

NOT FOR PUBLICATION

JAN 14 2010

SUSAN M SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. AZ-09-1305 PaJuMk  
)  
BASHAS', INC.; BASHAS' ) Bk. Nos. 09-16050-JMM  
7 LEASCO INC.; SPORTSMAN'S, LLC, ) 09-16051-JMM  
) 09-16052-JMM  
8 Debtors. ) (Jointly administered)

9 )  
10 OFFICIAL JOINT COMMITTEE OF )  
UNSECURED CREDITORS, ) MEMORANDUM<sup>1</sup>  
11 )  
Appellant, )  
12 v. )  
)  
13 BASHAS', INC.; BASHAS' LEASECO )  
INC.; SPORTSMAN'S, LLC; WELLS )  
14 FARGO BANK, N.A.; UNITED STATES )  
TRUSTEE, )  
15 )  
Appellees.<sup>2</sup> )  
16 )

17 Ordered submitted on the brief on November 24, 2009<sup>3</sup>

18 Filed - January 14, 2010

19 Appeal from the United States Bankruptcy Court  
20 for the District of Arizona

21 Honorable James M. Marlar, Chief Bankruptcy Judge, Presiding.

22 \_\_\_\_\_  
23 \_\_\_\_\_  
24 <sup>1</sup> This disposition is not appropriate for publication.  
25 Although it may be cited for whatever persuasive value it may have  
(see Fed. R. App. P. 32.1), it has no precedential value. See 9th  
26 Cir. BAP Rule 8013-1.

27 <sup>2</sup> Appellees filed notices that they did not intend to  
participate in this appeal.

28 <sup>3</sup> Order entered November 24, 2009. See Fed. R. Bankr. P.  
8012; 9th Cir. BAP R. 8012-1.

1 Before: PAPPAS, MARKELL and JURY, Bankruptcy Judges

2 The Official Committee of Unsecured Creditors (the  
3 "Committee") in the jointly administered chapter 11<sup>4</sup> cases of  
4 debtors Bashas', Inc., Bashas' Leasco Inc. and Sportsman's Inc.  
5 appeals the order of the bankruptcy court denying the Committee's  
6 application to employ a financial advisor. We AFFIRM.

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**FACTS**

9 Bashas'<sup>5</sup> filed a chapter 11 petition on July 12, 2009. At  
10 that time, it operated 158 grocery stores in Arizona employing  
11 over 10,000 workers. Bashas' is the twelfth largest employer in  
12 the state of Arizona, and the fifteenth largest privately held  
13 grocery chain in the United States. Bashas' bankruptcy schedules  
14 report annual gross revenue of more than \$2 billion for fiscal  
15 years 2007 and 2008, as well as \$386 million in assets and  
16 \$271 million in liabilities.

17 On July 24, 2009, the United States Trustee appointed the  
18 Committee to participate in the bankruptcy case. § 1102(a)(1)  
19 (requiring that "as soon as practicable after the order for  
20 relief, the United States trustee shall appoint a committee of  
21 creditors holding unsecured claims . . . ."). No other official  
22 committees have been appointed.

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25 <sup>4</sup> Unless otherwise indicated, all chapter, section and rule  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
27 the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The  
28 Federal Rules of Civil Procedure are referred to as Civil Rules.

<sup>5</sup> For convenience, the chapter 11 debtors are referred to  
collectively in the singular.

1 In its capacity as debtor in possession, in the first two  
2 months of the case, Bashas' applied for and received court  
3 permission to engage eleven different professional entities under  
4 § 327, including attorneys, claims agents, auctioneers, real  
5 estate brokers, liquor license brokers, and of importance here, a  
6 financial advisor, Deloitte Financial Services, LLP ("Deloitte").  
7 The bankruptcy court initially expressed reservations regarding  
8 the Deloitte application at a hearing on July 31, 2009, and denied  
9 the application. However, after hearing Bashas' motion for  
10 reconsideration, the bankruptcy court approved Deloitte's  
11 retention as Bashas' financial advisor on August 19, 2009.<sup>6</sup>

12 The Committee filed an application on August 5, 2009, to  
13 employ its own financial advisor, Mesirow Financial ("Mesirow").  
14 The bankruptcy court set a hearing on the Mesirow application on  
15 September 9, 2009, but Mesirow asked the Committee to withdraw the  
16 application on September 1, 2009. Three days later, the Committee  
17 filed an application to employ Sierra Consulting Group, LLC  
18 ("Sierra") as its financial advisor.

19 The Committee's application came before the bankruptcy court  
20 for hearing on September 9, 2009. No objections to the Sierra  
21 retention application had been filed or were raised at the hearing  
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25 <sup>6</sup> After the filing of the Committee's brief in this appeal,  
26 Bashas' informed the bankruptcy court on October 30, 2009, that  
27 Deloitte had withdrawn as its financial advisor effective  
28 September 30, 2009. Bashas' requested appointment of Keegan,  
Linscott & Kenon, P.C. ("KLK") as replacement financial advisor.  
The bankruptcy court approved the employment of KLK as replacement  
financial advisor to the debtor in possession on November 5, 2009.

1 by any of the interested parties in the case.<sup>7</sup> However, in an  
2 extended colloquy with the Committee's counsel, the bankruptcy  
3 court questioned the Committee's need for a financial advisor: "I  
4 looked this through and I'm frankly puzzled by what a consulting  
5 group as financial advisor is going to help us with. . . . If a  
6 debtor is going to propose a 100 percent plan, why does a  
7 committee need a financial advisor?" Hr'g Tr. 50:24-51:1. The  
8 court then twice asked counsel for Bashas' if it would be  
9 proposing a 100 percent plan. Bashas' counsel confirmed that, "We  
10 will be proposing a plan that provides for 100 percent payment to  
11 unsecured creditors." Hr'g Tr. 51:10-14. Assuming that a plan  
12 would be presented at an early date, the bankruptcy court inquired  
13 of the Committee's counsel, "And ask yourself, why would anybody  
14 reject a 100 percent plan? So at that point then you confirm an  
15 early plan, you've got terms, and the debtor either complies with  
16 the terms and pays everybody 100 cents on the dollar or the debtor  
17 doesn't, in which case there's a default and we move on to Plan  
18 B." As to specific financial questions, the court questioned  
19 whether the Committee had shown a need for a financial advisor:  
20 "Why does the Committee need help doing that? Don't we already  
21 have the Deloitte group looking through a number of these same

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23 <sup>7</sup> In its brief, the Committee states, "the record is clear  
24 that not a single party filed an objection to the Sierra  
25 application." This is technically true. However, counsel for the  
26 Committee at the hearing on September 9 acknowledged that: "There  
27 were some concerns raised by both the debtor and the U.S.  
28 Trustee's office regarding the application." Hr'g Tr. 50:15-17  
(September 9, 2009). We assume that Bashas' withdrew any  
objection it may have had to the retention application because it  
later joined in the Committee's motion to reconsider the denial of  
that application. There is nothing in the record discussing the  
U.S. Trustee's concerns or position regarding the proposed  
retention.

1 issues? Plus, you've got access to the Debtor's records if you  
2 like." Hr'g Tr. 52:3-6.

3 After this exchange, the bankruptcy court ruled that it would  
4 not approve the Committee's request to employ Sierra as a cost to  
5 the bankruptcy estate, but that it would approve retention if the  
6 advisor's fees were to be paid by the members of the Committee.  
7 In response to counsel's question "whether at some point" the  
8 bankruptcy court might reconsider its decision, the court replied,  
9 "Well, we'll cross that bridge when we come to it." Hr'g Tr.  
10 55:17-18.<sup>8</sup> The bankruptcy court entered its order denying the  
11 Sierra retention application on September 10, 2009.

12 The Committee moved for reconsideration of the denial of  
13 Sierra's retention on September 17, 2009. In its motion, the  
14 Committee generally argued that it should have the right to employ  
15 a financial advisor because of the complexity of the bankruptcy  
16 case, the bankruptcy court's finding that Bashas' intent to  
17 propose a plan providing for 100 percent payment to unsecured  
18 creditors was not supported by any evidence, and that Bashas'  
19 joined in the motion for reconsideration.

20 The bankruptcy court denied the Committee's motion for  
21 reconsideration in an order entered September 23, 2009, wherein  
22 the court reiterated, "If the Committee desires to retain such  
23 entity, it may do so at its expense, but not the estates[']."  
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25 <sup>8</sup> In response to a question from the Committee's counsel  
26 whether the bankruptcy court would consider an order providing for  
27 payment to Sierra by the Committee, but allowing the Committee to  
28 apply under § 503(b) for reimbursement from the estate as an  
administrative expense, the bankruptcy court said no, indicating  
that the proper request for any review of its decision was through  
Civil Rules 59(e) or 60(b).

1 The Committee filed a timely appeal from the bankruptcy court's  
2 order denying the retention application on September 22, 2009.<sup>9</sup>

### 4 JURISDICTION

5 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
6 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C. § 158.

### 8 ISSUE

9 Whether the bankruptcy court abused its discretion in denying  
10 the Committee's application to retain a financial advisor.

### 12 STANDARD OF REVIEW

13 We review orders regarding the employment of bankruptcy  
14 professionals for abuse of discretion. Com-1 Info, Inc. v.  
15 Wolkowitz (In re Maximus Computers, Inc.), 278 B.R. 189, 195  
16 (9th Cir. BAP 2002). A two-part test is applied to determine if  
17 an abuse of discretion has occurred: (1) we review de novo whether  
18 the bankruptcy court identified the correct legal rule to apply to  
19 the relief requested; (2) we review whether the trial court's  
20 application of the facts to the correct legal standard was  
21 illogical, implausible or without support in inferences that may  
22 be drawn from the facts in the record. If any of these three  
23 apply, only then are we able to have a "definite and firm  
24 conviction" that the district court reached a conclusion that was  
25 a "mistake" or was not among its "permissible" options, and thus  
26 that it abused its discretion by making a clearly erroneous

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28 <sup>9</sup> The Committee did not appeal the bankruptcy court's order denying the reconsideration.

1 finding of fact. United States v. Hinkson, 585 F.3d 1247, 1257  
2 (9th Cir. 2009).

## 3 4 DISCUSSION

### 5 A.

6 The authority and procedures governing an official  
7 committee's employment of bankruptcy professionals are found in  
8 § 1103(a) and Rule 2014(a). Section 1103(a) provides, in part,  
9 that "with the court's approval, [a] committee may select and  
10 authorize the employment by such committee of one or more  
11 attorneys, accountants or other agents, to represent or perform  
12 services for such committee[.]" The legislative history to this  
13 provision indicates that "Normally, one attorney should suffice;  
14 more than one may be authorized for good cause. The same  
15 considerations apply to the service of others, if the need for any  
16 at all is demonstrated." S. REP. No. 989, 95th Cong., 2d Sess.  
17 114-115 (1978) (emphasis added). To implement this Code  
18 provision, Rule 2014(a) requires that an application for approval  
19 of a committee's employment of a professional be filed and that,  
20 "The application shall state the specific facts showing the  
21 necessity for the employment. . . ."

22 Bankruptcy courts have discretion in denying applications for  
23 employment of professionals. Elias v. Lisowski Law Firm, Chtd.  
24 (In re Elias), 215 B.R. 600, 603 (9th Cir. BAP 1997), aff'd,  
25 188 F.3d 1160 (9th Cir. 1999) (per curiam). Indeed, the Panel has  
26 described this as a "broad" or "wide discretion" standard.  
27 Movitz v. Baker (In re Triple Star Welding, Inc.), 324 B.R. 778,  
28 781 (9th Cir. BAP 2005); see also, Harold & Williams Dev. Co. v.

1 United States Trustee (In re Harold & Williams Dev. Co.),  
2 977 F.2d 906, 909 (4th Cir. 1992); In re Martin, 817 F.2d 175, 182  
3 (1st Cir. 1987). As the Tenth Circuit recently explained,

4 [The Bankruptcy Code] gives broad discretion to the  
5 bankruptcy court over the appointment of professionals  
6 . . . in part by empowering the court to approve  
7 candidates so selected. If the bankruptcy court lacked  
8 such discretion, it would simply be a rubber stamp for  
9 the selections of counsel or other professionals by  
10 participants in bankruptcy proceedings. . . . "The  
11 purpose of the rule requiring court approval of  
12 employment is to enable the court to control  
13 administrative expenses." In re Sound Radio, Inc.,  
14 145 B.R. 193, 202 (Bankr. D.N.J. 1992). Further,  
15 "absent extraordinary circumstances, bankruptcy estates  
16 should not be consumed by the fees and expenses of  
17 court-appointed professionals." [Quoting In re Toney,  
18 171 B.R. 414, 415 (Bankr. S.D. Fla. 1994), and citing  
19 In re Auto Parts Club, 211 B.R. 29 (9th Cir. BAP 1997)].

20 Official Comm. of Unsecured Creditors v. Harris (In re Sw. Food  
21 Distributors), 561 F.3d 1106, 1112 (10th Cir. 2009).

22 A critical element in demonstrating the need to employ a  
23 financial advisor is whether that employment duplicates the  
24 efforts of other professionals already employed. As the  
25 bankruptcy court in In re Drexel Burnham Lambert explained,

26 the application must explain how the investment  
27 banker/advisor will eliminate, or at least reduce, the  
28 duplication of effort Judge Paskey alluded to in  
29 In re Hillsborough Holdings Corp., 125 B.R. 837 [838-39  
30 (Bankr. M.D. Fla. 1991)], where there are armies of  
31 professionals apparently doing the same thing as the  
32 investment banker/advisor. Specifically, the intention  
33 is to avoid accountants and investment bankers/advisors  
34 massaging the same numbers twice when one trip to the  
35 masseuse would generally suffice.

36 133 B.R. 13, 41 (Bankr. S.D.N.Y. 1991).

37 The Committee's application to employ Sierra addresses the  
38 various elements required under Rule 2014(a), such as duties,  
39 terms of compensation, and disinterestedness. However, with the

1 exception of one conclusory statement,<sup>10</sup> the application provides  
2 no substantive explanation of the need for the advisor's services  
3 nor the likelihood that there may be a duplication of the services  
4 to be rendered by Bashas' advisor. Arguably, then, the  
5 application does not comply with Rule 2014(a), and the bankruptcy  
6 court, in exercising its discretion, might have denied the  
7 application for that reason.

8 In its motion for reconsideration, the Committee did expand  
9 on the need for a financial advisor. However, as noted above, the  
10 Committee has not appealed the bankruptcy court's denial of that  
11 motion. Because we can not be sure that the arguments advanced  
12 in the reconsideration motion were considered by the bankruptcy  
13 court before it originally denied the Committee's application, the  
14 Panel need not consider those matters in this appeal.

15 Crawford v. Lungren, 96 F.3d 380, 389 n.6 (9th Cir. 1996);  
16 Sylvester v. Hafif (In re Sylvester), 220 B.R. 89, 91 n.4  
17 (9th Cir. BAP 1998).

18 Even if we were to consider the substance of the Committee's  
19 motion for reconsideration as to the Committee's need for a  
20 financial advisor, it would not impact our decision. A motion for  
21 reconsideration should not be granted unless there is newly  
22 discovered or previously unavailable evidence, the court committed  
23 clear error, or there was an intervening change in law. McDowell  
24 v. Cameron, 290 F.3d 1036, 1038 (9th Cir. 1999) (en banc). As  
25 discussed below, the bankruptcy court did not err in denying the

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27 <sup>10</sup> "The Committee needs assistance in collecting and  
28 analyzing financial and other information in relation to the  
Chapter 11 cases."

1 retention application, and there was no intervening change in the  
2 law. The sole "new" evidentiary "fact" raised in the  
3 reconsideration motion that was not available to the bankruptcy  
4 court or parties at the time of the original retention hearing was  
5 that Bashas', the debtor in possession, had elected to support the  
6 retention. However, that development did not compel the  
7 bankruptcy court to approve the Committee's retention application.

8 First, to be precise, Bashas' joinder in the motion for  
9 reconsideration of the denial of retention never concedes that the  
10 Committee needs a financial advisor. What the joinder states is:

11 it has become apparent to Bashas' that the Committee  
12 sincerely believes it requires the services of an FA to  
13 enable it to properly evaluate the debtor's financial  
14 information, which is admittedly voluminous. Bashas'  
15 relationship with these business partners is so  
16 important, that if these long-term partners believe that  
17 an FA is necessary, then in the interest of maintaining  
18 these long-term relationships, Bashas' supports its  
19 business partners and joins in their request that the  
20 court reconsider its September 10th order.

21 As can be seen, while Bashas' supports the retention, it is not  
22 because Bashas' perceives a need for it, but rather to preserve a  
23 working relationship with Committee members who may believe there  
24 is such a need.

25 The Committee repeatedly asserts in its reconsideration  
26 motion, as well as in its brief in this appeal,<sup>11</sup> that the size and  
27 complexity of Bashas' reorganization required the bankruptcy court  
28 to approve its employment of a financial advisor:

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25 <sup>11</sup> "Typically, applications to employ estate professionals  
26 are granted as a matter of course when they are unopposed and  
27 especially where such an application is supported by the debtor."  
28 Br. at 10. Without regard for whether this statement is always  
true, it is not relevant. Past practice can never trump what the  
law provides.

1 The case law establishes, beyond argument, that in large  
2 restructurings such as these cases it is incumbent upon  
3 the court to ensure that debtors and committees receive  
of them given the fiduciary role in which they serve.

4 The Committee cites to only one case for this broad statement, the  
5 Tenth Circuit's recent decision in In re Sw. Food Distributors.

6 We cite this decision above for the proposition that a bankruptcy  
7 court has broad discretion in approving the hiring of

8 professionals, but disagree that it supports the Committee's  
9 position in this case. The decision did not involve a "large

10 restructuring," but instead was filed by a debtor with less than

11 \$1 million in assets. More importantly, in that case, the

12 Tenth Circuit affirmed the bankruptcy court's denial of the

13 employment of a professional because the creditor's committee had

14 not demonstrated a need for the retention. In re Sw. Food

15 Distributors, 561 F.3d at 1112.

16 In sum, neither the retention application nor the Committee's  
17 later arguments in the reconsideration motion adequately

18 demonstrate a need for Sierra's retention, thus failing to satisfy  
19 the threshold requirement of Rule 2014(a).

20 Rather than defending the showing made in the application,

21 the Committee instead challenges as deficient two statements made  
22 by the bankruptcy court in explaining its reasons for denying its

23 request: that Bashas' would present a plan providing for

24 100 percent payout to the unsecured creditors and consequently the

25 Committee had no need to employ a financial advisor; and that the

26 Committee could rely on analyses and data provided by Bashas'

27 expert, Deloitte. As discussed below, neither of these arguments

28 has merit.

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**B.**

The Committee argues that the bankruptcy court had no evidence that Bashas' would present a 100 percent payment plan. This contention is simply incorrect.

At the hearing, the bankruptcy court asked its counsel if Bashas' would present a full-payment plan, and counsel replied, "We will be proposing a plan that provides for 100 percent payment to unsecured creditors."<sup>12</sup> Hr'g Tr. 51:10-14. At that point in the bankruptcy case, the bankruptcy court had presided over more than a dozen hearings, and the bankruptcy court's docket included over 800 pleadings and other filings. Even a cursory review of the transcript and record on appeal shows that the bankruptcy court was fully engaged and familiar with the status and circumstances in this complex case. The bankruptcy court was assured by Bashas' counsel that a 100 percent payout plan would be proposed, the court expected the plan to be presented in the foreseeable future, and if Bashas' plan failed to materialize as promised, the parties could then consider other options. Viewing the proceedings in context, the bankruptcy court did not abuse its discretion when it based its denial of the Committee's

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<sup>12</sup> The Committee objects that this statement by Bashas' counsel is not "evidence" that a full-payment plan will be proposed. The Committee is correct in that respect, but it is incorrect in further describing counsel's statement as "hearsay." It is neither. It is a "representation of counsel," and as such, the bankruptcy court was justified in relying upon it, in part, in making its decision. As noted by one appellate court, "the [trial] court, as a matter of federal procedure, is entitled to rely on statements made by counsel in open court." Ergo Science, Inc. v. Martin, 73 F.3d 595, 600 (5th Cir. 1996) Moreover, if "a later dispute arises as to the nature of the statements, litigants possess procedural remedies to correct mistakes." Id.

1 application, in part, on Bashas' representation that it would  
2 propose a 100 percent payout plan.

3       The Committee argues that the bankruptcy court should have  
4 allowed the Committee an opportunity to introduce evidence in  
5 support of these issues, citing the Panel's decision in  
6 In re Crest Mirror & Door Co., Inc., 57 B.R. 830, 832 (9th Cir.  
7 BAP 1986): "In order to make an informed decision about an  
8 employment application, it may be necessary for the judge to hear  
9 testimony or make further inquiry of counsel." Id. at 832.

10       Crest Mirror does not compel reversal. Immediately following  
11 the cited text, the Crest Mirror panel noted that the bankruptcy  
12 court in that case had been presented with a new, material and  
13 previously undisclosed fact at the hearing to approve retention:  
14 "Here, for example, the bankruptcy judge did not discover that  
15 Crest sought to have Greeley's employment retroactively approved  
16 until that fact came out at the hearing." It was under those  
17 circumstances that the panel correctly instructed the bankruptcy  
18 court to provide an opportunity for the applicant to offer  
19 evidence regarding a material issue that had not been disclosed to  
20 the court or the other parties before the retention hearing.

21       In this appeal, there was a hearing at which the Committee  
22 had an opportunity to present its arguments. At this retention  
23 hearing, the Committee never requested the opportunity to  
24 introduce evidence regarding the issues before the court. Indeed,  
25 at one point, counsel for the Committee declined the opportunity  
26 to continue with its argument, saying "I know when to quit. I'm  
27 not going to argue any longer." Hr'g Tr. 55:8-9.

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1 After being advised that the Creditors' Committee was  
2 willing to make available all reports and information  
3 generated by its accountants, Ernst & Whitney, the  
4 Equity Committee determined that it would be  
5 unnecessary, wasteful, and duplicative to retain its own  
6 professionals to perform general accounting services  
7 being undertaken by others. Consequently, the Equity  
8 Committee proposed to retain Arthur Andersen to perform  
9 only specific services that may be requested from time  
10 to time which are of special interest and concern to the  
11 Equity Committee.

12 Id. at 321. Whereas in Saxon the financial advisor's duties would  
13 be limited and would rely on analyses and data provided by the  
14 creditor's committee expert, the Committee here apparently seeks  
15 to employ a financial advisor independent of the other  
16 professionals, with a full portfolio of responsibilities and  
17 authority to engage in independent fact finding and data  
18 development. Also, whereas the Saxon committee acknowledged that  
19 withholding of information by one party is "unnecessary, wasteful  
20 and duplicative," the Committee here suggests that, under Saxon,  
21 such sharing is a conflict of interest in violation of § 1103(a).

22 Although the Ninth Circuit has not had occasion to explore  
23 the issues raised in Saxon, one bankruptcy court in this circuit  
24 has allowed, and in fact required, sharing of information among  
25 the parties:

26 The application seeks the appointment in order to carry  
27 out a broad and expansive investigation into the affairs  
28 of the debtor, much more detailed and involved than the  
usual advice to the Committee during the course of the  
debtor's plan. The application provides for a ". . .  
forensic review of current and historical intercompany  
transactions between Sunshine Mining Company  
("Sunshine"), Sunshine's subsidiaries ("Affiliates") and  
Sunshine Precious Metals, Inc. (the debtor) . . ." as  
well as ". . . a financial and operational analysis of  
the mining operations of the Debtor." As such, the  
defined duties are overly broad since the record does  
not support the necessity of such work and its attendant  
expense. While there may be allegations in the record of

1 improper intra-corporate dealings, such allegations do  
2 not warrant a full scale audit into these dealings and  
3 into a cost analysis of the mining operations of the  
4 debtor. If the Committee has difficulty obtaining  
5 financial information from the debtor, application can  
6 be made to the Court for disclosure and production of  
7 the debtor's records.

8 In re Sunshine Precious Metals, Inc., 142 B.R. 918, 923 (Bankr. D.  
9 Idaho 1992).

10 Appellate authority from other circuits also blesses the  
11 sharing of information among parties in the bankruptcy case. The  
12 Third Circuit implicitly approved the sharing of information  
13 between the debtor's professionals and an equity committee when it  
14 allowed the bankruptcy court to consider the sharing of financial  
15 information between the debtor and committee in designing caps on  
16 the compensation of professionals employed by the equity  
17 committee. Comm. of Equity Sec. Holders of Federal-Mogul Corp. v.  
18 Official Comm. of Unsecured Creditors (In re Federal Mogul Corp.),  
19 348 F.3d 390, 404-405 (3d Cir. 2003).

20 In sum, the bankruptcy court did not abuse its discretion in  
21 denying the Sierra retention application, in part, because the  
22 Committee could utilize information and analysis prepared by the  
23 financial advisor to Bashas'.

24 **D.**

25 While the bankruptcy court properly based its ruling on two  
26 different grounds, that a 100 percent plan was to be proposed  
27 shortly by Bashas', and that the Committee could obtain the needed  
28 financial information from Bashas', the Committee contends that  
the bankruptcy court instead denied it permission to employ a  
financial advisor solely to control administrative expenses. The  
Committee urges us to hold that this was not a proper basis to

1 deny the application. See, In re Standard Steel Sections, Inc.,  
2 200 B.R. 511, 513 n.2 (S.D.N.Y. 1996) ("The court may not deny  
3 appointment simply because of its belief that such appointment may  
4 prove to be a drain on the assets of the estate.").

5       Although the bankruptcy court repeatedly cautioned the  
6 parties that it was concerned about controlling costs, the reasons  
7 it articulated for denying the Sierra retention application was  
8 that there was no need for the Committee to have its own financial  
9 advisor because Bashas' intended to propose a plan which provided  
10 a 100 percent payout to unsecured creditors and the Committee  
11 could obtain financial analyses from Bashas'. In doing so, the  
12 bankruptcy court identified the correct legal rule to apply in  
13 deciding whether to approve or deny the requested application,  
14 i.e., whether the requirements of § 1103(a) and Rule 2014(a) had  
15 been satisfied. The threshold requirement in Rule 2014(a) is that  
16 the applicant has shown a need for the employment of the  
17 professional. Here, the bankruptcy court determined that the  
18 Committee had not established a need for a financial advisor. The  
19 bankruptcy court's conclusion was neither illogical nor  
20 implausible and is supportable by the facts, and inferences that  
21 may be drawn from the facts, in the record. Consequently, the  
22 bankruptcy court did not abuse its discretion in denying the  
23 Committee's application to retain Sierra as its financial  
24 advisor.<sup>13</sup>

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26       <sup>13</sup> Before concluding, a final point is appropriate. The  
27 bankruptcy court properly denied the employment application based  
28 upon the facts available to the court at that time. While the  
bankruptcy court denied the Committee's reconsideration request  
(continued...)

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**CONCLUSION**

We AFFIRM the decision of the bankruptcy court.

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<sup>13</sup>(...continued)

made immediately following its original ruling, if the material facts change, we see no reason the Committee could not again apply to the bankruptcy court for permission to engage a professional. For example, if contrary to its representation to the bankruptcy court, Bashas' proposes something other than a 100 percent payment plan, or if the 100 percent plan it proposes is flawed in some fashion in the Committee's view and is rejected by the unsecured creditors, the Committee may be able to persuade the bankruptcy court that a financial advisor is required to allow it to effectively contest confirmation and explore other options in the case.