

JUL 22 2016

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. NC-15-1143-WJuKu
)	
WOODCRAFT STUDIOS, INC.,)	Bk. No. 4:10-bk-74611
)	
Debtor.)	
<hr/>		
ALBERT M. KUN,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM*
)	
PAUL J. MANSDORF, Chapter 7)	
Trustee,)	
)	
Appellee.)	
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Argued and Submitted on January 21, 2016
at San Francisco, California

Filed - July 22, 2016

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

Honorable Roger L. Efremsky, Bankruptcy Judge, Presiding

Appearances: Appellant Albert M. Kun argued pro se; Jeremy W. Katz of Shierkatz RLLP argued for appellee Paul J. Mansdorf, Chapter 7 Trustee.

Before: WANSLEE,** JURY, 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 8024-1.

** Hon. Madeleine C. Wanslee, United States Bankruptcy Judge for the District of Arizona, sitting by designation.

1 **INTRODUCTION**

2 Albert M. Kun ("Kun") appeals from an order granting the
3 motion of chapter 7¹ trustee Paul J. Mansdorf ("Trustee") to
4 vacate the order employing Kun as counsel for the debtor-in-
5 possession, Woodcraft Studios, Inc. Kun also appeals from an
6 order disallowing the proofs of claim he filed for attorneys
7 fees related to services provided during the chapter 11 portion
8 of the case. We AFFIRM both orders.

9 **FACTS**

10 **Debtor's Bankruptcy Case and Kun's Employment**

11 On December 22, 2010 Kun filed a voluntary chapter 11
12 petition for debtor.² Debtor paid Kun a \$5,000.00 retainer to
13 represent the debtor-in-possession and the estate.³ The
14 bankruptcy court signed an order employing Kun and approved a
15 "general retainer;" the employment order notes that "[r]eceipt
16 of any compensation is subject to prior court approval."
17
18
19

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

23 ² We have taken judicial notice of the bankruptcy court
24 docket and various documents filed through the electronic
25 docketing system. See O'Rourke v. Seaboard Sur. Co. (In re E.R.
26 Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989); Atwood v.
Chase Manhattan Mort. Co. (In re Atwood), 293 B.R. 227, 233 n.9
(9th Cir. BAP 2003).

27 ³ The early factual background for this case is found in a
28 related district court decision. See Kun v. Mansdorf
(In re Woodcraft Studios, Inc.), 464 B.R. 1 (N.D. Cal. 2011).

1 **Order Disallowing All Fees and Directing**
2 **Disgorgement of Retainer**

3 The bankruptcy case was converted to chapter 7 on May 4,
4 2011, and Paul J. Mansdorf was appointed the chapter 7 trustee.
5 Kun filed an interim application for attorneys fees of \$8,250.00
6 and reimbursement of expenses of \$56.10. The application and
7 attached time sheet revealed that Kun was still owed money for
8 prepetition services because he had not drawn down on a retainer
9 before filing the case. The Trustee and the United States
10 trustee each filed objections to the fee application arguing
11 that Kun was a prepetition creditor who was not disinterested.

12 On June 8, 2011, the bankruptcy court held a hearing on the
13 fee application and the objections. At the conclusion of the
14 hearing, the bankruptcy court found that Kun had failed to
15 adequately disclose his connection to the debtor, as required by
16 § 327 and Rule 2014, and that Kun was not disinterested because
17 he continued to hold a prepetition claim for work completed
18 prepetition. Accordingly, the court denied all fees and ordered
19 disgorgement of the \$5,000.00 retainer.

20 At that hearing, Kun indicated to the bankruptcy judge that
21 he was unable to return the \$5,000.00 retainer because he had
22 already spent it. Following colloquy with Kun, the bankruptcy
23 court concluded that Kun should still have the retainer because
24 he did not draw it down prepetition. Further, once the
25 bankruptcy petition was filed, absent court approval, which Kun
26 had not previously sought, no fees were approved and no
27 postpetition order was entered by the bankruptcy court approving
28

1 payment of any portion of the retainer to Kun.⁴

2 Kun filed an appeal of the order denying the interim fee
3 application and for disgorgement of the retainer. The appeal
4 was heard by the United States District Court for the District
5 of California.

6 **Kun Files Proofs of Claim After Appealing the Fee Denial and**
7 **Disgorgement Order**

8 After the notice of appeal had been filed, but before the
9 district court ruled on the appeal, on September 8, 2011, Kun
10 filed two proofs of claim, claims 14-1 and 15-1. The separate
11 proofs of claim appear to be identical and they each claim that
12 Kun has an \$8,306.10 claim for attorneys fees secured by a
13 prepetition retainer and lien. Additionally, without stating a
14 basis, Kun asserts that each of the alleged secured claims for
15 attorneys fees are a priority claim. Attached to each of the
16 proofs of claim is a copy of the same time sheet dated May 4,
17 2011, that Kun had attached to the fee application the
18 bankruptcy court denied.

19 **District Court and Ninth Circuit Rulings**

20 The district court's published opinion affirmed both the
21 bankruptcy court's ruling and its rationale, noting Kun's
22 failure to disclose, his lack of eligibility to be employed
23 under § 327, and his lack of compliance with the Bankruptcy Code

24
25 ⁴ According to the Trustee, as of the date the Trustee filed
26 his brief in this appeal, Kun has failed or refused to disgorge
27 the retainer. At oral argument, Kun did not dispute the
28 Trustee's renewed statement that Kun has not yet complied with
the bankruptcy court order from June 2011 to disgorge the
retainer.

1 and Rules 2014 and 2016(b). Based on Kun's disclosure
2 violations, the district court determined that the bankruptcy
3 court was well within its discretion to deny all fees to Kun and
4 to order disgorgement of his retainer. The district court
5 specified that all retainer agreements, and all fee agreements
6 in general, are subject to the bankruptcy court's approval and
7 modification, regardless of how they are treated or created
8 under state law. Further, even though it was proper for the
9 bankruptcy court to deny fees based solely on the disclosure
10 violations, the bankruptcy court's finding that Kun was not
11 disinterested under § 327 and was in fact a prepetition creditor
12 of the debtor was not clearly erroneous, and this finding was a
13 separate basis under § 328(c) to deny compensation. The
14 district court concluded that the bankruptcy court did not abuse
15 its discretion, nor did it mis-apply the law in denying the
16 entire fee application and ordering disgorgement of the
17 retainer.

18 Kun appealed to the Ninth Circuit, which affirmed the
19 district court in an unpublished memorandum decision. The Ninth
20 Circuit held that failing to disclose prepetition work for a
21 debtor "constitutes a statutory violation of both the Bankruptcy
22 Code and the Federal Rules of Bankruptcy Procedure." Kun v.
23 Mansdorf, 558 Fed. Appx. 755 (9th Cir. 2014). The Bankruptcy
24 Code and Rules "create strict disclosure rules which are
25 intended to ensure that an applicant attorney is not, inter
26 alia, an interested party with a claim on the estate entering
27 into bankruptcy." Id. at 755-56. "A bankruptcy court also 'has
28 broad and inherent authority to deny **any and all** compensation

1 when an attorney fails to meet the requirements' of the
2 Bankruptcy Code and [Rules]." Id. at 756 (citation omitted)
3 (emphasis added). The Ninth Circuit concluded that Kun had
4 failed to disclose material facts to the bankruptcy court in
5 connection with his employment application and that the
6 bankruptcy court acted within its discretion by denying his
7 application for attorney's fees and by ordering disgorgement of
8 the retainer.

9
10 **Request to Vacate Employment Order and Objection to Proofs of
Claim**

11 On November 15, 2011, the Trustee filed a motion to vacate
12 the order allowing Kun's employment combined with an objection
13 to his proofs of claim. The Trustee argued that the employment
14 order should be vacated because of the finding that Kun was
15 ineligible to represent the debtor-in-possession. The Trustee
16 also claimed that vacating the employment order would vacate any
17 alleged "true retainer" or security interest that Kun might have
18 in the \$5,000.00 retainer he received from the debtor, as well
19 as any attorney's lien Kun may assert. The Trustee objected to
20 the secured/priority status alleged in the proofs of claim on
21 the grounds that Kun has no security interest in any property of
22 the estate, including the \$5,000.00 retainer, that all of the
23 requested fees had been disallowed, and that Kun failed to
24 comply with the bankruptcy court's order to return the \$5,000.00
25 retainer to the bankruptcy estate.

26 On November 29, 2011, Kun filed a response to the Trustee's
27 motion to vacate the employment order and objection to proofs of
28 claim. According to Kun, being a creditor of the estate at the

1 time that the chapter 11 petition was filed does not preclude
2 him from serving as counsel for the debtor. Kun argued that the
3 order disallowing his fee application said nothing about a
4 future proof of claim and that he was able to file a proof of
5 claim for the fees owed to him as of May 4, 2011, which was when
6 the case was converted. The bankruptcy court held these matters
7 in abeyance until 2015 when the district court and Ninth Circuit
8 appeals were concluded.

9 On March 4, 2015, the bankruptcy court held a hearing on
10 the motion to vacate the employment order and the objection to
11 Kun's proofs of claim. At the hearing, Kun argued that there
12 was no basis to vacate or terminate his employment agreement
13 with the debtor. Kun again argued that he did not know he was a
14 creditor, so he made no misrepresentation about being a
15 creditor. Regarding the proofs of claim, Kun argued that the
16 Ninth Circuit's order only dealt with the prepetition claims,
17 \$3,950.00, so there is still some \$1,050.00 in postpetition fees
18 that the Ninth Circuit did not consider. Kun reiterated that he
19 was concerned only about the postpetition fees in the amount of
20 \$1,050.00, and any fees associated with the defense of fees,
21 obtaining the fees, or maintaining and keeping the fees.

22 **Employment Order Vacated**

23 The bankruptcy court made findings of fact and conclusions
24 of law on the record at the March 4, 2015 hearing. The court
25 vacated the order employing Kun as counsel for the debtor-in-
26 possession and the bankruptcy estate. The court summarized the
27 previous findings and noted that Kun's compensation had already
28 been denied in a prior order and that the appropriate remedy was

1 to vacate the employment order at that time. Further, the court
2 commented that to the extent the employment order may have been
3 construed to have approved Kun's alleged \$5,000.00 lien in his
4 retainer, vacating the employment order also vacates any alleged
5 lien. The court stated that the employment order was being
6 vacated because, if Kun had made proper disclosure that he was
7 not disinterested, the court would never have approved the
8 employment. Vacating the employment order fixes the problem and
9 the court found there was nothing in the Bankruptcy Code or
10 Rules, or in the cases cited by Kun, that prohibits the court
11 from vacating the employment order when there was no basis to
12 enter that order, in light of the information later revealed
13 that Kun was not disinterested.

14 **Kun's Proofs of Claim Disallowed**

15 Regarding the proofs of claim, the court commented that
16 even if Kun did have a lien, the disallowance of the fees means
17 that the lien attaches to nothing because an attorney's lien
18 simply secures the amount of the underlying debt as determined
19 by the bankruptcy court. The court noted that the order
20 allowing the employment was drafted by Kun and it did not
21 provide for a non-refundable retainer or a security retainer.
22 Instead, the order only referred to a general retainer. The
23 bankruptcy court explained that vacating the employment order
24 and addressing the objection to the proofs of claim were new
25 issues that had not been addressed in the previous order and
26 appeals.

27 The court found that the proofs of claim should be
28 disallowed because there was no basis for the claims. Kun's

1 fees were previously disallowed in full and the bankruptcy court
2 previously ordered disgorgement of the retainer. Any lien that
3 may have been created is gone, and even if there was an
4 enforceable lien, it does not attach to anything because Kun's
5 compensation was denied in full.

6 On March 10, 2015, the bankruptcy court entered the order
7 vacating the employment order and disallowing Kun's proofs of
8 claim.

9 On April 23, 2015, Kun filed a timely notice of appeal
10 pursuant to an extension granted by the bankruptcy court.

11 **PREFATORY COMMENT**

12 This is the second appeal concerning payment of Kun's
13 attorneys fees. As stated above, Kun filed a fee application
14 requesting an award of attorneys fees. It was through this
15 application and the attached time sheet that Kun first revealed
16 that he was a prepetition creditor and had undisclosed
17 connections with the debtor.

18 The bankruptcy court denied all fees and costs represented
19 in the fee application and ordered Kun to disgorge the \$5,000.00
20 retainer. Two appellate courts held that the bankruptcy court
21 properly found that Kun had violated his requirement to make
22 full and proper disclosures to be employed as a professional of
23 the bankruptcy estate and that he was not disinterested. Either
24 finding by the bankruptcy court was an independent basis for
25 denying all fees and costs and ordering disgorgement.

26 This Panel is not reviewing any matter that was the subject
27 of the first series of appeals, viz: whether Kun violated the
28 disclosure requirements; whether he was not disinterested, and

1 therefore ineligible to be employed as a professional of the
2 bankruptcy estate under § 327; or the propriety of the
3 bankruptcy court's disallowance of all fees and costs identified
4 in the fee application, plus disgorgement of the \$5,000.00
5 retainer.

6 Further the Panel notes that the fees disallowed in full
7 were all of the fees identified in the fee application, both
8 prepetition and postpetition, plus the claimed expenses. There
9 is no indication in the rulings by either the district or
10 circuit court that the bankruptcy court order denying all fees
11 and costs and ordering disgorgement of the retainer was limited
12 in any fashion. The Panel thus finds that the order denying
13 fees applies to the entire amount of fees represented by the fee
14 application, not the net amount that Kun stated was still owing.
15 This conclusion is based on the language used by the bankruptcy
16 court in denying the fees in total, and because the order
17 requires disgorgement of the full \$5,000.00 retainer the debtor
18 paid to Kun.

19 On this second appeal, the Panel will rely on the findings
20 of fact and conclusions of law that have been already
21 established and that are the law of the case.

22 **JURISDICTION**

23 The bankruptcy court had jurisdiction under 28 U.S.C.
24 §§ 1334 and 157(b) (2) (A) and (B). This Panel has jurisdiction
25 under 28 U.S.C. § 158.

26 **ISSUES**

27 1. Did the bankruptcy court abuse its discretion in vacating
28 the employment order?

1 2. Did the bankruptcy court abuse its discretion in
2 disallowing Kun's proofs of claim?

3 **STANDARDS OF REVIEW**

4 We review a decision regarding the employment of a
5 professional for an abuse of discretion. Elias v. Lisowski Law
6 Firm, Chtd. (In re Elias), 215 B.R. 600, 603 (9th Cir. BAP
7 1997).

8 "An order overruling a claim objection can raise legal
9 issues (such as the proper construction of statutes and rules)
10 which we review de novo, as well as factual issues (such as
11 whether the facts establish compliance with particular statutes
12 or rules), which we review for clear error." Allen v. U.S.
13 Bank, N.A. (In re Allen), 472 B.R. 559, 564 (9th Cir. BAP 2012)
14 (quoting Veal v. Am. Home Mortg. Serv., Inc. (In re Veal),
15 450 B.R. 897, 918 (9th Cir. BAP 2011)).

16 We review a bankruptcy court's decision to allow or
17 disallow a proof of claim for an abuse of discretion. Green v.
18 Brotman Med. Ctr., Inc. (In re Brotman Med. Ctr., Inc), 2012 WL
19 603709, at *6 (9th Cir. BAP Jan. 20, 2012).

20 To determine whether the bankruptcy court abused its
21 discretion, we conduct a two-step inquiry: (1) we review de novo
22 whether the bankruptcy court "identified the correct legal rule
23 to apply to the relief requested" and (2) if it did, whether the
24 bankruptcy court's application of the legal standard was
25 "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in
26 inferences that may be drawn from the facts in the record.'" United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009)
27 (en banc) (citation omitted).
28

1 DISCUSSION

2 **A. The Bankruptcy Court Did Not Abuse its Discretion When it**
3 **Vacated Kun's Employment Order.**

4 Section 327(a) requires that any professional employed by
5 the estate be disinterested.⁵ In prior proceedings, the
6 bankruptcy court found that Kun was not eligible to be counsel
7 for the debtor under § 327 because he was a prepetition creditor
8 and thus not disinterested. Accordingly, all requested fees
9 were denied and Kun was ordered to disgorge his retainer. The
10 bankruptcy court's findings were affirmed on appeals to the
11 district court and to the Ninth Circuit.

12 Bankruptcy courts have inherent power to enforce their own
13 orders and to take corrective action when necessary.
14 Section 105(a) vests bankruptcy courts with powers "necessary or
15 appropriate to carry out the provisions of" the Bankruptcy Code.
16 11 U.S.C. § 105(a). Thus, a bankruptcy court has the
17 discretionary power under § 105(a) to reconsider, modify, or
18 vacate previous orders. See Zurich Am. Ins. Co. V. Int'l
19 Fibercom, Inc. (In re Int'l Fibercom, Inc.), 503 F.3d 933, 940
20 (9th Cir. 2007).

21 In this appeal, Kun argues that neither § 327 nor any other
22 section of the Bankruptcy Code expressly authorizes the
23 revocation of the "attorney's fee contract." Kun further argues
24

25 ⁵ Section 327(a) provides: "Except as otherwise provided in
26 this section, the trustee, **with the court's approval**, may employ
27 one or more attorneys, accountants, appraisers, auctioneers, or
28 other professional persons, **that do not hold or represent an**
interest adverse to the estate, and **that are disinterested**
persons. . . ." (emphasis added).

1 that neither Rule 2014 nor any other rule addresses revocation
2 of the "attorney's fee contract." Kun contends that the
3 bankruptcy court apparently assumed, but did not find, that his
4 representation about being disinterested was sufficiently
5 fraudulent to vacate the employment contract. Kun's position is
6 that the word "disinterested" is an opinion, not a fact, and
7 that an opinion cannot be the basis of a fraudulent
8 representation. Kun also argues that the employment agreement
9 is governed by state law, not federal law, and that the Trustee
10 alleges no ground to vacate under California law. Further,
11 there was no fraud in this case because there was no scienter -
12 more specifically, Kun did not make a knowing misrepresentation
13 because he did not understand that he was a creditor. Finally,
14 Kun concludes that there is no precedent in bankruptcy law to
15 set aside an employment contract for negligent
16 misrepresentation.

17 Kun's arguments fail to appreciate the procedural and
18 appellate history of this case as well as the law and process
19 for employing a professional to represent the debtor-in-
20 possession and the bankruptcy estate in a chapter 11 case.
21 Kun's arguments are focused on the power of the bankruptcy court
22 to revoke his employment contract with the debtor and whether
23 the bankruptcy court made a finding of fraud, or if fraud could
24 have been found. However, the bankruptcy court made clear that
25 it was not revoking Kun's employment contract with the debtor.
26 Instead, using its inherent § 105 power, the bankruptcy court
27 vacated its previous order approving the employment application
28 filed in the bankruptcy case.

1 Under provisions of the Bankruptcy Code and Rules,
2 specifically §§ 327, 328, 329, 330, 331, and Rules 2014 and
3 2016, before a professional such as an attorney may be employed
4 by, and paid from, the bankruptcy estate, he must meet certain
5 criteria, and the court must approve the employment. A
6 professional who fails to comply with the requirements of the
7 Bankruptcy Code or Rules relating to the employment may forfeit
8 the right to be paid and the person performing these
9 professional services may be considered an "officious
10 intermeddler or gratuitous volunteer." 3 Collier on Bankruptcy
11 ¶ 327.03[2][c] (Alan N. Resnik & Henry J. Sommer, eds., 16th ed.
12 2015). Simply put, Congress made it abundantly clear that
13 § 327(a) requires court approval for a professional to be
14 employed by the estate, and a professional who is not employed
15 by the estate is not entitled to be paid by the estate.

16 However, even if the professional obtains an order allowing
17 employment under § 327(a), that does not establish a right to be
18 compensated as fees must be granted under § 330. 3 Collier at
19 ¶327.03[2][d] (citing Ferrara & Hantman v. Alvarez, 124 F.3d
20 567, 571 (3d Cir. 1997), and noting that compensation from
21 estate funds is subject to a second look by the bankruptcy court
22 under § 330). The bankruptcy court clearly retains the
23 authority to deny allowance of fees and reimbursement of
24 expenses if the professional is not disinterested, or if the
25 professional holds or represents an adverse interest to the
26 estate with respect to the matter on which the professional is

1 employed.⁶

2 In this case, the bankruptcy court determined that Kun
3 failed to comply with the disclosure requirements regarding his
4 proposed employment as a professional of the estate and that Kun
5 was not disinterested. Those findings were upheld on appeal to
6 the district court and to the Ninth Circuit. Accordingly, Kun
7 did not meet the requirements to be employed by the estate, and
8 the bankruptcy court concluded it would not have granted the
9 employment if Kun had properly disclosed that he was a
10 prepetition creditor.

11 In re Coastal Equities, Inc., 39 B.R. 304 (Bankr. S.D. Cal.
12 1984), is a case that is factually similar to this one. In
13 Coastal Equities, the bankruptcy court for the Southern District
14 of California vacated an employment order based on the failure
15 of the professional to make full and complete disclosure. Id.
16 at 309. Kun seeks to distinguish Coastal Equities on grounds
17 that the court found the law firm representing the debtor to
18 have had a materially adverse interest. Kun states that in this
19 case, no such finding was made and that the bankruptcy court

21 ⁶ Section 328(c) states:

22 Except as provided in section 327(c), 327(e),
23 or 1107(b) of this title, the court may deny
24 allowance of compensation for services and
25 reimbursement of expenses of a professional
26 person employed under section 327 or 1103 of
27 this title if, at any time during such
28 professional person's employment under 327 or
1103 of this title, such professional person
is not a disinterested person, or represents
or holds an interest adverse to the interest
of the estate with respect to the matter on
which such professional person is employed.

1 instead found that debtor's counsel's representation was not
2 disinterested. Kun states that the word disinterested is an
3 opinion, not a fact and an opinion cannot be the basis of a
4 fraudulent representation.

5 We disagree with Kun's analysis. The bankruptcy court made
6 a finding of fact that Kun was a prepetition creditor of the
7 debtor and thus not disinterested - this is not simply an
8 opinion; it is a finding. Moreover, fraudulent representation
9 is not the reason that Kun's fee application was denied in full
10 or the reason that he was not eligible under § 327(a) to
11 represent the debtor-in-possession or the bankruptcy estate.
12 Because Kun was appointed without full disclosure of his
13 disqualifying status as a creditor, vacatur of the employment
14 order was the court's chosen and most effective method of
15 terminating the improper representation. As Judge Meyers held
16 in Coastal Equities:

17 The requisite showing for approval of employment was
18 not properly made by this Applicant. Had the Court
19 been fully and properly informed, it would have held
20 that this Applicant could not represent the debtor-in-
21 possession due to the conflicting interests present
22 and because it would not have been in the best
23 interest of the estate. A debtor-in-possession, as
24 well as its counsel, owe an undivided loyalty to the
25 estate. . . . Accordingly, the Order appointing [the
26 professional] as attorney for debtor is vacated and
27 cannot form the basis for any fee request for fees
28 incurred while representing the debtor-in-possession.

24 39 B.R. at 309. Because he was a creditor of the estate, Kun
25 was not disinterested and he was not eligible to be employed as
26 an estate professional under § 327(a). Kun held an interest
27 materially adverse to the estate. The court in Coastal Equities
28 determined that the failure of the attorneys to make proper

1 disclosure, which is the same issue presented by this case, was
2 the basis to vacate the order employing the professionals. The
3 bankruptcy court properly vacated an order it would not have
4 entered if all requisite disclosures had been made.

5 The bankruptcy court acted within its discretion to
6 reconsider and vacate the employment order based on the newly
7 disclosed fact that Kun was not disinterested and therefore not
8 employable because he held a prepetition claim against the
9 debtor. The decision to vacate the employment order is hereby
10 AFFIRMED.

11 **B. The Bankruptcy Court Did Not Abuse its Discretion When it**
12 **Disallowed the Proofs of Claim.**

13 Kun also complains that the bankruptcy court abused its
14 discretion in disallowing the two proofs of claim. Kun filed
15 what appear to be two identical proofs of claim in the period
16 after the bankruptcy court had denied all fees and expenses in
17 the fee application and ordered disgorgement of the \$5,000.00
18 retainer, but before the district court ruled on his appeal of
19 the bankruptcy court's order.

20 Each proof of claim was filed as a secured, priority claim
21 in the amount of \$8,306.10. The basis for the secured claim is
22 stated as a prepetition retainer and lien. Kun does not
23 identify any basis to give the claim priority under § 507(a).
24 Attached to each proof of claim is the same time sheet dated
25 May 4, 2011 that was attached to Kun's fee application. No
26 other documentation was attached to the proofs of claim.

27 Kun points out that once a proof of claim is executed under
28 penalty of perjury and filed with the court, it is prima facie

1 evidence of the validity and amount of the claim under
2 Rule 3001(f). Kun then argues that the only grounds for
3 disallowing a claim are listed in § 502. Kun states that the
4 bankruptcy court never held that the claim is not enforceable
5 against the debtor under state law. Instead, the bankruptcy
6 court merely disallowed the claim. Kun argues that the claim is
7 still enforceable against the debtor's property. Finally, Kun
8 asserts the bankruptcy court clearly erred when it found that
9 the reasonable value of Mr. Kun's services was zero because
10 there was no question that the debtor needed to file bankruptcy
11 or that the bankruptcy petition had been filed, and anyone who
12 is familiar with bankruptcy work knows the amount of time and
13 effort these cases take.

14 Kun's argument is nonsense. The only way a professional
15 can be paid from the bankruptcy estate for professional services
16 provided to the estate is when the professional has been
17 properly employed under § 327. See § 330(a)(1). As repeatedly
18 held: "[c]ourt approval of the employment of counsel for a
19 debtor in possession is sine qua non to counsel getting paid.
20 Failure to receive court approval for the employment of a
21 professional in accordance with § 327 and Rule 2014 precludes
22 the payment of fees." DeRonde v. Shirley (In re Shirley),
23 134 B.R. 940, 943-44 (9th Cir. BAP 1991); see also Shapiro
24 Buchman LLP v. Gore Bros. (In re Monument Auto Detail, Inc.),
25 226 B.R. 219, 224 (9th Cir. BAP 1998); and McCutchen, Doyle,
26 Brown & Enersen v. Official Comm. Unsecured Creditors
27 (In re Weibel), 176 B.R. 209, 211 (9th Cir. BAP 1994).

28 There is no dispute that Kun was not properly employed

1 under § 327. The bankruptcy court and two appellate courts
2 confirmed that Kun violated his disclosure obligations because
3 he did not fully disclose his connections to the debtor.
4 Further, Kun was not disinterested because he was a prepetition
5 creditor of the estate.

6 This Panel has stated that it will not reopen the findings
7 or analysis from the first set of appeals, but we note that the
8 law is clear that under § 328(c), if at any time during the
9 professional's employment under § 327, the professional is not
10 disinterested, or holds an interest adverse to the estate with
11 respect to the matter on which the professional is employed, the
12 bankruptcy court may deny allowance of all compensation and
13 expenses. Further, the requirement to make full and accurate
14 disclosure by a professional seeking employment or fees from the
15 estate is an independent responsibility. Neben & Starrett, Inc.
16 v. Chartwell Fin. Corp. (In re Park-Helena Corp.), 63 F.3d 877,
17 880 (9th Cir. 1995). "The disclosure rules are applied
18 literally, even if the results are harsh." Id. at 881.
19 "Negligent or inadvertent omissions 'do not vitiate the failure
20 to disclose.'" Id. (citation omitted).

21 Kun's argument that he may pursue his fees under a state
22 law theory is also misplaced. Kun may only recover fees related
23 to his representation in the bankruptcy case in accordance with
24 the provisions allowing fee awards provided in the Bankruptcy
25 Code. "[T]he Code and Rules preclude fee awards for services
26 performed on behalf of a bankruptcy estate based on state law
27 theories not provided for by the Code." Monument Auto, 226 B.R.
28 at 224 (citing Weibel, 176 B.R. at 212 and Shirley, 134 B.R. at

1 944). See also Law Offices of Ivan W. Halperin v. Occidental
2 Fin. Grp., Inc. (In re Occidental Fin. Grp., Inc.), 40 F.3d
3 1059, 1063 (9th Cir. 1994) ("As a general rule the equitable
4 remedy of quantum meruit cannot be available where the fees are
5 barred by law under the bankruptcy rules," citing In re Shirley,
6 134 B.R. at 944-45, noting that allowing recovery under quantum
7 meruit and other state law theories would void the Bankruptcy
8 Code and Rule provisions requiring approval of employment).

9 Kun apparently fails to understand four key points in this
10 case. First, it is a requirement under § 330(a) that he must be
11 properly employed under § 327 to receive compensation as a
12 professional of the estate. Second, he failed to make full and
13 accurate disclosure about being a prepetition creditor. Third,
14 by holding a claim for prepetition services he was not
15 disinterested. Finally, the fact that he was not disinterested
16 meant that he was not employable. Thus, the order (1) denying
17 all fees and costs represented in Kun's fee application and
18 (2) directing disgorgement of the \$5,000.00 retainer meant that
19 all of the fees and costs incurred in connection with the case
20 were completely disallowed by the bankruptcy court.

21 Kun's position that he still has a claim under state law or
22 that the claim remains enforceable against property of the
23 bankruptcy estate is not supported by the applicable law. Kun's
24 claims for attorneys fees and costs represented in the two
25 proofs of claim were not denied based on an equitable
26 disallowance theory. The claims for fees and costs were denied
27 under § 502(b)(1) as unenforceable because they had already been
28 disallowed in full. They were also denied under § 502(b)(4)

1 based on a finding by the bankruptcy court that the claims
2 exceeded the reasonable value to the bankruptcy estate. There
3 is no basis for the allowance of attorneys fees that have been
4 previously disallowed by the bankruptcy court. The fees and
5 costs represented in the proofs of claim are the same fees and
6 costs which the court previously denied.

7 The Panel finds that the bankruptcy court did not abuse its
8 discretion in disallowing Kun's two proofs of claim that
9 represented the exact same fees and costs that the court
10 previously disallowed in full based on Kun's violations of the
11 disclosure rules and because Kun was not disinterested. Once a
12 determination has been made to deny fees and costs of a
13 professional of the estate, there is no legal basis to revive
14 those same claims. The order sustaining the objections to the
15 proofs of claim is AFFIRMED.

16 The Panel notes that Kun raised a third point on appeal:
17 whether the bankruptcy court erred in finding that the
18 reasonable value of his services was zero. The Panel finds that
19 the issue is moot, and it need not decide the matter based on
20 the holdings in the first series of appeals that the bankruptcy
21 court properly exercised its discretion when it denied the
22 attorney fee application in its entirety based on Kun's
23 disclosure violations and that his prepetition claim rendered
24 him not disinterested and therefore ineligible to be employed
25 under § 327(a).

26 **CONCLUSION**

27 This appeal confirms that if an attorney is not properly
28 employed by the estate, the bankruptcy court does not abuse its

1 discretion in later vacating an employment order. Additionally,
2 once attorneys fees have been denied, the same attorneys fees
3 and costs may not be recovered through the filing of subsequent
4 proofs of claim or based on alternative, state law theories.
5 Under the facts of this case, with the attorneys fees and costs
6 disallowed in full and our determination that the bankruptcy
7 court did not abuse its discretion in disallowing the subsequent
8 proofs of claim, it does not matter what, if any, benefit or
9 value counsel may have provided to the estate.

10 For the foregoing reasons, we AFFIRM.