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**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-40392

In the Matter of: **EDWARD MANDEL,**
Debtor.

* * * * *

EDWARD MANDEL,
Appellant,

v.

MASTROGIOVANNI SCHORSCH & MERSKY;
ROSA ORENSTEIN,

Appellees.

**Appeal from the United States District Court
for the Eastern District of Texas
USDC 4:12-CV-313**

(Filed Sep. 7, 2018)

Before: **JOLLY, DENNIS, and ELROD, Circuit Judges.**

PER CURIAM:*

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

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This is yet another appeal arising out of Edward Mandel's bankruptcy proceeding. Mandel removed a lawsuit originally filed in Texas state court into his federal bankruptcy proceeding. There was a receiver appointed by the state court in the removed case. The receiver filed a claim in the bankruptcy proceeding for fees incurred for her actions in the state court lawsuit and in the bankruptcy court. The bankruptcy court awarded the receiver fees, and Mandel disputes that award. Holding that some categories of fees awarded were proper, but some were improperly awarded, we AFFIRM the district court's judgment in part, but VACATE the fee award and REMAND to the bankruptcy court to recalculate the proper fee award.

I.

Edward Mandel's bankruptcy proceeding has spawned multiple appeals before this court.¹ Here, Mandel appeals the bankruptcy court's fee award to a receiver appointed in Texas state court litigation over the ownership of White Nile, a failed search engine start-up company. The receiver was appointed by the state trial court to protect White Nile's interests in the ownership dispute. While the White Nile litigation involved several parties disputing ownership and

¹ See, e.g., *In re Mandel*, 720 F. App'x 186 (5th Cir. 2018); *In re Mandel*, 641 F. App'x 400 (5th Cir. 2016); *In re Mandel*, 578 F. App'x 376 (5th Cir. 2014).

obligations, two are relevant here—Mandel and Steven Thrasher, White Nile’s co-founders.²

A. The White Nile Receivership and Payment Dispute

A lawsuit over the ownership of White Nile was filed in Texas state court. As part of the litigation, the parties initially agreed to the appointment of a receiver to protect White Nile’s interests in the litigation. The state trial court issued three orders relevant to the receivership before the case was removed to federal court as part of Mandel’s bankruptcy.

The first state court receivership order set out the scope of the receiver’s authority and agreed that the parties would propose three attorneys to act as a receiver. The parties were to meet and confer to see if they could agree on an appointment from the three proposed persons, but the order stated the court would appoint a receiver if the parties failed to agree. Mandel agreed to pay 52.5% of the receiver’s fees and Thrasher 47.5% of the fees. The order also stated the receiver was without authority to retain independent counsel without notice to the parties and court approval.

The second state court receivership order appointed Rosa Orenstein, who is a bankruptcy attorney and who was one of the parties’ proposed candidates,

² The White Nile litigation was tried in Mandel’s bankruptcy proceeding and twice appealed to this court. See *In re Mandel*, 720 F. App’x 186 (5th Cir. 2018).

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as the receiver. The scope of the receiver's duties were set out as follows: to "(1) direct and control White Nile's participation in this litigation; (2) take actual possession of all White Nile's books and records . . . and all bank accounts of White Nile; and (3) take constructive possession of all White Nile's other property." The second order restated the fee-sharing agreement between Mandel and Thrasher but did not include the prohibition on the retention of independent counsel. There was no language in the second receivership order stating that it vacated or supplanted the first receivership order.

The third relevant state court order is a payment order explaining the terms of payment for Orenstein and her retained counsel. Orenstein retained the firm Mastrogiovanni Schorsch & Merksy [sic] (Mastrogiovanni) to assist her in her capacity as receiver. Mandel and Thrasher initially agreed to Orenstein's retention of counsel, but soon Mandel began to object to the continued retention of Mastrogiovanni. Over Mandel's objection, the state court entered a formal order finding that Mastrogiovanni's retention was authorized under the receivership orders and stating Mandel and Thrasher's terms of payment to the receiver and Mastrogiovanni. The payment terms stated the percentage of fees each party was responsible for and the schedule for payment.

Mandel failed to comply with the terms of the payment order and wrote to the state court claiming an inability to financially comply. Orenstein moved to compel compliance and the state court ordered

financial discovery from Mandel. The state court held a hearing after Orenstein alleged that Mandel was not complying with the ordered financial discovery, but the state court continued the hearing to allow Mandel another opportunity to voluntarily comply and did not make a ruling at that time. Subsequently, Mandel initiated mandamus proceedings concerning the validity of the payment order and was ultimately denied relief by the Supreme Court of Texas. Orenstein hired an attorney at Hankinson Levinger to represent her in those mandamus proceedings. Mandel filed for bankruptcy on the day that the state trial court was set to resume the hearing on the enforcement of the payment order. Filing the bankruptcy case initiated a litigation stay halting the state court proceedings.

B. The Bankruptcy Court White Nile Proceedings

After Mandel filed for Chapter 11 bankruptcy, he removed the White Nile litigation to federal court. Orenstein and Mastrogiovanni then filed claims against Mandel's bankruptcy estate. Orenstein also filed a claim on behalf of White Nile. Thrasher also filed claims individually and derivatively on behalf of White Nile. In the bankruptcy case, Orenstein filed three motions to lift the automatic stay, three corresponding motions to remand, a motion to appoint a trustee, objections to the appointment of additional counsel for Mandel, and opposed cash collateral motions. In connection with the motion to appoint a

trustee, Mandel sought to depose Orenstein and she retained counsel to defend herself.

The White Nile matter was tried as an adversarial proceeding in the bankruptcy case as a derivative claim of Thrasher. Although Orenstein had made multiple filings in the bankruptcy case-in-chief, the bankruptcy court excused her from participating in the actual White Nile ownership adversarial proceeding. The bankruptcy court did so in a scheduling order on White Nile's claims that excused Orenstein from participation in the adversarial proceedings unless Thrasher paid all her expenses. After the trial on Thrasher's derivative claim in the bankruptcy court, but before the bankruptcy court issued its opinion, the bankruptcy court severed and remanded Orenstein's and Mastrogiovanni's claims for receivership fees against Thrasher to the state trial court. The state trial court then approved a settlement between Orenstein, Mastrogiovanni, and Thrasher, to which Mandel was not a party.

C. The Bankruptcy Court Claims Hearing

After the bankruptcy court tried the White Nile matter, the bankruptcy court issued an order in the bankruptcy case on Orenstein and Mastrogiovanni's claims for fees. Mandel had filed objections to both Orenstein and Mastrogiovanni's claims. He asserted that Orenstein was only entitled to pre-petition fees of \$10,468.42 because she was not entitled to fees for the duplicative White Nile claim in the bankruptcy case,

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there was insufficient documentation of her claim otherwise, and the receivership orders did not provide recovery for her fee dispute with Mandel.

Following the hearing on Orenstein and Mastrogiovanni's claims, the bankruptcy court issued its findings and concluded that, Orenstein was entitled to \$315,553 in total fees for her work as White Nile's receiver and Mastrogiovanni was entitled to \$155,517 in total fees for its work assisting Orenstein, as unsecured claims. The award included fees incurred from the time Orenstein was appointed as receiver through the adversary proceeding in the bankruptcy court. Encompassed in the award were fees for Orenstein and Mastrogiovanni's actions in the state court proceedings, the proceedings in bankruptcy court following removal, and representing White Nile as a creditor of Mandel's bankruptcy estate.³

Mandel appealed the award to the district court raising thirteen issues on appeal. Initially, the district court dismissed the appeal on standing grounds, but was reversed by this court in *In re Mandel*, 641 F. App'x 400 (5th Cir. 2016), which held that Mandel still had standing after the conversion of his Chapter 11

³ Included in the bankruptcy court's fee calculation were Orenstein and Mastrogiovanni's fees incurred in the state court litigation (including the financial discovery and mandamus proceedings); all fees incurred in the bankruptcy case (including filings in the bankruptcy case-in-chief, filings in the removed White Nile matter, and time spent assisting Thrasher in litigating the White Nile derivative claim); and fees incurred retaining counsel to assist Orenstein.

bankruptcy proceeding to a Chapter 7 proceeding. *Id.* at 405. The district court subsequently overruled each of Mandel’s objections on appeal from the bankruptcy court and affirmed the award. In doing so, the district court concluded that the bankruptcy court accounted for the retention of unauthorized attorneys by reducing the award from amount of fees that Orenstein and Mastrogiovanni had sought. Mandel timely appeals.

II.

“When a court of appeals reviews the decision of a district court, sitting as an appellate court, it applies the same standards of review to the bankruptcy court’s findings of fact and conclusions of law as applied by the district court.” *Jacobsen v. Moser (In re Jacobsen)*, 609 F.3d 647, 652 (5th Cir. 2010) (quoting *Kennedy v. Mindprint (In re ProEducation Int’l, Inc.)*, 587 F.3d 296, 299 (5th Cir. 2009)). “This court reviews the bankruptcy court’s findings of fact under the clearly erroneous standard . . . but the bankruptcy court’s conclusions of law are subject to *de novo* review.” *Pierson & Gaylen v. Creel & Atwood (In re Consol. Bancshares, Inc.)*, 785 F.2d 1249, 1252 (5th Cir. 1986) (citations omitted).

III.

Mandel asserts here that he is only contesting the district court’s legal findings to support the fee

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award—not the specific numeric amounts awarded.⁴ Our review, therefore, looks solely at whether the district court correctly determined that Orenstein was entitled to certain categories of fees as a matter of law. As such, we do not address whether the fee amounts have been properly proven up as supported by the record and evidence within the respective categories.

The contested categories of fees include: (1) any fees incurred assisting other claimants in the bankruptcy court White Nile trial; (2) Orenstein’s work representing White Nile as a creditor in the bankruptcy proceeding; (3) fees incurred for hiring attorneys not specifically approved by the state court, both pre-bankruptcy petition in state court and post-petition in bankruptcy court; and (4) post-petition attorneys’ fees in the bankruptcy court.⁵ Mandel does not contest Orenstein’s entitlement to pre- or post-petition fees incurred while acting in her capacity as White Nile’s receiver or Mastrogiovanni’s entitlement to pre- and post-petition fees for acting as counsel to Orenstein in her capacity as receiver. Mandel acknowledges that Orenstein and Mastrogiovanni are entitled to some amount of fees from the bankruptcy estate, but insists the district court erred in affirming the bankruptcy court’s award in full. We agree, and we remand the case

⁴ Under the receivership orders, Mandel and Thrasher were responsible for their respective portions of Orenstein’s fees. Orenstein and Mastrogiovanni settled with Thrasher for his portion of fees owed.

⁵ Mandel raised multiple points of error on appeal in his briefing. At oral argument, he listed these categories as the ones he contests.

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to the bankruptcy court to calculate a fee award consistent with our opinion as follows.

IV.

We first turn to the award of fees for Orenstein's role in the White Nile adversary proceeding, which was tried as a derivative claim of Thrasher in the bankruptcy case. Orenstein assisted Thrasher in trying the White Nile matter as a derivative claim. Mandel argues that because the bankruptcy orders excused Orenstein from participating in the White Nile trial she was not entitled to any fees awarded after the bankruptcy court's order. Orenstein maintains that any assistance after the order excusing her was done in her capacity as receiver. The bankruptcy court found that Orenstein was acting in her capacity as a receiver. "A finding is clearly erroneous if a review of the record leaves a definite and firm conviction that a mistake has been committed." *Boudreaux v. United States*, 280 F.3d 461, 466 (5th Cir. 2002) (internal quotations and citations omitted).

The White Nile litigation was tried as a derivative claim of Thrasher. The bankruptcy court excused Orenstein from participating in the trial itself unless Thrasher paid her fees. Subsequently, Orenstein responded to discovery propounded on White Nile and was subpoenaed to testify in her capacity as a receiver. Explaining the order excusing Orenstein, the bankruptcy court stated in the opinion awarding fees that: the "court was simply allowing Orenstein to not appear

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at trial without violating her fiduciary duties when the claims she was asserting were duplicative of the derivative claims asserted by Thrasher for White Nile, and there was a significant risk of nonpayment to her and her counsel.” The bankruptcy court made a factual finding that Orenstein was carrying out her duties as a receiver in providing any assistance to Thrasher, who was representing White Nile’s interests in the adversary proceeding. Mandel has not shown that this factual finding was clearly erroneous. Therefore, there was no error in awarding Orenstein fees for her work as a receiver in the White Nile adversarial proceeding.⁶

V.

The main question of law on appeal is the scope of Orenstein’s authority under the state court receivership orders and whether Orenstein had the authority to act as White Nile’s attorney as a claimant in the bankruptcy case-in-chief. The bankruptcy court concluded that the state court receivership orders authorized Orenstein to represent White Nile as a claimant in Mandel’s bankruptcy proceeding in addition to her duties as White Nile’s receiver in the ownership dispute litigation. The district court agreed. We do not.⁷

⁶ Mandel does not contest as a matter of law the award of any fees to Orenstein in her capacity as a receiver that were incurred post-bankruptcy petition.

⁷ Because we determine that Orenstein was not entitled to attorneys’ fees for representing White Nile as a creditor in the bankruptcy proceeding, we do not need to address Mandel’s arguments that the bankruptcy court’s fee award was erroneous both

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The removal of the state court litigation in which Orenstein was appointed as receiver to federal court did not expand the receiver's powers under the court order. "A receiver has only that authority conferred by the Court's order appointing him." *Ex parte Hodges*, 625 S.W.2d 304, 306 (Tex. 1981). "We give effect to an order 'in light of the literal language used if the language is unambiguous.'" *Clay Exploration, Inc. v. Santa Rosas Operating, LLC*, 442 S.W.3d 795, 800 (Tex. App.—Houston [14th Dist.] Aug. 14, 2014, no pet.) (quoting *Reiss v. Reiss*, 118 S.W.3d 439, 441 (Tex. 2003)). Judicial orders, "like other written instruments, are to be construed as a whole toward the end of harmonizing and giving effect to all the court has written." *Id.* (quoting *Constance v. Constance*, 544 S.W.2d 659, 660 (Tex. 1976)). Both the first and second state court receivership orders define the receiver's powers identically to:

- (1) direct and control White Nile's participation in this litigation; (2) take actual possession of all White Nile's books and records, including but not limited to all files of White Nile's current and prior counsel in this

because it was not allowed under Texas's fee shifting provisions and because Orenstein was not successful in many of her filings. In addition, we note the bankruptcy court already stated that it did not award any fees for work done solely in Orenstein's personal capacity post-petition. To the extent Mandel objected to any work that Orenstein did post-petition in the bankruptcy proceedings where there was potential overlap between work done in her personal capacity as a creditor and her capacity representing White Nile as a creditor, that concern is obviated by our holding that she is not entitled to fees for acting as White Nile's attorney in the bankruptcy proceeding.

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litigation, and all bank accounts of White Nile; and (3) take constructive possession of all White Nile's other property.

The relevant question, therefore, is whether the term "this litigation" conferred on Orenstein a broad authority to represent White Nile's interests in all litigation involving the entity, or authority limited to representing White Nile's interests in the ownership dispute, both in the state court and upon the removal of the matter to federal court.⁸ We conclude it is the latter.

"[T]his litigation" is a limiting term in the state court's receivership orders. *See Newman v. Toy*, 926 S.W.2d 629, 631 (Tex. App.—Austin 1996, writ denied) (explaining that a receiver steps into the shoes of the prior shareholder except as limited by statute or the [sic] "the terms of the trial-court order"). At the time the receivership orders were agreed to there was no bankruptcy case. In context, "this litigation" referred to the ownership dispute in state court over White Nile. Mandel removed the state court dispute to be tried as an adversarial proceeding in the bankruptcy

⁸ Upon removal, the state court receivership orders maintained effect in federal court. 28 U.S.C. § 1450 ("All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court."); *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300, 1304 (5th Cir. 1988) ("[W]henever a case is removed, interlocutory state court orders are transformed by operation of 28 U.S.C. § 1450 into orders of the federal district court to which the action is removed."). Mandel does not assert that removal affected the validity of the receivership order post-removal, only whether the actions the receiver took post-removal were authorized under those orders.

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case. Orenstein was appointed as a receiver for White Nile under the state court orders and not as White Nile's counsel. Removing the state court ownership dispute to federal court to be tried as one component of a larger bankruptcy proceeding did not confer broader authority on Orenstein than she would have had if the ownership dispute had remained in state court. The venue for the ownership dispute litigation simply changed.

The state court's actions after the bankruptcy court's remand of Orenstein's claims against Thrasher also supports interpreting "this litigation" narrowly to only refer to the White Nile ownership litigation. After the claims for Thrasher's share of the receivership fees were remanded to the state trial court, Orenstein sought permission from the state court as White Nile's receiver to file a lawsuit against Mandel's former attorneys for misrepresentations, which was denied. The state trial court, therefore, did not interpret the receivership orders as giving Orenstein the authority to act generally on behalf of White Nile. The bankruptcy court did not modify the receivership orders. Thus, Orenstein did not have authority under the receivership orders to act generally on White Nile's behalf in the bankruptcy case. *See* 28 U.S.C. § 1450. Representing White Nile as a creditor in the bankruptcy proceeding was a broader exercise of authority than delegated to Orenstein by the term "this litigation."⁹ As such, the

⁹ Orenstein's failure to obtain clarification from either the bankruptcy court or the state court on the scope of her authority is especially troubling as she was representing herself and

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bankruptcy court erred to the extent it awarded attorneys' fees based on the receivership orders to Orenstein and Mastrogiovanni for work in the bankruptcy proceeding beyond work done solely in Orenstein's capacity as receiver in the White Nile litigation.¹⁰

VI.

Having determined that the receivership orders did not authorize Orenstein to represent White Nile as a creditor in the bankruptcy proceeding, we turn to whether the receivership orders generally authorized the retention of additional counsel to assist her in duties as receiver, in the mandamus proceedings, and in representing White Nile as an attorney in the

Mastrogiovanni as creditors of the bankruptcy estate at the same time as her representation of White Nile as a creditor against that same estate.

¹⁰ Because we are reviewing the bankruptcy and district court's judgments only for legal error, we do not express an opinion on the sufficiency of the evidence to support the award of a particular dollar amount in damages. We do however note that on remand the bankruptcy court should consider whether Orenstein properly segregated her fees and to what extent co-mingled fees could support an award of fees to Orenstein in her capacity as receiver. *See, e.g., Bergeron v. Sessions*, 561 S.W.2d 551, 554 (Tex. Ct. App.—Dallas, 1977, writ ref'd n.r.e.) (stating that where a receiver served as both receiver and his own attorney he was required to segregate his fees); *see also Kotz v. Murariu*, No. 04-12-00420-CV, 2013 WL 6205457, at *1-2 (Tex. App.—San Antonio Nov. 27, 2013, no pet.) (mem. op., not designated for publication); *Bishop v. Smith*, No. 09-08-00185-CV, 2009 WL 5205362, at *6 (Tex. App.—Beaumont, Dec. 31, 2009, no pet.); *Hodges v. Peden*, 634 S.W.2d 8, 11 (Tex. App.—Houston [14th Dist.] Apr. 8, 1982, no writ).

bankruptcy case. The bankruptcy court ruled that under the state court receivership orders, as a matter of law, Orenstein had the right to retain counsel to represent her in her performance of her receivership duties. We conclude that Orenstein was authorized under the orders to retain counsel to assist her in her duties as the receiver and that Orenstein's actions in retaining counsel in the mandamus proceedings were done in her capacity as the receiver. We conclude, however, that the retention of counsel to assist in the bankruptcy case was not authorized because Orenstein was not acting in her capacity as receiver when representing White Nile as a creditor in the bankruptcy.

We construe the three state court receivership orders "toward the end of harmonizing and giving effect to all the court has written." *Clay Exploration*, 442 S.W.3d at 800. A receiver has only the authority conferred by the order appointing her. *Ex parte Hodes*, 625 S.W.2d at 306.

The first state court receivership order expressly prohibited the receiver from retaining independent counsel "without leave of the court after notice to all parties and hearing." The second state court receivership order did not contain this prohibition. Whether Orenstein had the authority to retain independent counsel turns on whether the second receivership order gave effect to the first order or amended the terms of the first order. Mandel argues the terms of the first order remained in full effect. Orenstein argues that the state court's payment order already decided the issue of her power to retain independent counsel in her favor.

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In the payment order, the state court concluded that “the Receiver’s determination that she required the ongoing services of independent counsel was appropriate and within her authority and that the parties additionally acquiesced in and encouraged that engagement.” Harmonizing the payment order with the receivership orders, Orenstein had authority to retain counsel to assist her in her duties as receiver. *See Clay Exploration*, 442 S.W.3d at 800. Orenstein and Mastrogiovanni were acting in their capacities as receiver and counsel, and not for their own efforts and at their own imperilment, as the state court acknowledged at the November 12, 2009 hearing on the receiver’s motion to compel payment. The collection efforts were the result of Mandel claiming an inability to financially comply with the payment terms of the receivership orders and the payment order. The bankruptcy court did not err in awarding fees for attorneys retained in the attempt to collect Mandel’s share of the receivership payments from when [sic] the state court proceedings.¹¹

As to the retention of counsel in the bankruptcy case, we have already determined that Orenstein was not authorized to represent White Nile as a creditor in the bankruptcy proceeding, and therefore, her retention of independent counsel to assist her in those matters would likewise not be authorized. However, fees for those attorneys were already excluded from the

¹¹ As the collection efforts were done in Orenstein’s capacity as receiver, the award of fees to her and Mastrogiovanni for these efforts was not error either.

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award. As the district court noted, the bankruptcy court reduced the award to reflect that Orenstein brought superfluous attorneys to the bankruptcy court proceedings. Mandel argues that he is not challenging the award of fees as an issue of fact, only as a matter of law. Our review is therefore limited to whether a category of fees was included in the fee award. The district court found that the bankruptcy court already accounted for the retention of superfluous attorneys in the bankruptcy proceedings and reduced the fee award accordingly. Therefore, this category was already excluded.

Therefore, there was no error as a matter of law as to the award of fees for the retention of independent counsel. The district court properly awarded fees for independent counsel retained in the state court proceedings and already excluded fees for the additional counsel retained in the bankruptcy case.

VII.

Finally, there is no need here to address Mandel's argument that attorneys' fees incurred post-petition are not allowable to an unsecured creditor under the Bankruptcy Code. Because we hold that Orenstein's receivership authority did not allow her to represent White Nile as a creditor, any attorneys' fee she incurred post-petition were not authorized by her pre-petition receivership orders. Therefore, we need not address the legal issue of whether the award of the

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post-petition attorneys' fees is allowed under the Bankruptcy Code.

VIII.

The judgment of the district court is AFFIRMED in part. We VACATE the fee award to Orenstein and Mastrogiovanni and REMAND to the bankruptcy court with orders to recalculate the award amount to Orenstein and Mastrogiovanni as is consistent with this opinion.

NOT FOR PRINTED PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§
EDWARD MANDEL	§
<i>Debtor.</i>	§
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EDWARD MANDEL,	§
<i>Appellant,</i>	§
v.	§ CIVIL ACTION No.
MASTROGIOVANNI	§ 4:12-CV-313
SCHORSCH & MERSKY,	§ JUDGE RON CLARK
et al.,	§ VSL
<i>Appellees.</i>	§

MEMORANDUM OPINION ON APPEAL
FROM BANKRUPTCY COURT

(Filed Mar. 31, 2017)

Appellant Edward Mandel (debtor) appeals the bankruptcy court's March 28, 2012 Order Regarding the Debtor's Objections to Claim Nos. 27 and 28 (the "Claim Allowance Order"), in which the bankruptcy court allowed Rosa Orenstein ("Orenstein") a claim in the amount of \$315,553.00 and allowed Mastrogiovanni, Schorsch, and Mersky, P.C. ("MSM") a claim in the amount of \$155,517.00.

Previously, this court dismissed this appeal for Mandel’s lack of standing. Mandel appealed this court’s dismissal. The Fifth Circuit reversed and remanded, ordering this court to consider the appeal on the merits and holding that Mandel has standing because the debt that is the subject of the Claim Allowance Order has not yet been discharged.¹

The court affirms the bankruptcy court’s ruling.

I. BACKGROUND

The underlying facts stem from litigation surrounding the founding and dissolution of White Nile, an internet search engine start-up, begun by Steven Thrasher, Mandel, and Jason Coleman (“White Nile litigation”). The court has stated the underlying facts in detail in a previous Memorandum Opinion regarding Mandel’s objections to the claims of Steven Thrasher, Jason Coleman, and White Nile. *See In re Mandel*, No. 4:15-cv-715, 2006 WL 7374428 (E.D. Tex. Dec. 20, 2016). Relevant to this appeal are facts surrounding the dispute over the appointment of, and the fees awarded to, Rosa Orenstein, as Receiver for White Nile, and Rosa Orenstein’s retention of MSM as independent counsel, both in the White Nile litigation.

On November 1, 2008, when the litigation between Mandel and Thrasher, Coleman, and White Nile was in state court, the state court appointed Orenstein as

¹ The dischargeability proceeding is currently pending before the bankruptcy court.

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receiver for White Nile. Mandel, who asserts an interest in White Nile, entered into an agreed Order to pay 52.5% of Orenstein's fees. This Order provided Orenstein with the authority, subject to further order of the court, to (1) "direct and control White Nile's participation in this litigation"; (2) "take actual possession of all White Nile's books and records, including but not limited to all files of White Nile's current and prior counsel in this litigation, and all bank accounts of White Nile"; and (3) "take constructive possession of all of White Nile's other property."² Nov. 2008 Order Appointing Receiver, Ex. 48, at p. 1.³ The November 2008 Order also stated that Orenstein had "no authority to retain independent counsel, consultants, experts, or professionals without leave of court after notice to all parties and hearing." Nov. 2008 Order Appointing Receiver, Ex. 48, at p. 2.

On May 29, 2009, the state court entered a second Order Appointing Receiver, again providing Orenstein with the power to direct and control White Nile's participation in litigation, take actual possession of White Nile's records, and take constructive possession of all White Nile's other property.⁴ May 2009 Order Appointing Receiver, Ex. 49, at pp. 1–2. Unlike the November 2008 Order, the May 2009 Order did not include a

² This Order was signed by Judge Mary Murphy.

³ All exhibits referenced in this Order are exhibits that were admitted by the bankruptcy court at its trial on Claims Nos. 27 and 28.

⁴ This Order was signed by Judge Eric V. Moye.

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provision prohibiting Orenstein from retaining independent counsel. On September 15, 2009, the state court entered an Order approving Orenstein's request to designate MSM as independent counsel and approving payment to both Orenstein and MSM. Payment Order, Ex. 50. Among other things, the court found that Orenstein's "determination that she required the ongoing services of independent counsel was appropriate and within her authority" and that Orenstein's engagement of independent counsel was "in compliance with the Texas Rules of Professional Conduct." Payment Order, Ex. 50, at p. 2. The Payment Order also designated MSM as Orenstein's independent counsel and provided that Mandel would pay 52.5% of MSM's and Orenstein's fees and that Thrasher would pay 47.5% of their fees. The state court further approved Orenstein's and MSM's fees up to September 9, 2009, specifically finding their fees to be fair, reasonable, and necessary. Payment Order, Ex. 50.

Mandel made several payments to Orenstein and MSM following the September 15 Order but eventually claimed to be unable to pay his portion of all of their fees. Orenstein continued to conduct discovery regarding Mandel's claim pursuant to state court orders.

On January 25, 2010, Mandel filed a petition for relief under Chapter 11 of the Bankruptcy Code. Subsequently, Orenstein entered into a settlement agreement regarding Thrasher's obligation to pay 47.5% of her reasonable fees and expenses, under which she received a settlement payment in the total amount of \$380,000. Orenstein used a portion of that payment to

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pay the law firms of Hunton & Williams, L.L.P. and Hankinson Levinger. L.L.P. for the legal assistance that they provided to her as receiver.

Orenstein filed a proof of claim for \$332,160.61, seeking allowance of her fees and expenses through December 2, 2011. MSM filed a proof of claim for \$163,701.75, seeking allowance of their fees and expenses for providing Orenstein legal assistance when she was receiver through December 2, 2011.

Mandel asserted numerous objections to Orenstein's and MSM's claims. On December 2, 2011, the bankruptcy court orally overruled Mandel's objections, reasoning:

(a) [Mandel] argued that Orenstein did not have the right to retain counsel to represent her, specifically, Hunton & Williams and Hankinson Levinger. The Court found, as a matter of fact and law, that Orenstein has the authority to hire counsel to represent her in the performance of her duty as a receiver. The Court further found that this authority is not unfettered inasmuch as the state court orders appointing Orenstein only require the Debtor to pay her reasonable and necessary expenses.

(b) [Mandel] argued that Orenstein is not entitled to recover fees spent on her efforts to collect her fees and expenses from [Mandel]. The state court, however, instructed Orenstein to investigate [Mandel's] claim that he lacked the financial ability to comply with

the orders appointing the receiver. Orenstein and her counsel are entitled to recover fees and expenses for so-called “collection efforts” since those efforts were co-extensive with the state courts [sic] orders regarding the investigation of the Debtor’s financial ability to comply with the state court’s orders.

(c) [Mandel] asserted that he should be excused from payments to Orenstein, because this Court entered an order that contradicts his asserted interest in White Nile, and the state court entered an order approving a settlement between Thrasher and White Nile. The Court overruled this objection to the claims of Orenstein and MSM, because [Mandel’s] obligation to Orenstein and her counsel is not dependent on his interest in White Nile, if any. [Mandel’s] obligation to pay Orenstein’s fees and expenses arises out of the agreement of the parties and the orders of the state court.

(d) [Mandel] asserted that this Court, having excused Orenstein from the trial on [Mandel’s] objections to the claims of Coleman, Thrasher and White Nile, relieved Orenstein from her duties as receiver and modified the state court orders appointing her. [Mandel], however, misinterprets this court’s order. This court was simply allowing Orenstein to not appear at trial without violating her fiduciary duties when the claims she was asserting were duplicative of the derivative claims asserted by Thrasher for White Nile, and there was a significant risk of nonpayment to her and her counsel.

(e) [Mandel] argued that Orenstein's fees should be discounted, because she "lost twelve or thirteen" matters," [sic] according to [Mandel's] counsel. The Court overruled that objection to the extent it related solely to the number of losing matters. The fact that Orenstein did not ultimately prevail on all of her legal challenges does not mean that she cannot recover fees and expenses, but goes, instead, to the reasonableness of her fees and expenses.

(f) [Mandel] argued that Orenstein should not recover any fees or expenses in connection with her participation in [Mandel's] bankruptcy case. The Court overruled this objection to the claims of Orenstein and MSM, because the orders appointing Orenstein as receiver authorize her to direct and control White Nile's participation in this case in order to protect White Nile's claims against this estate. Orenstein, in fact, participated in this case to protect White Nile's claims against this estate.

(g) Finally, [Mandel] argued that Orenstein is not entitled to be paid for her fees and expenses incurred in her collection efforts in this Court. The Court overruled this objection, in part. Orenstein's right to be paid is contractual in nature. Under Texas state law, Orenstein is entitled to be paid for her collection efforts due to [Mandel's] breach of his agreement to pay her fees. Orenstein, however, is

not entitled to be paid for her own time spent in this Court seeking to collect her fees from [Mandel's] estate.

In re Mandel, No. 10-40219 (Bankr. E.D. Tex. Mar. 28, 2012) (findings of fact and conclusions of law re: Mandel's objections to claim nos. 27 and 28). After announcing this ruling, the parties introduced evidence and argument regarding Mandel's remaining objections to the claims of Orenstein and MSM that: (1) Orenstein and MSM filed their claims in an estimated amount as of the petition date and failed to attach sufficient documentation, and therefore, their claims lacked prima facie validity; and (2) attorney's fees that are the subject of the claims were unreasonable and to some extent, unnecessary.

Ultimately, the bankruptcy court found that Orenstein and MSM did not take frivolous or unreasonable legal positions in their non-bankruptcy litigation with Mandel, but did occasionally make inexplicable choices in the bankruptcy case, and found that Orenstein was entitled to an allowed unsecured claim in the amount of \$315,553.00 for her fair, reasonable, and necessary receiver's fees and expenses and that MSM was entitled to an allowed unsecured claim in the total amount of \$155,517.00 for MSM's fair, reasonable, and necessary attorney's fees.

II. ISSUES PRESENTED

Mandel raises the following issues on appeal:

- (1) whether the bankruptcy court committed reversible error in concluding that the Receivership Orders authorized Orenstein to represent White Nile in Mandel's bankruptcy case, such that Orenstein and MSM could be compensated by Mandel for such services;
- (2) whether the bankruptcy court committed reversible error in concluding that Orenstein and MSM were acting within the scope of the Receivership Orders so as to be entitled to compensation thereunder;
- (3) whether the bankruptcy court committed reversible error in awarding Orenstein compensation for services that she performed as an attorney, since the Receivership Orders did not authorize her to provide such services;
- (4) whether the bankruptcy court committed reversible error in awarding Orenstein compensation for service she performed as legal counsel, as well as the legal services of Hunton & Williams, L.L.P. and Hankinson Levinger, L.L.P., since the Receivership Orders did not authorize the retention of these attorneys or of Orenstein as legal counsel;
- (5) whether the bankruptcy court, applying section 38.001 of the Texas Civil Practice and Remedies Code, committed reversible error in awarding fees and expenses to Orenstein and MSM for multiple proceedings in which they lost; and

(6) whether the bankruptcy court committed reversible error in concluding that pre-petition unsecured creditors, such as Orenstein and MSM, are entitled to post-petition attorney's fees and expenses under the Bankruptcy Code.

III. STANDARD OF REVIEW

District courts review bankruptcy rulings and decisions under the same standards employed by federal courts of appeal: a bankruptcy court's findings of fact are reviewed for clear error, and its conclusions of law are reviewed *de novo*. *In re Nat'l Gypsum Co.*, 208 F.3d 498, 504 (5th Cir. 2000). A finding of fact is clearly erroneous only if, based on all of the evidence, the district court is left "with the definite and firm conviction that a mistake has been made." *Robertson v. Dennis*, 330 F.3d 396, 401 (5th Cir. 2003). "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *In re Renaissance Hosp. Grand Prairie Inc.*, 713 F.3d 285, 294 (5th Cir. 2013). Due regard must be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses. FED. R. BANKR. P. 8013; *Matter of Herby's Foods, Inc.*, 2 F.3d 128, 131 (1993).

IV. ANALYSIS

A. The bankruptcy court did not err in concluding that the Receivership Orders authorized Orenstein to represent White Nile in Mandel’s bankruptcy case.

Mandel first argues on appeal that the bankruptcy court committed reversible error in concluding that the Receivership Orders authorized Orenstein to represent White Nile in Mandel’s bankruptcy case, such that Orenstein and MSM could be compensated by Mandel for such services. “A receiver has only that authority conferred by the Court’s order appointing [her].” *Clay Expl., Inc. v. Santa Rosa Operating, LLC*, 442 S.W.3d 795, 800 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (quoting *Ex Parte Hodes*, 625 S.W.2d 304, 306 (Tex. 1981)). Receivership orders, “like other written instruments, are to be construed as a whole toward the end of harmonizing and giving effect to all the court has written.” *Clay Expl., Inc.*, 442 S.W.3d at 800 (quoting *Constance v. Constance*, 544 S.W.2d 659, 660 (Tex. 1976)).

The Receivership Orders specifically authorized Orenstein to “direct and control White Nile’s participation in this litigation.” Nov. 2008 Order Appointing Receiver, Ex. 48, at p. 1; May 2008 Order Appointing Receiver, Ex. 49, at p. 1. “The ordinary purpose of a receivership is to take full charge and possession of property involved in litigation, in order to protect, defend and preserve it, impound and hold it subject to the order of the court, or, if necessary, to administer or manage it, ‘upon a principle of justice for the benefit of all

concerned,’ pending final determination of the litigation and the rights of the parties.” *Staggs v. Pena*, 133 S.W.2d 212, 214 (Tex. Civ. App. 1939, no writ) (internal citation omitted).

In this case, Orenstein was charged with directing and controlling White Nile’s participation in litigation of claims against White Nile in order to protect, defend, and preserve the property of White Nile. After Mandel voluntarily filed for bankruptcy and removed the White Nile litigation to the Bankruptcy Court, Orenstein’s position as Receiver remained important as she worked to preserve White Nile’s claims against Mandel’s estate, as Mandel was one of the founders and shareholders of White Nile. The bankruptcy court did not err in concluding that the Receivership Orders authorized Orenstein to represent White Nile in Mandel’s bankruptcy case. Mandel’s first point of error on appeal is overruled.

B. The bankruptcy court did not err in concluding that Orenstein and MSM were acting within the scope of the Receivership Orders.

Mandel’s second issue on appeal is that the bankruptcy court committed reversible error in concluding that Orenstein and MSM were acting within the scope of the Receivership Orders so as to be entitled to compensation thereunder. Mandel does not brief this issue separate and apart from his first issue on appeal. This issue is therefore waived. *See Adams v. Union*

Mediterranea Di Scurta, 364 F.3d 646, 653 (5th Cir. 2004). Mandel's appeal on this ground is overruled as waived, and in the alternative, it is denied for the reasons stated above.

C. The bankruptcy court did not err in awarding Orenstein compensation for services that she performed as an attorney.

Mandel's next argument on appeal is that the bankruptcy court committed reversible error in awarding Orenstein compensation for services that she performed as an attorney, since the Receivership Orders did not authorize her to provide such services. Specifically, Mandel takes issue with the bankruptcy court allowing Orenstein to recover attorney's fees and costs for her efforts to collect payment owed by Mandel under the Receivership Orders and Payment Order.⁵

When Mandel claimed to be unable to pay the fees owed to Orenstein, the state court ordered Orenstein and Mandel to engage in discovery related to Mandel's alleged inability to pay Orenstein's fees. Dec. 1 Trans., Dkt. # 22, at p. 146. Multiple parties, the undersigned,

⁵ Mandel's appellant brief is not a model of clarity. The list of issues presented at the beginning of his brief does not correspond with the headings throughout his brief, and several parts of his briefing seem unrelated to his list of issues presented. The court has expended numerous resources attempting to piece together Mandel's brief. To the extent that Mandel's argument that Orenstein is not entitled to attorney fees is not actually an argument that Orenstein is not entitled to attorney fees for her collection efforts, this issue on appeal is waived. *See Adams v. Unione Mediterranea Di Scurta*, 364 F.3d 646, 653 (5th Cir. 2004).

and Judge Rhoades, the learned bankruptcy court Judge in this matter, have commented on Mandel's litigiousness, throughout the eight long years of Mandel's bankruptcy litigation, and all of the related adversary proceedings, state court proceedings, federal district court proceedings, and endless appeals of nearly every outcome in nearly every court. Mandel's resistance to Orenstein's request for information supporting his claim that he could no longer afford to pay his portion of her fees and expenses forced both Orenstein and the state court to spend many hours enforcing Orenstein's request for payment.

Orenstein is a highly experienced bankruptcy attorney. There is some evidence in the record that she viewed questions and tasks both as a bankruptcy attorney and as Receiver for White Nile. For example, at the bankruptcy court's trial on this matter, counsel for Mandel asked Orenstein, "What amount of the \$250,000 you are seeking today are for your services as Receiver and what amount of it is for your's or your law firm's services as attorneys?" Dec. 1 Trans., Dkt. # 22, at p. 81. Orenstein responded, "It's very hard to divide those up because my brain doesn't fully—I'm reading this document only as a Receiver. My legal training comes in. If I'm reading things, I'm analyzing them as a lawyer, as well." Dec. 1 Trans., Dkt. # 22, at p. 81. Mandel points to no time entry, and the court can find none, in which Orenstein attempts to recover fees solely in her capacity as an attorney for herself, unrelated to her capacity as Receiver. Orenstein's experience as an attorney was necessary to her performance

as Receiver in this matter, given the state court's orders for Orenstein to pursue Mandel's assertions that he could not afford payment, given Mandel's litigiousness, and given the complexity of the legal and factual issues in this case. Orenstein is entitled to fees to the extent that they are co-extensive with court-ordered and necessary collection efforts for payments owed under the Receiver Orders and Payment Order. Mandel's appeal on this issue is overruled.

D. The bankruptcy court did not err in awarding compensation to Orenstein for her own legal services as well as the legal services of Hunton & Williams, L.L.P. and Hankinson Levinger, L.L.P.

Next, Mandel argues that the bankruptcy court committed reversible error in awarding Orenstein compensation for service she performed as the legal counsel, as well as the legal services of Hunton & Williams, L.L.P. and Hankinson Levinger, L.L.P., since the Receivership Orders did not authorize the retention of these attorneys or of Orenstein as legal counsel. For the reasons outlined above, any argument related to Orenstein collecting fees related to her collection efforts for fees owed under the Receiver or Payment Orders is overruled.

The bankruptcy court already found that Orenstein and MSM "occasionally brought multiple lawyers to hearings in the [bankruptcy court] for no obvious reason." *In re Mandel*, No. 10-40219 (Bankr. E.D. Tex.

Mar. 28, 2012) (findings of fact and conclusions of law re: Mandel's objections to claim nos. 27 and 28). As a result of Orenstein and MSM bringing extra attorneys to proceedings in the bankruptcy court, the bankruptcy court reduced the claim that Orenstein was seeking from \$332,160.61 to \$315,553.00 and reduced the claim that MSM was seeking from \$163,701.75 to \$155,517.00. *In re Mandel*, No. 10-40219 (Bankr. E.D. Tex. Mar. 28, 2012) (findings of fact and conclusions of law re: Mandel's objections to claim nos. 27 and 28). The bankruptcy court accounted for the unauthorized retention of superfluous attorneys in determining the total amount of the claim allowed. Mandel's argument on this issue is overruled.

E. The bankruptcy court did not commit reversible error in awarding fees and expenses to Orenstein and MSM for the proceedings in which they lost.

Next, Mandel argues that the bankruptcy court committed reversible error in applying section 38.001 of the Texas Civil Practice and Remedies Code to award fees and expenses to Orenstein and MSM for multiple proceedings in which they lost. The bankruptcy court did not cite to or reference section 38.001 of the Texas Civil Practice and Remedies Code in the Findings of Fact and Conclusions of Law. *In re Mandel*, No. 10-40219 (Bankr. E.D. Tex. Mar. 28, 2012) (findings of fact and conclusions of law re: Mandel's objections to claim nos. 27 and 28). Rather, the bankruptcy court awarded Orenstein fees under *Bergeron v. Sessions*,

561 S.W.2d 551, 554 (Tex. Civ. App.—Dallas 1997, writ ref'd n.r.e.), and the bankruptcy court awarded both MSM and Orenstein only fees that were “reasonable and necessary,” as outlined in the Payment Order. Payment Order, Ex. 50.

1. Orenstein’s Compensation

A receiver’s compensation is to be determined by the overall value of her services, not by the receiver’s win/loss record. *Bergeron*, 561 S.W.2d at 552. The “controlling” factors in determining this value are:

- (1) the nature, extent and value of the administered estate;
- (2) the complexity and difficulty of the work;
- (3) the time spent;
- (4) the knowledge, experience, labor, and skill required of, or devoted by the receiver;
- (5) the diligence and thoroughness displayed; and
- (6) the results accomplished.

Id. at 554–55.

a. The nature, extent, and value of the administered estate

Orenstein was appointed Receiver to protect the assets of White Nile. White Nile’s most valuable asset

was its intellectual property, the ownership of which was highly litigated due to its potentially high future rate of return. This factor weighs in favor of a higher value of compensation for Orenstein's services.

b. The complexity and difficulty of the work

Although Orenstein was appointed Receiver in a state court proceeding, Mandel subsequently removed the case to the bankruptcy court. The bankruptcy proceedings surrounding White Nile spun off several adversary proceedings, several appeals, challenges before the patent office, a remand to state court, and appeals in state court, among other things. The vast proceedings and issues before these courts show the complexity and difficulty of services as Receiver for White Nile. This factor weighs in favor of a higher value of compensation for the Receiver's services.

c. The time spent

Mandel again objects vaguely and broadly to the time that Orenstein spent as Receiver in this case. However, Mandel objects to no specific time entries before this court and objected to no specific time entries before the bankruptcy court. As noted above, Orenstein spent a tremendous amount of time as Receiver in this case, due to the litigiousness of the parties (primarily Mandel) and the highly contentious issues in this case. This factor weighs in favor of a higher value of compensation for Orenstein.

d. The knowledge, experience, labor, and skill required of, or devoted by Orenstein

Orenstein is a highly experienced attorney, as discussed above, and her experience was required in light of the complexity of the issues in this case. This factor weighs in favor of a higher value of compensation for Orenstein.

e. The diligence and thoroughness displayed

Orenstein was thorough. The bankruptcy court already accounted for the times in which Orenstein was overly thorough by not agreeing to certain orders that may have saved the estate money, or by bringing too many counsel to certain hearings. This factor weighs slightly in favor of a higher value of compensation for Orenstein.

f. The results accomplished

As Mandel notes, Orenstein did not win every matter that she pursued on behalf of White Nile. However, this is but one of the six controlling factors that the court must consider. Moreover, her arguments and positions on the issues which she lost were neither frivolous nor a waste of resources. Upon reviewing the *Bergeron* factors, the court finds that the bankruptcy court did not err in holding that Orenstein is entitled to an allowed unsecured claim in the amount of \$315,553.00 for her fair, reasonable, and necessary receiver's fees and expenses.

2. MSM's Compensation

Likewise, the bankruptcy court did not base its allowance of MSM's claim for fees on section 38.001 of the Texas Civil Practice and Remedies Code. The bankruptcy court correctly noted that Orenstein's authority to retain outside counsel such as MSM was not unfettered, as previous state court orders only required Mandel to pay Orenstein and MSM "reasonable and necessary" expenses. *See* Nov. 2008 Order Appointing Receiver, Ex. 48; May 2009 Order Appointing Receiver, Ex. 49; Payment Order, Ex. 50. The bankruptcy court reduced MSM's claim by approximately \$8,000, finding that some of MSM's claim fees were not "fair, reasonable, and necessary." Mandel's argument that the bankruptcy court erroneously awarded fees under section 38.001 of the Texas Civil Practice and Remedies Code is overruled, as it is clear from the bankruptcy court's Findings of Fact and Conclusions of Law that section 38.001 was not the basis for the bankruptcy court's allowance of either Orenstein's or MSM's claim.

F. The bankruptcy court did not err in concluding that Orenstein and MSM are entitled to post-petition attorney's fees and expenses.

Mandel's final issue on appeal is whether the bankruptcy court committed reversible error in concluding that pre-petition unsecured creditors, such as Orenstein and MSM, are entitled to post-petition attorney's fees and expenses under the Bankruptcy Code. "Obligations which arise out of [pre-petition] contracts, but are due [post-petition], are [pre-petition]

debts.” *In re E. Tex. Steel Facilities, Inc.*, 117 B.R. 235, 242–43 (Bankr. N.D. Tex. 1990).

The Receivership Orders were agreed orders between Mandel, or Mandel’s attorney and representatives, White Nile or its representatives, and Thrasher, or Thrasher’s attorney and representatives. Under Texas law, agreed orders are treated as contracts between the parties to the agreed order. *See, e.g., In re Thornburg*, 277 B.R. 719, 726 (Bankr. E.D. Tex. 2002); *Keys v. Litton Loan Serv., L.P.*, No. 14-07-00809, 2009 WL 4022178, at *2–3 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *West v. Brenntag Sw., Inc.*, 168 S.W.3d 327, 337 (Tex. App.—Texarkana 2005, pet. denied). Mandel agreed to pay 52.5% of Orenstein’s fees. Nov. 2008 Order Appointing Receiver, Ex. 48; May 2008 Order Appointing Receiver, Ex. 49.

Because Mandel’s obligation to pay Orenstein’s and MSM’s fees arose from a pre-petition contract, they are properly considered pre-petition fees and expenses. The bankruptcy court therefore awarded only pre-petition fees and expenses. Mandel’s appeal on this ground is overruled.

V. CONCLUSION

IT IS THEREFORE ORDERED that the bankruptcy court’s March 28, 2012 Order Regarding the Debtor’s Objections to Claim Nos. 27 and 28 is AFFIRMED.

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**So ORDERED and SIGNED this 31st day of
March, 2017.**

/s/ Ron Clark
Ron Clark, United States
District Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE: §
EDWARD MANDEL, § Case No. 10-40219
§ (Chapter 11)
Debtor. §

FINDINGS OF FACT AND CONCLUSIONS
OF LAW REGARDING DEBTOR'S
OBJECTIONS TO CLAIM NOS. 27 AND 28

(Filed Mar. 28, 2012)

This matter is before the Court on the Debtor's objections to Claim No. 28, filed by Rosa Orenstein, and Claim No. 27, filed by Mastrogiovanni, Schorsch & Mersky, P.C. ("MSM"). Orenstein and MSM are seeking the allowance of unsecured, pre-petition claims for their attorneys' fees and expenses in connection with the state court receivership of White Nile Software, Inc. ("White Nile"). The Court conducted a hearing on the Debtor's objections on December 1st and 2nd, 2011.

I. FINDINGS OF FACT

1. The underlying facts are familiar to the parties, and the Court has set them out in detail in its opinion regarding the Debtor's objection to the claims of Steven Thrasher, Jason Coleman, and White Nile. *See In re Mandel*, 2011 WL 4599969 (Bankr. E.D. Tex. Sept. 30, 2011).

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2. By way of brief background, a state court appointed Orenstein as receiver for a company called White Nile prior to the Debtor's bankruptcy. The Debtor, who asserts an interest in White Nile, entered into an agreed order to pay 52.5% of the receiver's fees.

3. In an order signed on September 15, 2009, the state court approved the receiver's retention of MSM as independent counsel and required the Debtor to pay 52.5% of the fees of the receiver's counsel. The state court also approved the fees of Orenstein and MSM through September 9, 2009, specifically finding their fees to be fair, reasonable, and necessary.

4. The Debtor made several payments to Orenstein and her counsel following the entry of the September 9th order. The Debtor, however, claimed to be unable to pay his portion of all of the fees charged by Orenstein and her counsel. Orenstein conducted discovery regarding the Debtor's claim pursuant to orders issued by the state court.

5. Orenstein testified, credibly, that she had to fight to get business and financial information from the Debtor, that the Debtor's business structure and finances are unusually complicated, and that the Debtor is extremely litigious.

6. The state court's orders appointing Orenstein as White Nile's receiver and requiring the Debtor to pay a portion of Orenstein's fees and the fees of Orenstein's counsel have been upheld on appeal.

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7. The Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code on January 25, 2010.

8. Orenstein entered into a settlement agreement with respect to Steven Thrasher's obligation to pay 47.5% of her reasonable fees and expenses after the Debtor filed for bankruptcy. She received a settlement payment in the total amount of \$380,000 during the pendency of the Debtor's bankruptcy case. Orenstein used a portion of the settlement proceeds to pay the law firms of Hunton & Williams L.L.P. and Hankinson Levinger L.L.P. for the legal assistance they provided to her as receiver for White Nile.

9. The evidence introduced at the hearing included several checks written by the Debtor, or at his direction, to Orenstein and her counsel. The claims of Orenstein and MSM are for the remaining balance.

10. In particular, Orenstein is seeking allowance of her fees and expenses in the total amount of \$332,160.61 through December 2, 2011. MSM is seeking allowance of its fees and expenses in the total amount of \$163,701.75 through December 2, 2011, for the assistance they provided to Orenstein as receiver. They are requesting allowance of their claims as general, unsecured claims in the total amount of \$495,862.36.

11. The Debtor asserted numerous legal objections to the claims of Orenstein and MSM. On December 2, 2011, the Court orally overruled the Debtor's legal objections, as follows:

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(a) The Debtor argued that Orenstein did not have the right to retain counsel to represent her, specifically, Hunton & Williams and Hankinson Levinger. The Court found, as a matter of fact and law, that Orenstein has the authority to hire counsel to represent her in the performance of her duty as a receiver. The Court further found that this authority is not unfettered inasmuch as the state court orders appointing Orenstein only require the Debtor to pay her reasonable and necessary expenses.

(b) The Debtor argued that Orenstein is not entitled to recover fees spent on her efforts to collect her fees and expenses from the Debtor. The state court, however, instructed Orenstein to investigate the Debtor's claim that he lacked the financial ability to comply with the orders appointing the receiver. Orenstein and her counsel are entitled to recover fees and expenses for so-called "collection efforts" since those efforts were co-extensive with the state court's orders regarding the investigation of the Debtor's financial ability to comply with the state court's orders.

(c) The Debtor asserted that he should be excused from payments to Orenstein, because this Court entered an order that contradicts his asserted interest in White Nile, and the state court entered an order approving a settlement between Thrasher and White Nile. The Court overruled this objection to the claims of Orenstein and MSM, because the Debtor's obligation to Orenstein and her counsel is not dependent on his interest in White Nile, if any. The Debtor's obligation to pay Orenstein's fees and expenses arises out of the

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agreement of the parties and the orders of the state court.

(d) The Debtor asserted that this Court, having excused Orenstein from the trial on the Debtor's objections to the claims of Coleman, Thrasher and White Nile, relieved Orenstein from her duties as receiver and modified the state court orders appointing her. The Debtor, however, misinterprets this Court's order. This Court was simply allowing Orenstein to not appear at trial without violating her fiduciary duties when the claims she was asserting were duplicative of the derivative claims asserted by Thrasher for White Nile, and there was a significant risk of nonpayment to her and her counsel.

(e) The Debtor argued that Orenstein's fees should be discounted, because she "lost twelve or thirteen" matters," according to the Debtor's counsel. The Court overruled that objection to the extent it related solely to the number of losing matters. The fact that Orenstein did not ultimately prevail on all of her legal challenges does not mean that she cannot recover fees and expenses, but goes, instead, to the reasonableness of her fees and expenses.

(f) The Debtor argued that Orenstein should not recover any fees or expenses in connection with her participation in the Debtor's bankruptcy case. The Court overruled this objection to the claims of Orenstein and MSM, because the orders appointing Orenstein as receiver authorize her to direct and control White Nile's participation in this case in order to protect White Nile's claims

against this estate. Orenstein, in fact, participated in this case to protect White Nile's claims against this estate.

(g) Finally, the Debtor argued that Orenstein is not entitled to be paid for her fees and expenses incurred in her collection efforts in this Court. The Court overruled this objection, in part. Orenstein's right to be paid is contractual in nature. Under Texas state law, Orenstein is entitled to be paid for her collection efforts due to the Debtor's breach of his agreement to pay her fees. Orenstein, however, is not entitled to be paid for her own time spent in this Court seeking to collect her fees from the Debtor's estate.

12. After the ruling, the parties introduced evidence and argument regarding the Debtor's remaining objections to claims of Orenstein and MSM. Specifically, the Debtor objects that Orenstein and MSM filed their claims in an estimated amount as of the petition date and failed to attach sufficient documentation, and, therefore, their claims lack *prima facia* [sic] validity. The Debtor also objects that the attorneys' fees that are the subject of the claims are unreasonable and were, at least to some extent, unnecessary.

13. The Court took the Debtor's remaining objections under advisement following the conclusion of the hearing.

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §1334(b) and 28 U.S.C.

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§157(a). The Court has the authority to enter a final order in this contested matter since it constitutes a core proceeding as contemplated by 28 U.S.C. §157(b)(2)(A), (B), and (O).

2. The Bankruptcy Code defines a claim as a “right to payment . . . or . . . right to an equitable remedy.” 11 U.S.C. §101(5). A “proof of claim” is “a written statement setting forth a creditor’s claim” and must “conform substantially to the appropriate Official Form.” FED. R. BANKR. P. 3001(a).

3. Section 501(a) of the Bankruptcy Code provides that a “creditor . . . may file a proof of claim.” Section 502(a) states that a claim filed under §501 “is deemed allowed” unless an objection is made. If an “objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim . . . as of the date of filing the petition, and shall allow such claim.” 11 U.S.C. §502(b).

4. Orenstein’s claim for her post-petition fees and expenses is allowable as an unsecured claim in bankruptcy. *See In re Nair*, 202 Fed.Appx. 765, (5th Cir. 2006) (per curium) [sic] (citing *In re United Merchants and Mfrs., Inc.*, 674 F.2d 134, 137 (2d Cir.1982)).

5. A proof of claim executed and filed in accordance with the requirements of Federal Rule of Bankruptcy Procedure 3001 and Official Form 10 constitutes “prima facie evidence of the validity and amount of the claim.” FED. R. BANKR. P. 3002(f). Thus, a claimant who has complied with Bankruptcy Rule 3001 and Official Form 10 will prevail unless the

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objecting party produces evidence at least equal in probative force to that offered by the proof of claim and which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency. *E.g., Lundell v. Anchor Const. Specialists, Inc. (In re Lundell)*, 223 F.3d 1035, 1041 (9th Cir. 2000); *Sherman v. Novak (In re Reilly)*, 245 B.R. 768, 773 (2nd Cir. BAP 2000). If the claim is rebutted, then whichever party would have the burden of proof respecting the claim outside of bankruptcy bears that same burden in bankruptcy. *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 26 (2000).

6. Here, Orenstein and MSM submitted proof of their claims using Official Form 10. They listed the amount of attorneys' fees and costs due and owing as of the petition date. In addendums attached to the Official Forms, they referenced various state court orders and pleadings supporting their entitlement to attorneys' fees from the Debtor. In response to the Debtor's objection to their claims, Orenstein and MSM submitted their time records as well as voluminous documents from their litigation with the Debtor, among other things.

7. The question now before the Court is whether the amounts sought by Orenstein and MSM in their proofs of claim, as amended and supplemented by the evidence introduced at trial, are allowable under state law.

8. Receivers are entitled to reasonable compensation under Texas law. *See Jones v. Strayhorn*, 321

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S.W.2d 290, 292-93 (Tex. 1959). The value of a receiver's services determines the appropriate amount of compensation. *Hodges v. Peden*, 634 S.W.2d 8 (Tex. App.—Houston [14th Dist] 1982). To determine the value of a receiver's services, Texas courts generally consider the following factors:

- the nature, extent and value of the administered estate;
- the complexity and difficulty of the work;
- the time spent;
- the knowledge, experience, labor and skill required of, or devoted by the receiver;
- the diligence and thoroughness displayed; and
- the results accomplished.

See Bergeron v. Sessions, 561 S.W.2d 551, 554 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).

9. In this case, in the Agreed Order Appointing Receiver signed on November 1, 2008, the Debtor agreed that "the receiver's fees shall be \$350 per hour . . . plus reasonable and necessary out-of-pocket expenses. . . ." The subsequent Order Appointing Receiver signed on May 24, 2009 contained identical language. Thus, the Court's determination of the reasonableness of Orenstein's fees and expenses is based on the same or similar factors articulated in *Bergeron* and similar cases.

10. Applying the *Bergeron* factors here, the most valuable asset belonging to White Nile was, arguably, its intellectual property. The state court appointed Orenstein as the receiver for White Nile because the shareholders were fighting over ownership and control of White Nile's intellectual property, among other things. The dispute was personal, contentious, involved numerous individuals, and resulted in state court litigation, several bankruptcy cases (including this one), RICO litigation before a federal district court, challenges submitted to the patent office, and appeals in both state and federal courts, among other things.

11. The Debtor has not challenged particular time entries. Rather, he generally objects that the claims of Orenstein and MSM should be reduced, because they did not prevail on some of their legal claims. *See Jason D.W. by Douglas W. v. Houston Independent School Dist.*, 158 F.3d 205, 210 (5th Cir. 1998) ("[A]ttorneys' fees must reflect the degree of success obtained.").

12. Orenstein and her counsel are experienced attorneys. This experience was required in light of the complexity of some of the legal issues and the high level of litigiousness displayed by the Debtor. The Debtor's resistance to Orenstein's requests for information supporting his claim that he could not afford to pay his portion of her fees and expenses forced Orenstein and her counsel to spend many hours enforcing her requests.

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13. Orenstein and MSM were diligent and thorough. Although they did not prevail on every argument they raised, they did not take frivolous or unreasonable legal positions in their non-bankruptcy litigation with the Debtor. However, they occasionally brought multiple lawyers to hearings in this Court for no obvious reason. Moreover, in light of her experience as a bankruptcy attorney, Orenstein's opposition to a cash collateral motion in the Debtor's bankruptcy case was inexplicable. The Debtor's use of cash collateral would have benefited his estate and, by extension, unsecured creditors of the Debtor such as Orenstein.

14. The Court, in light of all the arguments and evidence presented by the parties in connection with the Debtor's objections to the claims of Orenstein and MSM, concludes that the preponderance of the evidence establishes that Orenstein is entitled to an allowed unsecured claim in the amount of \$315,553 for her fair, reasonable, and necessary receiver's fees and expenses. The Court further concludes that a preponderance of the evidence establishes that MSM is entitled to an allowed, unsecured claim in the total amount of \$155,517 for MSM's fair, reasonable, and necessary attorneys' fees.

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15. The Court will enter a separate order consistent with these findings of fact and conclusions of law.

Signed on 3/28/2012

/s/ Brenda T. Rhoades SR
HONORABLE BRENDA T. RHOADES,
CHIEF UNITED STATES
BANKRUPTCY JUDGE

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-40392

In the Matter of: EDWARD MANDEL,

Debtor

EDWARD MANDEL,

Appellant,

v.

MASTROGIOVANNI SCHORSCH & MERSKY;
ROSA ORENSTEIN,

Appellees.

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING

(Filed Oct. 10, 2018)

Before JOLLY, DENNIS, and ELROD, Circuit Judges.

PER CURIAM:

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IT IS ORDERED that the petition for rehearing is
DENIED.

ENTERED FOR THE COURT:

/s/ Jennifer W. Elrod
UNITED STATES CIRCUIT JUDGE
