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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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| IN RE: DELTA ENTERTAINMENT CORPORATION |) | Case No. CV 09-05301 DDP |
| THOMAS S. PACCIORETTI as liquidating trustee for DELTA ENTERTAINMENT CORPORATION, |) | [USBC Number LA07-16302-EC] |
| Plaintiff, |) | ORDER REVERSING DECISION OF BANKRUPTCY COURT AND DISMISSING ADVERSARY PROCEEDING |
| v. |) | |
| STARCREST OF CALIFORNIA, INC., |) | |
| Defendants. |) | |

This matter is before the court on an appeal from a decision by the United States Bankruptcy Court. After reviewing and considering the materials submitted by the parties, the court reverses the bankruptcy court decision and dismisses the adversary proceeding.

cc: US Bankruptcy Court and the US Trustee's Office

1 **I. Background**

2 In 2008, after filing a Chapter 11 bankruptcy petition, Delta
3 Entertainment Corporation confirmed a liquidation plan and created
4 a liquidating trust. ER 338. Broadway Advisors, LLC ("Broadway")
5
6 was named Liquidating Trustee ("Trustee"). (Id.)

7 Thomas S. Paccioretti ("Paccioretti") is Broadway's principal
8 and sole shareholder. (ER 338). Plaintiff, "Thomas S. Paccioretti
9 as liquidating trustee for Delta Entertainment Corporation" brought
10 an adversary proceeding against Defendant Starcrest of California,
11 Inc. ("Starcrest"). (ER 84). At no point, however, was
12 Paccioretti named Trustee.

13 In February 2009, Starcrest moved for judgment on the
14 pleadings, contesting Paccioretti's standing. (ER 118). The
15 bankruptcy court observed that "the correct Trustee is obviously
16 free to file a new action," and dismissed the adversary proceeding
17 for lack of jurisdiction.¹ (ER 37, 368).

18 Broadway, the correct Trustee, did not file a new action, but
19 did file a motion for reconsideration of the bankruptcy court's
20 order dismissing the adversary proceeding. (ER 331). The
21 bankruptcy court granted Broadway's motion (ER 57-62, 396), and
22 granted Paccioretti's subsequent motion to amend to substitute
23 Broadway as Plaintiff. (ER 563). Starcrest filed a motion for
24 reconsideration, (ER 400), which was denied. (ER 517). Starcrest
25 timely filed two Notices of Appeal regarding the denial of its
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27 _____
28 ¹ The bankruptcy court also denied Paccioretti's motion to
amend to substitute in Broadway as Plaintiff. (ER 361-362.)

1 motion for reconsideration and the bankruptcy court's order
2 granting Paccioretti leave to substitute in Broadway.

3 **II. Jurisdiction**

4 This court has the discretion to grant leave to appeal
5 interlocutory orders. 28 U.S.C. § 158(a). This court may consider
6 a notice of appeal as a motion for leave to appeal. Fed.R.Bankr.P.
7 8003(c). In considering whether leave should be granted, the court
8 looks to 28 U.S.C. 1292(b). In re Sperna, 173 B.R. 654, 658 (9th
9 Cir. BAP 1994). Because there is a substantial ground for
10 difference of opinion regarding Paccioretti's standing, and because
11 resolution of the jurisdictional question will materially advance
12 the termination of this litigation, this court construes
13 Starcrest's Notices of Appeal as motions for leave to appeal,
14 grants the motions, and proceeds to the merits.

15 **III. Standard of Review**

16 The bankruptcy court's conclusions of law are reviewed de
17 novo, while its findings of fact are reviewed for clear error.
18 Blausey v. United States Trustee, 552 F.3d 1124, 1132 (9th Cir.
19 2009)(citing In re Salazar, 430 F.3d 992, 994 (9th Cir. 2005)).
20 This court may affirm on any ground supported by the record.
21 Thrifty Oil Co. v. Bank of America, Nat'l Trust and Sav. Ass'n, 322
22 F.3d 1039, 1046 (9th Cir. 2003).

23 **IV. Discussion**

24 The parties do not dispute that Paccioretti was not, and is
25 not, the Trustee. The issue before the court is whether the
26 bankruptcy court had subject matter jurisdiction over the adversary
27 proceeding filed by Paccioretti.

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1 Lack of Article III standing is a jurisdictional defect.
2 Renne v. Duncan, 623 F.3d 787, 796 (9th Cir. 2010). Standing
3 requires that three essential elements be met, the first of which
4 is that "the plaintiff must have suffered an 'injury in fact.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).
5
6 Nevertheless, Paccioretti argues that "constitutional standing does
7 not require the injury in fact have actually occurred to the party
8 bringing the suit." (Appellee's Brief at 10).

9 The court disagrees. At a constitutional minimum, "the
10 plaintiff himself [must have] suffered some threatened or actual
11 injury" Warth v. Seldin, 422 U.S. 490, 499 (1975). Even
12 then, however, a plaintiff must also assert his own rights, not
13 those of third parties. Id. This "prudential standing"
14 requirement operates in addition, not as an alternative, to the
15 constitutional standing requirement. Dunmore v. United States, 358
16 F.3d 1107, 1112 (9th Cir. 2004). While defects in jurisdictional
17 standing may be curable, id., Article III standing is a threshold
18 jurisdictional prerequisite central to subject matter jurisdiction.
19 Bates v. United Parcel Service, Inc., 511 F.3d 974, 985 (9th Cir.
20 2007) (en banc); Gerlinger v. Amazon.com Inc., 526 F.3d 1253, 1255.

21 The facts in this case are somewhat similar to those in
22 Dunmore. In Dunmore, a pro se plaintiff sued for a refund of his
23 alleged tax overpayments following a personal bankruptcy. Dunmore,
24 358 F.3d at 1109. The overpayments, however, belonged to the
25 bankruptcy estate, not to Dunmore individually. Id. The defendant
26 therefore moved to dismiss Dunmore's complaint for lack of
27 prudential standing. Id. at 1110.

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1 The Ninth Circuit found that Dunmore did have constitutional
2 standing, for he himself had suffered an injury in fact traceable
3 to the defendant and redressable by the court. Id. at 1112.
4 The court agreed, however, that Dunmore lacked prudential standing,
5 and that the bankruptcy estate, not Dunmore himself, was the real
6 party in interest. The court therefore remanded for a
7 determination whether the defect in prudential standing was
8 curable. Id. at 1112-1113.

9 A plaintiff who is not the real party in interest may,
10 therefore, lack prudential standing while possessing constitutional
11 standing. Here, however, there is no evidence in the record that
12 Paccioretti suffered any injury in fact, nor has he alleged that he
13 himself suffered any injury. Contrary to Paccioretti's argument,
14 Dunmore does not stand for the proposition that a plaintiff has
15 constitutional standing to assert claims based on injuries suffered
16 by third parties. See also Warth, 422 U.S. at 501 (Regardless
17 whether prudential standing exists, "Art[icle] III's requirement
18 remains: the plaintiff still must allege a distinct and palpable
19 injury to himself"); Elk Grove Unified School Dist. v.
20 Newdow, 542 U.S. 1, 12 (2004) ("The Article III limitations are
21 familiar: The plaintiff must show that conduct of which he
22 complains has caused him to suffer an 'injury in fact' that a
23 favorable judgment will redress.").

24 Having concluded that Paccioretti lacks constitutional
25 standing, the court need not address his contention that the
26 bankruptcy court properly allowed him to cure prudential and real
27 party in interest defects. (Appellee's Opening Brief at 9, 11, 14,
28 19). See, e.g. Fed.R.Civ.P. 82 ("These rules do not extend . . .

1 the jurisdiction of the district courts); Miquel v. Country
2 Funding Corp., 309 F.3d 1161, 1165 (9th Cir. 2002) (Rule 15 may not
3 be used to extend jurisdiction); Davis v. Yageo Corp., 481 F.3d
4 661, 678 (“[W]hether or not [plaintiff] was the real-party-in-
5 interest, it does not have standing, and it cannot cure its
6 standing problem through an invocation of Fed.R.Civ.P. 17(a).”).

7 **IV. Conclusion**

8 For the reasons stated above, the bankruptcy courts grant of
9 reconsideration and leave to amend are REVERSED. Because the court
10 lacks subject matter jurisdiction over Pacioretti’s claim, the
11 adversary proceeding is DISMISSED.

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14 IT IS SO ORDERED.

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17 Dated: December 20, 2011



DEAN D. PREGERSON

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United States District Judge

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