



**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA**

In re:

SAEED COHEN,

Debtor.

Case No.: 2:13-bk-26483-NB

Chapter 11

**MEMORANDUM DECISION ON "ISSUE 5"
REGARDING THE CHARACTERIZATION
OF PROFESSIONAL CLAIMS AS
COMMUNITY OR SEPARATE DEBTS**

Date: July 31, 2014
Time: 2:00 p.m.
Place: Courtroom 1545
255 E. Temple Street
Los Angeles, CA 90012

I. INTRODUCTION

The general rule is that, although the community marital estate is liable for any debt incurred by either spouse before or during marriage, any debts incurred after spouses are living separate and apart are their separate debts. In this case some divorce attorneys and other professionals, who represented Ms. Cohen¹ after she separated from the Debtor, argue on Ms. Cohen's behalf for an exception to this rule. They have not established any such exception, and the claims that they filed will be disallowed.

¹ Unless the context suggests otherwise, definitions and citation formats are as set forth in this court's earlier memorandum decision on "Issue 1" (dkt. 692), or the parties' briefs.

1 In contrast, a *prima facie* showing has been made that certain other fees by
2 some of the Debtor's professionals were incurred in protecting the community estate
3 post-separation, and the Debtor has cited authority that costs of protecting of the
4 community estate are chargeable to that estate. No party in interest has overcome that
5 *prima facie* showing, so those claims will be allowed as community claims.

6 **II. BACKGROUND**

7 A scheduling order (dkt. 394) established various discreet issues to be litigated in
8 this case. Issue 5 in that order is:

9 [W]hether any of the claims asserted by the Debtor's or [Ms.
10 Cohen's] professionals or any other creditor against the Debtor's
11 estate are "community claims" as defined in 11 U.S.C. § 101(7) or
12 are the Debtor's or [Ms. Cohen's] separate debts payable from
property other than of the kind identified in 11 U.S.C. § 541(a)(2)
and the allowed amount of such claims. [Dkt. 394 at 4:24-28]

13 Issue 5 was bifurcated at a status conference on June 25, 2014, and this
14 memorandum decision addresses only the characterization of the professionals' claims
15 (as community or separate claims). In other words, this decision does not address
16 other claims, nor the dollar amount of any claims.

17 The professionals' claims are as follows:

18 **Professionals retained by Ms. Cohen**

19 Claim No. 9	Kehr, Schiff & Crane, LLP
20 Claim No. 10	Brager Tax Law Group, APC
Claim No. 16	Mayer Hoffman McCann P.C.
Claim No. 17	Kolodny Law Group/Kolodny & Anteau

21 **Professionals retained by the Debtor**

22 Claim No. 14	Cruz Saavedra ("Saavedra")
23 Claim No. 15	Bryan Cave, LLP ("Bryan Cave")
Claim No. 18	Gursey Schneider LLP ("Gursey")
Schedule F	Jaffe & Clemens
	Dr. Armen Hekmati
	G.L. Howard Accountant
	Hochman Salkin Rettig Toscher & Perez
	The Udinsky Group

26 After further briefing (now including dkt. 428, 429, 430, 431, 491, 492, 493, 510,
27 512), and arguments on July 31, 2004, both Issue 5 and a related issue ("Issue 1") were
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1 taken under submission.² A memorandum decision on Issue 1 was entered on
2 November 13, 2014 (dkt. 692, the "Issue 1 Decision") and, as argued by the Committee
3 and the Debtor, the Issue 1 Decision largely foreshadows the outcome of this Issue 5
4 decision. Nevertheless, this court has refrained from issuing this decision, mainly in the
5 hope of encouraging settlement.

6 Unfortunately, the parties' numerous mediation sessions to date have been
7 unsuccessful. Meanwhile the Debtor and the Committee have resolved a number of
8 other issues, including a settlement with One West Bank N.A., and have achieved
9 progress on liquidating certain assets in order to fund that settlement. It appears that
10 issuing this decision now will aid the parties in moving forward with a plan of
11 reorganization.

12 **III. JURISDICTION, AUTHORITY, AND VENUE**

13 This court has the jurisdiction and authority to issue a final order on the
14 characterization of the professionals' claims, for the reasons set forth in the Issue 1
15 Decision (dkt. 692 at 5:23-12:8). Venue is also proper.

16 The Committee and the Debtor have objected to the standing of Ms. Cohen's
17 professionals to assert the claims and arguments at issue. Those objections are
18 overruled.

19 Ms. Cohen's professionals filed, or should be deemed to have filed, their claims
20 on behalf of Ms. Cohen (see claim nos. 9, 10, 16, 17, and dkt. 492 at 6:1-8:8, 493 at
21 10:1-11:28). Alternatively, if it were necessary, the professionals could amend the
22 claims to make it explicit that such claims are asserted on behalf of Ms. Cohen, and
23 such amended claims would relate back to the date on which the claims originally were
24 filed. See Rule 15(c) (incorporated by Rule 7015, as applicable in this court's discretion
25 under Rule 9016(c)).

26
27 ² At the hearing on July 31, 2014, counsel for Ms. Cohen objected to the responsive briefs filed by the
28 debtor (dkt. 510) and the Committee (dkt. 512). Those briefs were properly filed pursuant to the
procedures established at the hearing on June 25, 2014. In fact, some of the professionals also chose to
file supplemental briefs (dkt. 492, 493) pursuant to those procedures. Ms. Cohen's objection is overruled.

1 On a related issue, it is true that Ms. Cohen is the real party in interest. But she
2 has acquiesced in her professionals' assertion of these claims, presumably because
3 under nonbankruptcy law the professionals would be entitled to seek payment of their
4 fees out of any distributions to her. Therefore, again, the professionals are deemed to
5 be acting on her behalf.

6 For all of these reasons, neither the claims nor the arguments asserted by the
7 professionals will be rejected on grounds of standing or the real party in interest
8 doctrine.

9 **IV. DISCUSSION**

10 **A. Professionals retained by Ms. Cohen**

11 The arguments of the Committee and the Debtor are persuasive (as articulated in
12 dkt. 510, 512).³ As this court previously held in the Issue 1 Decision, the general rule is
13 that claims can only be asserted against the community estate if the debt was incurred
14 (by either spouse) before or during marriage, not afterwards. Alternatively, assuming
15 for the sake of discussion that California law were to attempt to change the character of
16 such claims after the filing of a bankruptcy petition or attempt to modify the priorities in
17 bankruptcy (neither of which it does), that attempt would be preempted by federal
18 bankruptcy law. See Issue 1 Decision (dkt. 692) at 13:1-14:28, 22:25-25:17.

19 **1. California law**

20 Some of Ms. Cohen's professionals argue that attorney fees are different from all
21 other debts, and that post-separation attorney fees incurred by Ms. Cohen should be
22 treated as community claims. They cite various portions of the California Family Code
23 that permit either spouse to use community property to pay their reasonable attorney
24 fees incurred in the divorce proceedings. But that temporary authority to use
25 community property is analogous to an advance, out of the anticipated share of
26 community property to be distributed to the spouse after the payment of creditors. See
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28 ³ This court expresses no view, however, on the factual disputes that might or might not affect any
allocation of debts as between the Debtor and Ms. Cohen (dkt. 512 at 7:11-8:16).

1 dkt. 510 at 7:19-8:10.

2 As stated in the debtor's brief:

3 The fact that a party is permitted to use community property
4 does not make the obligation a debt for which community property
5 is liable. Nor does the fact that the party is allowed to use separate
6 property make the obligation a separate debt. Otherwise, the
 character of the debt would be determined by the source of funds
 used to pay it. This could never be the rule. [Dkt. 512 at 7:7-8.]

7 Ms. Cohen's professionals also cite portions of the California Family Code that
8 authorize "need based" and "sanction based" allocations between spouses. See
9 Committee Brief (dkt. 510) at 4:22-6:25. Nothing in those statutes even suggests, let
10 alone establishes, an exception to the general rule in California Family Code § 910 that
11 only makes the community estate liable for debts incurred "before or during marriage."

12 Put differently, the professionals, standing in the shoes of Ms. Cohen, confuse
13 the issue of allocation of debts as between spouses with classification of debts as either
14 community or separate. Either spouse can use community property to pay reasonable
15 divorce attorney fees, subject to later equalization. Divorce attorney fees also can be
16 allocated as between the spouses. But none of that changes the fact that when Ms.
17 Cohen incurred debts to her divorce attorneys post-separation, they were incurred as
18 her separate debts, not community debts.

19 Likewise, the authorities cited by Ms. Cohen in favor allowing of the
20 professionals' claims to be paid out of the community estate only authorize such
21 distributions as a method of allocating those claims between the spouses. At most,
22 divorce attorney fees sometimes might be "treated" as if they were community debts in
23 the limited sense that, after payment of all community claims, the attorney fees may be
24 deducted from community assets prior to equal division and distribution of the
25 remainder to the spouses. See Committee Brief (dkt. 510) at 9:19-22.

26 For all of these reasons, California law does not support the arguments of Ms.
27 Cohen's professionals that their separate claims against her should be recharacterized
28 as community claims against the bankruptcy estate. The claims will be disallowed on

1 this basis.

2 **2. Bankruptcy law**

3 Alternatively, supposing for the sake of discussion that Ms. Cohen could have
4 charged the community estate for her post-separation attorney fees under California
5 law, any such ability to charge community property terminated once this bankruptcy
6 case was commenced, because the Bankruptcy Code now governs the priorities of
7 distribution. This is highlighted by the fact that, as conceded in the briefs filed by two of
8 her professionals, they must "stand in the shoes" of Ms. Cohen to make any claims, and
9 any right to fees is "derivative" of any rights she has to be awarded fees. Dkt. 492, 7:6–
10 7; dkt. 493 at 11:12-13. As a matter of bankruptcy law (and as explained in the Issue 1
11 Decision), creditors' claims have priority over any distribution to Ms. Cohen, and that
12 priority applies to her attempt to obtain reimbursement for her divorce professionals'
13 fees. As stated by the Bankruptcy Appellate Panel for the Ninth Circuit:

14 Frequently, a bankruptcy case is commenced by one spouse
15 during the pendency of a dissolution or divorce proceeding. The
16 bankruptcy petition terminates the jurisdiction of the divorce or
17 dissolution court over, at least, the non-exempt assets of the
spouses until all creditors are paid in full. The jurisdiction of the
bankruptcy court is exclusive [*In re Teel*, 34 B.R. 762, 764 (9th
Cir. BAP 1983) (emphasis added).]

18 Ms. Cohen is only entitled to an allocation of whatever community property
19 remains after payment of creditors. Neither she nor her professionals have shown any
20 basis to elevate her separate liability to her divorce professionals for post-separation
21 fees into a community claim that must be paid pro rata with debts incurred during the
22 marriage. Thus, her professionals' claims (on her behalf) will be disallowed on this
23 alternative ground.

24 **B. Professionals retained by the Debtor**

25 Divorce fees are one thing, and professional fees incurred to protect the
26 community estate are another. The Debtor has argued persuasively that, under
27 California law, the attorney fees of Bryan Cave, LLP were incurred to represent the
28 community estate's interests in litigation and therefore are themselves community debts.

1 See dkt. 512 at 3:19-5:4; *In re Marriage of Hirsch*, 211 Cal.App.3d 104 (1989).
2 Likewise, under the Bankruptcy Code, the Bryan Cave claim (no. 15) appears to qualify
3 as a community claim for bankruptcy purposes. See *generally* Issue 1 Decision (dkt.
4 692) at 13:1-14:2. No party in interest has cited any contrary authority. Accordingly, the
5 claim of Bryan Cave will be allowed as a community claim.⁴

6 The Saavedra claim (no. 14) appears to be based on the same litigation as the
7 Bryan Cave claim, and appears to be allowable as a community claim for the same
8 reasons. Again, no contrary authority has been cited.

9 The Committee (dkt. 429 at 8:8-14) and Ms. Cohen (dkt. 431 at 3:18) have
10 objected to the Gursey claim (claim no. 18). Those fees appear to have been incurred
11 for forensic accounting services on behalf of the Debtor in his divorce, and therefore are
12 subject to the same objections as the claims of Ms. Cohen's professionals. Gursey and
13 the Debtor have not cited any contrary authority. Accordingly, the Gursey claim will be
14 disallowed as a community claim – no objection has been made to the allowance of that
15 claim as separate liability of the Debtor, so it will be allowed to that limited extent.

16 Ms. Cohen has objected (dkt. 431 at 2:23-28) that the scheduled claims of
17 several persons, who appear to be professionals, are likewise separate liabilities of the
18 Debtor. Those include claims on behalf of: Dr. Armen Hekmati; G.L. Howard
19 Accountant; Hochman Salkin Rettig Toscher & Perez; Jaffe & Clemens; and The
20 Udinsky Group. See Bankruptcy Schedule F (dkt. 39 at PDF pp. 18-30). No response
21 has been received by those claimants, and the proof of service attached to Ms. Cohen's
22 amended objection (dkt. 431) includes each of them, so these objections are sustained
23 and the claims are disallowed to the extent that they are asserted as community claims,
24 and allowed (pursuant to § 1111(a)) as separate liabilities of the Debtor.

25 The Committee has also objected to the scheduled claim of Jaffe & Clemens
26 (dkt. 429 at 4:1-7), asserting that it appears to be a claim for a separate liability of the
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28 ⁴ In contrast, the terms used by the Brager firm in describing its tasks (dkt. 493 at 3:25-5:25) show that it
was acting for Ms. Cohen's separate interests, as opposed to protecting the community interests.

Debtor, and its objection was served on that claimant (*id.* at PDF p. 16). No response appears on the docket, and for this alternative reason this claim is disallowed to the extent that it is asserted as a community claim, and allowed as a separate liability of the Debtor.

V. CONCLUSION

The claims filed by Ms. Cohen's professionals (claim nos. 9, 10, 16, 17) will be disallowed as community claims (and will be treated as assertions, on behalf of Ms. Cohen, that she should receive a greater allocation of whatever assets might remain after paying creditors' claims, which is an issue for another day). The following claims will be disallowed as community claims, but allowed as a separate liability of the Debtor: filed claim (no. 18) of Gurse, and the scheduled claims of Dr. Armen Hekmati; G.L. Howard Accountant; Hochman Salkin Rettig Toscher & Perez; Jaffe & Clemens; and The Udinsky Group. The claims filed by Bryan Cave (no. 15) and Saavedra (no. 14) will be allowed as community claims.

No proposed orders implementing the foregoing rulings should be lodged at this time. As with the Issue 1 Decision, it appears appropriate to defer entry of any such orders so as to give all parties in interest at least a short "breathing spell" before having to litigate appeals. In fact, it may be appropriate to defer entry of any such orders until a plan of reorganization is confirmed, so that the confirmation order and all related rulings can be appealed at the same time. That issue, and any other procedural issues, can be addressed as needed at future status conferences.

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Date: April 6, 2015



Neil W. Bason
United States Bankruptcy Judge