NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. NV-10-1407-JuHJo
	BAP No. NV-10-1449-JuHJo
KIMMI HALL,	BAP No. NV-10-1463-JuHJo
	(related appeals)*
Debtor.	
	Bk. No. 09-19942-BAM
WISHENGRAD LAW OFFICES, LLC,	
Appellant,	
v.	AMENDED** MEMORANDUM***
YVETTE WEINSTEIN, Chapter 7 Trustee; KIMMI HALL; INTERIM FUNDING, INC.,	
Appellees.	

Argued and Submitted on July 20, 2011
at Las Vegas, Nevada

Filed - August 22, 2011

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Bruce A. Markell, Bankruptcy Judge, Presiding

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* While not formally consolidated, these three related appeals were heard at the same time, and were considered together. This single disposition applies to the three appeals, and the clerk is directed to file a copy of this disposition in each appeal.

** The disposition originally listed the wrong bankruptcy case number of 09-19943. This disposition is amended to list the correct bankruptcy case number of 09-19942.

*** 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.

Appearances: Terry Coffing, Esq., of Marquis Aurbach Coffing argued for Appellant Wishengrad Law Offices, LLC; Elizabeth E. Stephens, Esq., of Sullivan Hill Lewin Rez & Engel argued for Appellee Yvette Weinstein; Damon Dias, Esq., of Dias Law Group, Ltd. argued for Appellee Interim Funding, Inc.

Before: JURY, HOLLOWELL, and JOHNSON,[1] Bankruptcy Judges.

Creditor, Wishengrad Law Offices, LLC ("WLO"), appeals from three orders issued by the bankruptcy court:

(1) the Order Sustaining Trustee's Objection to Proofs of Claim of Evan Wishengrad Claim Nos. 9-1 and 10-1, entered October 14, 2010 (BAP No. 10-1407);

(2) the Order Approving Settlement Agreement Regarding Distribution of Settlement Proceeds, entered November 3, 2010 (BAP No. 10-1449); and

(3) the Order Overruling Wishengrad Law Offices, LLC's Objection to Interim Funding Inc.'s Proof of Claim No. 8-1, entered November 15, 2010 (BAP No. 10-1463).

The Panel authorized joint briefing of the appeals by order entered December 7, 2010. We AFFIRM in all appeals.

I. FACTS

WLO represented debtor Kimmi Hall in a personal injury suit against Wells Fargo Bank, NA ("Wells Fargo") for injuries she sustained during an armed robbery at a Wells Fargo branch in Las Vegas, Nevada. Debtor entered into two retainer agreements[2]

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[1] Hon. Stephen L. Johnson, United States Bankruptcy Judge for the Northern District of California, sitting by designation.

[2] The first and second agreements dated October 20, 2006 and June 20, 2007, were between WLO and debtor. At the same time debtor executed the June 20, 2007 agreement, she executed a (continued...)

with WLO which provided that WLO would represent her on a contingency fee basis or, if debtor discharged WLO, she agreed to pay for WLO's services at prevailing hourly rates. Both agreements provided WLO with an attorney's lien on any recovery.

To fund litigation costs and debtor's living expenses while the action was pending, debtor entered into a series of agreements with Interim Funding, Inc. ("IFI"), a litigation funding company based in California. In connection with each agreement, Evan Wishengrad, the named partner of WLO, signed an Attorney/Client Acknowledgment stating that he answered debtor's questions regarding the agreement. He also separately signed each agreement below debtor's signature, acknowledging the terms. The agreements provided IFI with a lien and security interest in the Wells Fargo litigation proceeds and contained a choice-of-law clause, adopting California law.

WLO also represented debtor and her husband in a lawsuit brought against debtor by Jae Ha ("Ha"). Ha filed a lawsuit against debtor in state court for breach of contract which arose out of Ha's purchase of debtor's business. The retainer agreement provided that WLO's attorney's fees and costs incurred in the Ha litigation, billed at an hourly rate, would be secured by a lien on the Wells Fargo litigation proceeds. The agreement further stated that payment of fees in the Ha litigation was not contingent on the outcome of either the Ha or Wells Fargo litigation.

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[2](...continued)
separate agreement which contained similar provisions on behalf of her husband, Keith Hall, under a power of attorney.

WLO was unsuccessful in defending debtor in the breach of contract suit and Ha obtained a state court judgment against her for $229,048.26 on January 29, 2009. Subsequently, the state court awarded Ha $56,339.94 in attorney's fees and costs and a second judgment was entered against debtor on April 29, 2009.

Apparently to prevent Ha from executing on the state court judgments, debtor filed her chapter 7[3] petition on June 11, 2009. Appellee, Yvette Weinstein, was appointed the trustee.

WLO contacted the trustee, advising her of the personal injury lawsuit. Thereafter, the trustee sought to employ Mr. Wishengrad of WLO as special counsel. Debtor objected and requested the court to employ Peter Christiansen, Esq. of Christiansen Law Offices ("CLO") instead. According to Mr. Christianson's declaration in support of debtor's objection, debtor had filed a complaint against Mr. Wishengrad with the Nevada State Bar Association.[4]

On September 4, 2009, debtor converted her case from chapter 7 to chapter 13. She then filed an application to employ Mr. Christiansen as special counsel. At the September 16, 2009 hearing on the matter, the court found that Mr. Wishengrad and WLO were creditors of debtor and, therefore, held adverse interests to the bankruptcy estate and debtor. The

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[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

[4] We have taken judicial notice of the bankruptcy case docket and underlying bankruptcy records. Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

court instructed WLO to turn over its files related to the Wells Fargo litigation to CLO. In so doing, the court stated that to the extent WLO had a valid lien right against the files, WLO would be adequately protected.

CLO was appointed special counsel by order entered September 17, 2009.

On February 2, 2010, WLO filed proof of claim no. 9-1, an unsecured claim in the sum of $102,505.46 for attorney's fees and costs incurred in the Ha litigation. WLO also filed proof of claim no. 10-1, asserting a secured claim of $370,569.50 for attorney's fees and costs incurred in the Wells Fargo litigation.

On January 14, 2010, IFI filed proof of claim no. 8-1, asserting a secured claim for $350,010.

On March 2, 2010, debtor filed a motion to approve her settlement of the Wells Fargo litigation for $225,000. Before that motion could be heard, on March 18, 2010, the bankruptcy court entered an order reconverting debtor's chapter 13 case to one under chapter 7. Weinstein was appointed successor trustee. Debtor then withdrew her settlement motion.

The bankruptcy court ordered a settlement conference, which the trustee, debtor, debtor's general counsel, CLO, and creditors IFI and WLO attended on May 20, 2010.[5] With the exception of WLO, the parties agreed that the settlement proceeds would be distributed among the debtor, her husband, and

[5] Collectively the parties' claims exceeded the settlement amount and many of the claims were disputed.

certain secured and administrative claimants. The settlement expressly reserved $7,500 for unsecured creditors.

On June 22, 2010, the trustee filed her Motion to Approve Settlement of Personal Injury Case and to Approve Settlement Agreement Regarding Disbursement of Settlement Proceeds. WLO objected to the motion and Ha filed a joinder. Part of WLO's objection was that it was slated to receive zero from the Wells Fargo settlement proceeds even though it had asserted a secured claim on those proceeds.

The bankruptcy court heard the motion on July 27, 2010, and entered its order approving the settlement amount of $225,000 in the personal injury case on August 9, 2010 (the "Personal Injury Settlement Order"). However, because the trustee failed to object to WLO's secured proof of claim, the court did not approve the trustee's proposed settlement regarding the disbursement of the settlement proceeds (the "Disbursement Settlement"). The court stayed that portion of the trustee's motion for sixty days to give the trustee an opportunity to file her objection to WLO's claim and continued the matter to September 21, 2010.

On August 5, 2010, the trustee filed her objection to WLO's claim, arguing that WLO was not entitled to a charging lien or a retaining lien against the Wells Fargo settlement proceeds.

On September 7, 2010, WLO filed an objection to IFI's proof of claim. WLO asserted that IFI did not have a perfected lien and that IFI's agreements with debtor were champertous and thus void under Nevada law. WLO further argued that its attorney's lien had priority over IFI's asserted secured claim.

On September 21, 2010, the bankruptcy court heard the trustee's objection to WLO's claim. Also on calendar was the Disbursement Settlement which had been continued from July 27, 2010. After hearing oral argument, the bankruptcy court sustained the trustee's objection, allowing WLO's proofs of claim as unsecured only, with no part secured. Although the trustee argued at the time that WLO as an unsecured creditor lacked standing to object to IFI's claim, the bankruptcy court did not consider that argument because WLO's objection to IFI's claim was set for hearing on October 12, 2010. The court continued the Disbursement Settlement to October 12, 2010, so that those matters could be heard together.

At the October 12, 2010 hearing, the bankruptcy court overruled WLO's objection to IFI's claim on the merits and on the grounds that (1) WLO, as an unsecured creditor, lacked standing to object to IFI's claim; (2) if the Personal Injury Settlement Order was interlocutory, it would approve the trustee's motion in "toto", including the Disbursement Settlement, under the standards set forth in Martin v. Kane (In re A&C Props.), 784 F.2d 1377, 1381 (9th Cir. 1986); and (3) if the Personal Injury Settlement Order was final, then the settlement barred WLO from objecting to IFI's claim.

On October 14, 2010, the bankruptcy court entered the Order Sustaining Trustee's Objection to Proofs of Claim of Evan Wishengrad Claim Nos. 9-1 and 10-1.

On November 3, 2010, the court entered the Order Approving Settlement Agreement Regarding Distribution of Settlement Proceeds (the "Disbursement Settlement Order").

On November 15, 2010, the court entered the Order Overruling Wishengrad Law Offices, LLC's Objection to Interim Funding Inc.'s Proof of Claim No. 8-1.

WLO timely appealed each of the orders.

II. JURISDICTION

The bankruptcy court had jurisdiction over this proceeding under 28 U.S.C. §§ 1334 and 157(b)(2)(B) and (K). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUES

A. Whether the bankruptcy court erred in concluding that WLO did not have an allowable secured claim;

B. Whether the bankruptcy court erred in granting the trustee's motion to approve the Distribution Settlement; and

C. Whether the bankruptcy court erred in overruling WLO's objection to IFI's proof of claim.

IV. STANDARDS OF REVIEW

We review the bankruptcy court's conclusions of law and questions of statutory interpretation de novo and findings of fact for clear error. Rule 8013; Roberts, Sheridan & Kotel, PC v. Bergen Brunswig Drug Co. (In re Mednet), 251 B.R. 103, 106 (9th Cir. BAP 2000).

"The 'basic federal rule' in bankruptcy is that state law governs the substance of claims[.]" Raleigh v. Ill. Dep't of Rev., 530 U.S. 15, 20 (2000). Under Nevada law, whether a statute's requirements must be complied with strictly or only substantially is a question of law that we review de novo. Leven v. Frey, 168 P.3d 712, 714 (Nev. 2007).

We review a bankruptcy court's decision to allow or deny a

proof of claim for an abuse of discretion. Bitters v. Networks Elec. Corp. (In re Networks Elec. Corp.), 195 B.R. 92, 96 (9th Cir. BAP 1996) ("the bankruptcy court has sole jurisdiction and discretion to allow or disallow the claim under federal law.") (citing Pepper v. Litton, 308 U.S. 295, 304 (1939)).

We review the bankruptcy court's decision to approve a settlement under Rule 9019 for an abuse of discretion. In re A&C Props., 784 F.2d at 1380.

We also review a court's decision whether to hold an evidentiary hearing for an abuse of discretion. See Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1139 (9th Cir. 2004).

We follow a two-part test to determine objectively whether the bankruptcy court abused its discretion. United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc). First, we "determine de novo whether the bankruptcy court identified the correct legal rule to apply to the relief requested." Id. Second, we examine the bankruptcy court's factual findings under the clearly erroneous standard. Id. at 1262 n.20. We affirm the court's factual findings unless those findings are "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" Id. If the bankruptcy court did not identify the correct legal rule, or its application of the correct legal standard to the facts was illogical, implausible, or without support in the record, then the bankruptcy court abused its discretion. Id.

V. DISCUSSION

A. The Order Sustaining Trustee's Objection to WLO's Proofs of Claims Nos. 9-1 and 10-1

WLO contends the bankruptcy court erred in sustaining the trustee's objection to its secured claim by (1) deciding that WLO's charging lien was unperfected under Nevada law and (2) concluding that WLO had not met its burden to demonstrate the value of its retaining lien.

WLO'S Charging Lien

An attorney's charging lien in Nevada is governed by Nevada Revised Statute ("NRS") 18.015 which provides in part:

> 1. An attorney at law shall have a lien upon any claim, demand or cause of action, including any claim for unliquidated damages, which has been placed in the attorney's hands by a client for suit or collection, or upon which a suit or other action has been instituted. The lien is for the amount of any fee which has been agreed upon by the attorney and client. In the absence of an agreement, the lien is for a reasonable fee for the services which the attorney has rendered for the client on account of the suit, claim, demand or action.
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> 2. An attorney perfects the lien by serving notice in writing, in person or by certified mail, return receipt requested, upon his or her client and upon the party against whom the client has a cause of action, claiming the lien and stating the interest which the attorney has in any cause of action.
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> 3. The lien attaches to any verdict, judgment or decree entered and to any money or property which is recovered on account of the suit or other action, from the time of service of the notices required by this section.

In determining whether WLO perfected its charging lien in the Wells Fargo settlement proceeds, our analysis begins with the language of NRS 18.015 itself. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989). A plain reading of the

statute demonstrates that for WLO to perfect its lien it must have served notice of the lien (1) in writing; (2) by personal service or by certified mail, return receipt requested; and (3) on its client (debtor) and the adverse party (Wells Fargo). Perfection of an attorney's lien is required prior to its enforcement. Michel v. Eighth Dist. Ct., 17 P.3d 1003, 1007-08 (Nev. 2001).

Because of the manner of service prescribed (personal or certified mail), we construe the requirement of service to include evidence of a proper return. Here, there is no return receipt or other proof in the record evidencing service upon debtor or Wells Fargo by either certified mail or personal service. Accordingly, WLO's charging lien was unperfected at the time of debtor's bankruptcy filing unless (1) an exception to the automatic stay allowed it to perfect its lien postpetition or (2) the substantial compliance doctrine applies to the notice requirements in NRS 18.015(2).

1. Exception To The Automatic Stay

WLO asserts that an exception to the automatic stay exists under §§ 362(b)(3) and 546(b) because it had an interest in debtor's property prepetition and that therefore it was entitled to perfect the lien postpetition.[6] Those provisions allow the

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[6] Section 362(b)(3) provides for an exception to the stay "of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) . . . ."

Section 546(b)(1) provides:

(continued...)

postpetition perfection of liens only if applicable nonbankruptcy law provides for the perfected lien to be effective against a previously acquired interest in the property; i.e., to "relate back." WLO contends that under these circumstances the applicable nonbankruptcy law referenced in § 546(b) is the common law governing attorney's liens. According to WLO, under common law, an attorney's lien relates back to the time the attorney began working on the case.

The Nevada bankruptcy court in In re Nicholson, 57 B.R. 672 (Bankr. D. Nev. 1986) squarely rejected WLO's position. In In re Nicholson, the bankruptcy court allowed the trustee to avoid the attorney's lien under §§ 545(2) and 544(a) on the grounds that the attorney had not complied with the notice provision under NRS 18.015(2) and the statute did not explicitly allow for the relation back of the lien to prior to the commencement of debtor's bankruptcy case.

We discern no reason to depart from the holding in Nicholson. An attorney's lien in Nevada is governed by statute

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[6](...continued)
The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that--

(A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection; or

(B) provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation.

and the plain language of NRS 18.015(2) does not indicate that relation back is permitted. Thus, we are not persuaded by WLO's argument that common law principles should be used to fill in the gaps in Nevada's charging lien statute; there are simply no gaps to fill when the statute explicitly states what is required for the perfection and attachment of attorney's liens.

In sum, there is no exception to the automatic stay which would allow WLO to perfect its lien postpetition.

2. Substantial Compliance

Alternatively, WLO argues that it substantially complied with the notice provisions in the statute. WLO asserts that it gave notice to debtor of its lien by including specific language in its retainer agreement stating that WLO maintained a charging lien on any proceeds from the litigation, which debtor was required to sign and initial acknowledging the lien. WLO further contends that Wells Fargo was aware of WLO's representation and that WLO would have a potential claim on any award or settlement as this is customary in personal injury litigation. Last, WLO contends that neither debtor nor Wells Fargo would be prejudiced by the lack of strict compliance.

The Nevada Supreme Court has stated that Nevada lien law "should be liberally construed in aid of the object of the legislature, which was to furnish security to attorneys by giving them a lien upon the subject of the action." Berrum v. Georgetta, 98 P.2d 479, 480 (Nev. 1940). Whether a statute's notice requirements must be complied with strictly or only substantially is a question of law that we review de novo. Leven, 168 P.3d at 714. In determining whether strict or

substantial compliance is required, Nevada courts examine the statute's provisions, as well as policy and equity considerations. Id. at 717.

NRS 18.015(2) does not require any magic words or forms for the notice requirement. Under Nevada law, substantial compliance may be sufficient for "form and content" requirements. Id. at 718. However, the statute is specific regarding the manner of notice. Nevada courts strictly construe statutory "time and manner" requirements. Id.

The District Court of Nevada in Schlang v. Key Airlines, Inc. 158 F.R.D. 666 (D. Nev. 1994) recognized this tenet. In Schlang, the attorney sent notice by regular mail. The district court found the method was ineffectual under the plain language of NRS 18.015(2) and held that the attorney's lien was not perfected. The court stated that "[t]o find otherwise, would effectively eliminate the specifically enumerated avenues of notice that are set forth in the statute." Id. at 669.

Even in the mechanics' lien arena, upon which WLO heavily relies, the Nevada Supreme Court has held that the requirements of the mechanics' lien statute cannot be so "liberally construed as to condone the total elimination of a specific requirement of the statute." Schofield v. Copeland Lumber Yards, , 692 P.2d 519, 520 (Nev. 1985). Here, the strict manner and mode of service requirements in the statute do not permit the perfection of a lien merely by referring to it in a retainer agreement. When no alternative method is provided by the statute, the method prescribed must be taken as exclusive. Moreover, the record does not show that any written notice was served on Wells

Fargo.

Finally, equitable considerations have a role in determining whether the substantial compliance doctrine is applicable. The record does not show that WLO took any steps to comply with the statute nor has it offered a reasonable explanation as to why it did not comply. Therefore, we agree with the bankruptcy court's conclusion that the actions described by WLO did not constitute substantial compliance.

3. Loss Of Lien Rights

WLO also asserts that it did not lose its lien against the Wells Fargo settlement proceeds when it was replaced by CLO. However, it is unnecessary for us to decide this issue because it assumes in the first instance that WLO had a valid lien, which it did not. As discussed above, WLO could not serve debtor and Wells Fargo with a notice of lien after the bankruptcy filing, as any attempt to do so would be invalid.

In sum, based on this record, the bankruptcy court did not err in sustaining the trustee's objection to WLO's charging lien.

WLO's Retaining Lien

Under Nevada law, a common law retaining lien entitles an attorney to retain a client's papers or property until a court, at the request of the client, requires the attorney to deliver the retained items upon the client's payment or furnishing of security for the attorney's fees. Figliuzzi, 890 P.2d at 801.

The bankruptcy court ordered WLO to turn over the files to the trustee under § 542(e) which provides:

Subject to any applicable privilege, after notice and

> a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.

Although § 542(e) does not address what happens to an attorney's retaining lien or whether the attorney is entitled to some sort of adequate protection, bankruptcy courts have concluded that upon turnover, the lien remains intact and the lien is entitled to appropriate valuation. Direnfeld, Greene & Blackburn Co. v. Olmsted Utility, Inc. (In re Olmsted Utility, Inc.), 127 B.R. 808, 811 (Bankr. N.D. Ohio 1991); In re Jarax Int'l, Inc., 81 B.R. 715, 717 (Bankr. S.D. Fla. 1987); Oiltech, Inc. v. Nelson & Harding (In re Oiltech, Inc.), 38 B.R. 484, 488 (Bankr. D. Nev. 1984). We look to these cases as providing direction on valuation.

1. Valuation

In In re Olmsted, 127 B.R. at 813, the bankruptcy court observed the difficulty of such a valuation:

> [t]he liens and interests provided for in the Code are rights in property of the debtor which, at least in principle, are capable of sale . . . [t]he value of the retaining lien, on the other hand, bears no relationship to any sort of market concept . . . [and][t]he value is solely a function of the client's need . . . .[t]he closest analogy is ransom not sale.

The Olmsted court engaged in a benefit to the estate analysis. The court observed that if the lawsuit to which the retaining lien relates resulted in an award to the estate, it would be appropriate to permit the professional to share in the reward. "It can be argued plausibly, therefore, that unless the professional receives some share of the benefit, creditors of

the estate will have been unjustly enriched at the professional's expense." Id. However, the court recognized that where the papers turned over neither add to the estate nor help preserve it, there was likely no basis upon which to compensate the lien holder. Id. The court acknowledged that this approach might result in no payment being made on a valid retaining lien. Id.

In In re Jarax, the court found that if the records were essential to the recovery of assets, the court would value the lien commensurate with the amount of the recovery. The bankruptcy court instructed the law firm in its proof of claim to fully document the amount claimed, enumerate the records turned over, assert specifically its claim of lien in detail, and identify the source of the records, whether obtained from the debtor directly, generated as attorney-client work product, or obtained from another source. 81 B.R. at 717.

Finally, in In re Oiltech, the bankruptcy court recognized the problematic task of valuing an attorney's lien and adequately protecting it. In that case, the court scheduled an evidentiary hearing to determine the value to the debtor of the books, records, and files once held by the law firm. 38 B.R. at 489.

In papers filed in support of its retaining lien prior to the hearing on the claims objection, WLO proposed that the value of the files could be measured by (1) WLO's undisputed billing statements; (2) the settlement that was reached; or (3) WLO's hard costs, which totaled $49,394.25. All three valuations depended upon the affidavit of Mr. Wishengrad, who described the

immense amount of work that WLO had undertaken as counsel for debtor.

But none of WLO's proposed values met the standards for proving the value of a retaining lien under established case law. The appropriate measure is the benefit of the documents to the estate, not the amount of unpaid legal fees (or hard costs). See In re Olmsted, 127 B.R. 808; In re Herrera, 390 B.R. 746, 749 (Bankr. S.D. Fla. 2008).

Moreover, the record shows that WLO never established any relationship between the value of the files and the amount of the settlement. As observed by the bankruptcy court, standing alone, none of WLO's proposed methods for valuation proved that the files were the sole cause of the settlement. The bankruptcy court correctly noted that there were many other factors that could have contributed to the ultimate settlement, not the least of which were services of Mr. Christianson who actually attended the settlement conference. In short, nowhere in the record did WLO provide direct evidence on the issue of the documents' role in achieving the recovery versus Mr. Christianson's role.

After the fact, WLO in its reply brief and supplemental excerpts of record, shows that CLO's staff spent 11.3 hours reviewing WLO's files and 7.7 hours reviewing and summarizing transcripts of depositions. WLO concludes from these time records that the files were not irrelevant or ignored by CLO. However, the record does not show that this evidence was presented to the bankruptcy court in the first instance. Consequently, we do not consider it on appeal. Lowry v. Barnhart, 329 F.3d 1019, 1024–25 (9th Cir. 2003). Even so,

consideration of the additional documents would not change the outcome because the time spent reviewing the files or summarizing transcripts, without more, does not prove that the information was used for the settlement.

2. Lack of Evidentiary Hearing

WLO also argues that the bankruptcy court erred by refusing to continue the matter for more discovery and an evidentiary hearing. A bankruptcy court's decision on whether to conduct an evidentiary hearing is reviewed for an abuse of discretion. Murphy v. Schneider Nat'l, Inc., 362 F.3d at 1139. The bankruptcy court here concluded that an evidentiary hearing was unwarranted when the matter had been continued numerous times and WLO had ample opportunity to take discovery.

WLO cites In re Oiltech, 38 B.R. 484, for the proposition that an evidentiary hearing is required in connection with the valuation of an attorney's retaining lien. There, the debtor posted $30,000 as replacement collateral for the books and records it needed, but the bankruptcy court was reluctant to value the lien at $30,000 in a vacuum. Therefore, the court scheduled an evidentiary hearing to determine the value to the debtor of the books, records, and files. However, Oiltech does not hold that an evidentiary hearing is required to determine the value of a retaining lien; it allowed one on its facts.

Otherwise, WLO presented no argument in its opening brief as to why the bankruptcy court's refusal to continue the matter for more discovery and an evidentiary hearing was an abuse of discretion. Arguments not specifically and distinctly made in an appellant's opening brief are waived. Golden v. Chicago

Title Ins. Co. (In re Choo), 273 B.R. 608, 613 (9th Cir. BAP 2002). WLO does not contend that it received inadequate notice or opportunity to be heard. Moreover, the bankruptcy court permitted WLO to file any evidence in support of its claim and the record shows WLO had ample time to conduct discovery.

In sum, we discern no error in the bankruptcy court's disallowance of WLO's claim as secured based on a lack of proof to support the asserted value of its retaining lien.

B. The Order Approving The Distribution Settlement

At the October 12, 2010 hearing, the bankruptcy court approved the Distribution Settlement under an A&C Props. analysis in conjunction with overruling WLO's objection to IFI's proof of claim. In so doing, the bankruptcy court relied to a large extent on its previous findings made at the original July 27, 2010 hearing on the trustee's settlement motion. At that hearing the court throughly discussed the factors in A&C Props. as they pertained to the settlement regarding the personal injury claim and the distribution of the settlement proceeds. In particular, the court found the settlement(s) in the best interest of creditors because of the holdback of $7,500 for unsecured creditors.

Nowhere does WLO contend that the court's analysis under A&C Props. was incorrect. Rather, WLO's primary issue with the court's approval of the Distribution Settlement was that it failed to take into account WLO's secured attorney's lien or replacement lien. However, as discussed above, we agree with the bankruptcy court's decision that WLO was an unsecured creditor. Because no other errors are assigned to the court's

ruling, further discussion of the A&C Props. factors is unnecessary. Accordingly, we conclude that the bankruptcy court did not abuse its discretion in approving the Distribution Settlement.

C. The Order Overruling WLO's Objection to IFI's Proof of Claim No. 8-1

The bankruptcy court overruled WLO's objection to IFI's proof of claim on several grounds.

1. Standing

The bankruptcy court found that WLO, as an unsecured creditor, did not have standing to object to IFI's claim.

Section 502(a) provides that a party in interest may object to a claim. Creditors are considered parties in interest under § 502(a). Lawrence v. Steinford Holding, B.V. (In re Dominelli), 820 F.2d 313, 315 (9th Cir. 1987). However, as a general rule, once a trustee is appointed, the trustee is the optimal party in interest to raise objections on behalf of the estate. Id. at 317. The reason for limiting an unsecured creditor's right to object to another creditor's claim is the need for the orderly and expeditious administration of the estate and the recognition that, as the spokesman for all creditors, a trustee normally can represent each general creditor as effectively as could the creditor itself. Id. However, where the trustee's interests conflict with those of an individual secured creditor, the rule is inapplicable because "all interests should be represented in the bankruptcy court." Id.

The Ninth Circuit in In re Dominelli held that, in the

context of a settlement of the estate's claim against a lienholder, the conflict between a trustee and an individual secured creditor could be remedied by giving notice and providing the secured creditor an opportunity to be heard at the hearing on the settlement. Id. The court further held that once a court approves the settlement, the settlement operates as res judicata to bar any creditor from raising a claim objection on behalf of the estate.

While In re Dominelli is not on all fours with the facts presented here, its holdings apply to this case. Although WLO filed its objection to IFI's claim prior to the court's ruling on its unsecured status, a party's standing is subject to review at any stage of litigation. Max Recovery, Inc. v. Than (In re Than), 215 B.R. 430, 434 (9th Cir. BAP 1997). Therefore, once the bankruptcy court ruled that WLO held unsecured claims, a ruling with which we agree on appeal, the trustee was the optimal party in interest to raise objections to IFI's claim on behalf of the estate.

Further, we could find no evidence in the record that demonstrated the trustee's interests conflicted with those of WLO. If there was any conflict, it was remedied because WLO had notice and an opportunity to participate in the hearing on the settlement. The trustee did not decline or refuse to challenge IFI's claim, but instead determined that settlement of the competing claims, including those of IFI, against a limited pot of money was in the best interest of the estate. In fact, WLO had the opportunity to settle its own claims with the trustee, which it did not do.

In connection with WLO's objection to IFI's claim, the bankruptcy court approved the Distribution Settlement, a decision which we affirm on appeal. Under these circumstances, we agree with the bankruptcy court that WLO did not have standing to object to IFI's claim on behalf of the estate.

2. The Merits Of IFI's Claim

The bankruptcy court also overruled WLO's objection to IFI's claim on the merits.

a. Choice Of Law And Champerty

WLO argues that IFI's agreements with debtor were unenforceable under Nevada law because they were champertous. Therefore, WLO contends IFI's claim must be disallowed under § 502(b)(1) which provides that a claim must be disallowed if it is unenforceable against the debtor and property of the debtor under any agreement or application law.

Each of the agreements between debtor and IFI, which were acknowledged by WLO, had a choice-of-law clause, adopting California law. WLO argues that Nevada law should apply because the agreements between debtor and IFI are champertous and against the public policy of Nevada.[7] Nevada recognizes champertous agreements, however, California has never recognized the common law doctrines of champerty and maintenance. See Muller v. Muller, 23 Cal.Rptr. 900, 901 (Cal. Ct. App. 1962). We review de novo the bankruptcy court's decision concerning the

[7] As discussed below, if the parties' choice of law is contrary to the public policy of Nevada, Nevada may reject that choice of law. Further, the choice of law matters here because perfection of IFI's lien under California law differs from perfection under Nevada law.

appropriate choice of law. Abogados v. AT&T, Inc., 223 F.3d 932, 934 (9th Cir. 2000).

Nevada uses a multi-factor test to determine whether to enforce a choice-of-law provision in a contract. Ferdie Sievers & Lake Tahoe Land Co. v. Diversified Mortg. Investors, 603 P.2d 270, 273 (1979). The parties are required to act in good faith and not for the purpose of evading the law of the real situs of the contract. Additionally, the situs must have a substantial relationship to the transaction and the agreement must not be contrary to the public policy of the forum. Id. So long as the parties satisfy these factors, the contract's choice-of-law provision must be given effect.

In Sievers, the Nevada Supreme Court affirmed the trial court's holding that the choice-of-law provision applying the law of Massachusetts was enforceable against a Nevada resident. Massachusetts allowed an interest rate in excess of twelve percent, whereas Nevada did not. In declining to find the choice-of-law clause violative of public policy, the Nevada Supreme Court observed:

> A crucial function of choice-of-law rules is that their application should further harmonious relations between states and facilitate commercial intercourse between them. If we disregard this important conflicts function here because a contract provision is not in accord with our statutes and thus violative of a strong forum public policy, we would perhaps rarely find another state's laws controlling. Consequently, the clear intentions of the parties would be defeated.

Id. at 274. The court concluded that "[i]f the parties have stipulated . . . to a fair and reasonable rate of interest valid under the laws of a state to which the transaction has a

substantial nexus, and there is not a clear effort to evade our state law, the provision should not be found violative of our public policy unless the rate is substantially above what our law allows so as to shock the conscience of this court." Id.

With these directives in mind, we conclude that the choice-of-law provision in the parties' agreement should be upheld. The record shows that IFI is a California corporation that evidently transacts business throughout the United States, that the agreements at issue were drawn up in California and that the funds advanced to debtor came from California. Thus, there is sufficient evidence to support a finding that the transactions between debtor and IFI had a substantial relationship with California. Moreover, the parties' intent controls unless there is evidence that IFI's intent was to do anything other than to have all of its loan transactions governed by the laws of its domicile, California. There is no such evidence in the record before us.

Even so, WLO would not prevail on its champerty argument under Nevada law. Before we reach the substantive issue, there are two threshold matters. First, the Ninth Circuit in Del Webb Cmtys., Inc. v. Partington, __F.3d__, 2011 WL 2854086, at *7 (9th Cir. 2011) held that the rule rendering contracts void for champerty cannot be invoked except between the parties to the champertous agreement. Here, WLO was not a party to the agreements between IFI and debtor, but simply signed the agreements acknowledging their terms. Therefore, WLO could not use the champerty defense on its own behalf. Moreover, as discussed above, WLO could not step into the trustee's shoes to

object to IFI's claim on behalf of the estate due to its unsecured creditor status and the trustee's settlement of IFI's claim.

Second, Nevada case law suggests, but does not decide, that whether an agreement is champertous or not is a mixed question of law and fact. Compare Temeron, Inc. v. Ferraro Energy Corp., 861 P.2d 319, 326 (Okl. Ct. App. 1993). In our view, this standard is appropriate because although the determination whether an agreement is champertous is based on factual conclusions, it also requires distinctively legal analysis to determine whether the elements of champerty have been proven. In our review of mixed questions, we give deference to the bankruptcy court's factual findings so long as those findings are not clearly erroneous, but we will review the legal consequences of those factual findings de novo. See Searles v. Riley (In re Searles), 317 B.R. 368, 373 (9th Cir. BAP 2004), aff'd, 212 Fed. Appx. 589 (9th Cir. 2006).

Our review of the record here shows that the elements of champerty have not been met. In Lum v. Stinnett, 488 P.2d 347, 350 (Nev. 1971), the Nevada Supreme Court explained the relationship between the common law offenses of maintenance and champerty:

> the 'common law offense of maintenance' as existing 'when a person without interest in a suit officiously intermeddles therein by assisting either party with money or otherwise to prosecute or defend it.' Champerty is maintenance with the additional feature of an agreement for the payment of compensation or personal profit from the subject of the suit.

Id. at 350. Thus, if an agreement is champertous, it necessarily constitutes maintenance because champerty is a form

of maintenance.

Because champerty is maintenance with an additional feature, we first consider the elements for the maintenance offense. The record shows that IFI was a "stranger" to the Wells Fargo litigation, but it does not follow that IFI was an officious intermeddler. "The financier becomes an officious intermeddler when he or she offers unwanted advice or otherwise attempts to control the litigation for the purpose of stirring up strife or continuing a frivolous lawsuit." Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 278 (S.C. 2000) (citing Smith v. Hartsell, 63 S.E. 172, 174 (S.C. 1908) (stating it has come to be generally accepted that an agreement will not be condemned as champertous unless the interference is clearly officious and for the purpose of stirring up strife and continuing litigation). Thus, the key to a claim of maintenance appears to be the amount of control over the claims for an improper purpose. Compare Achrem v. Expressway Plaza Ltd. P'ship, 917 P.2d 447, 449 (Nev. 1996) (noting public policy against assignment of personal injury tort actions because assignor loses control of the litigation).[8]

Here, WLO had already filed the lawsuit before IFI entered into the agreements with debtor, so IFI could not have encouraged debtor to file the suit. Moreover, the record contains no evidence that IFI concerned itself with the details

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[8] WLO discusses the Ohio case of Rancman v. Interim Funding Settlement Corp., 789 N.E.2d 217 (Ohio 2003) in its reply brief. In Rancman, the Ohio Supreme Court held that agreements similar to the one here were champertous. The holding in Rancman has not been adopted by any court in Nevada.

of the litigation or attempted to impose its views on debtor or WLO. WLO refers to a letter from IFI to Wells Fargo which gave Wells Fargo notice that IFI had a financial interest in any payment. According to WLO, this letter likely interfered with the amount of the settlement, because Wells Fargo learned that debtor was in dire need of funding. However, there is no evidence to support this statement in the record. In reality, there may have been many reasons for the amount of the settlement not the least of which was the true value of debtor's case.

Finally, there is no evidence in the record that shows WLO gave up control over the litigation and, in fact, the record strongly implies to the contrary. Accordingly, we discern no error with the bankruptcy court's factual finding that there was simply no exercise of control over the lawsuit. Without a claim for maintenance, WLO's champerty claim fails as a matter of law. Because the contracts were not champertous, the public policy of Nevada was not offended by the California choice-of-law provision. Therefore, it stands.

b. Perfection

WLO also argues that IFI failed to perfect its lien under Nevada law, premised on its assertion that Nevada law prevailed. Applying the choice of California law, the bankruptcy court found that the Uniform Commercial Code was inapplicable to IFI's lien and that it had complied with Cal. Civ. Code § 2881, which

applies to liens created by contract.[9] WLO's opening brief does not develop any other argument regarding how the bankruptcy court erred in its conclusion. Arguments not specifically and distinctly made in an appellant's opening brief are waived. In re Choo, 273 B.R. at 613. In its reply brief, WLO reiterates that Nevada law applies to the agreements and that Nevada law does not provide for the perfection of liens merely by stating in the contract that a lien exists. Because we have determined that the parties' choice-of-law clause adopting California law should be upheld, we need not address the issue any further. We discern no error with the bankruptcy court's conclusion that IFI had a secured claim against the Wells Fargo settlement proceeds.

3. Claim Preclusion

The bankruptcy court also overruled WLO's objection to IFI's claim on claim preclusion grounds. This ruling was misplaced due to the court's bifurcation of the trustee's compromise motion. However, the error was harmless because we can affirm on any ground supported by the record. Shanks v. Dressel, 540 F.3d 1082, 1086 (9th Cir. 2008).

VI. CONCLUSION

Accordingly, we AFFIRM the bankruptcy court's decision with respect to each of the orders appealed.

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[9] Cal. Civ. Code § 2881 provides: Lien, how created. A lien is created:

1. By contract of the parties; or,
2. By operation of law.