

JUL 12 2017

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NOT FOR PUBLICATION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

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In re:	)	BAP No.	AZ-16-1221-BJuL
	)		
PRM FAMILY HOLDING COMPANY,	)	Bk. No.	13-09026-BKM
LLC,	)		
	)		
Debtor.	)		
_____	)		
EL CHILERITO SPICE CO., INC.,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM<sup>1</sup></b>	
	)		
DALE C. SCHIAN, Creditor	)		
Trustee of the PRM Family	)		
Holding Company, LLC Trust;	)		
PRM FAMILY HOLDING COMPANY,	)		
LLC; UNITED STATES TRUSTEE,	)		
	)		
Appellees.	)		
_____	)		

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

Filed - July 12, 2017

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

Honorable Brenda K. Martin, Bankruptcy Judge, Presiding

Appearances: Helen K. Santilli argued for appellant El Chilerito  
Spice Co., Inc.; Elizabeth L. Janczak of Freeborn &  
Peters LLP argued for appellee Dale C. Schian,  
Creditor Trustee of the PRM Family Holding Company,  
LLC Trust.

Before: BRAND, JURY and LAFFERTY, 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, it has no precedential value. See 9th Cir. BAP Rule 8024-1.

1 Creditor El Chilerito Spice Co., Inc. ("El Chilerito")  
2 appeals an order correcting the order confirming the joint plan of  
3 liquidation of jointly administered chapter 11<sup>2</sup> debtors PRM Family  
4 Holding Company, LLC ("PRM Family") and its seven affiliates.<sup>3</sup> We  
5 DISMISS because El Chilerito lacks standing to bring this appeal.

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

7 **A. Events leading to the corrective order**

8 **1. Bankruptcy filings, joint plan and confirmation order**

9 On March 28, 2013, PRM Family and its seven affiliates filed  
10 eight chapter 11 bankruptcy cases in Arizona. The cases were  
11 jointly administered under the first filed case, PRM Family  
12 (collectively, "Debtors"); an official joint committee of  
13 unsecured creditors ("Committee") was appointed.

14 Debtors and the Committee (together "Plan Proponents") filed  
15 their Joint Plan of Liquidation Dated December 30, 2014 ("Joint  
16 Plan"). Section 7.1 of the Joint Plan – Substantive Consolidation  
17 of Estates – provided that the forthcoming confirmation order  
18 would "contain one or more provisions substantively consolidating  
19 the Estates (defined as the estates of all eight Debtors) into the  
20 Estate of PRM Family[.]" See Section 7.1.1. That section further  
21 provided, among other things, that all debts of the Debtors would  
22 be substantively consolidated upon the Effective Date.

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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  
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

27 <sup>3</sup> The other debtors are Prodigio Mercado, LLC; Pro's ABQ  
28 Ranch Markets, LLC; Pro's ELP Ranch Markets, LLC; Pro's ELP Ranch  
Markets Beverage Company, LLC; Pro's & Son's, LLC; Provenzano's,  
LLC; and Pro's Ranch Markets (CA), LLC.

1 Section 7.2 of the Joint Plan – Vesting of Assets – provided,  
2 in relevant part: "On the Effective Date, assets of the Estates  
3 (including . . . all Causes of Action) will be transferred to and  
4 vest in the Creditor Trust (defined as the trust established for  
5 the benefit of certain creditors) and be deemed contributed  
6 thereto, subject to the terms of the Plan." Thus, according to  
7 this section, the avoidance actions that were later filed against  
8 El Chilerito and others would transfer to the Creditor Trust on  
9 the Effective Date.

10 Sections 5.1.1, 5.2.1, 5.3.1 and 5.7 of the Joint Plan  
11 (regarding treatment of certain claims) each contained language  
12 stating: "In accordance with the Creditor Trust Agreement, the  
13 Creditor Trust Assets (defined as the assets of all eight Debtors)  
14 will be transferred to the Creditor Trust no later than seven (7)  
15 days after entry of the Confirmation Order." These sections  
16 indicated that the avoidance actions would be transferred to the  
17 Creditor Trust within 7 days of the confirmation date, not on the  
18 Effective Date as stated in Section 7.2 of the Joint Plan.

19 Section 7.10 of the Joint Plan – Case Administration –  
20 provided that attorney Dale Schian, former counsel for the  
21 Committee, was to be appointed as Creditor Trustee and that on the  
22 "Effective Date" would possess the rights of the Debtors for all  
23 matters, including standing to file the avoidance actions.

24 Finally, Section 10.3 of the Joint Plan – Retention of  
25 Jurisdiction – provided that the bankruptcy court retained  
26 jurisdiction to "correct[] . . . any defect and the curing of any  
27 omission or inconsistency in the Plan or Confirmation Order as may  
28 be necessary to carry out the purposes and intent of the Plan."

1 El Chilerito, a Class 1 creditor, voted in favor of the Joint  
2 Plan.

3 The bankruptcy court entered the Confirmation Order for the  
4 Joint Plan on April 13, 2015. Notably, the Confirmation Order did  
5 not include a provision for substantive consolidation of the  
6 jointly administered estates. However, it did provide that upon  
7 confirmation "all of the assets of the Debtors" would "immediately  
8 be transferred to the Creditor Trust." Thus, contrary to the  
9 Joint Plan, the Confirmation Order provided that the Debtors'  
10 assets would transfer immediately to the Creditor Trust, not  
11 within 7 days after confirmation or on the Effective Date.<sup>4</sup>

12 The Confirmation Order also approved the Creditor Trust  
13 Agreement, which was attached to the Confirmation Order as its  
14 Exhibit A. Contrary to the Confirmation Order but consistent with  
15 portions of the Joint Plan, the Creditor Trust Agreement provided  
16 that: "Within seven (7) days of the Effective Date, the Debtors  
17 shall transfer the Creditor Trust Assets to the [Creditor] [T]rust  
18 . . . ." However, the Creditor Trust Agreement also stated that,  
19 if any of its terms or provisions conflicted with the terms and/or  
20 provisions of the Joint Plan or Confirmation Order, the Joint Plan  
21 and Confirmation Order governed. Unfortunately, those two  
22 documents had inconsistencies within them and between them.

23 About six weeks postconfirmation, Creditor Trustee and all  
24 eight Debtors entered into an Assignment Agreement which  
25 transferred, assigned, conveyed and delivered to the Creditor  
26 Trust all of Debtors' rights, title and interests in the Creditor

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28 <sup>4</sup> The Effective Date did not occur until March 18, 2016,  
nearly one year after confirmation.

1 Trust Assets. The Assignment Agreement provided that, in the  
2 event of any conflict or inconsistency between its terms and the  
3 Joint Plan and Confirmation Order, the Joint Plan and Confirmation  
4 Order prevailed. The Assignment Agreement was not filed with the  
5 court until March 22, 2016, after the dispositive motion,  
6 discussed below, had been filed.

7 **2. The adversary proceedings and dispositive motion**

8 On May 27, 2015, just two days before the statute of  
9 limitations was to run, Creditor Trustee on behalf of the Creditor  
10 Trust filed adversary complaints against El Chilerito and others,  
11 seeking to avoid and recover preferential transfers under § 547  
12 and § 550. The caption of the complaint against El Chilerito  
13 named the Debtors as "PRM Family Holding Company LLC, et al."  
14 Creditor Trustee was named as the plaintiff. The complaint stated  
15 that it applied to "All Debtors."

16 El Chilerito moved for summary judgment on Creditor Trustee's  
17 avoidance action, alleging that the bankruptcy court lacked  
18 subject matter jurisdiction because the complaint failed to name  
19 the proper debtor. El Chilerito claimed it had not engaged in any  
20 business with PRM Family; rather, it had done business only with  
21 affiliate Pro's Ranch Markets, LLC, which was not the named  
22 debtor. Further, naming Creditor Trustee as plaintiff for just  
23 PRM Family failed to invoke the court's jurisdiction because  
24 PRM Family had no preference claims against El Chilerito. In  
25 short, El Chilerito argued that, because the Debtors' estates had  
26 not been substantively consolidated, PRM Family could not bring  
27 preference claims belonging to other Debtors which may hold such  
28 claims.

1 In opposition, Creditor Trustee contended the Joint Plan  
2 clearly contemplated substantive consolidation of the Debtors'  
3 estates, but through a simple oversight, the Confirmation Order  
4 did not contain a substantive consolidation provision; Creditor  
5 Trustee was filing a motion to correct retroactively that  
6 omission. Creditor Trustee argued that, with retroactive  
7 substantive consolidation of the Debtors' estates into the  
8 PRM Family estate, PRM Family was the proper case in which to file  
9 the adversary complaints.

10 The bankruptcy court denied El Chilerito's motion for summary  
11 judgment. Recognizing the conflicts between and among the Joint  
12 Plan, the Confirmation Order, the Creditor Trust Agreement and the  
13 Assignment Agreement as to the timing of the asset transfer to the  
14 Creditor Trust, the court determined that the Confirmation Order,  
15 which was a final order and enforceable, controlled. The court  
16 found that because Debtors' assets, including the avoidance  
17 actions, were properly transferred to the Creditor Trust upon  
18 confirmation, Creditor Trustee had standing to bring the avoidance  
19 actions against El Chilerito (and the other defendants) when he  
20 filed his complaints on May 27, 2015.

21 The court also determined that the adversary complaints were  
22 properly captioned. In reviewing the Joint Plan and the Creditor  
23 Trust Agreement, which the court opined were "not models of  
24 clarity," it found that the Creditor Trust arose in the PRM Family  
25 case and that Creditor Trustee was charged with acting on behalf  
26 of the consolidated creditors. The jointly administered Debtors  
27 had assigned their causes of action, including the avoidance  
28 actions, to the Creditor Trust for Creditor Trustee to pursue.

1 The court noted that, although the Joint Plan and Creditor Trust  
2 Agreement granted Creditor Trustee authority over only debtor  
3 PRM Family, this was not an obstacle; the avoidance actions no  
4 longer belonged to any of the other Debtors.<sup>5</sup>

5 **3. Motion to amend the Confirmation Order**

6 While the dispositive motions were pending in the avoidance  
7 actions, Creditor Trustee moved to amend the Confirmation Order  
8 retroactive to April 13, 2015, to include a provision  
9 substantively consolidating Debtors' estates into the estate of  
10 PRM Family ("Motion to Amend"). As former counsel for the  
11 Committee, Creditor Trustee had assisted in drafting the Joint  
12 Plan and Confirmation Order. He asserted that the substantive  
13 consolidation provision was not intentionally omitted from the  
14 Confirmation Order; it was merely an oversight.

15 El Chilerito opposed the Motion to Amend, raising arguments  
16 that were later rejected by the court in the orders denying the  
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18 <sup>5</sup> In addition to El Chilerito's summary judgment motion,  
19 defendants GH Dairy and Shamrock had moved to dismiss the Creditor  
20 Trustee's avoidance actions against them. As part of the court's  
21 ruling on those dispositive motions, the court noted that, to the  
22 extent corrective action was needed to state that all debts were  
23 consolidated into the PRM Family estate, it could amend the  
24 Confirmation Order for that purpose. Accordingly, because the  
Confirmation Order was inconsistent with the Joint Plan, which  
appeared to the court to have been an oversight by both the court  
and Plan Proponents, the court further ordered that the  
Confirmation Order was corrected and amended to contain a  
provision substantively consolidating the debts of the jointly  
administered Debtors into the estate of PRM Family.

25 Following comment from defendant GH Dairy, the court agreed  
26 that, insofar as the orders denying the dispositive motions  
27 contained a determination that the Confirmation Order was amended  
28 to correct an omission, such correction should be reflected in a  
separate order entered in the administrative case. That is what  
led to the sua sponte corrective order entered on July 1, 2016,  
which is the subject of this appeal.

1 dispositive motions as noted above.<sup>6</sup>

2 On July 1, 2016, without a hearing, the bankruptcy court  
3 entered the Order Correcting Joint Plan of Liquidation Dated  
4 December 30, 2014 as Amended ("Corrective Order"). Despite the  
5 consolidation language in Section 7.1.1 of the Joint Plan, it was  
6 not clear to the court whether substantive consolidation of all  
7 debts and assets were intended, or merely debt consolidation.  
8 Ultimately, the court found that the consolidation of debts was  
9 anticipated and material to the Joint Plan and "was omitted in  
10 error by the Plan Proponents who prepared the Confirmation Order  
11 and the Court that signed it." Order (July 1, 2016) 2:9-10  
12 (emphasis in original).

13 Therefore, based on its "inherent authority" to correct  
14 mistakes or omissions, citing Wiersma v. Bank of the West  
15 (In re Wiersma), 483 F.3d 933, 939 (9th Cir. 2007), the bankruptcy  
16 court sua sponte corrected the Confirmation Order to conform with  
17 Section 7.1.1 of the Joint Plan and amended that order to provide,  
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19 <sup>6</sup> Specifically, El Chilerito argued: (1) amending the  
20 Confirmation Order to substantively consolidate the estates would  
21 adversely affect the rights of the parties to the jointly  
22 administered cases; (2) the Joint Plan could not be amended by  
23 Creditor Trustee; (3) Creditor Trustee did not gain power over the  
24 avoidance actions until the Effective Date – March 18, 2016 – when  
25 the Debtors' assets were effectively transferred to the Creditor  
26 Trust, which was ten months **after** he filed the avoidance actions;  
27 (4) any consolidation contemplated by the Joint Plan in Section  
28 7.1.1 was limited only to the Debtors' debts, not the assets, as  
reflected by Section 7.2, which vested the separate assets of each  
estate in the Creditor Trust by assignment without merging them;  
(5) Creditor Trustee provided no foundation which demonstrated his  
knowledge about what the Debtors, Committee and others did or did  
not intend respecting the Confirmation Order's omission of  
substantive consolidation; and (6) the purpose of the Motion to  
Amend was to allow Creditor Trustee to avoid his negligent errors  
in his "willy nilly" filing of preference actions in the wrong  
cases and his failure to read the Confirmation Order.



1 upon the Effective Date, that the "debts" of the jointly  
2 administered Debtors' estates were substantively consolidated into  
3 the estate of PRM Family. This timely appeal followed.

## 4 **II. JURISDICTION**

5 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
6 and 157(b)(2)(A) & (L). Our jurisdiction is discussed below.

## 7 **III. ISSUES**

8 1. Does El Chilerito have standing to appeal the Corrective  
9 Order?

10 2. If so, did the bankruptcy court err when it entered the  
11 Corrective Order?

## 12 **IV. STANDARDS OF REVIEW**

13 Standing is an issue of law we review de novo. Palmdale  
14 Hills Prop., LLC v. Lehman Comm. Paper, Inc. (In re Palmdale Hills  
15 Prop., LLC), 654 F.3d 868, 873 (9th Cir. 2011) ("standing is a  
16 necessary component of subject matter jurisdiction.").

## 17 **V. DISCUSSION**

### 18 **El Chilerito lacks standing to appeal the Corrective Order.**

19 Creditor Trustee contends that El Chilerito lacks standing to  
20 appeal the Corrective Order because it has not established that it  
21 suffered any harm as a result of the order's entry.<sup>7</sup> We agree.

22 "A federal court may exercise jurisdiction over a litigant  
23 only when that litigant meets constitutional and prudential

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25 <sup>7</sup> El Chilerito's brief on appeal focuses primarily on its  
26 desire to dismiss Creditor Trustee's avoidance action. Whether  
27 Creditor Trustee had standing to file that action and whether the  
28 correct caption was used on the adversary complaint were issues  
determined in the bankruptcy court's order denying El Chilerito's  
motion for summary judgment. Accordingly, those issues are not  
properly before us.

1 standing requirements." Veal v. Am. Home Mortg. Servicing, Inc.  
2 (In re Veal), 450 B.R. 897, 906 (9th Cir. BAP 2010) (citing Elk  
3 Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004)).  
4 "Standing is a 'threshold question in every federal case,  
5 determining the power of the court to entertain the suit.'" Id.  
6 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

7 Bankruptcy appellate standing, or prudential standing, is  
8 narrower than Article III standing. It requires an appellant to  
9 show that he or she has been "directly and adversely affected  
10 pecuniarily" by the bankruptcy court's decision. In re Palmdale  
11 Hills Prop., LLC, 654 F.3d at 874. The appellant must show that  
12 the order on appeal diminished its property, increased its  
13 burdens, or detrimentally affected its rights. Fondiller v.  
14 Robertson (In re Fondiller), 707 F.2d 441, 442 (9th Cir. 1983).

15 El Chilerito argues that the Corrective Order effectively  
16 altered vested rights and created disparate treatment of parties  
17 in interest. The only "vested rights" identified by El Chilerito  
18 are their alleged standing and jurisdictional defenses to the  
19 avoidance actions. The "disparate treatment" it alleges is that  
20 those defendants who have settled with Creditor Trustee will be  
21 treated differently from the 50-some defendants whose adversary  
22 actions are not yet resolved. El Chilerito does not articulate  
23 what that disparate treatment would be.

24 El Chilerito fails to recognize that the Corrective Order,  
25 which substantively consolidated only the Debtors' "debts"  
26 retroactive to the Effective Date of March 18, 2016, has no  
27 possible impact on their rights vis-a-vis the avoidance action.  
28 The debt consolidation had no effect on the Creditor Trustee's

1 standing<sup>8</sup> or the bankruptcy court's subject matter jurisdiction  
2 over the avoidance actions, which were clearly an "asset" of the  
3 Debtors and, ultimately, the Creditor Trust. We perceive no  
4 adverse change in El Chilerito's rights by the limited amendment  
5 to the Confirmation Order, and El Chilerito has identified no such  
6 impaired rights. Simply put, our resolution of the order on  
7 appeal will not give El Chilerito the relief it really seeks –  
8 dismissal of Creditor Trustee's avoidance action.

9 Because we are dismissing the appeal for El Chilerito's lack  
10 of standing, we do not reach the issue of whether the bankruptcy  
11 court erred by entering the Corrective Order.

#### 12 **VI. CONCLUSION**

13 We DISMISS El Chilerito's appeal for lack of standing.  
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27 <sup>8</sup> The bankruptcy court held in the orders denying the  
28 dispositive motions that Creditor Trustee's standing was derived  
from the Confirmation Order and the Assignment Agreement. The  
Corrective Order does nothing to change that result.