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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-13-1368-TaKuPa
)
 MATTHEW F. GALLAGHER and) Bk. No. 12-10213-NB
 MELISSA A. GALLAGHER,)
)
 Debtors.)
)
 MATTHEW F. GALLAGHER;)
 MELISSA A. GALLAGHER,)
)
 Appellants,)
)
 v.) **MEMORANDUM***
)
 KATHY A. DOCKERY, Chapter 13)
 Trustee; BOROWITZ & CLARK LLP,)
)
 Appellees.)
)

Argued and Submitted on February 20, 2014
at Pasadena, California

Filed - March 17, 2014

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

Honorable Neil W. Bason, Bankruptcy Judge, Presiding

Appearances: Appellant Melissa A. Gallagher argued pro se;
 Akihito Koyama on brief for Appellee, Kathy A.
 Dockery, Chapter 13 Trustee; Michael Erik Clark,
 Nancy Bonaccorso Clark and Shannon A. Doyle of
 Borowitz & Clark, LLP, on brief for Appellee,
 Borowitz & Clark, LLP.

Before: TAYLOR, PAPPAS, and KURTZ, 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 Debtors Matthew and Melissa Gallagher retained appellee
3 Borowitz & Clark, LLP (the "Firm") as bankruptcy counsel in a
4 chapter 13¹ case. The Firm represented Debtors until the
5 bankruptcy court sustained objections to Debtors' amended
6 chapter 13 plan and then substituted out of the case. It
7 obtained a fee award, but only after the bankruptcy court
8 converted the case to a chapter 7 proceeding. The bankruptcy
9 court later reconverted the case to chapter 13. This appeal
10 stems from a post-reconversion order² (the "Turnover Order")
11 requiring that Debtors return to Chapter 13 Trustee Kathy Dockery
12 the plan payments that she refunded to them after the initial
13 conversion. The Chapter 13 Trustee sought return pursuant to
14 § 105(a) and for the specific and sole purpose of paying the
15 Firm's fees. The bankruptcy court granted the Chapter 13
16 Trustee's request - not under § 105(a) but under § 542 - and, in
17 addition to ordering turnover, provided the Firm with immediate
18 collection rights.

19 We determine that the bankruptcy court erred, as a matter of
20 law, and, therefore, we REVERSE.

21 **FACTS**

22 The relevant facts are not in dispute. Debtors filed their
23

24 ¹ Unless specified otherwise, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

26 ² Debtors' notice of appeal states that they appeal from
27 the Memorandum Decision Holding Debtors Jointly and Severally
28 Liable Under 11 U.S.C. [§] 542, which the bankruptcy court
entered on July 22, 2012, the same day that it issued the
Turnover Order.

1 petition pro se, but subsequently retained the Firm which filed
2 an amended chapter 13 plan and responded extensively to plan
3 objections filed by Debtors' mortgage lender, U.S. Bank. The
4 Debtors challenged the mortgage debt on their residence on
5 multiple grounds.³ The bankruptcy court ultimately sustained
6 U.S. Bank's objections in a memorandum decision entered on
7 July 12, 2012. It then held two hearings on July 17, 2012.
8 Debtors did not appear at either hearing, but the Firm appeared
9 at both.

10 At the first hearing, the Firm advised the bankruptcy court
11 that the Firm no longer represented the Debtors. It then
12 disclosed that the Debtors did not make their July plan payment.
13 In response, the bankruptcy court converted the case to a
14 chapter 7 case.

15 At the second hearing, held in connection with U.S. Bank's
16 relief from stay motion, the Firm appeared on behalf of Debtors.
17 U.S. Bank advised the bankruptcy court that it would accept its
18 tentative ruling, which provided for a four-week continuance to
19 allow U.S. Bank to supplement the record, but asked that Debtors
20 resume regular payments in the interim. The Firm then disclosed
21 that the Debtors could not do so. In response, the bankruptcy
22 court granted stay relief.

23 The following day, the Firm filed an application for
24 approval of supplemental attorney's fees. No one objected to
25

26 ³ We take judicial notice of the documents on the
27 bankruptcy court's electronic docket in the bankruptcy case. See
28 O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d
955, 957-58 (9th Cir. 1989) (reviewing court may take judicial
notice of underlying bankruptcy documents).

1 this request, and the bankruptcy court later entered an order
2 (the "Fee Order") awarding fees in the amount of \$17,415.21. Two
3 weeks before entry of the Fee Order, however, the bankruptcy
4 court entered the order converting the case (the "Conversion
5 Order"). The bankruptcy court, therefore, modified the Fee Order
6 by striking "13" and inserting "7," to provide that the
7 "Chapter 7 Trustee is directed to pay" the allowed fees from the
8 estate, funds permitting and subject to § 726(b).⁴ Fee Order
9 (dkt. #67).

10 Shortly thereafter, the Chapter 13 Trustee filed and served
11 her Notice of Intent to File Trustee's Final Report and Account
12 ("Notice of Intent"). The Notice of Intent provided an objection
13 period of thirty days after the service date of August 23, 2012.
14 The first page of the attachment to the Notice of Intent
15 disclosed that the Firm did not hold an allowed claim. The
16 second page identified \$8,297.00 as "Debtor Refunds." The
17 Chapter 13 Trustee also mailed a check for \$8,297.00 (the
18 "Refund") to the Debtors on August 23, 2012; the Debtors promptly
19 cashed it.

20 Seven days later, and before termination of the 30-day
21 notice period, the Chapter 13 Trustee filed a declaration
22 (purportedly executed the next day, August 31, 2012) and stated
23 under penalty of perjury that she had received no objection to
24 the Notice of Intent within the period permitted by Rule 5009.
25 She filed her Final Report and Account on August 31, 2012; an

26
27 ⁴ Section 726(b) provides that allowed § 503(b)
28 administrative claims incurred postconversion take priority over
allowed § 503(b) administrative claims incurred preconversion.

1 order entered September 12, 2012 that discharged her as Trustee
2 in the chapter 13 case and exonerated her bond.

3 The Chapter 13 Trustee eventually realized that the Firm
4 obtained a Supplemental Fee Award postconversion, but did not get
5 paid. She sent a written demand to the Debtors requesting prompt
6 return of the Refund; the Debtors did not respond. She then
7 entered into a stipulation with the chapter 7 trustee⁵
8 ("Stipulation") agreeing to reconvert the chapter 7 case to
9 chapter 13 for the purpose of filing a motion seeking to require
10 turnover of the Refund and payment of the Firm. The bankruptcy
11 court⁶ entered an order approving the Stipulation and
12 reconverting the case to chapter 13 ("Reconversion Order"), and
13 thereafter the Chapter 13 Trustee filed her motion to compel
14 turnover ("Turnover Motion").

15 The Chapter 13 Trustee based the Turnover Motion on the
16 bankruptcy court's broad discretion under § 105(a). She argued
17 that fairness and equity demanded that the Debtors return the
18 Refund because they received it "purely due to an administrative
19 error" and as a result of "excusable neglect or mistake."
20 Turnover Motion at 6 (dkt. #89).

21 The Debtors opposed the Motion to Compel Turnover on
22 multiple grounds. Of most relevance here, they argued that use
23 of § 105 to require return of the Refund and to require payment
24

25 ⁵ The Chapter 13 Trustee's counsel executed the Stipulation
26 on behalf of the Chapter 13 Trustee on September 11, 2012, and
27 filed it on September 12, 2012, the day the Chapter 13 Trustee
28 was discharged.

⁶ Judge Barry Russell, the judge assigned the chapter 7
case, signed the Reconversion Order.

1 of the Firm from the Refund created a conflict with other
2 provisions of the Bankruptcy Code.⁷ They pointed out that,
3 pursuant to § 1326(a)(2), the Chapter 13 Trustee lacked authority
4 following conversion to pay creditors any undistributed funds and
5 that payment to the Debtors of the Refund did not create a
6 windfall to the Debtors because § 541(a)(6) excluded the Debtors'
7 postpetition earnings from inclusion in the chapter 7 estate.
8 The Debtors also cited Warfield v. Salazar (In re Salazar),
9 465 B.R. 875 (9th Cir. BAP 2012), for its discussion and
10 application of the plain language of § 348(f)(1)(A) to exclude
11 from property of a converted chapter 7 estate, tax refunds that
12 the debtors spent during their chapter 13 case for normal living
13 expenses.

14 Over the Debtors' opposition, and after hearing,⁸ the
15 bankruptcy court granted the Chapter 13 Trustee's request. It
16 entered a memorandum decision and the Turnover Order on July 22,
17 2013. The bankruptcy court, however, did not grant the Turnover
18 Motion pursuant to § 105(a). Rather, it based the Turnover Order
19 on § 542.⁹ The Turnover Order also recites that it is
20 enforceable by any appropriate representative of the bankruptcy
21

22 ⁷ Debtors direct this argument, in part, to the
23 reconversion of the case to chapter 13, which they argue violates
24 their rights under the 13th Amendment of the Constitution. As
discussed below, we lack jurisdiction to review the Reconversion
Order, and we therefore do not consider this argument.

25 ⁸ At the hearing, the Debtors advised the bankruptcy court
26 that they had not been unwilling to return the Refund to the
Chapter 13 Trustee, they just did not have it anymore.

27 ⁹ The bankruptcy court, however, misstated in the
28 Memorandum Decision that the Chapter 13 Trustee brought the
Turnover Motion pursuant to § 542.

1 estate; if not paid in full within 60 days, allowed entry of a
2 payroll deduction order; and, was explicitly without prejudice to
3 the rights of the Firm, subject to the automatic stay, to collect
4 their allowed fees from Debtors, "together with any appropriate
5 interest, costs of collection, and other charges." Turnover
6 Order at 2 (dkt. #106).

7 The Debtors timely filed a notice of appeal from the
8 Turnover Order.

9 JURISDICTION

10 The bankruptcy court had jurisdiction under 28 U.S.C.
11 §§ 1334 and 157(b)(2)(A) and (E).

12 We have jurisdiction under 28 U.S.C. § 158(a) and (b) to
13 hear appeals from final judgments, orders, and decrees; and with
14 leave of the Panel, from interlocutory orders and decrees of
15 bankruptcy judges. Rule 8002 provides that a notice of appeal
16 must be filed with the clerk within 14 days of entry of the
17 judgment, order, or decree.

18 Debtors include in their statement of issues on appeal
19 several issues relating to the Conversion Order, the Fee Order,
20 and the Reconversion Order. The bankruptcy court entered the
21 Conversion Order on July 26, 2012, the Fee Order on August 9,
22 2012, and the Reconversion Order on September 20, 2012. Debtors
23 filed their notice of appeal from the Turnover Order on July 31,
24 2013, long after the 14-day filing period provided under
25 Rule 8002 expired as to all but the Turnover Order.

26 The burden of demonstrating jurisdiction lies with the party
27 asserting it. Kokkonen v. Guardian Life Ins. Co. of Am.,
28 511 U.S. 375, 379-80 (1994). Here, Appellants merely state that

1 we have appellate jurisdiction pursuant to 28 U.S.C. § 158. They
2 offer no authority to establish our jurisdiction to hear
3 challenges to the final and non-appealable Conversion Order, Fee
4 Order, or Reconversion Order. We, therefore, conclude that we
5 have jurisdiction under 28 U.S.C. § 158 solely with respect to
6 the Turnover Order.

7 **ISSUE**

8 Whether the bankruptcy court erred in entering the Turnover
9 Order.

10 **STANDARD OF REVIEW**

11 We review the bankruptcy court's interpretation of the
12 Bankruptcy Code de novo. Shapiro v. Henson, 739 F.3d 1198, 2014
13 U.S. App. LEXIS 440, *4 (9th Cir. 2014). De novo review means
14 that our review is independent; we give no deference to the
15 bankruptcy court's conclusion. See First Ave. W. Bldg., LLC v.
16 James (In re Onecast Media, Inc.), 439 F.3d 558, 561 (9th Cir.
17 2006).

18 **DISCUSSION**

19 **A. Section 542 does not support the Turnover Order.**

20 The bankruptcy court's analysis under § 542 was relatively
21 brief. The bankruptcy court recited that § 542 requires that:
22 "Persons who receive 'possession, custody, or control' of
23 property of the bankruptcy estate must deliver such property to
24 the trustee and account for such property 'or the value of such
25 property.'" Memorandum Decision at 3 (dkt. #105)(emphasis in
26 original). From there, the bankruptcy court quoted Ninth Circuit
27 authority:

28 "If a debtor demonstrates that she is not in possession

1 of the property of the estate or its value at the time
2 of the turnover action, the trustee is entitled to
3 recovery of a money judgment for the value of the
4 property of the estate." In re Rynda, 2012 WL 603657
at *2 (9th Cir. BAP) (sic) (unpublished); and In re
Newman, 487 B.R. 193, 198-202 (9th Cir. BAP 2013)
(following Rynda).

5 Id. The bankruptcy court then concluded that "Debtors are liable
6 for the dollar amount of the [Refund]." ¹⁰ Id. The bankruptcy
7 court found the Debtors' Salazar argument inapplicable. ¹¹
8 Instead, the bankruptcy court reasoned that the Debtors
9 accidentally received property of the estate ¹² that should have
10 been paid to the Firm and that, despite having spent the Refund,
11 they remained contractually and legally obligated to return the
12 Refund or its value. We determine that the bankruptcy court
13 erred, as a matter of law, in its application of § 542.

14 As the Debtors correctly argue on appeal, their chapter 13
15 plan payments were not property of the chapter 7 estate, and the
16 Chapter 13 Trustee properly paid the Refund to the Debtors as
17 required by §§ 348(f)(1)(A) and 1326(a)(2). And because the

18 ¹⁰ The bankruptcy court's memorandum decision specifically
19 states that it "memorializes and elaborates on the Court's ruling
20 at the hearing." Memorandum Decision at 3. The bankruptcy
21 court's oral ruling, however, did not further expand its
reasoning, and the tentative ruling issued in advance of the
hearing likewise contained very limited analysis.

22 ¹¹ We agree that Salazar is distinguishable on its facts;
23 it involved (a) a § 542 motion filed by the chapter 7 trustee in
the debtors' converted case, not a motion by a chapter 13
24 trustee; and (b) tax refunds received by the debtors prior to
conversion that they conceded to be property of their estate
25 pursuant to § 541(a). Salazar, 465 B.R. at 877-78. Nonetheless,
Salazar does support a conclusion that the Debtors were permitted
26 to spend the refunded amounts for living expenses during the
converted chapter 7 case.

27 ¹² The bankruptcy court did not discuss or present analysis
28 as to whether the funds continued to be property of the estate
after conversion, during the chapter 7 case, or on reconversion.

1 Debtors were no longer in possession or control of the Refund at
2 the time of reconversion, the Refund did not become property of
3 the chapter 13 estate on reconversion.

4 We further determine that even if the Refund became property
5 of the chapter 13 estate on reconversion, the Chapter 13 Trustee
6 lacked standing to bring a motion under § 542. Thus, the
7 bankruptcy court erred by granting relief under § 542.

8 **1. Property of the estate on reconversion.**

9 When the Debtors' case converted to chapter 7,
10 § 348(f)(1)(A) defined the property of the chapter 7 estate as
11 "property of the estate, as of the date of filing of the
12 petition, that remains in the possession of or is under the
13 control of the debtor on the date of conversion." It is
14 undisputed that the Refund consisted of postpetition plan
15 payments made from the Debtors' postpetition earnings. And it is
16 undisputed that the Chapter 13 Trustee remained in custody and
17 control of the Refund on the conversion date. Thus, on the
18 conversion date, the Refund was not a prepetition asset, was not
19 in the "possession of" the Debtors, and was not under the
20 Debtors' "control." As such, the Refund did not become property
21 of the Debtors' chapter 7 estate. See In re Michael, 699 F.3d
22 305, 313 (3d Cir. 2012) ("property acquired post-petition that is
23 in the Chapter 13 estate at the time of conversion is not
24 property of the new Chapter 7 estate.").

25 It is not disputed that the Debtors received the Refund
26 postconversion and in accordance with the Notice of Intent. The
27 Debtors advised the bankruptcy court that they spent the Refund
28 on living expenses during their chapter 7 case. At the time they

1 spent the Refund, it was not property of their chapter 7 estate,
2 and no Bankruptcy Code provision prohibited their use of the
3 Refund. The bankruptcy court's conclusion that Debtors had no
4 right to spend the Refund, thus, was in error.

5 Upon reconversion to chapter 13, § 1306 defined property of
6 this second chapter 13 estate. In relevant part, § 1306 provides
7 that property of a chapter 13 estate includes, in addition to the
8 property specified in § 541, "earnings from services performed by
9 the debtor after commencement of the case but before the case is
10 closed, dismissed, or converted to a case under chapter 7, 11, or
11 12 of this title, whichever occurs first."¹³ Thus, property of
12 the second chapter 13 estate could include the Debtors'
13 postpetition earnings and, thus, the Refund. Debtors, however,
14 must have retained some interest in the Refund at the time of
15 reconversion for it to constitute property of the second
16 chapter 13 estate. To the extent Debtors spent the Refund, they
17 no longer held any interest therein. See § 541(a) (property
18 includes all "interests" of the debtor). Put another way,
19 reconstituting the estate on reconversion does not change the
20 nature of the asset when spent. The Refund, which was the
21 Debtors' property during the chapter 7 case and spent by Debtors
22 during the chapter 7 case, did not become property of the
23 reconverted chapter 13 estate because it no longer existed.
24 Therefore, the Refund is not appropriately subject to a § 542
25 order in the second chapter 13 case.

27
28 ¹³ Neither conversion, nor reconversion, effects a change
in the date of "commencement of the case." See § 348(a).

1 **2. The Chapter 13 Trustee lacks § 542 standing.**

2 In a § 542 turnover action, the "property being sought is
3 'property that the trustee may use, sell, or lease under section
4 363 of this title." Shields v. Adams (In re Adams), 453 B.R.
5 774, 777 (Bankr. N.D. Ala. 2011). This necessary element of
6 § 542 presents an insurmountable problem for the Chapter 13
7 Trustee. Under § 1303, a chapter 13 trustee is prohibited from
8 using, selling, or leasing property of the estate. Rather,
9 § 1303 provides that the debtor, "exclusive of the trustee," has
10 the rights and powers of a trustee under § 363(b).

11 On reconversion, the Debtors became entitled under § 1306 to
12 sole possession of property of the second chapter 13 estate, and
13 under § 1303 they had the sole authority to exercise rights under
14 § 363(b). If the Refund became an asset of the second chapter 13
15 estate upon reconversion, only the Debtors could use and control
16 the Refund; the Chapter 13 Trustee could not compel turnover.
17 She could object to their plan (they didn't intend to file one).
18 She could request dismissal of their case (they wanted that to
19 happen). What she could not do as a chapter 13 trustee was
20 require them to turnover the Refund or any other asset under
21 § 542 or to use any particular asset for a particular purpose
22 under § 542. Therefore, the bankruptcy court erred as a matter
23 of law when it granted the Chapter 13 Trustee turnover rights
24 under § 542.

25 **B. Section 105(a) does not support turnover.**

26 We may affirm on any basis in the record. See Caviata
27 Attached Homes, LLC v. U.S. Bank, N.A. (In re Caviata Attached
28 Homes, LLC), 481 B.R. 34, 44 (9th Cir. BAP 2012). Because the

1 chapter 13 Trustee initially brought this motion under § 105(a),
2 we also consider whether it supports affirmance here. We
3 determine that it does not.

4 Section 105(a) provides, in relevant part, that the "court
5 may issue any order, process, or judgment that is necessary or
6 appropriate to carry out the provisions of this title." Despite
7 this broad statement, "it is generally agreed that § 105 is not a
8 roving commission to do equity or to do anything inconsistent
9 with the Bankruptcy Code." Yadidi v. Herzlich (In re Yadidi),
10 274 B.R. 843, 848 (9th Cir. BAP 2002). As the Supreme Court
11 recently observed, it is impossible to "carry out" the provisions
12 of the Bankruptcy Code through actions that the Bankruptcy Code
13 does not allow. Law v. Siegel, 571 U.S. _____, 2014 U.S. LEXIS
14 1784, *11 (2014). Here, the Chapter 13 Trustee attempts to use
15 § 105(a) to achieve results that are directly contrary to the
16 result required by other Bankruptcy Code provisions.

17 The Chapter 13 Trustee seeks control over the Refund, an
18 asset that was properly turned over to the Debtors and properly
19 spent by the Debtors. As discussed above, it is an asset that
20 did not survive to become part of the second chapter 13 estate.
21 But if it did, § 1306(b) mandates that: "[e]xcept as provided in
22 a confirmed plan or order confirming a plan, the [chapter 13]
23 debtor shall remain in possession of all property of the estate."
24 Here, if the Refund became part of the second chapter 13 estate,
25 there is no confirmed plan, and no plan is even contemplated.
26 Thus, the Bankruptcy Code leaves control over the Refund - if it
27 is an estate asset at reconversion - solely in the Debtors'
28 hands. Requiring Debtors under § 105 to disgorge funds for any

1 reason (equitable or otherwise) is inconsistent with the
2 provisions of § 1306.

3 Nor do we agree that the Chapter 13 Trustee mistakenly
4 disbursed the Refund to the Debtors. The interplay between
5 §§ 348 (governing conversion) and 1326 (governing a chapter 13
6 trustee's retention or disbursement of plan payments) mandates
7 this result. See Viegelaahn v. Harris (In re Harris), 491 B.R.
8 866 (W.D. Tex. 2013) (interpreting § 348(f)(1)(A), chapter 13
9 trustee was required to return to the debtor funds collected
10 pursuant to a confirmed chapter 13 plan as of the date of
11 conversion of the case); In re Krahenbuhl, 2013 Bankr. LEXIS
12 2918 (Bankr. E.D. Wis. 2013) (funds acquired by the chapter 13
13 debtor postpetition and contributed toward his chapter 13 plan
14 are not property of the chapter 7 estate and must be returned to
15 the debtor upon conversion); In re DeSimone, 2013 Bankr. LEXIS
16 5121 (Bankr. N.J. 2013) (undistributed plan payments must be
17 returned to the debtor on conversion after deducting the § 503(b)
18 attorneys' fees allowed preconversion)(emphasis added).

19 Here, the bankruptcy court entered the Fee Order after entry
20 of the Conversion Order albeit prior to return of the Refund to
21 the Debtors. Under these facts, the Chapter 13 Trustee was
22 required to return the Refund to the Debtors. See
23 In re Clements, 495 B.R. 74, 76 (Bankr. E.D. Pa 2013) (where no
24 order had been entered denying plan confirmation,¹⁴ and § 503(b)
25 attorney's fees were not allowed until postconversion, all
26 postpetition assets had to be returned to the debtors on

27
28 ¹⁴ Here, the bankruptcy court entered a memorandum decision
that sustained plan objections and denied confirmation.

1 conversion to chapter 7); In re Garris, 496 B.R. 343, 348-49
2 (Bankr. S.D.N.Y. 2013) (§ 1326(a)(2) permits deduction from funds
3 on hand of only those § 503(b) claims allowed as of the date of
4 dismissal of a chapter 13 case, unless the bankruptcy court, for
5 "cause," orders otherwise, pursuant to § 349(b)).¹⁵

6 **CONCLUSION**

7 Based on the foregoing, we REVERSE the bankruptcy court's
8 Turnover Order. Because we determine that the bankruptcy court
9 erred in ordering turnover of the Refund or its value, the
10 enforcement mechanisms contained in the Turnover Order do not
11 survive and we order that the Firm immediately return any funds
12 seized pursuant to the Turnover Order.

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25 ¹⁵ The bankruptcy court relied, in part, on In re Oliver,
26 222 B.R. 272, 274 (Bankr. E.D. Va. 1998) for the proposition that
27 attorneys' fees are to be paid prior to return of funds to
28 debtor. In re Oliver, however, is distinguishable as it involved
dismissal of a chapter 13 case in which attorneys fees were
allowed by the court from funds on hand, simultaneously with the
dismissal.