

MAR 10 2015

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	In re:	)	BAP No.	CC-13-1606-KiKuD
6	JUDY ANN JENSEN,	)	Bk. No.	8:09-14106-CB
7	Debtor.	)		
8	_____	)		
9	TIMOTHY P. PEABODY,	)		
10	Appellant,	)		
11	v.	)	<b>MEMORANDUM<sup>1</sup></b>	
12	JUDY ANN JENSEN; RICHARD A.	)		
13	MARSHACK, Chapter 7 Trustee,	)		
14	Appellees.	)		
	_____	)		

Submitted without Oral Argument  
on February 19, 2015

Filed - March 10, 2015

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

Honorable Catherine E. Bauer, Bankruptcy Judge, Presiding

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Appearances: Appellant Timothy P. Peabody pro se on brief;  
Michael D. Franco on brief for appellee, Richard A.  
Marshack, Chapter 7 Trustee.

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Before: KIRSCHER, KURTZ and DUNN, 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 8024-1.

1 Appellant Timothy P. Peabody appeals an order denying his  
2 motion for relief from judgment under Civil Rule 60(b)(1).<sup>2</sup>  
3 Because the bankruptcy court failed to conduct any analysis under  
4 Pioneer-Briones or to articulate any findings or conclusions in  
5 denying the motion, we VACATE and REMAND.<sup>3</sup>

#### 6 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

7 Debtor Judy Ann Jensen filed a chapter 11 bankruptcy case on  
8 May 4, 2009. The Court converted her case to chapter 7 on  
9 December 7, 2011.

10 During the pendency of the Chapter 11 case, Debtor filed an  
11 adversary action pro se against her former business partner, a  
12 debtor under chapter 7. Timothy P. Peabody substituted in as  
13 counsel for Debtor in the adversary action on April 4, 2011.  
14 Debtor paid Peabody a \$10,000 retainer for services to be rendered  
15 in the chapter 11 case. Peabody never filed an application for  
16 employment with the bankruptcy court or obtained an order  
17 approving his employment.

#### 18 1. Trustee's excessive fee motion and the disgorgement 19 order

20 After conversion of the case, chapter 7 trustee Richard A.  
21 Marshack filed a motion to determine whether the fees Debtor paid  
22 to Peabody exceeded a reasonable value under § 329(b) and  
23 Rule 2017 ("Excessive Fee Motion"). Trustee asserted two grounds  
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25 <sup>2</sup> Unless specified otherwise, all chapter, code and rule  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
27 the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The  
28 Federal Rules of Civil Procedure are referred to as "Civil Rules."

<sup>3</sup> The docket reflects that one of the appellees in this case  
is debtor Judy A. Jensen. Debtor has not appeared in this appeal.

1 for why Peabody should be required to disgorge all or a  
2 substantial portion of the \$10,000 retainer: (1) Peabody failed  
3 to seek employment or obtain an order approving his employment in  
4 accordance with § 327(a) and Rule 2014; and (2) in Trustee's  
5 opinion, Peabody failed to perform services worth \$10,000.  
6 Peabody did nothing other than filing an amended complaint and  
7 several status reports. Peabody failed to present contemporaneous  
8 billing records to Debtor or the U.S. Trustee or to file any fee  
9 applications with the bankruptcy court. Debtor claimed in her  
10 declaration in support of the Excessive Fee Motion that Peabody  
11 never served discovery requests on her former business partner in  
12 connection with her adversary action.

13 Peabody failed to file a response to the Excessive Fee Motion  
14 or appear at the hearing on May 14, 2013. After hearing brief  
15 argument from Trustee, the bankruptcy court ruled that it would  
16 grant the motion and order Peabody to disgorge the entire \$10,000  
17 retainer.

18 The bankruptcy court entered an order granting the Excessive  
19 Fee Motion on June 24, 2013 ("Disgorgement Order") and ordered  
20 Peabody to return the \$10,000 retainer to Trustee within 30 days  
21 of entry of the order. The bankruptcy court did not state at the  
22 hearing or in the Disgorgement Order the basis for granting the  
23 Excessive Fee Motion. Peabody failed to remit the funds within  
24 30 days as ordered.

25 **2. Peabody's motion to set aside the Disgorgement Order**

26 Peabody moved to set aside the Disgorgement Order ("Motion to  
27 Set Aside") on October 16, 2013. Although he cited § 105(a) as  
28 the basis for relief, Peabody argued that the Disgorgement Order

1 should be set aside due to mistake, inadvertence or excusable  
2 neglect. Peabody admitted to receiving notice of the Excessive  
3 Fee Motion and related hearing, but asserted that his staff  
4 miscalendared the hearing date, thus preventing him from filing a  
5 timely response or appearing at the hearing.

6 In support of his Motion to Set Aside, Peabody attached a  
7 copy of an invoice to Debtor dated June 13, 2013. The invoice,  
8 which Peabody admitted compiling after Trustee filed the Excessive  
9 Fee Motion, included Peabody's time records for Debtor's case  
10 dating from February 10, 2011 through May 19, 2012, and reflected  
11 107.4 billable hours totaling \$34,905.00. Peabody contended that  
12 Debtor, being disgruntled and unhappy with the results of his  
13 representation of her, sought to recover the \$10,000 retainer and  
14 to avoid paying the remaining outstanding amounts.

15 Trustee opposed the Motion to Set Aside, contending Peabody  
16 failed to establish excusable neglect under Civil Rule 60(b)(1).  
17 In his attached declaration, counsel for Trustee stated that he  
18 faxed letters to Peabody on August 12, 2013, and on September 24,  
19 2013, regarding the Disgorgement Order but received no response.  
20 Although Trustee's counsel stated he attached the letters as  
21 Exhibit A, he did not. Counsel had also attempted to call  
22 Peabody's office on August 21, 2013, to no avail. Counsel  
23 contended that only after he threatened to file a motion to show  
24 cause did Peabody respond, stating that he was filing the Motion  
25 to Set Aside.

26 Trustee asserted the Pioneer factors for relief under Civil  
27 Rule 60(b)(1) had not been met. First, Peabody's failure to  
28 prepare an adequate fee application, or to provide timely billing

1 or to file a timely response to the Excessive Fee Motion  
2 prejudiced the estate, by causing the estate to incur additional  
3 administrative expenses. Second, as for delay, Peabody never  
4 filed an application for employment or explained why he failed to  
5 file one. Only when faced with the Excessive Fee Motion did he  
6 actually compile a billing statement. Third, Peabody completely  
7 controlled the reasons for delay - his staff miscalendared the  
8 hearing date. Finally, Trustee disputed Peabody's good faith,  
9 contending that at no point had he filed an employment application  
10 or provided a fee application for review and approval by the court  
11 prior to taking funds. Even now, the new bill failed to account  
12 for the \$10,000 retainer paid.

13 The bankruptcy court held a hearing on the Motion to Set  
14 Aside on November 19, 2013. The bankruptcy court expressed its  
15 concern with Peabody waiting until October to seek relief from the  
16 final Disgorgement Order entered in June. When asked what he did  
17 in response to Trustee's letters, Peabody stated that he informed  
18 Trustee of the calendaring error and his intention to file the  
19 Motion to Set Aside. He also told Trustee that the Excessive Fee  
20 Motion was inappropriate. Peabody told the court that he signed a  
21 retainer agreement with Debtor years ago to provide work on her  
22 "civil case" as well as the bankruptcy case and that not all of  
23 the funds were for his bankruptcy work. Peabody contended that  
24 Debtor's declaration in support of the Excessive Fee Motion  
25 contained false statements.

26 After hearing further argument from the parties, the  
27 bankruptcy court announced it would deny the Motion to Set Aside,  
28 and that Peabody had until December 31, 2013, to return the

1 \$10,000 to Trustee. The bankruptcy court entered an order on  
2 December 17, 2013 ("Order"), consistent with the oral  
3 announcement. The bankruptcy court did not articulate its reasons  
4 for denying the Motion to Set Aside at the hearing or in the  
5 Order.

6 Peabody timely filed a notice of appeal of the Order on  
7 December 23, 2013, and filed an amended notice of appeal on  
8 February 15, 2014.

## 9 **II. JURISDICTION**

10 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
11 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C. § 158.

## 12 **III. ISSUE**

13 Did the bankruptcy court abuse its discretion in denying the  
14 Motion to Set Aside?

## 15 **IV. STANDARD OF REVIEW**

16 A court's denial of a motion under Civil Rule 60(b) is  
17 reviewed for an abuse of discretion. Lemoge v. United States,  
18 587 F.3d 1188, 1191-92 (9th Cir. 2009); Alonso v. Summerville  
19 (In re Summerville), 361 B.R. 133, 139 (9th Cir. BAP 2007) (citing  
20 Hammer v. Drago (In re Hammer), 112 B.R. 341, 345 (9th Cir. BAP  
21 1990), aff'd, 940 F.2d 524 (9th Cir. 1991)). A bankruptcy court  
22 abuses its discretion if it applied the wrong legal standard or  
23 its findings were illogical, implausible or without support in the  
24 record. TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820,  
25 832 (9th Cir. 2011).

## 26 **V. DISCUSSION**

27 Peabody contends the bankruptcy court did not apply the  
28 appropriate legal standard under § 105(a) in denying the Motion to

1 Set Aside. We agree the bankruptcy court applied an incorrect  
2 legal standard in denying Peabody's motion, but for different  
3 reasons.

4 A bankruptcy court has the discretionary power under § 105(a)  
5 to reconsider, modify or vacate its previous orders. See Zurich  
6 Am. Ins. Co. v. Int'l Fibercom, Inc. (In re Int'l Fibercom, Inc.),  
7 503 F.3d 933, 940 (9th Cir. 2007). However, such relief is sought  
8 by motion under Rule 9024, which has incorporated Civil  
9 Rule 60(b). Meyer v. Lenox (In re Lenox), 902 F.2d 737, 739-40  
10 (9th Cir. 1990).

11 Although Peabody cited § 105(a) as the basis for relief from  
12 the Disgorgement Order, his motion set forth a claim for relief  
13 from a final judgment under Civil Rule 60(b)(1) based on his  
14 mistake, inadvertence and excusable neglect: his staff had  
15 miscalendared the May 14 hearing date causing him not to file a  
16 response to the Excessive Fee Motion and to miss the hearing.  
17 Because of this, and because the 14-day appeal time had expired on  
18 the Disgorgement Order when Peabody filed his Motion to Set Aside,  
19 the bankruptcy court should have construed his motion as a motion  
20 for relief from judgment under Civil Rule 60(b). Negrete v. Bleau  
21 (In re Negrete), 183 B.R. 195, 197 (9th Cir. BAP 1995). The court  
22 may have construed it as such; we cannot tell from the record. In  
23 any event, we conclude it abused its discretion by failing to  
24 apply the legal standard required under Civil Rule 60(b)(1).

25 **A. The bankruptcy court failed to apply Pioneer-Briones or to**  
26 **make specific findings of fact and conclusions of law in**  
**denying the Motion to Set Aside.**

27 Under Civil Rule 60(b)(1), as incorporated by Rule 9024, a  
28 court may relieve a party from a final order upon a finding of

1 excusable neglect. In Pioneer Inv. Servs. Co. v. Brunswick  
2 Assocs. Ltd. P'ship, 507 U.S. 380, 395 (1993), the Supreme Court  
3 held that excusable neglect, for purposes of Rule 9006(b) (1),  
4 encompasses an attorney's negligence in complying with a filing  
5 deadline.

6 To determine whether a party's neglect is excusable, courts  
7 must apply a four-factor equitable test, examining: (1) the  
8 danger of prejudice to the opposing party; (2) the length of the  
9 delay and its potential impact on the proceedings; (3) the reason  
10 for the delay; and (4) whether the movant acted in good faith.

11 Id.

12 The Ninth Circuit adopted the Pioneer test for Civil  
13 Rule 60(b) (1) cases in Briones v. Riviera Hotel & Casino, 116 F.3d  
14 379, 381 (9th Cir. 1997). Through subsequent decisions, including  
15 Bateman v. U.S. Postal Service, 231 F.3d 1220, 1224-25 (9th Cir.  
16 2000), and Pincay v. Andrews, 389 F.3d 853, 860 (9th Cir. 2004)  
17 (en banc), the Ninth Circuit has further clarified how courts  
18 should apply this test. In Bateman, the Circuit concluded that  
19 when considering a Civil Rule 60(b) motion, a trial court abuses  
20 its discretion by failing to engage in the four-factor Pioneer-  
21 Briones equitable balancing test. 231 F.3d at 1223-24. Bateman  
22 had moved to set aside a summary judgment which had been entered  
23 due to his counsel's failure to file a timely opposition. Id. at  
24 1223. The district court, without mentioning the Pioneer-Briones  
25 test, denied the motion after considering only facts relating to  
26 the reason for Bateman's delay – the third Pioneer-Briones factor.  
27 Id. at 1224. The Circuit concluded that the district court had  
28 failed to engage in the equitable analysis mandated by Pioneer and



1 Briones and, by not considering the other three Pioneer-Briones  
2 factors, had abused its discretion in denying Bateman's motion.

3 Courts must "explicitly use the Pioneer-Briones framework for  
4 analysis of excusable neglect under [Civil] Rule 60(b)(1)[.]"  
5 Lemoge, 587 F.3d at 1192 (district court abused its discretion for  
6 not citing to Pioneer or Briones and for considering only three  
7 factors relating to the four factors identified in Pioneer-  
8 Briones) (citing Bateman, 231 F.3d at 1224). See also Ahanchian v.  
9 Xenon Pictures, Inc., 624 F.3d 1253, 1261-62 (district court  
10 abused its discretion for failing to cite or apply the equitable  
11 test under Pioneer-Briones and basing its decision solely on  
12 whether the reason for delay - the third Pioneer-Briones factor -  
13 could establish excusable neglect). A court's mere failure to  
14 cite the Pioneer-Briones test will generally not require reversal,  
15 but the court must have actually engaged in the equitable analysis  
16 those cases mandate. Lemoge, 587 F.3d at 1193; Bateman, 231 F.3d  
17 at 1224.

18 Here, the bankruptcy court did not cite to either Pioneer or  
19 Briones or expressly enumerate any of the Pioneer-Briones factors.  
20 Although one could argue that it considered Peabody's delay in  
21 filing his Motion to Set Aside, considering only one Pioneer-  
22 Briones factor is clearly insufficient. The extent of the court's  
23 oral ruling was "I'm going to deny the motion to set aside and  
24 vacate the order." Hr'g Tr. 7:5-6, November 19, 2013. The Order  
25 simply stated "IT IS ORDERED THAT the Motion is DENIED." The  
26 above authority required the bankruptcy court to specifically  
27 address the Pioneer-Briones factors in the course of making its  
28 decision; it did not do so. Accordingly, it abused its discretion

1 by applying an incorrect legal standard.

2 We acknowledge that Peabody did not specifically refer to  
3 Pioneer or to Briones in his moving papers and did not mention the  
4 cases during the hearing on the Motion to Set Aside. He failed  
5 even to cite the correct rule for relief. Trustee, however, did  
6 articulate the Pioneer-Briones factors and provided reasons for  
7 why he believed Peabody had failed to establish them.  
8 Nevertheless, Peabody's failure to cite the correct rule or  
9 relevant authorities did not relieve the bankruptcy court of its  
10 duty to apply the correct legal standard. See Bateman, 231 F.3d  
11 at 1224 (party's failure to cite Pioneer or Briones or discuss any  
12 of the factors under the equitable test did not relieve district  
13 court of its duty to apply the correct legal standard).

14 Our decision to vacate is further supported by the fact the  
15 bankruptcy court failed to articulate **any** findings of fact or  
16 conclusions of law. A motion for relief from judgment under  
17 Rule 9024 is a contested matter under Rule 9014, subject to Civil  
18 Rule 52(a) by incorporation under Rule 7052, which requires the  
19 bankruptcy court to find the facts specifically and state its  
20 conclusions of law separately. In the absence of complete  
21 findings, we may vacate a judgment and remand the case to the  
22 bankruptcy court to make the required findings or develop further  
23 evidence. First Yorkshire Holdings, Inc. v. Pacifica L 22, LLC  
24 (In re First Yorkshire Holdings, Inc.), 470 B.R. 864, 871 (9th  
25 Cir. BAP 2012) (citing United States v. Ameline, 409 F.3d 1073,  
26 1079 (9th Cir. 2005)).

## 27 VI. CONCLUSION

28 Because the bankruptcy court failed to engage in the Pioneer-

1 Briones analysis required for evaluating Civil Rule 60(b)(1)  
2 excusable neglect cases or to make any findings and conclusions  
3 sufficient for review, we VACATE the Order and REMAND to the  
4 bankruptcy court for findings and conclusions consistent with this  
5 decision.

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