankruptcy court for determination by other parties,
4 including those from the F&F Group. Therefore, allowing Petrarca
5 and Mazzola to appeal the Election Order does not impede judicial
6 economy. Therefore, our analysis must focus on whether Petrarca
7 and Mazzola are directly and adversely affected pecuniarily by
8 the Election Order.

9 This panel has determined that:

10 [i]n choosing to enact Code Section 702, the statute
11 allowing creditors to vote for a Chapter 7 trustee,
12 Congress must have concluded that the choice of a
13 trustee could materially affect the creditors of the
14 estate. Parties who make the effort to attend the
15 meeting of creditors and vote for a trustee should be
16 allowed to appeal an order resolving a disputed
17 election.

18 In re Martech USA, Inc., 188 B.R. at 850. Accordingly, the
19 Election Order affects Petrarca and Mazzola directly and
20 pecuniarily. Because Petrarca and Mazzola, through their
21 attorney, attended and requested a trustee vote, we conclude that
22 they have standing to appeal the Election Order even though they
23 did not file their own objections to the Election Report before
24 the bankruptcy court.

25 2. Mootness

26 The UST and the Trustee also assert that by abandoning their
27 challenge to the disqualification of the proxy votes, Petrarca
28 and Mazzola have mooted their appeal. We agree.

Petrarca and Mazzola have not made any argument on appeal
challenging the bankruptcy court's adoption of the UST's figures

1 and calculations beyond asserting that the Undersecured
2 Creditors' claims were ineligible to be included in a call (or
3 vote) for a trustee election. The UST calculated the pool of
4 eligible creditors' claims as \$180,717,663.32. If the
5 Undersecured Creditors' claims are excluded, the amount of
6 eligible claims is reduced to \$129,219,118.93. Twenty percent of
7 that amount is \$25,843,823.79. Only \$18,934,153,89 in eligible
8 claims requested an election, falling short of the 20% threshold
9 amount. Furthermore, even when the Undersecured Creditors votes
10 are removed, the Trustee still received more votes than Ward.³

11 Constitutional mootness is derived from Article III of the
12 U.S. Constitution, which provides that the exercise of judicial
13 power depends on the existence of a case or controversy. DeFunis
14 v. Odegaard, 416 U.S. 312, 316 (1974); Clear Channel Outdoor,
15 Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25, 33 (9th Cir. BAP
16 2008). The doctrine of constitutional mootness is a recognition
17 of Article III's prohibition against federal courts issuing
18 advisory opinions. Church of Scientology of Calif. v. United
19 States, 506 U.S. 9, 12 (1980) ("It has long been settled that a
20 federal court has no authority to give opinions upon moot
21 questions or abstract propositions, or to declare principles or
22 rules of law which cannot affect the matter in issue in the case
23 before it.") (internal citations omitted).

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26 ³ The UST calculated that the Trustee received
27 \$109,119,623.36 in votes. If the \$51,498,544.39 held by the
28 Undersecured Creditors is subtracted from the voting total, the
Trustee received \$57,621,078.97 to Ward's \$8,239,101.50.

1 The mootness doctrine applies when events occur during the
2 pendency of the appeal that make it impossible for the appellate
3 court to grant effective relief. Id. The determining issue is
4 "whether there exists a 'present controversy as to which
5 effective relief can be granted.'" People of Village of Gambell
6 v. Babbitt, 999 F.2d 403, 406 (9th Cir. 1993) (quoting NW Env'tl.
7 Def. Ctr. v. Gordon, 849 F.2d 1241, 1244 (9th Cir. 1988)). If no
8 effective relief is possible, we must dismiss for lack of
9 jurisdiction. United States v. Arkison (In re Cascade Rds.,
10 Inc.), 34 F.3d 756, 759 (9th Cir. 1994).

11 Petrarca and Mazzola confined the appeal to the singular
12 issue of whether the bankruptcy court erred in finding that the
13 Undersecured Creditors held eligible claims entitling them to
14 request and vote in the trustee election. The numbers in the
15 Election Report indicate that Undersecured Creditors' claims did
16 not affect the outcome of the election. See, e.g., Am. W.
17 Airlines, Inc. v. Nat'l Mediation Bd., 119 F.3d 772, 777 (9th
18 Cir. 1997) (election outcome unchanged even if disputed votes
19 discounted, therefore plaintiff's injury not traceable to the
20 decision to include the votes). Therefore, even if we were to
21 reverse the bankruptcy court's determination that the
22 Undersecured Creditors were eligible to use the unsecured portion
23 of their claims to participate in the election, the Trustee would
24 remain the permanent trustee for the Debtor's bankruptcy case.
25 As a result, there is no case or controversy as to which we can
26 provide effective relief. Id. Any determination we would make
27 regarding this issue would be wholly advisory and beyond our
28 jurisdiction.

1 C. Frivolous Appeal

2 In his response brief on appeal, the Trustee requested that
3 the BAP enter an order to show cause why sanctions should not be
4 imposed on Petrarca and Mazzola for filing a frivolous and
5 deficient appeal.⁴ The Trustee did not file a separate motion
6 requesting sanctions.

7 We have the authority to impose sanctions under Rule 8020
8 when an appeal is frivolous.⁵ "An appeal is considered frivolous
9 in this circuit when the result is obvious or the appellant's
10 arguments of error are wholly without merit." See Taylor v.
11 Sentry Life Ins. Co., 729 F.2d 652, 656 (9th Cir. 1984) (internal
12 citations omitted) (applying Fed. R. App. P. 38). The imposition
13 of sanctions against litigants for a frivolous appeal is a matter
14 for our discretion. George v. City of Morro Bay (In re George),
15 144 Fed. Appx. 636, 637 (9th Cir. 2005). We decline to impose
16 sanctions under Rule 8020 because at the time Petrarca and
17 Mazzola filed their appeal, it was not wholly without merit.

18
19
20 ⁴ The Trustee contends the appeal is deficient because
21 Petrarca and Mazzola failed to file excerpts of record pursuant
22 to Rule 8009(b). That is not the case. Petrarca and Mazzola
23 filed excerpts that provided an adequate record on April 14,
24 2010. The Trustee filed an appellate brief and its own excerpts
25 of record on May 26 and 27, 2010, which was wholly duplicative of
26 the record supplied by Petrarca and Mazzola.

27 ⁵ Rule 8020 mirrors the language of Federal Rule of
28 Appellate Procedure. It provides that if we "determine[] that
an appeal from an order, judgment, or decree of a bankruptcy
judge is frivolous, [we] may, after a separately filed motion or
notice from the district court or bankruptcy appellate panel and
reasonable opportunity to respond, award just damages and single
or double costs to the appellee."

VI. CONCLUSION

Because we cannot provide effective relief to Petrarca and Mazzola if we were to reverse the bankruptcy court's ruling regarding the eligibility of the Undersecured Creditors' claims for purposes of § 702(b), we DISMISS the appeal as moot.