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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. AZ-16-1260-LBJu  
 )  
 GILBERT HOSPITAL, LLC, ) Bk. No. 14-01451-MCW  
 )  
 Debtor, )  
 )  
 )  
 )  
 DAVID K. GOTTLIEB, Trustee )  
 of the Gilbert Hospital )  
 Unsecured Creditors' Trust, )  
 )  
 Appellant, )  
 )  
 v. ) **MEMORANDUM\***  
 )  
 GILBERT HOSPITAL, LLC; )  
 TIMOTHY JOHNS, )  
 )  
 Appellees. )

Argued and Submitted on May 18, 2017  
at Phoenix, Arizona

Filed - June 8, 2017

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

Honorable Madeleine C. Wanslee, Bankruptcy Judge, Presiding

Appearances: Keith L. Hendricks of Moyes Sellers & Hendricks  
 Ltd. argued for Appellee Timothy Johns; Daren R.  
 Brinkman, Laura J. Portillo and Kevin Ronk of  
 Brinkman Portillo Ronk, APC on brief for Appellant  
 David K. Gottlieb.

Before: LAFFERTY, BRAND, and JURY, Bankruptcy Judges.

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\*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 **INTRODUCTION**

2 David K. Gottlieb, Trustee of the Gilbert Hospital Unsecured  
3 Creditors' Trust ("GH USC Trust"), appeals the bankruptcy court's  
4 order overruling his § 502(d)<sup>1 2</sup> objection to the allowance of  
5 Dr. Timothy Johns' administrative claim for post-petition  
6 services as Chief Medical Officer ("CMO") of Gilbert Hospital,  
7 LLC ("GH"). The bankruptcy court overruled the objection because  
8 the § 502(d) issue had been raised and settled in the context of  
9 a motion to approve a settlement of Dr. Johns' pre- and post-  
10 petition claims against GH and a related debtor.

11 We AFFIRM.

12 **FACTS**

13 GH filed a chapter 11 petition on February 5, 2014. Several  
14 months earlier, a different hospital with the same founders  
15 (including Dr. Johns), Florence Hospital at Anthem, LLC ("FHA"),  
16 had filed a chapter 11 case in the same district (case no.  
17 13-03201-BMW, presided over by the Honorable Brenda Moody  
18 Whinery). The cases were jointly administered for plan  
19 confirmation in the FHA court.

20 Dr. Johns was the CMO for GH and the sole manager of FHA.  
21 Shortly after the GH bankruptcy was filed, GH entered into an  
22 Amended and Restated Chief Medical Officer Agreement with  
23 Dr. Johns, which spelled out Dr. Johns' duties as CMO and set his

24 \_\_\_\_\_  
25 <sup>1</sup>Unless otherwise indicated, all chapter and section  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

27 <sup>2</sup>Section 502(d) requires the disallowance of a claim of any  
28 entity from which property is recoverable under section 542, 543,  
550, or 553 or that is a transferee of a transfer avoidable under  
section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a).

1 compensation at \$175 per hour.

2 Over the course of the bankruptcies, Dr. Johns asserted pre-  
3 and post-petition claims against both GH and FHA, some of which  
4 were disputed. The debtors and Dr. Johns negotiated a settlement  
5 of those claims - including Dr. Johns' claim for post-petition  
6 services as CMO - and their treatment under the plan (the  
7 "Stipulation"); on September 18, 2015, GH, FHA, and Dr. Johns  
8 jointly moved for approval of the Stipulation under Rule 9019  
9 ("9019 Motion"). With respect to Dr. Johns' claim for post-  
10 petition services as GH's CMO, paragraph 57 of the Stipulation  
11 provided:

12 GH and Johns agree that Johns shall file an  
13 administrative application by the Administrative Claims  
14 Bar Date to support the Johns Administrative Claim and  
15 GH shall pay the Johns Administrative Claim in full  
16 upon allowance or upon terms agreed to by GH and Johns.  
17 Allowance of the Johns Administrative Claim shall be  
18 subject to a full accounting of time sheets and full  
19 compliance with all healthcare and regulatory laws  
20 including the Stark Law.

21 The Official Committee of Unsecured Creditors of GH  
22 ("GHUCC") filed an objection to the 9019 Motion. GHUCC argued  
23 that the settlement should be subject to a heightened level of  
24 scrutiny because Dr. Johns was an insider of both GH and FHA.  
25 Among GHUCC's objections was the following:

26 5. The Committee anticipates bringing several  
27 avoidance actions against Johns and anticipates that  
28 Johns will not have any amount of allowed claims after  
the avoidance actions have been litigated. The  
Committee has evidence that Johns owes far more to the  
Gilbert estate than Johns claims the estate owes him.  
The Committee therefore does not believe that any of  
Johns' claims should be or will be allowed. However,  
as a fallback, the Committee requests that should Johns  
be determined to have any priority claims against  
Gilbert that are allowed claims, Johns be paid by the  
Reorganized Debtor and not from any funds which are to  
be distributed to the GH USC Trust.

1 GHUCC's objections were resolved by stipulation, with GHUCC  
2 agreeing that paragraph 57 of the Stipulation would remain  
3 unchanged. In contrast, the parties agreed to add language  
4 reserving the GH USC Trust's right to dispute Dr. Johns' pre-  
5 petition wage claims. At the hearing on the 9019 Motion,  
6 Judge Whinery approved the Stipulation as modified by the  
7 parties. The order approving the Stipulation, which was entered  
8 November 18, 2015, included the following language:

9 IT IS FURTHER ORDERED confirming that Johns shall  
10 file an administrative application by the  
11 Administrative Claims Bar Date to support the Johns  
12 Administrative Claim in the GH Bankruptcy. Johns and  
GH reserve all rights related to the Allowance and  
payment of the Johns Administrative Claim.

13 In the meantime, Debtors' Second Amended Joint Plan of  
14 Reorganization (the "Plan") was confirmed by order entered  
15 October 26, 2015. GHUCC appealed the confirmation order. That  
16 appeal was settled, and a stipulated order amending the  
17 confirmation order was entered February 29, 2016. Because of the  
18 appeal, the effective date of the Plan was delayed by  
19 approximately four months to February 19, 2016.

20 Among other things, the Plan provided that a holding company  
21 would be formed to own GH and to acquire ownership of FHA. The  
22 Plan also provided for the formation of the GH USC Trust, through  
23 which GH's unsecured creditors with allowed claims would be paid  
24 in full from funds provided by the reorganized debtor.

25 Administrative claims, secured bank debt, and other priority  
26 claims were to be paid directly by the reorganized debtor.

27 On May 20, 2016, Dr. Johns filed an application for  
28 allowance of an administrative claim for \$319,775 for his post-

1 petition services as CMO of GH (the "Application"). The  
2 Application indicated that GH had completed its accounting and  
3 compliance review of the records supporting Dr. Johns' claim as  
4 required under the Stipulation and that the parties had agreed  
5 the claim would be paid over six months. Gottlieb, as Trustee of  
6 the GH USC Trust, filed an objection to the Application, arguing  
7 that the application was untimely, excessive in amount, provided  
8 no proof of entitlement to the claim, and could not be paid under  
9 § 502(d). Gottlieb also filed a supplemental objection asserting  
10 that the Stipulation had not allowed Johns an administrative  
11 claim but had provided only that Johns could file an application  
12 for allowance of such a claim. Gottlieb argued that even though  
13 the administrative claim would be paid by the reorganized debtor,  
14 the GH USC Trust and its constituents could potentially be harmed  
15 by payment of the claim because the payment would reduce the  
16 amount available for the reorganized debtor to distribute to the  
17 GH USC Trust for payment of unsecured claims. Gottlieb also  
18 argued that the claim should not be paid pursuant to § 502(d)  
19 until any avoidance actions against Dr. Johns were resolved.

20 At the August 11, 2016 hearing on the Application, counsel  
21 for Dr. Johns indicated to the court that the reorganized  
22 debtor's audit of Dr. Johns' time records had resulted in an  
23 approximate \$60,000 reduction in the amount requested. Counsel  
24 for GH and FHA both indicated that they supported approval of the  
25 application.

26 The bankruptcy court overruled Gottlieb's objections,  
27 finding that Dr. Johns' claim was based upon a two-party  
28 agreement between GH and Dr. Johns to perform post-petition

1 services for a specified compensation over a specific time  
2 period. The court noted that the amount of the claim exceeded an  
3 agreed-upon cap of \$300,000 but that the additional compensation  
4 was due to the delay in the effective date caused by the GH UCC's  
5 appeal of the confirmation order.

6 The court also relied on the language of paragraph 57 of the  
7 Stipulation, noting that although the language was not as clear  
8 as it could have been, the Stipulation required GH to pay the  
9 claim in full upon allowance or upon terms agreed to by GH and  
10 Johns. Importantly, the bankruptcy court found that Dr. Johns  
11 provided beneficial services to the estate and that he should be  
12 compensated for the time he spent providing services to GH.

13 With respect to the § 502(d) objection, the court stated  
14 that the objection did not need to be resolved with respect to  
15 the Application "at this time." The court also denied counsel's  
16 request to have the reorganized debtor hold the funds in reserve  
17 pending resolution of the adversary proceeding: "we should pay  
18 the man. He performed services and is entitled to that  
19 compensation so Dr. Johns should be paid[.]"<sup>3</sup>

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21 <sup>3</sup>In her subsequent ruling on Gottlieb's motion for stay  
22 pending appeal, Judge Wanslee clarified that she had overruled  
23 the § 502(d) objection because it had been disposed of in  
connection with the 9019 Motion:

24 [T]he Trust's arguments appear to forget that this is  
25 the same argument that it raised in front of Judge  
26 Whinery when it opposed the 9019 settlement, and that  
27 the Unsecured Creditors Committee asked in the  
28 alternative that the Debtor make the CMO payments to  
Johns, and that it not come out of payments that were  
to be made to the hospital.

(continued...)

1 The bankruptcy court approved the Application by order  
2 entered August 16, 2016. Gottlieb timely appealed and moved for  
3 a stay pending appeal, which was denied by both the bankruptcy  
4 court and a BAP motions panel.

5 **JURISDICTION**

6 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
7 §§ 1334 and 157(b) (2) (B). We have jurisdiction under 28 U.S.C.  
8 § 158.

9 **ISSUE**

10 A. Did Gottlieb have standing to object to Dr. Johns'  
11 administrative claim?

12 B. Did the bankruptcy court abuse its discretion in  
13 overruling Gottlieb's objection and allowing Dr. Johns'  
14 administrative claim for compensation for post-petition services  
15 as CMO?

16 **STANDARD OF REVIEW**

17 Standing is a legal issue that we review de novo. Aheong v.  
18 Mellon Mortg. Co. (In re Aheong), 276 B.R. 233, 238 (9th Cir. BAP  
19 2002).

20 We review for abuse of discretion the bankruptcy court's

21 \_\_\_\_\_  
22 <sup>3</sup>(...continued)

23 . . . .

24 The Trust failed to appeal the 9019 settlement which  
25 finally resolved some of the claims of Johns against  
26 the Debtor. And in the case of the CMO pay it set  
27 forth a standard for filing an administrative claim and  
a requirement that the Debtor audit the time sheets,  
and that the claim be subject to compliance review, all  
of which has now happened[.]

28 Hr'g Tr. (September 7, 2016) at 47:20-49:23.

1 order allowing or disallowing an administrative claim. Gonzalez  
2 v. Gottlieb (In re Metro Fulfillment, Inc.), 294 B.R. 306, 309  
3 (9th Cir. BAP 2003). A bankruptcy court abused its discretion if  
4 it applied the wrong legal standard or its findings were  
5 illogical, implausible or without support in the record.  
6 TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th  
7 Cir. 2011).

## 8 DISCUSSION

### 9 A. Standing

10 As a threshold matter, Dr. Johns contends that Gottlieb  
11 lacked standing to object to the administrative claim because the  
12 reorganized debtor - not the GH USC Trust - was the party liable  
13 to pay the claim. Although Dr. Johns did not file a cross-  
14 appeal, we have an independent duty to examine jurisdictional  
15 issues such as standing. In re Aheong, 276 B.R. at 238.

16 At the hearing on the Application, the bankruptcy court  
17 questioned Gottlieb's standing to object but seemed satisfied  
18 with counsel's answer that funds used by the reorganized debtor  
19 to pay Dr. Johns' claim could diminish the amount available to  
20 distribute into the GH USC Trust as required under the Plan and  
21 thus implicitly found that Gottlieb had standing.

22 A party's standing in a bankruptcy case is governed by the  
23 "person aggrieved" standard, which limits standing to parties who  
24 can demonstrate that they are "directly and adversely affected  
25 pecuniarily by an order of the bankruptcy court." Robinson v.  
26 Fondiller (In re Fondiller), 707 F.2d 441, 442-43 (9th Cir.  
27 1983). A party asserting standing must demonstrate that the  
28 bankruptcy court's order either diminishes its property,



1 increases its burdens, or detrimentally affects its rights. Id.  
2 at 442. According to Dr. Johns, the plan is on track and is  
3 almost fully funded, so there is little chance that the amount to  
4 be distributed to the GH USC Trust will be diminished by payment  
5 of the claim. However, we are reluctant to conclude on this  
6 record - which is not fully developed with respect to standing -  
7 that the GH USC Trust has **no** pecuniary interest in the outcome of  
8 this appeal. See Lopez v. Specialty Restaurants Corp.  
9 (In re Lopez), 283 B.R. 22, 26 n.7 (concluding that a chapter 7  
10 debtor had standing to appeal denial of a motion to reopen where  
11 she had alleged a reasonable possibility of a surplus estate).

12 **B. The bankruptcy court did not abuse its discretion in**  
13 **overruling Gottlieb's objection to allowance of Dr. Johns'**  
14 **post-petition wage claim.**

15 Under § 503, the bankruptcy court shall allow as an  
16 administrative claim "the actual, necessary costs and expenses of  
17 preserving the estate including . . . wages, salaries, and  
18 commissions for services rendered after the commencement of the  
19 case[.]" § 503(b)(1)(A)(i). To establish an administrative  
20 expense claim, the claimant must show that the debt: (a) arose  
21 from a transaction with the debtor in possession as opposed to  
22 the preceding entity; and (b) directly and substantially  
23 benefitted the estate. In re Metro Fulfillment, Inc., 294 B.R.  
24 at 309 (citing Microsoft Corp. v. DAK Indus., Inc. (In re DAK  
25 Indus., Inc.), 66 F.3d 1091, 1094 (9th Cir. 1995)).

26 Gottlieb does not contend that the bankruptcy court erred in  
27 finding that this standard was met. Rather, the sole issue  
28 presented in this appeal is whether the bankruptcy court erred in

1 approving the Application over Gottlieb's § 502(d) objection.

2 Section 502(d) provides:

3 Notwithstanding subsections (a) and (b) of this  
4 section, the court shall disallow any claim of any  
5 entity from which property is recoverable under section  
6 542, 543, 550, or 553 of this title or that is a  
7 transferee of a transfer avoidable under section  
8 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of  
9 this title, unless such entity or transferee has paid  
10 the amount, or turned over any such property, for which  
11 such entity or transferee is liable under section  
12 522(i), 542, 543, 550, or 553 of this title.

9 Gottlieb argues that because Dr. Johns is potentially liable  
10 for turnover of avoidable transfers, his administrative claim for  
11 post-petition wages should have been disallowed. Gottlieb  
12 contends that the bankruptcy court denied him due process in not  
13 considering the § 502(d) objection before allowing the claim.<sup>4</sup>

14 However, the bankruptcy court overruled Gottlieb's § 502(d)  
15 objection because the issue had been settled in connection with  
16 the 9019 Motion. Gottlieb's arguments on appeal misconstrue what  
17 occurred in connection with that motion.

18 Gottlieb argues that there was no duty to raise the § 502(d)

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19  
20 <sup>4</sup>The parties dispute whether § 502(d) applies at all to  
21 administrative claims. Gottlieb argues that it does, relying on  
22 MicroAge, Inc. v. Viewsonic Corp. (In re MicroAge, Inc.),  
23 291 B.R. 503, 508 (9th Cir. BAP 2002) (analyzing cases and  
24 concluding that "the better analysis is that § 502(d) may be  
25 raised in response to the allowance of an administrative  
26 claim."). Dr. Johns argues that this statement in MicroAge was  
27 dicta and urges this Panel to follow cases holding to the  
28 contrary. See, e.g., ASM Capital, LP v. Ames Dep't Stores, Inc.  
(In re Ames Dep't Stores, Inc.), 582 F.3d 422, 432 (2d Cir. 2009)  
("[W]e hold that section 502(d) does not apply to administrative  
expenses under section 503(b)").

Because we are disposing of the appeal on other grounds, we  
need not address this issue.

1 issue in response to the 9019 Motion because the Stipulation did  
2 not finally allow the Johns administrative claim. Gottlieb  
3 points to paragraph 57 of the Stipulation, which provides that  
4 Johns is to file an application for an administrative claim and  
5 that GH shall pay the claim upon allowance or upon terms agreed  
6 to by the parties. Gottlieb further argues that the GHUCC did  
7 not have any avoidance powers at that time and thus could not  
8 have raised a § 502(d) objection.

9       These arguments ignore that GHUCC did in fact raise a  
10 § 502(d) objection in connection with the 9019 Motion, and that  
11 objection was resolved by an agreement which preserved GH USC  
12 Trust's right to object to certain claims.<sup>5</sup> Dr. Johns' post-  
13 petition wage claim was not among those claims. Moreover, the  
14 Stipulation provided - as requested by the GHUCC - that the post-  
15 petition wage claim was to be paid by the reorganized debtor and  
16 not the GH USC Trust. In light of this agreement, there was no  
17 denial of due process.

18       Additionally, the bankruptcy court's interpretation of the  
19 Stipulation is plausible and supported by the record. Gottlieb  
20 is correct that the Stipulation did not deem the administrative  
21 claim allowed. However, in the context of the settlement as a  
22 whole and the resolution of the GHUCC's objections to the 9019  
23 Motion, it is not unreasonable to interpret the Stipulation as  
24 requiring only that the reorganized debtor be permitted to  
25 inspect Dr. Johns' time records and verify compliance with legal

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26  
27       <sup>5</sup>Gottlieb does not dispute that the GH USC Trust is the  
28 successor-in-interest to the GHUCC for purposes of being bound by  
the order approving the 9019 Motion.

1 requirements before the post-petition wage claim would be allowed  
2 and paid. In contrast, the final agreement with GHUCC explicitly  
3 reserved GH USC Trust's right to dispute pre-petition wage  
4 claims.

5 Gottlieb also assigns error to the bankruptcy court's  
6 refusal to require that funds be escrowed pending the outcome of  
7 the avoidance action. However, given our conclusion that the  
8 bankruptcy court did not err in overruling the § 502(d) objection  
9 on grounds that it had been resolved in connection with the 9019  
10 Motion, we find no error in this aspect of the bankruptcy court's  
11 ruling.

#### 12 **CONCLUSION**

13 On the record before us, we conclude that Gottlieb had  
14 standing to object to Dr. Johns' administrative claim.  
15 Nevertheless, Gottlieb has not demonstrated that the bankruptcy  
16 court abused its discretion in overruling his objection to  
17 allowance of Dr. Johns' post-petition wage claim. Accordingly,  
18 we AFFIRM.