

DEC 22 2011

NOT FOR PUBLICATION

SUSAN M SPRAY, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. SC-11-1000-KiMkH  
 )  
 LOG & CONVENTIONAL HOMES, ) Bk. No. 09-12365-JM  
 INC., )  
 )  
 Debtor. )  
 \_\_\_\_\_ )  
 )  
 ROBERT DOAN, )  
 )  
 Appellant, )  
 )  
 v. ) **M E M O R A N D U M**<sup>1</sup>  
 )  
 LESLIE GLADSTONE, Chapter 7 )  
 Trustee, )  
 )  
 Appellee. )  
 \_\_\_\_\_ )

Argued and Submitted on October 20, 2011  
at San Diego, California

Filed - December 22, 2011

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

Honorable James W. Meyers, Bankruptcy Judge, Presiding

Appearances: Daniel Joseph Winfree, Esq. argued for appellant,  
 Robert Doan; Christin Alene Batt, Esq. of the  
 Financial Law Group argued for appellee, Leslie  
 Gladstone, Chapter 7 Trustee.

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

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<sup>1</sup> 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 Appellant, creditor Robert Doan ("Doan"), appeals a  
2 bankruptcy court order denying his motion to remove chapter 7  
3 trustee, Leslie Gladstone ("Trustee"), from debtor's bankruptcy  
4 case. We AFFIRM.

5 **I. FACTUAL AND PROCEDURAL BACKGROUND**

6 Prior to filing bankruptcy, debtor, Log & Conventional  
7 Homes, Inc. ("LCH"), had entered into a contract to build a log  
8 home for the Haddocks. A dispute arose between the parties, and  
9 LCH sued the Haddocks in state court for breach of contract (the  
10 "State Court Action"). The Haddocks filed a counterclaim for  
11 approximately \$226,000 in damages due to LCH's alleged failure to  
12 complete the home.

13 Doan is the sole shareholder of LCH. LCH filed a voluntary  
14 chapter 7<sup>2</sup> petition on August 20, 2009. Its assets consisted of  
15 a \$43,000 bond securing a mechanic's lien, and a receivable of  
16 \$67,100, which is the amount Haddocks allegedly owed LCH on the  
17 contract. LCH has only two unsecured creditors: the Haddocks and  
18 Doan.<sup>3</sup>

19 Between September and November 2009, Trustee conducted four<sup>4</sup>  
20 § 341 creditor's meetings with LCH and Doan. Notably, Trustee's  
21 primary topic of discussion at all four meetings was the  
22

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23 <sup>2</sup> Unless otherwise indicated, all chapter, section and rule  
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

25 <sup>3</sup> Three proofs of claim were filed in LCH's bankruptcy case:  
26 (1) a claim from Haddocks for \$226,198; (2) a claim from Doan for  
27 \$265,898; and (3) a claim filed by Doan on behalf of LCH for  
\$110,006.

28 <sup>4</sup> Five meetings were held, but no testimony occurred at the  
third meeting on October 29, 2009.

1 potential preferences and fraudulent transfers made by LCH to  
2 Doan. Over the course of the four meetings, Trustee made only  
3 brief inquiries about the State Court Action. At the first  
4 meeting, Trustee asked about the status of the matter. Doan  
5 explained that LCH and Haddocks had been in litigation for two  
6 years, and that Haddocks's title insurance company had posted a  
7 bond insuring LCH's mechanic's lien, which was payable to LCH.  
8 Doan told Trustee that he would provide her with the necessary  
9 state court documents regarding perfection of LCH's mechanic's  
10 lien. As a result of the mechanic's lien and the receivable,  
11 Doan contended that the Haddocks owed LCH approximately \$110,000.

12 During the third meeting, Doan admitted that he had gambled  
13 with some of the funds he received from LCH. Trustee posed  
14 several follow-up questions to Doan on that issue. The only  
15 other mention of the State Court Action was at the fourth meeting  
16 on November 19, 2009. Trustee noted that she had not yet been  
17 provided with the mechanic's lien documents, but stated that she  
18 had been "talking to the party about resolving [the State Court  
19 Action]." Trustee further expressed her intention to pursue a  
20 "slam-dunk preference [action]" against Doan to recover at least  
21 \$81,000 for LCH's estate. At the end of the fourth meeting, the  
22 parties agreed to meet at Doan's counsel's office on December 4,  
23 2009, to further discuss Trustee's preference action and the  
24 State Court Action.<sup>5</sup>

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26 <sup>5</sup> Trustee filed her Complaint for Avoidance and Recovery of  
27 Fraudulent Transfers and/or Insider Preferential Transfers  
28 against Doan on February 25, 2010. In her complaint, which is  
still pending, Trustee is seeking to recover approximately  
\$210,000 from Doan in alleged fraudulent and/or preferential  
transfers under §§ 547 and 548.

1 **A. The Settlement Motion.**

2 On April 7, 2010, Trustee filed a Notice of Intended Action  
3 to Approve Stipulation to Settle Claim, Release Mechanic's Lien,  
4 and Dismiss State Court Action (the "Settlement Motion").  
5 According to the Settlement Motion, Haddocks were entitled to an  
6 allowed unsecured claim in the amount of \$100,000, and Trustee  
7 agreed to release LCH's mechanic's lien. The parties further  
8 agreed to dismiss the State Court Action with prejudice.

9 In his opposition to the Settlement Motion, Doan questioned  
10 the objectivity and neutrality of the Trustee. Specifically,  
11 Doan contended that Trustee's motion failed to set forth any  
12 factual background about the mechanic's lien or LCH's claim  
13 against Haddocks and the Haddocks's counter-claim, or recite any  
14 of the factors set forth in A & C Properties.<sup>6</sup> In Doan's  
15 opinion, the settlement effectively purged LCH's estate of its  
16 only asset while receiving nothing in return. Attached to Doan's  
17 declaration was a letter that LCH's counsel in the State Court  
18 Action had sent to Trustee. In that letter, counsel stated that  
19 he "[could not] fathom how [Trustee] could possibly reach a  
20 conclusion that the Haddocks [were] entitled to any compensation  
21 from [LCH]. . . . The facts and evidence [were] strong and well  
22 supported that the Haddocks' claim was trumped up and was not  
23 supported by any factual or legal basis. The evidence was also

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24  
25 <sup>6</sup> The fair and equitable settlement standard under Rule 9019  
26 requires consideration of: (1) probability of success in the  
27 litigation; (2) collectability; (3) complexity, expense,  
28 inconvenience, and delay attendant to continued litigation; and  
29 (4) the interests of creditors, which are said to be "paramount."  
30 Martin v. Kane (In re A & C Props.), 784 F.2d 1377, 1381 (9th  
31 Cir. 1986). These four factors are often referred to as the  
32 "A & C factors."

1 overwhelming that the Haddocks owed [LCH] at least \$40,000.00 and  
2 possibly more."

3 Trustee asserted in her reply that in negotiating the  
4 settlement, she had "reviewed many documents regarding [the State  
5 Court Action] and interviewed the Debtor at length about [it]."  
6 In her investigation, Trustee had obtained a copy of an  
7 independent report prepared by Roel Consulting Services (the  
8 "Roel Report"), an expert retained by the insurance carrier for  
9 LCH's contractor's license bond. The Roel Report concluded that  
10 LCH had not completed the work on the Haddocks's home and was  
11 "'guilty of Willful Disregard of Accepted Trade Standards in the  
12 construction of the home for the claimant.'" The Roel Report  
13 also concluded that necessary repairs/reconstruction to complete  
14 the work for which LCH was obligated amounted to \$115,000.  
15 Trustee further stated that LCH offered her no competing expert  
16 opinion to contradict the Roel Report's findings.

17 A hearing on the Settlement Motion was held on June 23,  
18 2010. There, the parties were ordered to file additional  
19 briefing before a continued hearing on the matter on August 4,  
20 2010. In short, Doan's supplemental declaration questioned the  
21 thoroughness of Trustee's investigation of the State Court Action  
22 and disputed the findings in the Roel Report. Doan noted that  
23 the mechanic's lien, with interest and court costs, was now worth  
24 \$110,006.

25 In her supplemental declaration, Trustee stated that she had  
26 told Doan and his counsel that she welcomed any information  
27 regarding the State Court Action, but they never provided her  
28 with any. In addition to the Roel Report, Trustee now stated

1 that she also interviewed counsel for the Haddocks and reviewed  
2 many of the State Court Action documents.<sup>7</sup> Trustee also included  
3 a declaration from Mr. Haddock to counter Doan's assertions about  
4 the Roel Report's findings.

5 After considering all of the pleadings and exhibits, the  
6 bankruptcy court approved Trustee's Settlement Motion, finding  
7 specifically that Trustee had met her burden to support the  
8 settlement as fair and reasonable under A & C Properties. The  
9 court entered an order consistent with its tentative ruling on  
10 August 26, 2010. Doan did not appeal the settlement order.

11 **B. The Removal Motion.**

12 On November 9, 2010, Doan moved to remove Trustee from LCH's  
13 bankruptcy case (the "Removal Motion"). The primary basis for  
14 the motion was Doan's displeasure with Trustee's handling of the  
15 Settlement Motion and her alleged favoritism of the Haddocks, the  
16 only other creditor in the case. According to Doan, Trustee made  
17 false representations to the court about the thoroughness of her  
18 investigation of the State Court Action; her inquiries about it  
19 were cursory and not what she represented in the Settlement  
20 Motion.

21 To support his Removal Motion, Doan included transcripts  
22 from the four § 341 creditor's meetings to show how little the  
23 State Court Action was discussed. Doan also included a  
24 declaration from his bankruptcy counsel, in which counsel stated  
25 that the State Court Action was never discussed at the December 4  
26

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27 <sup>7</sup> Trustee never mentioned that she spoke with state court  
28 counsel for LCH, who had expressed to her his disagreement with  
the settlement.

1 meeting at his office as Trustee had represented. In short, Doan  
2 argued that Trustee should be removed because: (1) her actions  
3 had harmed the estate by dissipating its only asset; (2) her  
4 preference of one creditor over another evidenced an apparent  
5 lack of disinterestedness and bias; (3) she had failed in her  
6 duties to conduct a complete investigation of the State Court  
7 Action and the Haddocks's claim; and (4) she had used her  
8 position to personally attack, harass, and intimidate Doan.

9 Trustee opposed the Removal Motion, contending that Doan  
10 failed to establish "cause" under § 324(a); it was merely Doan's  
11 attempt to disrupt her motion for summary judgment in the pending  
12 avoidance action against him. Trustee denied Doan's allegations  
13 of bias and adverse interest to the estate, and defended her  
14 investigation of the State Court Action and the validity of the  
15 Settlement Motion. Trustee further denied Doan's allegations of  
16 her improper dissipation of the estate's assets. To Trustee,  
17 Doan was a disgruntled defendant who failed to recognize the  
18 highly valuable asset of Trustee's avoidance action against him,  
19 and her obligation to pursue it. Doan had also failed to  
20 recognize Trustee's duty to inquire further about his use of  
21 LCH's funds to pay some of his gambling expenses.

22 In his reply, Doan reiterated his allegations, contending  
23 that Trustee's conduct in this case showed not only a clear  
24 appearance of impropriety, but also fell short of the fiduciary  
25 standards applicable to bankruptcy trustees.

26 The bankruptcy court heard Doan's Removal Motion on  
27 December 15, 2010, and denied it for failing to establish "cause"  
28 under § 324. An order denying the Removal Motion was entered on

1 January 21, 2011. Doan's premature notice of appeal filed on  
2 December 27, 2010, was considered timely upon entry of the  
3 removal order. Rule 8002(a).

## 4 **II. JURISDICTION**

5 The bankruptcy court had jurisdiction under 28 U.S.C.  
6 §§ 1334 and 157(b)(2)(A). An order denying a motion to remove a  
7 bankruptcy trustee is a final order. Dye v. Brown (In re AFI  
8  Holding, Inc.), 530 F.3d 832, 837 (9th Cir. 2008)(collecting  
9 cases). Therefore, we have jurisdiction under 28 U.S.C. § 158.

## 10 **III. ISSUE**

11 Did the bankruptcy court abuse its discretion in denying the  
12 Removal Motion?

## 13 **IV. STANDARD OF REVIEW**

14 Removal of a trustee under § 324(a) is left to the sound  
15 discretion of the bankruptcy court. In re AFI Holding, Inc.,  
16 530 F.3d at 844. To determine whether the bankruptcy court  
17 abused its discretion, we conduct a two-step inquiry: (1) we  
18 review de novo whether the bankruptcy court "identified the  
19 correct legal rule to apply to the relief requested" and (2) if  
20 it did, whether the bankruptcy court's application of the legal  
21 standard was illogical, implausible or "without support in  
22 inferences that may be drawn from the facts in the record."  
23 United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir.  
24 2009)(en banc).

## 25 **V. DISCUSSION**

### 26 **A. Removal under § 324(a).**

27 A bankruptcy trustee is the legal representative and  
28 fiduciary of the estate. In re AFI Holding, Inc., 530 F.3d at



1 844 (citing United States Trustee v. Joseph (In re Joseph),  
2 208 B.R. 55, 60 (9th Cir. BAP 1997)). A trustee's duties revolve  
3 around marshaling and distributing the assets of the debtor's  
4 estate according to the distribution scheme prescribed by the  
5 Code, and then closing the estate. Id. at 845.

6 The court, after notice and a hearing, may remove a trustee  
7 for "cause." § 324(a). Removal of a trustee is an extreme  
8 remedy. Morgan v. Goldman (In re Morgan), 375 B.R. 838, 847  
9 (8th Cir. BAP 2007); United States Trustee v. Repp (In re  
10 Sheehan), 185 B.R. 819, 822 (Bankr. D. Ariz. 1995). If a trustee  
11 is removed for cause, then that trustee is removed from all other  
12 cases in which the trustee is then serving. See § 324(b).

13 Although not defined in the Code, case law has established  
14 that "cause" to remove a trustee may include incompetence,  
15 violation of fiduciary duties, misconduct or failure to perform  
16 the trustee's duties, or lack of disinterestedness or holding an  
17 interest adverse to the estate. In re AFI Holding, Inc.,  
18 530 F.3d at 845. The party seeking removal has the burden to  
19 show specific facts supporting "cause." Id.

20 **B. The bankruptcy court did not abuse its discretion in denying**  
21 **the Removal Motion.**

22 Doan's burden of establishing an abuse of discretion has not  
23 been aided by his conduct of this appeal. Doan's opening brief  
24 fails to include a table of cases, a statement of the basis of  
25 appellate jurisdiction, a statement of the issues presented on  
26 appeal, or to provide a proper conclusion. See Rule 8010(a). In  
27 any event, Doan asserts the bankruptcy court abused its  
28 discretion by overlooking the evidence supporting his Removal

1 Motion: Trustee lied about the thoroughness of her of  
2 investigation of the State Court Action and Haddocks's claim;  
3 Trustee showed a lack of disinterestedness by preferring one  
4 creditor (the Haddocks) over another (Doan); and she harmed the  
5 estate by causing a complete dissipation of estate assets.

6 After the bankruptcy court reviewed the pleadings and  
7 exhibits filed by the parties, and considered the same arguments  
8 Doan raises on appeal, it concluded that Doan was merely  
9 rehashing the arguments he raised to oppose the Settlement  
10 Motion, and that his evidence failed to establish "cause" under  
11 § 324(a) and In re AFI Holding, Inc. Because the bankruptcy  
12 court applied the correct legal standard, we now review whether  
13 its factual findings are illogical, implausible, or without  
14 support in the record.

15 A trustee "'may not be the representative of any particular  
16 creditor, but must represent all creditors without partiality.'" In re AFI Holding, Inc., 530 F.3d at 844 (quoting Gross v. Russo  
18 (In re Russo), 18 B.R. 257, 270-71 (Bankr. E.D. N.Y. 1982)). In  
19 reviewing the underlying documents for the Settlement Motion, we  
20 agree that Trustee's investigation of the State Court Action may  
21 not have been as "extensive" as she had claimed. She spent  
22 little time questioning Doan about it. She also apparently never  
23 consulted with LCH's state court counsel in the suit, who opposed  
24 the settlement. Nonetheless, Doan has not established that  
25 Trustee's conduct regarding the Settlement Motion constituted  
26 "cause" to remove her from LCH's case. This conclusion is  
27 particularly true since the bankruptcy court found the settlement  
28 was fair and reasonable under A & C Properties, and Doan never

1 appealed the settlement order.

2 For purposes here, a "disinterested person" is one that  
3 "does not have an interest materially adverse to the interest of  
4 the estate or of any class of creditors or equity security  
5 holders, by reason of any direct or indirect relationship to,  
6 connection with, or interest in, the debtor, or for any other  
7 reason." § 101(14)(C). An "adverse interest" is the  
8 (1) possession or assertion of an economic interest that would  
9 tend to lessen the value of the bankruptcy estate; or  
10 (2) possession or assertion of an economic interest that would  
11 create either an actual or potential dispute in which the estate  
12 is a rival claimant; or (3) possession of a predisposition under  
13 circumstances that create a bias against the estate. In re AFI  
14  Holding, Inc., 530 F.3d at 845. An adverse interest is  
15 "material" if it exists "by reason of any direct or indirect  
16 relationship to, connection with, or interest in, the debtor  
17 . . . , or for any other reason." Id. at 845-46.

18 Doan failed to establish that Trustee held an economic, or  
19 any other, interest materially adverse to the interest of the  
20 estate or any class of creditors or equity security holders. No  
21 evidence established that Trustee had a prior direct or indirect  
22 relationship to, connection with, or interest in, LCH, Doan, or  
23 the Haddocks, or that Trustee had any actual or potential  
24 conflict of interest with same. Trustee's exercise of her  
25 business judgment to conclude that the Haddocks had a stronger  
26 case than LCH in the State Court Action does not equate to her  
27 holding an interest materially adverse to the estate.

28 As for Doan's argument that Trustee's settlement with the

1 Haddocks improperly dissipated the estate's assets, Doan fails to  
2 recognize, and understandably so, that Trustee's action against  
3 him is a valuable asset in LCH's bankruptcy estate, potentially  
4 worth at least \$210,000. Doan's displeasure with Trustee's  
5 action against him does not provide a basis for "cause" under  
6 § 324(a). Furthermore, if Doan had issues with the bankruptcy  
7 court's findings on the Settlement Motion, he could have appealed  
8 the settlement order.

9 Finally, Doan contends that Trustee should be removed  
10 because she has used her position of authority to intimidate and  
11 demean him. We reviewed Doan's evidence to support this  
12 contention, including the transcripts from all of the § 341  
13 creditor's meetings, and we disagree. We see no evidence that  
14 Trustee's interview of Doan was, as he suggests, "an abusive and  
15 angry tirade intended to demean" him. Trustee's questions and  
16 responses were proper, even if they may have seemed harsh or  
17 intrusive to Doan.

18 Accordingly, because the bankruptcy court's finding that  
19 Doan had failed to present specific facts establishing removal is  
20 not illogical, implausible or without support in the record, we  
21 conclude that it did not abuse its discretion in denying the  
22 Removal Motion. Hinkson, 585 F.3d at 1261-62.

## 23 VI. CONCLUSION

24 For the foregoing reasons, we AFFIRM.<sup>8</sup>

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26 <sup>8</sup> At oral argument, Trustee moved for sanctions against Doan  
27 for prosecuting a frivolous appeal. A request for sanctions must  
28 be made in a separately filed motion. Rule 8020; Highland Fed.  
Bank v. Maynard (In re Maynard), 264 B.R. 209, 213 n.5 (9th Cir.  
BAP 2001). Accordingly, Trustee's improper oral motion for  
sanctions is denied.