

September 15, 2010

Blaine F. Bates
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE STEVE ZIMMER PAIGE,
Debtor.

BAP No. UT-08-062

SEARCH MARKET DIRECT, INC. and
MAGNET MEDIA, INC.,

Bankr. No. 05-34474
Chapter 11

Appellants,

v.

OPINION*

GARY E. JUBBER, Trustee,
CONSUMERINFO.COM, INC., and
FABIAN & CLENDENIN,

Appellees.

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

Before CORNISH, Chief Judge, RASURE, and KARLIN, Bankruptcy Judges.

RASURE, Bankruptcy Judge.

Appellants Search Market Direct, Inc. (“SMDI”) and Magnet Media, Inc.
(collectively, “SMDI”)¹ appeal the Order Approving Chapter 11 Trustee’s Third

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

¹ Magnet Media, Inc. (“Magnet Media”) is apparently an affiliate of SMDI. From the record, it appears that SMDI caused Magnet Media to purchase some claims against the estate, and therefore at some point, Magnet Media was an unsecured creditor of the estate. It is undisputed that the claims purchased by SMDI and/or Magnet Media have been fully paid with interest pursuant to a

(continued...)

Application for Compensation and Fourth Verified Application for Compensation of Fabian & Clendenin, Counsel for Chapter 11 Trustee (the “Fee Order”) entered by the bankruptcy court for the District of Utah. SMDI’s objection to the bankruptcy estate’s payment of trustee fees to Appellee Gary E. Jubber (“Trustee”), and attorney fees to the Trustee’s counsel, Appellee Fabian & Clendenin (“Counsel”), on the ground that the Trustee and Counsel were not disinterested was overruled.

Because SMDI has no direct pecuniary interest in the reversal of the Fee Order, we conclude that SMDI lacks standing to prosecute this appeal, and the appeal must be DISMISSED for lack of jurisdiction.

I. BACKGROUND

Debtor Steve Zimmer Paige (“Debtor”) filed for relief under Chapter 7 of the Bankruptcy Code on September 16, 2005, and the Trustee was appointed to administer the Debtor’s bankruptcy estate.

A. The Domain Name

Sometime prior to the petition date, the Debtor had registered the internet domain name “freecreditscore.com” (the “Domain Name”). Although the Debtor re-registered the Domain Name in the name of another person prepetition, he possessed at least a beneficial or equitable interest in the Domain Name on the petition date. The Debtor failed, however, to disclose the Domain Name as an asset on his schedules, nor did he disclose his prepetition transfer thereof in his statement of financial affairs. By virtue of various postpetition transfers arranged by the Debtor, SMDI acquired the Domain Name from a third party in exchange for \$325,000. The Trustee learned of this undisclosed asset from an anonymous

¹ (...continued)
confirmed Chapter 11 plan.

Throughout the case, the parties have conflated SMDI and Magnet Media as if they were the same entity, and therefore we will also do so in this opinion.

source.²

B. Commencement of the Adversary Proceeding

In May 2006, the Trustee filed an adversary proceeding against SMDI, the intermediary transferees, and others, seeking avoidance of the Debtor's prepetition transfer of the Domain Name under Sections 544 and 548 of the Bankruptcy Code;³ a declaration that on the petition date, the Domain Name was property of the estate; a declaration that the postpetition transfers of the Domain Name were void under Section 362; avoidance of the postpetition transfers and recovery of the Domain Name under Sections 549 and 550; and damages for conversion of the Domain Name (the "Adversary Proceeding").⁴

C. SMDI's Purchase of the Debtor's Residual Interest and Certain Unsecured Claims

In September 2006, the Debtor sold his residual interest in the bankruptcy estate to SMDI.⁵ The Debtor's residual interest would have value only to the extent that Trustee recovered assets in excess of the amount required to fully pay all administrative expenses of the estate and the Debtor's prepetition claims with interest.⁶ In addition, at some point, SMDI and its affiliate, Magnet Media, purchased eight unsecured claims against the estate totaling approximately

² *Amended Disclosure Statement for Amended Joint Chapter 11 Plan* at 14, in Appellants' Appendix (hereinafter "App.") Vol. II at 469.

³ Unless otherwise stated, all references to § or "Section" herein are to sections of the Bankruptcy Code, title 11 of the United States Code.

⁴ *See First Amended Complaint, in App. Vol. II* at 569-86.

⁵ *See Notice of Assignment of Debtor's Residual Interest in Bankruptcy Estate, in App. Vol. II* at 400-01; *Transcript of Hearing of August 28, 2007*, at 406, ll. 14-15, in Appellees' Supplemental Appendix ("Appellees' Supp. App.") at 483; *Purchase Agreement, id* at 484-87.

⁶ *See, e.g.*, 11 U.S.C. § 726(a).

\$73,000, thereby becoming an unsecured creditor of the estate.⁷

D. Consumerinfo.com's Purchase of the Domain Name and a Co-interest in the Adversary Proceeding

The Debtor's estate lacked assets to fund the prosecution of the Adversary Proceeding.⁸ As a result, the Trustee sought bankruptcy court approval to sell an interest in the Adversary Proceeding (*i.e.*, the potential right to recover the Domain Name and/or damages). In August 2006, the bankruptcy court authorized the Trustee to conduct an auction of an interest in the Adversary Proceeding.⁹ At an auction held in September 2006, SMDI and ConsumerInfo.com ("ConsumerInfo," a nominal appellee herein) submitted competing bids.¹⁰ ConsumerInfo submitted the highest and best bid, but before the sale could be approved by the bankruptcy court, the case was converted, on motion of the Debtor, from a case under Chapter 7 to a case under Chapter 11.¹¹ The Trustee moved the bankruptcy court to reconvert the case to Chapter 7, which was denied. Instead, the bankruptcy court displaced the Debtor as debtor-in-possession with a Chapter 11 trustee.¹² On October 24, 2006, the Trustee was appointed as trustee of the Chapter 11 estate.¹³

In November 2006, the Trustee again filed a motion seeking bankruptcy court approval of the sale of a co-interest in the outcome of the Adversary

⁷ See *Proposed Distributions Under the Plan, Exhibit A to [SMDI's] Liquidating Chapter 11 Plan*, in App. Vol. II at 337.

⁸ *Transcript of Hearing of December 7, 2006*, at 7, 33-34, in Appellees' Supp. App. at 153, 179-80.

⁹ See *Memorandum Decision Granting Chapter 11 Trustee's Motion to Sell at 2*, in App. Vol. II at 403.

¹⁰ *Id.*

¹¹ *Id.* at 3, in App. Vol. II at 404.

¹² *Id.*

¹³ *Appointment of Chapter 11 Trustee*, in Appellees' Supp. App. at 93-94.

Proceeding to ConsumerInfo, this time setting forth the terms of the sale in a proposed Asset Purchase Agreement (the “APA”).¹⁴ In general, the APA provided that upon entry of an order approving the sale, ConsumerInfo would immediately pay \$1.9 million to the estate in exchange for certain assets. The targeted asset was the Domain Name and all assets related thereto, which the Trustee would be required to convey to ConsumerInfo free and clear of liens and claims when and if the Domain Name was recovered by the estate.¹⁵ In addition, ConsumerInfo would acquire a “co-interest” in the Adversary Proceeding and the right to receive 25% of the net proceeds of any monetary recoveries obtained in the Adversary Proceeding or in any other action related to the Domain Name.¹⁶ ConsumerInfo also agreed to pay the estate up to \$200,000 to reimburse it for attorney fees incurred in prosecuting the Adversary Proceeding.¹⁷

Under the APA, the Trustee would be required to “diligently prosecute the [Adversary Proceeding] where he believes he has a good faith basis for doing so.”¹⁸ In addition, the Trustee would be obligated to file a plan that would not impair ConsumerInfo’s rights under the APA, and “oppose if he can do so in good faith any other proposed plan which is not consistent with or impairs” ConsumerInfo’s rights under the APA and under the order approving the APA.¹⁹

¹⁴ *Id.* The APA is attached as Exhibit A to the Order Authorizing Sale of Domain Name Related Assets, *in App. Vol. II* at 423-45.

¹⁵ *APA* at 2, ¶ 1.1, *in App. Vol. II* at 424-25.

¹⁶ *Id.*

¹⁷ *APA* at 6, ¶ 1.6, *in App. Vol. II* at 428.

¹⁸ *Id.*

¹⁹ *APA* at 6, ¶ 1.7, *in App. Vol. II* at 428.

The APA further provided that –

The \$1,900,000 . . . shall be available [] immediately to the Trustee to pay allowed Chapter 7 and Chapter 11 administrative expenses and allowed claims of creditors against the Estate. Any distribution normally done with Bankruptcy Court approval in a Chapter 7 or Chapter 11 shall be made after notice or a hearing. *None of the amounts provided by [ConsumerInfo] shall benefit [the Debtor] or his purported assignees as residual interest holders in the Estate or benefit any other person or parties besides allowed Chapter 7 or Chapter 11 administrative expenses or allowed claims of creditors against the Estate.*

. . . .

*Any remaining Funds when the Estate is fully administered shall be returned to [ConsumerInfo] by the Trustee.*²⁰

As an alternative to the proposed sale to ConsumerInfo, SMDI submitted a counteroffer in which it proposed to pay \$1.9 million to the estate to settle the Adversary Proceeding. Acceptance of SMDI’s offer would have allowed SMDI to retain the Domain Name. However, rather than pay all \$1.9 million immediately, SMDI proposed to pay \$1.2 million in cash and satisfy the remaining \$700,000 in installments under a promissory note.²¹ SMDI also objected to the sale to ConsumerInfo, contending that the estate was selling substantially all its assets outside of a plan, and that the APA “impermissibly compromise[d] the Trustee’s independence.”²²

In its Memorandum Decision Granting Chapter 11 Trustee’s Motion to Sell, the bankruptcy court approved the Trustee’s rejection of SMDI’s counteroffer and overruled SMDI’s objections to the sale of the Domain Name to ConsumerInfo.²³ The bankruptcy court addressed and rejected SMDI’s contention

²⁰ APA at 4-5, ¶ 1.4, in App. Vol. II at 426-27 (emphasis added).

²¹ *Memorandum Decision Granting Chapter 11 Trustee’s Motion to Sell* at 4, in App. Vol. II at 405.

²² *Id.* at 5, in App. Vol. II at 406.

²³ *Id.* at 11-15, in App. Vol. II at 412-16.

that certain terms of the APA required the Trustee to surrender his business judgment and independence to ConsumerInfo.²⁴ SMDI had also argued that the APA provision prohibiting the estate from distributing any funds paid by ConsumerInfo to the Debtor or his assigns (*i.e.*, to SMDI, as assignee of the Debtor’s residual interest) was contrary to the distribution scheme envisioned by Section 1129. The bankruptcy court concluded, however, that the restriction was reasonable and did not “impermissibly impact any future chapter 11 plan.”²⁵ In addition, the bankruptcy court made specific findings that the Trustee appropriately analyzed the competing offers and exercised reasonable business judgment in advocating the sale to ConsumerInfo pursuant to the APA over the settlement with SMDI.²⁶ Finally, the bankruptcy court found that ConsumerInfo was a good faith purchaser.²⁷

An Order Authorizing Sale of Domain Name Related Assets (the “Sale Order”) was entered on December 12, 2006.²⁸ In the Sale Order, the bankruptcy court (1) overruled SMDI’s objections on their merits with prejudice; (2) approved the form of the APA and declared it “binding on the Estate, the Debtors and all creditors and interestholders;” and (3) authorized and directed the Trustee to execute, perform, consummate, and implement the APA and “take all further actions appropriate or desirable to effectuate the transactions contemplated” in the APA.²⁹ The sale of the co-interest in the Adversary Proceeding and a 25% interest in the net damages proceeds was made effective on the date of the “Initial

²⁴ *Id.* at 13-15, *in App. Vol. II* at 414-16.

²⁵ *Id.* at 9-10, *in App. Vol. II* at 410-11.

²⁶ *Id.* at 11, *in App. Vol. II* at 412.

²⁷ *Id.* at 12-13, *in App. Vol. II* at 413-14.

²⁸ *App. Vol. II* at 417-45.

²⁹ *Sale Order* at 2, *in App. Vol. II* at 418.

Closing.”³⁰ If the Trustee succeeded in recovering the Domain Name in the Adversary Proceeding, the transfer of the Domain Name free and clear of liens and claims was authorized by the Sale Order (and did not require any further notice or order of the court), and would be effective as of the date of the Subsequent Closing.³¹ Notwithstanding the “free and clear” language, the Sale Order provided that SMDI and other defendants in the Adversary Proceeding retained their defenses to the Trustee’s claims in the Adversary Proceeding until the merits of such defenses were determined.³² Finally, the bankruptcy court found and concluded that “[t]he transactions contemplated in the [APA] have been negotiated in good faith and at arms length. [ConsumerInfo] is entitled to all of the protections of Section 363(m) of the Bankruptcy Code.”³³

Neither SMDI nor anyone else appealed the Sale Order, and ConsumerInfo paid \$1.9 million to the estate at the Initial Closing (the “Sale Proceeds”).

E. ConsumerInfo’s Purchase of CCB Claims

In January 2007, CCB Data Corp., Inc. (“CCB”), a company whose predecessor in interest had employed the Debtor prepetition, filed a claim against the estate seeking to be reimbursed approximately \$131,000 for costs it alleged to have incurred in developing the Domain Name and related assets.³⁴ CCB also claimed that the Debtor converted or misappropriated the Domain Name.

³⁰ *Id.* The Initial Closing was to occur 10 days after the entry of the Sale Order. *APA* at 1, ¶ 8.1, *in App. Vol. II* at 433.

³¹ *Sale Order* at 2-3, *in App. Vol. II* at 418-19. The Subsequent Closing was to occur (1) after the expiration of the time to appeal any final order determining that the estate owned the Domain Name or (2) if an order determined the estate was entitled to *recover* the Domain Name, when the estate in fact recovered the Domain Name. *APA* at 11, ¶ 8.1, *in App. Vol. II* at 433.

³² *Sale Order* at 2-3, *in App. Vol. II* at 418-19.

³³ *Id.* at 3, ¶ 8, *in App. Vol. II* at 419.

³⁴ *Claim No. 27-2*, *in App. Vol. IV* at 1108.

ConsumerInfo purchased both claims from CCB (the “CCB-Related Claims”), and filed a proof of claim seeking a constructive trust over the Domain Name or its proceeds, estimating the value thereof as at least \$2.1 million.³⁵ Thus, at this point, the Trustee, SMDI, and ConsumerInfo (as assignee of CCB’s claim of conversion/misappropriation) each claimed ownership of the Domain Name.

In April 2007, SMDI objected to ConsumerInfo’s proofs of claim.³⁶ The Trustee, however, had already negotiated a settlement with ConsumerInfo in which ConsumerInfo agreed to reduce its claims to a \$250,000 unsecured claim and a \$350,000 subordinated claim, and the Trustee moved for approval of the settlement agreement (the “Settlement Motion”).³⁷ SMDI objected to the Settlement Motion,³⁸ and thereafter the Trustee withdrew the motion.³⁹

On July 3, 2007, ConsumerInfo filed an amended proof of claim asserting an unsecured tort claim for damages in the amount of \$2.1 million, effectively withdrawing its claim for a constructive trust over the Domain Name or its proceeds.⁴⁰ Thus, as of July 3, 2007, ConsumerInfo was no longer claiming an ownership interest in the Domain Name by virtue of the CCB-Related Claims; its interest then derived solely from the APA wherein it purchased the estate’s interest in the Domain Name (if and when recovered by the Trustee). Accordingly, on July 16, 2007, ConsumerInfo was joined as a co-plaintiff with

³⁵ *Claim No. 42-1, in App. Vol. IV at 1111.*

³⁶ *Objection to Claims (Claim Nos. 27-2 and 42), in App. Vol. III at 822-23.*

³⁷ *Motion to Approve Settlement Agreement Related to Claims of ConsumerInfo.com, in App. Vol. III at 825-38.*

³⁸ *Objection to Trustee’s Motion to Approve Settlement Agreement Related to Claims of ConsumerInfo.com, in Appellants’ Supp. App. at 1431-47.*

³⁹ *Withdrawal of Motion to Approve Settlement Agreement Related to Claims of ConsumerInfo.com and Notice of Cancellation of Hearing, in App. Vol. III at 446-47.*

⁴⁰ *Claim No. 42-2, in App. Vol. IV at 1113-38.*

the Trustee in the Adversary Proceeding.⁴¹

F. SMDI's Chapter 11 Plan

Meanwhile, on May 23, 2007, SMDI filed a Chapter 11 Liquidating Plan (the "SMDI Plan"), in which it proposed to return \$1.825 million of the Sale Proceeds to ConsumerInfo pursuant to a provision in the APA that permitted the Trustee to settle the Adversary Proceeding.⁴² SMDI proposed to fund the plan by paying the estate an amount that purported to satisfy all existing administrative expenses and creditors in full with 10% postpetition interest, in exchange for the dismissal of the Adversary Proceeding and assignment of the estate's interest in the Domain Name to SMDI.⁴³ SMDI proposed to satisfy ConsumerInfo's CCB-Related Claims by paying \$600,000 (plus postpetition interest) pursuant to the Settlement Motion, if it was approved,⁴⁴ but otherwise, SMDI planned to object to those claims. Residual funds after distribution, if any, would be returned to SMDI.

The Trustee opposed the SMDI Plan because, among other things, he believed that it was inconsistent with the estate's obligation to recover and convey the Domain Name to ConsumerInfo under the Sale Order and the APA. The Trustee believed that confirmation of the SMDI Plan could subject the estate to a sizable administrative claim for breach of the APA by ConsumerInfo. The SMDI Plan did not provide for the defense and possible payment of such a claim, and the need to resolve such an administrative claim would have delayed and

⁴¹ *First Amended Complaint*, in App. Vol. III at 569-86.

⁴² *See APA* at 5, ¶ 1.5, in App. Vol. II at 427-28.

⁴³ *[SMDI's] Liquidating Chapter 11 Plan*, in App. Vol. II at 322-38.

⁴⁴ The Settlement Motion was withdrawn by the Trustee after the SMDI Plan was filed.

possibly reduced recovery to unsecured creditors.⁴⁵

G. The Trustee's and ConsumerInfo's Joint Chapter 11 Plan

On June 22, 2007, the Trustee and ConsumerInfo filed their joint Chapter 11 plan (as thereafter amended, the "Joint Plan") and a disclosure statement.⁴⁶ In the Joint Plan, ConsumerInfo agreed to subordinate its CCB-Related Claims (totaling approximately \$2.23 million) to all other unsecured claims.⁴⁷ The Joint Plan also provided that the determination of the validity and amount of the CCB-Related Claims would be deferred until such time that the estate had assets to distribute to subordinated claims, if ever, and any such distributions would be paid solely from the estate's share of any monetary recoveries obtained in the Adversary Proceeding (or in any other proceeding related to the Domain Name).⁴⁸

The Joint Plan proposed to pay all other creditors, including the claims purchased by SMDI or its affiliate, in full with 10% postpetition interest, from the funds on hand (*i.e.*, the balance of the Sale Proceeds) and an additional \$200,000 infusion from ConsumerInfo.⁴⁹ ConsumerInfo also agreed to provide up to \$200,000 in additional funds if needed for litigation expenses related to the Adversary Proceeding and for post-confirmation administrative expenses.⁵⁰ Article 9 of the Joint Plan provided that "[a]fter the Trustee has made all distributions under this Plan and the Adversary Proceeding and any other Actions

⁴⁵ *Amended Disclosure Statement for Amended Joint Chapter 11 Plan* at 4, in App. Vol. II at 459.

⁴⁶ *Docket Sheet* at 30, *Doc. 331, 332*, in App. Vol. I at "AD."

⁴⁷ *Amended Disclosure Statement for Amended Joint Chapter 11 Plan* at 7, in App. Vol. II at 462.

⁴⁸ *Id.* at 3, 7-8, in App. Vol. II at 458, 462-63; *Amended Joint Chapter 11 Plan* at 11-12, in App. Vol. II at 499-500.

⁴⁹ *Second Amended Joint Chapter 11 Plan ("Joint Plan")* at 8-9, ¶ 5.1, in App. Vol. III at 665-66.

⁵⁰ *Joint Plan* at 9-10, ¶ 5.3, in App. Vol. III at 666-67.

are concluded, the Trustee shall return any remaining amounts from the Sales Proceeds to ConsumerInfo pursuant to the APA.”⁵¹

Under the Joint Plan, ConsumerInfo would obtain the benefit of the bargain it made with the estate that was memorialized in the APA and approved by the Sale Order—that is, ConsumerInfo would obtain the Domain Name if the Trustee recovered it. Moreover, unlike the SMDI Plan, the Joint Plan provided for the estate’s full performance of the APA and the Sale Order, and thus insured that the estate would not be exposed to defending against and possibly paying an administrative claim to ConsumerInfo for breaching the APA.

SMDI objected to confirmation of the Joint Plan, again alleging, among other things, that the Joint Plan, like the APA, impaired the Trustee’s discretion and compromised the Trustee’s disinterestedness.⁵²

H. Confirmation of the Joint Plan

After a hearing that spanned seven days, the bankruptcy court denied confirmation of the SMDI Plan and confirmed the Joint Plan (as amended).⁵³ On October 18, 2007, the Order Confirming Second Amended Joint Chapter 11 Plan (“Confirmation Order”) was entered.⁵⁴ The bankruptcy court concluded that the SMDI Plan was not proposed in good faith because it imposed a settlement of the Adversary Proceeding on the estate and ConsumerInfo without their consent, and thus violated the APA and was contrary to the unappealed Sale Order.⁵⁵ The

⁵¹ *Joint Plan* at 13, ¶ 9.1, in App. Vol. III at 670.

⁵² *Transcript of October 18, 2007, Bench Ruling* at 1538-41, in App. Vol. III at 612-15.

⁵³ *Transcript of October 18, 2007, Bench Ruling* at 1571, in App. Vol. III at 645; *Order Confirming Second Amended Joint Chapter 11 Plan (“Confirmation Order”)*, in App. Vol. III at 649–94.

⁵⁴ *Confirmation Order*, in App. Vol. III at 649-94.

⁵⁵ *Transcript of October 18, 2007, Bench Ruling* at 1558-59, in App. Vol. III

(continued...)

court also found that the SMDI Plan could reasonably be construed by ConsumerInfo as a breach of the APA by the estate, and because the SMDI Plan did not provide adequate funding for defense costs or payment of that contingent claim, the plan was not feasible.⁵⁶ The bankruptcy court also overruled SMDI's objection that questioned the disinterestedness of the Trustee.⁵⁷

Pursuant to the Joint Plan, on October 31, 2007, all allowed unsecured creditors' claims, including the claims of SMDI and Magnet Media, were paid from the Sale Proceeds, with interest, and the Adversary Proceeding was vested in a Liquidating Trust, for which the Trustee was appointed trustee.⁵⁸

I. Appeal of the Confirmation Order

SMDI appealed the Confirmation Order, and elected to have the appeal heard by the Utah District Court (the "Confirmation Appeal"). SMDI's applications for a stay of the Confirmation Order pending appeal were denied, and as stated above, the Joint Plan became effective and was substantially consummated.⁵⁹ On May 13, 2008, the Utah District Court dismissed the Confirmation Appeal as moot.⁶⁰ In December 2009, however, the order of

⁵⁵ (...continued)
at 632-33. The Sale Order provided that the APA was "binding on the Estate, the Debtors and all creditors and interestholders." *Sale Order* at 2, ¶ 3, in App. Vol. II at 418.

⁵⁶ *Transcript of October 18, 2007, Bench Ruling* at 1554-62 and 1569-70, in App. Vol. III at 628-36 and 643-44.

⁵⁷ *Id.* at 1540-41, in App. Vol. III at 614-15.

⁵⁸ *Joint Plan* at 9, ¶ 5.2, in App. Vol. III at 666; *Transcript of Hearing of November 6, 2007*, at 24-25, in App. Vol. III at 718-19.

⁵⁹ *See Transcript of Hearing of November 6, 2007*, at 24-25, in App. Vol. III at 718-19.

⁶⁰ *See Appellants' Response to Court's Order for Status Report Regarding District Court Appeals ("Status Report")* at 2, ¶ 1, and Exhibit A thereto, *Confirmation Appeal Docket Sheet, Doc. 80* (Doc. 66270). On July 14, 2010, after oral argument, this panel directed Appellants to file a report stating the
(continued...)

dismissal was reversed by the Tenth Circuit Court of Appeals, and the appeal was remanded to the Utah District Court for determination on the merits.⁶¹

On January 8, 2010, the Trustee and ConsumerInfo filed in the District Court a Motion to Supplement the Record on Appeal or, Alternatively, for Judicial Notice, and Suggestion of Mootness (the “First Mootness Motion”).⁶² A hearing on the First Mootness Motion was set for August 24, 2010.⁶³ The Trustee asserted on remand that even though the Tenth Circuit determined that the Confirmation Appeal was not moot at the time it came before it, it is now, because while the Tenth Circuit appeal was at issue, the Adversary Proceeding was resolved in favor of the Trustee and the estate recovered the Domain Name, which it irrevocably transferred to ConsumerInfo under the terms of the APA and the unappealed Sale Order. Accordingly, argues the Trustee, the Domain Name, which was to be conveyed to SMDI in exchange for SMDI’s funding of its plan, is no longer property of the estate, and therefore the SMDI Plan is clearly not confirmable and the Joint Plan has been substantially consummated.

J. Adjudication of the Adversary Proceeding

As stated above, the Adversary Proceeding resulted in a judgment against SMDI and the intermediary transferees of the Domain Name, and in favor of the Trustee. On September 18, 2009, the bankruptcy court entered a judgment (the “Judgment”)

⁶⁰ (...continued)
status of the Confirmation Appeal and another related appeal pending before the District Court and to include copies of the District Court docket sheets. *See Order Directing Appellants to File Status Report Regarding District Court Appeals*, entered July 14, 2010 (Doc. 66131).

⁶¹ *See Status Report* at 2, ¶ 1; *Search Market Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327 (10th Cir. 2009).

⁶² *See Status Report* at 2, ¶ 1; *Confirmation Appeal Docket Sheet at Doc. 92, 93, 94*.

⁶³ *See Status Report* at 2, ¶ 1; *Confirmation Appeal Docket Sheet at Doc. 102*.

find[ing] that the liquidating Trustee is entitled to immediate turnover of the domain name. The Court orders and directs each of the defendants to immediately turnover any interest any of them may hold or assert in the domain name and to cause any of their agents or representatives to fully cooperate in such turnover.⁶⁴

No monetary damages were awarded to the estate, although the Trustee and ConsumerInfo were awarded approximately \$110,000 in costs.⁶⁵

SMDI appealed the Judgment to the Utah District Court (the “Adversary Appeal”).⁶⁶ The District Court denied SMDI’s motion to stay the Judgment pending appeal.⁶⁷ Pursuant to that unstayed Judgment, the estate recovered the Domain Name and irrevocably transferred it to ConsumerInfo under the terms of the APA and the unappealed Sale Order. On July 1, 2010, the Trustee and ConsumerInfo filed in the District Court a Joint Motion to Dismiss and Suggestion of Partial or Total Mootness (“Second Mootness Motion”).⁶⁸ The matter is not yet fully briefed and the Second Mootness Motion has not yet been set for hearing.

K. Fee Applications and Order on Appeal

Throughout the Chapter 7 and Chapter 11 cases, the Adversary Proceeding, and the appeals, the Trustee was represented by Counsel, whose employment was

⁶⁴ *Adversary Docket Sheet* at 14, *Doc. 474*, in *App. Vol. V* at 1152. *See also Appellants’ Opening Brief* at 5 (the court “determin[e]d that the Debtor owned the Domain Name at the time he filed bankruptcy, that all post-petition transfers of the Domain Name (including the last transfer to SMDI) were void as violations of the automatic stay, and that SMDI was required to turn over the Domain Name to the Trustee.”).

⁶⁵ *Adversary Docket Sheet* at 4-5, *Doc. 545*, in *App. Vol. V* at 1142-43.

⁶⁶ *Id.* at 12-13, *Doc. 476, 477*; in *App. Vol. V* at 1151-52. The Trustee and ConsumerInfo filed a cross-appeal, apparently in connection with the denial of their claim for monetary damages. *Id.* at 10, *Doc. 499*, in *App. Vol. V* at 1148.

⁶⁷ *See Adversary Appeal Docket Sheet (Exhibit B to Status Report)* at *Doc. 18*.

⁶⁸ *Id.* at *Doc. 45, 46*.

approved under Section 327.⁶⁹ During the Chapter 11 proceeding, the Trustee and Counsel filed several interim fee applications seeking payment from the estate, which the bankruptcy court granted in substantial part by virtue of interim fee orders. SMDI objected to each fee application on various grounds, but its appeal before this Court focuses on its assertion that the bankruptcy court should have denied the applications pursuant to Section 328(c) because the Trustee and Counsel were not disinterested.⁷⁰ Section 328(c) provides that

⁶⁹ ConsumerInfo is, and has been at all times, represented by its own separate counsel.

⁷⁰ On May 4, 2007, the Trustee filed his first fee application and Counsel filed its second fee application seeking compensation for the period of October 6, 2006 to April 30, 2007. *Applications, in App. Vols. II & IV* at 304-321, 839-930. On May 29, 2007, SMDI filed its objection alleging various reasons why the Trustee's and Counsel's applications should not be granted, but did not raise the issue of disinterestedness. *Objection, in App. Vol. II* at 339-47. SMDI did ask the bankruptcy court to defer consideration of fees incurred in negotiating a settlement of ConsumerInfo's CCB-Related Claims, arguing that the services were not reasonable or necessary or beneficial to the estate. The bankruptcy court approved those fees on an interim basis, with the understanding that interim fees are subject to review on a final basis and may be subject to disgorgement when a final fee application is considered. *See Transcript of Bench Ruling of June 6, 2007, at 16, in App. Vol. II* at 381.

On October 19, 2007, a second interim fee order was entered awarding the Trustee and Counsel partial compensation for the period of May 1, 2007 to September 12, 2007, pending later hearings on SMDI's objection alleging that the Trustee and Counsel were not disinterested. *Order, in App. Vol. I* at 7-11. After two days of evidentiary hearings, the bankruptcy court overruled SMDI's objection, and on November 26, 2007, the second interim fee order was amended to approve all fees requested for the period. *Order, in App. Vol. I* at 12-16.

On January 18, 2007, the Trustee and Counsel filed their last interim applications, requesting fees for the period of September 13, 2007 to October 18, 2007. *Applications, in App. Vols. I & II* at 215-27, 228-70. Again, SMDI objected on the ground that the Trustee and Counsel were not disinterested. *Objection, in App. Vol. II* at 271-286.

the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 . . . if, at any time during such professional person's employment under section 327 . . . 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.⁷¹

SMDI's disinterestedness argument arises from the Trustee's and Counsel's administration of the estate after the CCB-Related Claims were assigned to ConsumerInfo. In January 2007, ConsumerInfo purchased CCB's claim to equitable ownership of the Domain Name, and this claim was directly adverse to the estate's claimed interest in the Domain Name.⁷² Because the Trustee and Counsel had pre-existing duties under the APA and Sale Order to prosecute the Adversary Proceeding for the benefit of ConsumerInfo, SMDI argued that the Trustee and Counsel were "representing" ConsumerInfo's interest in the Adversary Proceeding, and therefore the Trustee and Counsel were "representing" an interest adverse to the estate.⁷³ SMDI also contended that the Trustee's duties under the APA and Sale Order influenced the Trustee's judgment in other matters and predisposed the Trustee to favor ConsumerInfo in his administration of the estate. SMDI contends, for example, that the Trustee should have objected to the CCB-Related Claims and should not have prevented SMDI from objecting to those claims; should not have entered into the proposed settlement with ConsumerInfo and then should not have withdrawn the settlement; and should not have opposed the SMDI Plan.⁷⁴

⁷¹ 11 U.S.C. § 328(c).

⁷² The period of this alleged "adversity" was from January 2007 (when ConsumerInfo purchased the CCB-Related Claims) to July 2007 (when ConsumerInfo substituted a tort claim for its constructive trust claim).

⁷³ *Objection to Final Applications of Trustee and Fabian & Clendenin for Fees and Costs*, in App. Vol. II at 271-86.

⁷⁴ *Id.* We observe, as a factual matter, that even if the Trustee and Counsel
(continued...)

After confirmation of the Joint Plan, the Trustee and Counsel filed Chapter 11 Trustee's Third Application for Compensation and Fourth Verified Application for Compensation of Fabian & Clendenin, Counsel for Chapter 11 Trustee requesting interim approval of compensation for the period of September 13, 2007 to October 18, 2007 (the "Last Fee Application"), to which SMDI again asserted its conflict of interest objection. On June 17, 2008, the bankruptcy court overruled SMDI's objection, granted the Last Fee Application, and entered the Fee Order appealed herein. The Fee Order approved compensation only for the period of September 13, 2007 to October 18, 2007 (*i.e.*, \$9,438.40 to the Trustee and \$59,470.77 to Counsel), and authorized the estate to pay such compensation. Under the Joint Plan, the Trustee's and Counsel's administrative expenses were

⁷⁴ (...continued)

resigned from representing the estate when ConsumerInfo purchased the CCB conversion claim (as SMDI contends should have occurred), any successor trustee and its counsel would have inherited exactly the same alleged "adversity" or "conflict" that SMDI imputes to the Trustee and Counsel. The APA and Sale Order imposed obligations on the estate, the breach of which could have exposed the estate to litigation for specific performance and/or the assertion of an administrative claim by ConsumerInfo. SMDI contends that those very duties required the Trustee to favor ConsumerInfo's interests over the interests of the estate's other creditors, and created a conflict between the Trustee and the estate. This argument was rejected by the bankruptcy court in the unappealed Sale Order when it overruled "on [its] merits with prejudice" SMDI's objection that the APA required the Trustee to "surrender [his] business judgment and independence to ConsumerInfo." *Sale Order* at 2, *in App. Vol. II* at 418; *Memorandum Decision Granting Chapter 11 Trustee's Motion to Sell* at 13, *in App. Vol. II* at 414.

Under SMDI's interpretation of Sections 327(a) and 101(14), *no one* could have qualified to be employed to represent the estate or to carry out the estate's duties under the APA and Sale Order because every successor trustee would be faced with the same circumstances and thus the same alleged conflict. The alleged conflict was inherent in the position of trustee as a representative of the estate; it is not personal to this Trustee or Counsel.

Accordingly, SMDI's complaints about the particular strategic decisions made by the Trustee and Counsel regarding, for instance, whether and when to object to the CCB-Related Claims, objecting to SMDI's standing to object to the CCB-Related Claims, objecting to the SMDI Plan, and joining ConsumerInfo as a plaintiff rather than a defendant in the Adversary Proceeding really constituted objections to the Trustee's and Counsel's *judgment* in administering the estate, and thus whether the services rendered should be compensable by the estate as reasonable, necessary, and beneficial.

payable from the Sales Proceeds.⁷⁵

The Fee Order refers to the Trustee's and Counsel's applications as "Final Fee Applications."⁷⁶ However, the Trustee and Counsel actually filed their applications under Section 331, and requested interim compensation.⁷⁷ The record does not contain any "final fee application" that summarizes and justifies the necessity and reasonableness of all services rendered in the case, and requests final approval under Section 330 of all interim fees and expenses previously approved and paid.

It is not clear from the Fee Order that the bankruptcy court reviewed the necessity or benefit to the estate of *all* services rendered in the case, or the reasonableness of the total compensation awarded in this and prior interim fee orders in the aggregate, as is required by Section 330 of the Bankruptcy Code,⁷⁸ nor does the Fee Order expressly state that it is a final order. The Fee Order states that the bankruptcy court "incorporates all prior [interim fee] orders . . . and the Order Confirming the Second Amended Joint Chapter 11 Plan, as well as the findings and conclusions made therein."⁷⁹ However, this language could be interpreted as an incorporation of the court's prior findings and conclusions concerning SMDI's previous conflict of interest objections to the fee applications and to confirmation of the Joint Plan, as SMDI requested that all evidence from hearings on those matters be considered in determining SMDI's objection to the Last Fee Application. The bankruptcy court may have intended the Fee Order to

⁷⁵ *Joint Plan* at 8, ¶ 5.1, in App. Vol. III at 665.

⁷⁶ *Fee Order*, in App. Vol. I at 1-3.

⁷⁷ *Trustee's Third Application*, in App. Vol. II at 215-27; *Counsel's Fourth Application*, in App. Vol. II at 228-70.

⁷⁸ 11 U.S.C. § 330.

⁷⁹ *Fee Order* at 3, in App. Vol. I at 3.

be a final order, but it also could have intended to leave the compensation issue open for further bankruptcy court review and potential disgorgement⁸⁰ based on later developments in the case.⁸¹

On June 25, 2008, SMDI timely filed a notice of appeal of the Fee Order.

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely-filed appeals from “final judgments, orders, and decrees” and “with leave of court, from other interlocutory orders and decrees” of bankruptcy courts within the Tenth Circuit unless one of the parties elects to have the district court hear the appeal.⁸²

Neither party elected to have this appeal heard by the United States District Court for the District of Utah. The parties have therefore consented to appellate review by this Court.

A. Finality

“[A] decision is ordinarily considered final and appealable under § 1291 [and § 158(a)] only if it ‘ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’”⁸³ Orders disposing of interim fee applications are not final.⁸⁴

⁸⁰ See 11 U.S.C. § 330(a)(5).

⁸¹ For example, the actual benefit to the estate of prosecuting the Adversary Proceeding could not be determined when the Fee Order was entered.

⁸² 28 U.S.C. § 158(a)(1) and (3), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002 and 8003; 10th Cir. BAP L.R. 8001-3.

⁸³ *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

⁸⁴ “Interim allowances are always subject to the court’s re-examination and adjustment during the course of the case, and all expenses of administration must receive the court’s final scrutiny and approval.” 2 Collier on Bankruptcy ¶ 331.03 (15th ed. 1981). Interim awards, too, are refundable to the estate in cases of misconduct. *In re Arlan’s Department Stores, Inc.*, 462 F.Supp. 1255 (S.D.N.Y. 1978), *aff’d*, 615 F.2d 925 (2d Cir. 1979). Interim awards, then, are in no
(continued...)

At our direction, the parties briefed the issue of the finality of the Fee Order.⁸⁵ SMDI contends that the Fee Order is final because the bankruptcy court “incorporated” its prior interim orders and ruled on the last application for fees that required bankruptcy court approval. Under the Joint Plan, the liquidating trust’s payment of fees and costs incurred post-confirmation do not require bankruptcy court approval. Therefore, argues SMDI, the Fee Order is the final disposition of the bankruptcy court on the issue of the estate’s compensation of the Trustee and Counsel.⁸⁶ The Trustee and Counsel argue that the Fee Order is not final because if the Confirmation Order is reversed and vacated on appeal, the Trustee and Counsel will be entitled to apply for additional interim fees until another plan is confirmed or the case is otherwise resolved.⁸⁷

The Fee Order is ambiguous regarding finality. On one hand, it purports to “incorporate” the interim orders.⁸⁸ On the other hand, the Trustee and Counsel did not file a “final” fee application seeking approval of all interim fees, and the

⁸⁴ (...continued)
respect final adjudications on the question of compensation. Such awards are therefore interlocutory.

In re Callister, 673 F.2d 305, 307 (10th Cir. 1982); *see also Spears v. United States Trustee*, 26 F.3d 1023, 1024 (10th Cir. 1994).

⁸⁵ *Order Directing Briefing Regarding Jurisdiction*, entered June 2, 2010 (Doc. 65826).

⁸⁶ *Appellants’ Memorandum Regarding Jurisdiction*, filed herein on June 16, 2010 (Doc. 65998) at 7, citing *Iannochino v. Rodolakis (In re Iannochino)*, 242 F.3d 36, 44-45 (1st Cir. 2001) (even if the fee application was denominated “interim,” if no further fees were contemplated and court resolved all issues related to claim for fees in the case, the order was a final order).

⁸⁷ *Memorandum of Appellees Regarding Interlocutory Nature of this Appeal, and Whether this Court has Jurisdiction*, filed herein on June 16, 2010 (Doc. 65999), at 2-3.

⁸⁸ It also “incorporates” the Confirmation Order, which may indicate that the bankruptcy court’s intent was to incorporate its findings on SMDI’s objections to the fee applications and confirmation of the Joint Plan, specifically the finding that the Trustee and Counsel were not burdened with a conflict of interest.

Fee Order does not aggregate all amounts previously awarded and specifically approve them on a final basis.

Although SMDI has not moved for leave to appeal in the event the Fee Order is not a final order, Rule 8003 of the Federal Rules of Bankruptcy Procedure provides that a notice of appeal of a non-final order should be regarded as a motion for leave to appeal. Rule 8003 provides—

If a required motion for leave to appeal is not filed, but a notice of appeal is timely filed, the [appellate court] may grant leave to appeal or direct that a motion for leave to appeal be filed. The [appellate court] may also deny leave to appeal but in so doing shall consider the notice of appeal as a motion for leave to appeal.⁸⁹

The Tenth Circuit has held that “if the appellant fails to file the required motion but files a timely notice of appeal, Rule 8003(c) requires the [appellate court] to make one of the following three choices: (1) grant leave to appeal, (2) order the party to file a motion for leave to appeal, or (3) deny leave to appeal after considering the notice of appeal as a motion for leave to appeal.”⁹⁰ SMDI’s notice of appeal was timely, and thus, to the extent the Fee Order is not a final order, we construe the notice of appeal as a motion for leave to appeal.

As this Court has previously stated:

Leave to hear appeals from interlocutory orders should be granted with discrimination and reserved for cases of exceptional circumstances. Appealable interlocutory orders must involve a controlling question of law as to which there is substantial ground for difference of opinion, and the immediate resolution of the order may materially advance the ultimate termination of the litigation.⁹¹

We conclude that exceptional circumstances exist to grant leave to appeal this potentially non-final order. First, there is some evidence that the Fee Order was in fact intended to be the final expression of the bankruptcy court concerning

⁸⁹ Fed. R. Bankr. P. 8003(c).

⁹⁰ *In re Faragalla*, 422 F.3d 1208, 1211 (10th Cir. 2005).

⁹¹ *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 769-70 (10th Cir. BAP 1997).

the Trustee's and Counsel's compensation in this case. Second, this appeal has been pending since June 25, 2008, and after a lengthy stay pending the resolution of another appeal, it has finally been fully briefed and argued. We conclude it would be a waste of the parties' and judicial resources to remand the matter to the bankruptcy court to clarify its intent at this point. Finally, regardless of the finality of the Fee Order, as explained below, we conclude that SMDI lacks standing to appeal the Fee Order, and therefore this appeal should be terminated on jurisdictional grounds. Thus, we grant SMDI leave to appeal a potentially non-final order so that we may reach the standing issue.

B. SMDI's Standing to Prosecute Appeal of Fee Order

In order to have standing to appeal a bankruptcy court order, the appellant must establish that it is a "person aggrieved" by the appealed order. According to the Tenth Circuit,

only a person "whose rights or interests are directly and adversely affected pecuniarily by the decree or order of the bankruptcy court" may appeal. [*Holmes v. Silver Wings Aviation, Inc.*, 881 F.2d 939, 940 (10th Cir. 1989)] (citing *Fondiller v. Robertson (In re Fondiller)*, 707 F.2d 441, 442-43 (9th Cir. 1983)) (internal quotations and other citations omitted). "Litigants are 'persons aggrieved' if the order [appealed from] diminishes their property, increases their burdens, or impairs their rights." *GMAC v. Dykes (In re Dykes)*, 10 F.3d 184, 187 (3d Cir. Nov. 30, 1993) (citing *Fondiller*, 707 F.2d at 442). The "person aggrieved" test is meant to be a limitation on appellate standing in order to avoid "endless appeals brought by a myriad of parties who are indirectly affected by every bankruptcy court order." *Holmes*, 881 F.2d at 940.⁹²

Accordingly, SMDI must establish or demonstrate that the Fee Order directly, adversely and pecuniarily affects it.⁹³

⁹² *In re Am. Ready Mix, Inc.*, 14 F.3d 1497, 1500 (10th Cir. 1994). *See also In re Petroleum Prod. Mgmt., Inc.*, 282 B.R. 9, 13-15 (10th Cir. BAP 2002).

⁹³ SMDI contends that this Court already determined that SMDI has standing in its Order Denying Motion to Dismiss, Staying Appeal, and Granting in Part and Denying in Part Motion to Seal (Doc. 60988) entered on September 17, 2008. SMDI's standing was not addressed in that order. At that time, the Trustee's and Counsel's disinterestedness was at issue in an earlier-filed appeal before the

(continued...)

The Fee Order approved payment of fees and expenses to the Trustee and to Counsel in the amounts of \$9,438.40 and \$59,470.77, respectively.⁹⁴ All administrative expenses and distributions made under the Joint Plan were paid by the estate from the Sale Proceeds.⁹⁵ Theoretically, if this Court concluded that the Trustee and Counsel were not disinterested and that some or all of the compensation should not have been paid, the Trustee and Counsel would be required to disgorge some or all its compensation to the estate (or its successor-in-interest, the Liquidating Trust). None of those funds would be distributed to SMDI, however, because on October 31, 2007, all allowed unsecured creditors' claims, including the claims of SMDI and/or Magnet Media, were paid by the estate in full and with interest under the Joint Plan. Thus, SMDI, as a fully satisfied former creditor, has no pecuniary interest in the outcome of this appeal.

SMDI also argues that it has standing because it purchased the Debtor's residual interest. However, the APA and Sale Order, as well as the Joint Plan, prohibit the payment of any of the Sale Proceeds, or additional funds contributed by ConsumerInfo, to the Debtor or his assignees (*i.e.*, to the holder of the residual interest).

The APA approved by the Sale Order provided that –

⁹³ (...continued)
Tenth Circuit Court of Appeals. Accordingly, this Court determined that the Tenth Circuit appeal divested this Court of jurisdiction on that issue, and rather than dismiss this appeal, the Court entered a stay pending the Tenth Circuit's decision. When the Tenth Circuit's order did not resolve the disinterestedness issue, the stay terminated and a briefing schedule was established. *See Order Allowing Appeal to Proceed and Setting Briefing Schedule* entered November 23, 2009 (Doc. 64409).

⁹⁴ Alternatively, if the Fee Order is interpreted as also approving under Section 330 all interim fees previously awarded under Section 331, the amounts approved are arguably greater. For the purpose of analyzing SMDI's standing, however, the amount of the compensation approved by and authorized to be paid under the Fee Order is not relevant.

⁹⁵ *Joint Plan* at 8, ¶ 5.1, in *App. Vol. III* at 665.

The \$1,900,000 . . . shall be available [] immediately to the Trustee to pay allowed Chapter 7 and Chapter 11 administrative expenses and allowed claims of creditors against the Estate. Any distribution normally done with Bankruptcy Court approval in a Chapter 7 or Chapter 11 shall be made after notice or a hearing. *None of the amounts provided by [ConsumerInfo] shall benefit [the Debtor] or his purported assignees as residual interest holders in the Estate or benefit any other person or parties besides allowed Chapter 7 or Chapter 11 administrative expenses or allowed claims of creditors against the Estate.*

. . . .

*Any remaining Funds when the Estate is fully administered shall be returned to [ConsumerInfo] by the Trustee.*⁹⁶

Article 9 of the Joint Plan provided that “[a]fter the Trustee has made all distributions under this Plan and the Adversary Proceeding and any other Actions are concluded, the Trustee shall return any remaining amounts from the Sales Proceeds to ConsumerInfo pursuant to the APA.”⁹⁷ Because the only funds available for payment of compensation to the Trustee and Counsel pursuant to the Fee Order (and prior interim orders) were the Sale Proceeds, if the Trustee and Counsel were required to disgorge all or any part of their compensation, such funds would have to be returned to ConsumerInfo, and none may benefit the residual interest holder.⁹⁸ Accordingly, SMDI has no pecuniary interest in the

⁹⁶ APA at 4-5, ¶ 1.4, in App. Vol. II at 426-27.

⁹⁷ Joint Plan at 13, ¶ 9.1, in App. Vol. III at 670.

⁹⁸ Under the Joint Plan, the residual interest holder is eligible for a distribution only if the estate recovers damages in the Adversary Proceeding, and then only after ConsumerInfo’s subordinated CCB-Related Claims (asserted in the amount of \$2.23 million, but not yet liquidated or allowed) are satisfied in full. The bankruptcy court did not award any damages in the Adversary Proceeding.

SMDI argues that because the Trustee and ConsumerInfo have appealed the bankruptcy court’s failure to award a judgment for damages (principally against SMDI for its use of the estate’s Domain Name during the pendency of the bankruptcy case), the estate may eventually recover damages (on appeal, or after a remand or retrial) and thus SMDI, as residual interest holder, may obtain a distribution. In support of its argument, SMDI cites cases in which a debtor (as residual interest holder) is held to have standing to appeal where there is a “possibility” that the appeal could result in a solvent estate and thus a distribution

(continued...)

outcome of this appeal on account of its residual interest.

SMDI also argues that its standing derives from its status as a plan proponent. It contends that if it is successful in the Confirmation Appeal, and confirmation of the Joint Plan is vacated, it is possible that the SMDI Plan may then be confirmed. In the SMDI Plan, SMDI was to provide the funding to pay all unsecured creditors and administrative expenses in full. Thus, SMDI argues, the amount required to fund the SMDI Plan (if confirmed) would be reduced dollar for dollar by the amount that the Trustee's and Counsel's administrative claim for compensation could be reduced if it is successful in this appeal. At most, SMDI asserts an *indirect* financial stake in this appeal, which is insufficient to confer standing.⁹⁹

Moreover, under the SMDI Plan, SMDI agreed to fund the payment of claims and administrative expenses *in exchange for a settlement of the Adversary Proceeding in which SMDI retains the Domain Name*. But the Adversary Proceeding has been tried on its merits, and judgment was entered against SMDI. The Domain Name has already been recovered from SMDI by the Trustee and has been transferred, as required by the unappealed APA and Sale Order, to ConsumerInfo. Accordingly, SMDI admits that it must not only be successful in vacating confirmation of the Joint Plan, but it must also obtain a favorable decision in the Adversary Appeal, and the estate would have to recover the

⁹⁸ (...continued)
to the debtor. Reply Brief at 19. However, the possibility that SMDI's residual interest might have some value does not negate the requirement that any Sales Proceeds not used for the purposes stated in the APA and Joint Plan be returned to ConsumerInfo. Even if the Trustee and Counsel were required to disgorge fees awarded under the Fee Order, as requested by SMDI in this appeal, none of the disgorged funds could benefit SMDI as residual interest holder.

⁹⁹ See, e.g., *In re Petroleum Prod. Mgmt., Inc.*, 282 B.R. 9, 13-15 (10th Cir. BAP 2002).

Domain Name from ConsumerInfo,¹⁰⁰ before SMDI would have any incentive to propose a plan. That plan would then have to be confirmed by the bankruptcy court before SMDI would have any obligation to pay the administrative claim of the Trustee and Counsel (*i.e.*, the claim approved in the Fee Order) that SMDI challenges in this appeal.¹⁰¹ SMDI's arguable financial stake in the outcome of this appeal is too remote and speculative to support standing.¹⁰²

III. CONCLUSION

In the Tenth Circuit, only a person “whose rights or interests are directly and adversely affected pecuniarily by the decree or order of the bankruptcy court” may appeal.¹⁰³ We conclude that the multiple layers of intertwined contingencies that must occur in order for SMDI to arguably claim any pecuniary

¹⁰⁰ We also note that ConsumerInfo contends that the bankruptcy court's finding in the unappealed Sale Order that ConsumerInfo was a good faith purchaser entitled it to protection from attacks on the validity of the estate's transfer of the Domain Name to it under Section 363(m). SMDI's arguable pecuniary interest is derived from its intent to fund a plan in which it obtains the Domain Name. ConsumerInfo's contention that it cannot be forced to return the Domain Name to the estate is another legal obstacle that SMDI would be required to overcome before it could even propose a plan.

¹⁰¹ It also appears, however, that if SMDI were to fully prevail in the Adversary Appeal, and the appellate court concluded that the Domain Name was not an asset of the estate on the petition date and that SMDI should not have been required to turn over the Domain Name to the estate, arguably the Domain Name would eventually be returned to SMDI (assuming that SMDI also overcame ConsumerInfo's Section 363(m) argument). If SMDI did indeed reacquire the Domain Name, SMDI would not need to propose a plan or pay any of the estate's claims (*i.e.*, the fees challenged in this appeal) in order to obtain the Domain Name. Thus, SMDI's contention that it has an interest in reducing or eliminating the fees awarded in the Fee Order as a plan proponent is undermined by the fact that SMDI would have no incentive to propose and fund a plan if it recovers the Domain Name by prevailing in the Adversary Appeal.

¹⁰² *See, e.g., In re Cult Awareness Network, Inc.*, 151 F.3d 605, 608 (7th Cir. 1998) (contingencies that had to occur before the estate would be able to pay all claims and debtor could realize a return on its residual interest were too numerous and uncertain to establish standing of the debtor to appeal a sale order; the possibility of a surplus was “too remote to support standing”).

¹⁰³ *In re Am. Ready Mix, Inc.*, 14 F.3d 1497, 1500 (10th Cir. 1994) (internal quotation marks omitted).

benefit from the appeal of the Fee Order renders its interest in the appeal too remote and indirect to confer standing on SMDI. The appeal is therefore **DISMISSED** for lack of jurisdiction.