

1 (“Osborn”), counsel to Trustee Brian Mullen, filed applications for fees incurred in successfully
2 defending the appeal to the BAP, relying upon paragraph 5 of the SACR which provides for post-
3 settlement fees to be paid from the dissenting partner’s settlement share.¹ DePetris, Palmer and
4 others objected. The Court determined in separate written decisions dated November 13, 2007 that
5 an award under paragraph 5 of the SACR was appropriate and that the Court retained jurisdiction
6 over fee awards to professionals employed by the estate. Accordingly, the Court approved the fee
7 applications of Osborn and Stegall.²

8 DePetris and Palmer appealed the BAP’s dismissal order to the Ninth Circuit. Before the
9 matter was heard, DePetris and Palmer filed a motion to dismiss, noting that the parties had not
10 come to terms regarding attorneys’ fees and costs. Stegall filed a consent to dismissal, noting that
11 fees would not be sought at the circuit level but reserving its rights to pursue fees in the bankruptcy
12 court. The Montage Parties consented to dismissal, noting that fees would not be sought at the
13 circuit level but making no reservation of rights. DePetris and Palmer’s motion to dismiss was
14 granted and signed by the Clerk of the Court of the Ninth Circuit. Neither Stegall nor the Montage
15 Parties filed a fee application with the Ninth Circuit.

16 Stegall and the Montage Parties now seek fees and costs in this Court under paragraph 5 of
17 SACR. Stegall’s application is limited to fees incurred in connection with the appeal to the Ninth
18 Circuit; the Montage Parties, having not previously applied, seek all fees and costs incurred in
19 connection with the BAP and Ninth Circuit appeals. DePetris and Palmer object on the grounds that
20 Stegall and Montage did not file the appropriate motions with the Ninth Circuit and therefore this
21 Court has no jurisdiction to award fees. The Court agrees with DePetris and Palmer regarding fees
22 incurred in the appeal to the Ninth Circuit. However, consistent with its previous rulings the Court
23 finds that it has the ability to award fees incurred in the appeal to the BAP.

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25 ¹ Paragraph 5 of the SACR states, in part, “Non-Settling Parties need to recognize that if the
26 [general partner] or any other party is successful in defending the claims, such parties shall have a
claim to recover attorneys’s fees and costs from the Non-Settling Party Funds.”

27 ²Such The Court made certain deductions from the fees requested.
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1 **II. Discussion**

2 *A. Ninth Circuit Fees*

3 Fee awards in the Ninth Circuit are governed by rule. In the absence of a transfer from the
4 Circuit, the district court is not authorized to rule on a request for appellate attorneys' fees.
5 *Cummings v. Connell*, 402 F.3d 936, 947-48 (9th Cir. 2005). Under Ninth Circuit Rule 39-1.6³
6 ("Rule 39-1.6") an appellate party must request attorneys' fees within fourteen days after the
7 expiration of the period for rehearing. The party requesting fees must also support its request with
8 a memorandum, showing that the party is legally entitled to fees accompanied by the appropriate
9 form. "The deadline is strictly enforced." Circuit Advisory Committee Note to Rule 39-1.6 (citing
10 to *Mollura v. Miller*, 621 F.2d 334 (9th Cir. 1980)).

11 As an alternative to filing a Rule 39-1.6 motion, under Ninth Circuit Rule 39-1.8⁴ ("Rule 39-
12 1.8") a party may file a motion to transfer consideration of attorneys' fees "to the district court . .

13
14 ³ Rule 39-1.6 states:

15 (a) Time Limits: Absent a statutory provision to the contrary, a request for
16 attorneys' fees shall be filed no later than fourteen (14) days after the expiration of
17 the period within which a petition for rehearing may be filed, unless a timely petition
18 for rehearing is filed. If a timely petition for rehearing is filed, the request for
attorneys fees shall be filed no later than fourteen (14) days after the court's
disposition of the petition.

18 (B) Contents:

19 A request for an award of attorneys fees must be supported by a memorandum
20 showing that the party seeking fees is legally entitled to them and must be
21 accompanied by Form 9 (appended to these rules) or a document that contains
substantially the same information, along with:

22 (1) a detailed itemization of the tasks performed each date and the amount of time
spent by each lawyer and paralegal on each task;

23 (2) a showing that the hourly rates claimed are legally justified; and

24 (3) an affidavit or declaration attesting to the accuracy of the information. All
applications must include a statement that sets forth the application's timeliness. The
request must be filed separately from any cost bill.

25 ⁴ Rule 39-1.8 states:

26 Request for Transfer Any party who is or may be eligible for attorneys fees on
27 appeal to this Court may, within the time permitted in Circuit Rule 39-1.6, file a
28 motion to transfer consideration of attorneys fees on appeal to the district court or
administrative agency from which the appeal was taken.

1 . from which the appeal was taken.” Here, neither Stegall or the Montage Parties filed a motion
2 under either rule.⁵

3 Stegall and the Montage Parties argue that the Ninth Circuit rules do not apply because they
4 are requesting fees solely under paragraph 5 of the SACR, not under Rule 39-1.6. Despite this
5 argument’s surface appeal, it does not stand up under Ninth Circuit authority. No matter the
6 underlying authority for an award of fees (whether by statute, rule, contract or, as here, a court
7 approved settlement agreement), the procedural rules established by the Ninth Circuit apply. A
8 request for attorneys’ fees based on contract requires the request to be timely filed under Rule 39-1.6
9 or a request for transfer to be timely filed under Rule 39-1.8. *Hobson v. Orthodontic Centers of*
10 *America, Inc.*, 2007 WL 1795731, *1-*2 (E.D.Cal. 2007). The case law confirms this result; the
11 Ninth Circuit, and District Courts in the Circuit, have held that a timely request under either Rule
12 39-1.6 or Rule 39-1.8 is a prerequisite for a hearing on a motion to award fees. *See Cummings;*
13 *Hobson; Arulampalam v. Gonzales*, 399 F.3d 1087 (9th Cir. 2005) (denying a motion for fees
14 requested pursuant to the Equal Access to Justice Act (“EAJA”) as untimely that was mailed before
15 the deadline, but filed after the deadline); *Al-Harbi v. I.N.S.*, 284 F.3d 1080 (9th Cir. 2002)
16 (determining that a fee application filed within 30 days of the final judgment as allowed by the
17 EAJA was timely); *CSL, L.L.C. v. Imperial Bldg. Products, Inc.*, 2006 WL 3526924 (N.D.Cal. 2006)
18 (concluding that it may not award fees incurred on appeal to the Ninth Circuit without a transfer
19 under Rule 39-1.8); *Martin v. Nickels and Dimes, Inc.*, 804 F.Supp. 83 (D.Hawaii 1992) (finding that
20 absent a transfer under Rule 39-1.8 a district court does not have jurisdiction to hear an application
21 for fees incurred on appeal).

22 The mandate to file with the Ninth Circuit is found within the rule itself. Rule 39-1.6 begins
23 with the phrase “[a]bsent a statutory provision to the contrary, a request for attorneys’ fees shall be
24 filed.” Here, there is no statutory authority permitting a fee application to be approved by this Court.
25 Under the plain meaning of the rule, a request for fees or a request to transfer must be made to the

26
27 ⁵ Such a transfer to the District Court would then be subject to the general order of referral to the
28 Bankruptcy Court. General Order 01-15 (1), United States District Court for the District of Arizona.

1 Ninth Circuit. Therefore, this Court has no jurisdiction to award fees incurred in an appeal to the
2 Ninth Circuit.

3 *B. BAP Fees*

4 The Court has previously ruled that the BAP attorneys' fees incurred by Osborn and Stegall
5 were recoverable under paragraph 5 of the SACR. The Court revisits its earlier decision because
6 DePetris and Palmer have now offered alternative grounds to deny the fee applications.

7 The Court must determine if it has jurisdiction to award fees incurred on appeals to the Ninth
8 Circuit BAP. In doing so, the Court looks to the rules of the Ninth Circuit BAP. Much as Rule 39-
9 1.6 is an outgrowth of FRAP Rule 39, 9th Cir. BAP R. 8014-1 ("Rule 8014-1") is an outgrowth of
10 FRBP 8014, which itself is based on FRAP Rule 39. *See* Advisory Committee Note to Rule 8014
11 (1983). Pursuant to Rule 8014-1, "[c]osts under FRBP 8014 are taxed by filing a bill of costs with
12 the clerk of the *bankruptcy court*" (emphasis added). Further, Ninth Cir. BAP R. 8018(b)-1 ("Rule
13 8018(b)-1") states that "[i]n cases where Part VIII of the Federal Rules of Bankruptcy Procedure and
14 these rules are silent as to a particular matter of practice, a Panel *may* apply the Rules of the United
15 States Court of Appeals for the Ninth Circuit and the Federal Rules of Appellate Procedure"
16 (emphasis added). In awarding fees incurred in a BAP appeal, this Court is left with the challenge
17 of determining what Rule 8014-1, Rule 39-1.6, and Rule 8018(b)-1 require in this context.

18 The Court concludes that reading the rules as a whole, a bankruptcy court is given the
19 authority to award attorneys' fees incurred on appeal to the BAP. Importantly, Rule 8014-1(b)
20 establishes that costs are taxed through a filing with the clerk of the *bankruptcy court*. Although the
21 rule is silent on the issue of fees, this is a clear message that the BAP intends costs to be
22 administered by the bankruptcy court, not by the BAP. Moreover, the BAP is not bound by Rule
23 39-1.6. Through the use of the word "may," the application of any Ninth Circuit rule is left to the
24 discretion of the BAP Panel when Part VIII of the Bankruptcy Rules is silent; thus, it is not
25 compulsory. Here, there is no suggestion in the BAP's order that it intended to invoke the Ninth
26 Circuit rule on attorneys' fees in this case. Thus, it is apparent to this Court that nothing in the Ninth
27 Circuit rules, BAP rules, FRAP or FRBP specifically limits the jurisdiction of the bankruptcy courts
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1 to determine BAP attorneys' fees. Accordingly, the Court finds that it does have the authority to
2 award fees under Paragraph 5 of the SACR for attorneys' fees incurred in defending the appeal to
3 the BAP.

4 *C. Effect of the Motions to Dismiss*

5 Stegall, Montage Parties and DePetris and Palmer each filed pleadings relating to dismissal
6 by the Ninth Circuit. DePetris and Palmer argue that the Montage Parties waived their right to
7 request attorneys' fees from all appeals, including to the BAP, via the language in their consent to
8 dismissal. In the consent, the Montage Parties notified, "the Court that they will not seek fees or
9 costs in connection with the appeal to the Ninth Circuit Court of Appeals." The Montage Parties
10 contend that this statement means only that they would not seek fees and costs in the Ninth Circuit,
11 not that they were waiving their right to seek fees and costs from this Court.

12 The Court finds that the Montage Parties did not waive their right to seek attorneys' fees
13 from this Court for the BAP related fees. First, The Ninth Circuit granted DePetris and Palmer's
14 motion and issued it as the mandate of the court.⁶ Accordingly, DePetris and Palmer's statement that
15 "there are no agreements between the parties specifying how costs are to be paid," was the position
16 accepted by the Ninth Circuit. Second, even if this Court were to adopt the position that the
17 Montage Parties should be bound by their statement in their consent, it only referred to seeking fees
18 in the Ninth Circuit. Finally, the Montage Parties affirmatively reserved their right to seek fees from
19 this Court during the October 16, 2007 hearing regarding Osborn's Third Fee Application. Thus,
20 the Montage Parties have not waived their right to seek fees from the Court which relate to the BAP
21 appeal.

22 *D. Review of the Fee Applications*

23 Based on the foregoing, the Court does not have jurisdiction to award fees incurred on appeal
24 to the Ninth Circuit. But the Court does have the jurisdiction to award fees incurred on the appeal
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26 ⁶ The Order was issued by the Motions Attorney/Deputy Clerk pursuant to 9th Cir. R. 27-7.
27 Under the rule the Ninth Circuit delegates authority to staff attorneys, deputy clerks and others the
28 authority to decide certain motions.

1 to the BAP. The Court previously ruled that fees incurred in preparing a fee application are not
2 within the contemplation of Paragraph 5 of the SACR. Accordingly, fees incurred in preparing fee
3 applications will not be awarded. The Court has reviewed the fee applications of Stegall and the
4 Montage Parties accordingly.

5 1. Stegall

6 The Court has reviewed Stegall's billing and expense statements and finds that all of the fees
7 and costs requested relate to the period after the dismissal of the BAP appeal. Those fees and costs
8 are denied for the reasons stated above.

9 2. Montage Parties

10 The Court has reviewed the Montage billing and expense statements and finds that the fees
11 and costs incurred by the Montage Parties between February 27, 2007 and August 15, 2007 are
12 related to the BAP appeal and further finds the amounts requested to be reasonable. However, the
13 fees and costs incurred after August 15, 2007 are all related to the appeal to the Ninth Circuit.
14 Accordingly, the Court awards fees incurred on appeal to the BAP of \$8,206.50 and costs of \$10.50
15 and denies the remaining fees and costs.

16 **III. Conclusion**

17 Based on the foregoing, the Court denies Stegall's application for attorneys' fees and grants
18 Montage Parties' fees in the amount of \$8,206.50 and costs of \$10.50. Counsel for Montage Parties
19 is to lodge a form of order consistent with this decision for the Court's signature.

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21 **DATED:** May 19, 2008

22 
23 CHARLES G. CASE II
24 UNITED STATES BANKRUPTCY JUDGE

25 **COPY** of the foregoing mailed by the BNC and/or
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