

OCT 12 2011

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No. HI-10-1284-JuPaD
	)	BAP No. HI-10-1403-JuPaD
JIM SLEMONS HAWAII, INC.,	)	BAP No. HI-10-1404-JuPaD
	)	BAP No. HI-10-1405-JuPaD*
Debtor.	)	(related appeals)
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JIM SLEMONS HAWAII, INC.;	)	Bk. No. 09-01802
ANTHONY P. LOCRIKCHIO,	)	
	)	
Appellants,	)	
	)	
v.	)	M E M O R A N D U M**
	)	
OFFICE OF THE UNITED STATES	)	
TRUSTEE; CONTINENTAL	)	
INVESTMENT COMPANY, LTD.,	)	
	)	
Appellees.	)	
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Argued and Submitted by Video Conference on September 22, 2011  
at Pasadena, California

Filed - October 12, 2011

Appeal from the United States Bankruptcy Court  
for the District of Hawaii

\* While not formally consolidated, these four related appeals were heard at the same time and were considered together. This single disposition applies to the four appeals, and the clerk is directed to file a copy of this disposition in each appeal.

\*\* This disposition is not appropriate for publication. 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 Cir. BAP Rule 8013-1.

1 Honorable Robert J. Faris, Chief Bankruptcy Judge, Presiding\*\*\*  
2 Honorable Lloyd King, Recalled Bankruptcy Judge, Presiding\*\*\*\*

3 Appearances: Anthony P. Locricchio, Esq. argued for Appellant  
4 Jim Slemmons Hawaii, Inc. and himself pro se;  
5 Noah M. Schottenstein, Esq. argued for Appellee  
6 Office of the United States Trustee; and Jerrold  
K. Guben, Esq., of O'Connor, Playdon & Guben LLP,  
argued for Appellee Continental Investment  
Company, Ltd.

7  
8 Before: JURY, DUNN, and PAPPAS, Bankruptcy Judges.

9  
10 Appellant, chapter 11<sup>1</sup> debtor Jim Slemmons Hawaii, Inc.,  
11 appeals from five orders entered by the bankruptcy court:

12 (1) Order Denying Debtor's Motion To Disqualify Bankruptcy  
13 Judge (BAP No. 10-1284);

14 (2) Order Regarding Motion To Set Aside Judgment Re:  
15 Termination Of Non-Residential Lease (BAP No. 10-1403);

16 (3) Order Regarding Motion to Pay § 365(d)(3)  
17 Administrative Expense and Request For Payment of Sublessee  
18 Rents (BAP No. 10-1404);

19 (4) Order Regarding Motion To Pay Only Certain Rent  
20 Payments And to Have Credited \$85,000 Plus Interest And  
21 Penalties Against Rent Payments For Remainder Of August And All

22  
23 \*\*\* Judge Faris entered all the orders on appeal except for  
24 the Order Denying Debtor's Motion To Disqualify Bankruptcy Judge  
(BAP No. 10-1284).

25 \*\*\*\* Judge King entered the Order Denying Debtor's Motion To  
26 Disqualify Bankruptcy Judge (BAP No. 10-1284).

27 <sup>1</sup> Unless otherwise indicated, all chapter, section and rule  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 Of September And To Set Evidentiary Hearing And Permit Discovery  
2 Sworn Depositions On This Matter (BAP No. 10-1405); and

3 (5) Order Dismissing Case (BAP No. 10-1284).

4 Appellant, Anthony P. Locricchio ("Locricchio"), debtor's  
5 bankruptcy counsel, appeals the Order Denying Application for  
6 Professional Compensation By Debtor's Counsel (BAP No. 1284).

7 For the reasons stated, we AFFIRM each of these orders.

#### 8 I. FACTS

9 On March 21, 1983, Slemons Enterprises, Inc. ("SEI"), as  
10 lessee, and appellee, Continental Investment Company, Ltd.  
11 ("CIC"), as lessor, entered into a lease for three parcels of  
12 real property located on Kamehameha Highway, Aiea, Hawaii. In  
13 1992, SEI assigned the lease to debtor. Debtor and CIC entered  
14 into a second lease dated April 15, 1993, for two additional  
15 parcels of real property also located on Kamehameha Highway  
16 (hereinafter, we refer to the 1983 lease and the 1993 lease as  
17 the "Lease").

18 Debtor's monthly lease payments to CIC were \$61,300. To  
19 meet its obligation, debtor subleased the property to Tony  
20 Hawaii Corp. ("Tony Honda") for \$42,632 per month and Car  
21 Stereo, Inc. ("Car Stereo") for \$10,000 per month, with the  
22 remaining subleases to other parties to make up the difference.  
23 Debtor did not conduct any business on the leased property.

24 At some point, a portion of the leased property became  
25 subject to an eminent domain proceeding by the City of Honolulu  
26 for the development of a fixed rail system. Debtor evidently  
27 concluded that the portion of the leased property that was not  
28 subject to the eminent domain proceeding was extremely valuable

1 because it could be used for parking and passenger services.

2 The record indicates that debtor's relationships with Tony  
3 Honda, Car Stereo, and CIC were strained prior to debtor's  
4 bankruptcy filing. Debtor alleged that CIC wrongfully collected  
5 rental payments directly from Tony Honda. Debtor further  
6 alleged that CIC was engaged in conspiracy with Tony Honda and  
7 Car Stereo to oust it from the property. According to debtor,  
8 CIC's motivation as lead conspirator was to obtain the  
9 condemnation funds for itself and develop the property for a  
10 parking and passenger services area for the nine years remaining  
11 on debtor's Lease.<sup>2</sup>

12 In March 2009, debtor defaulted on the Lease.

#### 13 **Bankruptcy Events**

14 On August 10, 2009, debtor filed a chapter 11 bankruptcy  
15 case to prevent eviction by CIC. Debtor's petition described  
16 its business as a single real estate lease that it subleased and  
17 showed Jim Slemons as debtor's 100% owner. Debtor's schedules  
18 showed that the Lease was the main asset of the bankruptcy  
19 estate, with debtor's only source of income from its subtenants.  
20 In Schedule B, Debtor listed a condemnation claim against the  
21 City of Honolulu in the estimated amount of \$750,000. The  
22 schedules further showed that debtor had no secured creditors  
23 and three unsecured creditors, one of which was CIC listed with  
24 a disputed claim of \$225,000.

25 Under § 365(d)(4)(A) and (B), the deadline for debtor to  
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27 <sup>2</sup> We describe the disputes between the parties in further  
28 detail below.

1 assume the Lease or move for an extension of time to assume was  
2 December 8, 2009. The record reveals that Locricchio's failure  
3 to abide by these statutory directives led to the rejection of  
4 the Lease and the eventual dismissal of debtor's case.

5 **A. Locricchio's Employment**

6 On September 28, 2009, appellant Locricchio filed his  
7 application to be employed as debtor's attorney. The United  
8 States Trustee ("UST") objected on the grounds that Locricchio  
9 failed to make the appropriate disclosures under § 329(a) and  
10 Rule 2016(b). The UST also questioned Locricchio's experience  
11 in the chapter 11 arena due to a number of administrative issues  
12 that arose soon after the filing of the case.<sup>3</sup>

13 On October 19, 2009, the bankruptcy court heard the matter  
14 and tentatively approved Locricchio's employment conditioned on  
15 his providing the necessary disclosures. The court also  
16 expressed its view that Locricchio and debtor should consider  
17 associating with an attorney who had chapter 11 experience.<sup>4</sup>

18 One day later, Locricchio provided the necessary  
19 disclosures. On January 1, 2010, the court entered the order  
20 approving his employment.

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23 <sup>3</sup> Among other things, the UST complained that debtor had not  
24 filed a Statement of Financial Affairs, had not opened a proper  
25 debtor-in-possession bank account, did not have a Federal Tax  
26 Identification number, did not have a General Excise Tax license,  
27 had not filed a designation of responsible person, and had not  
28 filed an operating report for August 2009.

<sup>4</sup> Locricchio represented at the hearing on these appeals  
that he specialized in eminent domain proceedings.

1 **B. CIC's Motion For Timely Payment of Post-Petition Rent**

2 On August 25, 2009, CIC moved for the timely payment of  
3 postpetition rent under § 365(d)(3).

4 On October 7, 2009, CIC filed a supplemental pleading in  
5 support of its motion to address debtor's statement in its  
6 August 2009 operating report that CIC had wrongfully taken the  
7 June and July 2009 rental checks from Tony Honda. CIC  
8 maintained that Tony Honda's rental payments directly to CIC  
9 were consistent with an agreement in effect since October 21,  
10 1998.

11 CIC's supplemental pleading also revealed that prior to  
12 debtor's bankruptcy filing, on July 7, 2009, Locricchio wrote to  
13 Tony Honda's counsel, Ms. Sugimura, directing that Tony Honda  
14 make its rental payments to debtor rather than to CIC.  
15 Locricchio also stated that debtor would have the bankruptcy  
16 court make a determination whether Tony Honda's conduct caused  
17 debtor economic harm.<sup>5</sup> In response to the letter, Tony Honda  
18 evidently paid its August 2009 rent to debtor.

19 CIC also stated that it paid the real property taxes for  
20 July 1, 2009 to December 31, 2009, even though debtor was  
21 required to make those payments under the Lease. Finally, CIC  
22 stated that it credited all amounts received, whether from Tony  
23 Honda or debtor, to debtor's account and attached the supporting  
24 documentation.

25 On October 8, 2009, debtor opposed CIC's motion. Debtor's  
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27  
28 <sup>5</sup> This statement was made more than a month before the  
bankruptcy case was filed.

1 opposition was based on CIC's alleged lack of standing to bring  
2 the motion because the motion and memorandum in support  
3 occasionally referred to CIC as Consolidated Investment Company,  
4 Ltd. rather than Continental Investment Company, Ltd. Debtor  
5 made no other arguments in opposition.

6 On October 9, 2009, CIC filed a second supplement to its  
7 motion further clarifying that the payments made by Tony Honda  
8 to CIC were authorized by the October 21, 1998 letter agreement.  
9 CIC also attached accounting records for May, June and July 2009  
10 and renewed its request for an order requiring debtor to pay  
11 postpetition rent as it became due.

12 On the morning of October 19, 2009 – the day of the hearing  
13 on CIC's motion – debtor filed a pleading labeled as a motion  
14 without notice of a hearing date. In the motion, debtor sought  
15 to (1) obtain a \$85,000 credit against rent payments due CIC for  
16 the remainder of August and all of September; (2) pay the  
17 October rent; and (3) set an evidentiary hearing for the  
18 resolution of various disputes (hereinafter, the "Rent Offset  
19 Motion"). The factual basis for the offset of postpetition rent  
20 was CIC's alleged conspiracy with Tony Honda to deprive debtor  
21 of sublease funds and CIC's attempt to force debtor out of  
22 bankruptcy so that CIC could use the property to profit for  
23 itself.

24 Debtor described its dispute with Car Stereo, which had  
25 defaulted on its rent payments postpetition. Debtor contended  
26 that Car Stereo refused to pay its rent because of an "alleged  
27 fraudulent agreement" where debtor had orally agreed to pay 75%  
28 of Car Stereo's electric bill. Debtor asserted that no such

1 agreement ever existed. Debtor also alleged that the owners of  
2 Car Stereo fraudulently altered the sublease document between  
3 debtor and itself to extend the term of lease at the same rent.  
4 Because Car Stereo and Tony Honda were represented by  
5 Ms. Sugimura, debtor implied in its motion that Car Stereo was  
6 also part of the conspiracy with Tony Honda and CIC to oust  
7 debtor from the property.

8 The Rent Offset Motion also described other disputes  
9 between debtor and Tony Honda. Debtor alleged that Tony Honda  
10 had subleased the property without debtor's permission and had  
11 kept the rental payments for itself. Further, to add to  
12 debtor's troubles, Tony Honda had informed debtor that it would  
13 not pay debtor rent beginning with the October 2009 payment.  
14 Tony Honda's reason for withholding rent was due to debtor's  
15 alleged failure to abide by an agreement which required debtor  
16 to complete some environmental remediation work on the property  
17 leased to Tony Honda. Debtor maintained that it had already  
18 paid for that work.

19 In the end, debtor's thirty-six page motion sought an  
20 offset of rent of \$85,000 for the months of August and September  
21 2009 due to CIC's wrongful collection of prepetition rents from  
22 Tony Honda in June and July 2009 and an undisclosed amount of  
23 damages due to the alleged wrongful conduct of its subtenants  
24 and CIC.

25 At the October 19, 2009 hearing, the bankruptcy court  
26 stated that it had not read debtor's papers that were filed that  
27 morning because they were untimely. The court further explained  
28 that it would address whether the August and September rents had

1 to be paid when the Rent Offset Motion came on for hearing. The  
2 court also summarily rejected debtor's opposition based on the  
3 "typo" in the name of CIC in its pleadings. Finally, the court  
4 granted CIC's motion, but opined that it was unclear what the  
5 consequences would be if debtor did not comply with § 365(d)(3).

6 After some discussion with CIC's counsel about possible  
7 consequences, the court observed that the nonpayment of rent  
8 could be a factor in considering whether to grant debtor an  
9 extension of time to assume the Lease or if CIC sought to lift  
10 the stay.<sup>6</sup> However, the court concluded by stating that these  
11 issues would be left for "another day." Hr'g Tr. (October 19,  
12 2009) at 17:1-4.

13 The court entered the order granting CIC's motion on  
14 November 9, 2009. The order clearly stated that debtor was  
15 required to pay the monthly rent or prorated monthly rent for  
16 the postpetition period from the petition date; it did not  
17 relieve debtor from paying August or September rent. Although  
18 the order was inconsistent with the court's statements at the  
19 hearing that it would leave the issue of offset for "another  
20 day," debtor did not appeal the November 9, 2009 order and it  
21 became a final order in the case.

22 On November 22, 2009, debtor tendered \$80,300 to CIC for  
23 postpetition rent and other obligations. Because CIC had

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24  
25 <sup>6</sup> As described below, debtor construes the court's comments  
26 as a "threat" that it would deny debtor any extension of time to  
27 assume the Lease if it was not current on postpetition rent.  
28 Throughout its briefs, debtor uses this alleged "threat" to show  
the bankruptcy judge's bias and prejudice against it and to  
explain why debtor never filed a motion for an extension of time  
(because it would have been denied).

1 calculated the postpetition amount due as \$347,606.27, CIC  
2 returned the check to debtor on December 3, 2009, contending  
3 that debtor's payment did not comply with the bankruptcy court's  
4 November 9, 2009 order and that debtor was now in default. It  
5 was at this point that Locricchio contends he first learned  
6 about the contents of the November 9, 2009 order, which he  
7 claims was fraudulently submitted and obtained by CIC's counsel.

8 **C. CIC's Motion To Terminate The Lease**

9 The December 8, 2009, deadline for assuming the Lease came  
10 and went without debtor filing a motion to assume the Lease.  
11 § 365(d)(4)(A). Moreover, debtor did not move to extend the  
12 time to assume the Lease under § 365(d)(4)(B) within the 120-day  
13 period. As a result, on December 23, 2009, CIC filed a motion  
14 seeking (1) a declaration from the bankruptcy court that the  
15 Lease was terminated and (2) an order directing debtor to  
16 surrender the premises (the "Lease Termination Motion").

17 On January 8, 2010, debtor filed an opposition, contending,  
18 among other things, that its Rent Offset Motion barred CIC from  
19 seeking to terminate the Lease until the court ruled on the  
20 various disputes. Debtor further asserted that its Rent Offset  
21 Motion made clear that it had assumed the unexpired Lease under  
22 § 365(d)(4). Finally, debtor maintained that once CIC filed its  
23 motion seeking timely payment of the postpetition rent, it was  
24 barred from claiming that debtor had not assumed the Lease.

25 At the January 19, 2010 hearing, the court took the matter  
26 under advisement due to debtor's complaint that CIC gave debtor  
27 twenty-seven days notice instead of twenty-eight days. The  
28 court gave debtor until February 11, 2010, to file a

1 supplemental memorandum and CIC's counsel was given to  
2 February 18, 2010, to file a reply.<sup>7</sup> Debtor requested a further  
3 extension to February 18, 2010, which the bankruptcy court  
4 granted, and the time for CIC's reply was extended to  
5 February 25, 2010.

6 In debtor's supplemental pleading filed on February 18,  
7 2010, debtor accused the bankruptcy judge of being biased and  
8 stated that it would be filing a motion to disqualify him.

9 On February 22, 2010, before the filing of CIC's reply, the  
10 bankruptcy court issued a Memorandum Decision, finding that the  
11 Lease was rejected on December 9, 2009, by operation of law  
12 under § 365(d)(4). Citing Sea Harvest Corp. v. Riviera Land  
13 Co., 868 F.2d 1077 (9th Cir. 1989), the bankruptcy court  
14 rejected debtor's argument that its Rent Offset Motion  
15 constituted a properly noticed and timely motion to assume the  
16 Lease. The court also observed that a debtor must pay  
17 postpetition rent under § 365(d)(3) even if it later decided to  
18 reject the lease. Finally, because debtor had mentioned in its  
19 papers that it intended to file a motion for recusal, the  
20 bankruptcy judge addressed the issue in the Memorandum Decision,  
21 concluding there was no basis for his disqualification.

22 The court entered judgment for CIC on March 3, 2010 (the  
23 "Termination Judgment").

24  
25 \_\_\_\_\_  
26 <sup>7</sup> CIC filed its motion on December 23, 2009, and the hearing  
27 was set for January 19, 2010. Because the motion was filed  
28 during the holiday season and Locricchio did not participate in  
the court's non-mandatory electronic filing system which provides  
immediate notice, the court gave debtor additional time.

1 **D. Debtor's Recusal Motion**

2 On February 23, 2010 – one day after the court issued its  
3 Memorandum Decision terminating debtor's Lease – debtor filed a  
4 motion to disqualify Bankruptcy Judge Robert Faris (the "Recusal  
5 Motion"). Debtor alleged that the judge overlooked CIC's  
6 procedural irregularities and considered pleadings it should  
7 have stricken. Specifically, debtor asserted that the court  
8 should have stricken CIC's Lease Termination Motion because of  
9 the insufficient notice (twenty-seven days instead of twenty-  
10 eight). Debtor also alleged that CIC's counsel was part of a  
11 "bankruptcy club," which was a social luncheon gathering of  
12 bankruptcy attorneys that the bankruptcy judge regularly  
13 attended, and which excluded some attorneys from attending.  
14 Finally, debtor alleged that the court rushed out its  
15 February 22 memorandum on CIC's Lease Termination Motion due to  
16 the possible delay caused by debtor's notice of its yet-to-be-  
17 filed Recusal Motion.

18 Debtor's motion was set for hearing on April 26, 2010,  
19 before recalled Bankruptcy Judge Lloyd King.<sup>8</sup> On April 7, 2010,  
20 debtor filed an ex parte motion to stay the hearing so that it  
21 could conduct an investigation into the court's internal  
22 procedures. The investigation would supposedly uncover whether  
23 Judge Faris had improperly back-dated his Memorandum Decision

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24  
25 <sup>8</sup> A federal judge who is the subject of a recusal motion may  
26 hear that motion himself. United States v. Sibla, 624 F.2d 864,  
27 867-68 (9th Cir. 1980). To avoid any appearance of conflict or  
28 bias, some districts or divisions use a procedure that had a  
different judge rule on a recusal motion. The District of Hawaii  
used this optional procedure.

1 from February 24 to February 22 due to debtor's pending Recusal  
2 Motion. Judge King denied debtor's ex parte motion by  
3 Memorandum Decision and an order entered April 9, 2010.

4 At the April 26, 2010 hearing, Judge King denied debtor's  
5 Recusal Motion.

6 On May 5, 2010, Judge King issued a Memorandum Decision,  
7 finding that (1) Locricchio had not offered any evidence that if  
8 luncheon meetings were held and Judge Faris participated, the  
9 attendees precluded him, or any other attorney, from attending;  
10 (2) although debtor had insufficient notice of CIC's motion to  
11 terminate the Lease, the notice deficiency resulted in no  
12 prejudice to debtor because Judge Faris gave debtor the  
13 opportunity to file a supplemental pleading; (3) debtor failed  
14 to cite any case law that would require a court to deny a motion  
15 (versus continuing it) due to insufficient notice; and (4) Judge  
16 Faris did not err by issuing his Memorandum Decision granting  
17 CIC's motion to terminate the Lease prior to the hearing on  
18 debtor's motion to disqualify him. Judge King concluded by  
19 stating that debtor's allegations of bias against Judge Faris  
20 lacked factual and legal support.<sup>9</sup>

21 The bankruptcy court entered the order denying debtor's  
22 Recusal Motion on May 5, 2010.

23 **E. The May 24, 2010 Hearing On Various Motions**

24 Meanwhile, the parties to this appeal filed various  
25 motions.

26 \_\_\_\_\_  
27 <sup>9</sup> Judge King commented that debtor's original and  
28 supplemental memoranda in support of its Recusal Motion did not  
contain a single citation to a statute, rule, or reported case.

1 On February 4, 2010, Locricchio filed an application for  
2 interim fees, requesting \$39,647.40 for his services (the "Fee  
3 Application"). On February 25, 2010, the UST objected to the  
4 Fee Application on the grounds that Locricchio failed to follow  
5 the UST's guidelines for fee applications or discuss any of the  
6 factors in § 330(a) to assist the court in determining the  
7 reasonableness of the fees. CIC also objected, arguing that its  
8 postpetition rent had administrative priority over debtor's  
9 counsel's fees.

10 On April 5, 2010, debtor moved to set aside the Termination  
11 Judgment under Rule 9023 (the "Set Aside Motion"). Debtor's  
12 motion essentially rehashed the same arguments it made in the  
13 Recusal Motion. In other words, debtor argued that the  
14 bankruptcy judge's alleged bias was debtor's sole argument for  
15 setting aside the Termination Judgment.

16 On April 7, 2010, CIC moved for payment of administrative  
17 rent for the period August 10, 2009 (the petition date), to  
18 December 9, 2009 (the rejection date)(the "Administrative Rent  
19 Motion"). Debtor did not oppose the motion.

20 On April 26, 2010, the UST moved to dismiss debtor's case  
21 under § 1112(b) for "cause" (the "Dismissal Motion"). The UST  
22 asserted that debtor had no possibility of a successful  
23 reorganization without the Lease. Debtor responded by stating  
24 that it would not oppose the motion.

25 These motions, along with debtor's Rent Offset Motion

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1 filed on October 19, 2009,<sup>10</sup> were noticed for a hearing on  
2 May 24, 2010.

3 On May 20, 2010, the bankruptcy court issued a tentative  
4 decision regarding the various motions. The court granted the  
5 UST's Dismissal Motion on the ground that debtor could not  
6 reorganize without the Lease, its primary asset. The court  
7 further stated that it was inclined to deny all other pending  
8 motions as moot due to its decision to dismiss the bankruptcy  
9 case.

10 At the May 24, 2010 hearing, the bankruptcy court granted  
11 the UST's Dismissal Motion. The court also decided that it  
12 needed to rule on debtor's Set Aside Motion and found it  
13 untimely. The court requested that the parties focus their  
14 arguments on whether the remaining motions should be addressed  
15 by the bankruptcy court or litigated in state court.

16 Debtor argued that the remaining motions should be  
17 litigated in state court. CIC argued that the matter of  
18 Locricchio's Fee Application and its request for administrative  
19 rent under § 365(d)(3) were within the bankruptcy court's  
20 exclusive jurisdiction. The UST argued for dismissal with the  
21 rent issue decided by the state court. The court took the  
22 matters under advisement.

23 In a May 27, 2010 Memorandum Decision, the bankruptcy court  
24 denied debtor's Set Aside Motion on the grounds that it was

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25  
26 <sup>10</sup> On January 12, 2010, debtor filed a notice that the Rent  
27 Offset Motion would be heard on February 16, 2010. Therefore, by  
28 the time debtor noticed the hearing, the date for assuming the  
Lease – December 8, 2009 – had passed. The hearing for the Rent  
Offset Motion was continued from February 16 to May 24, 2010.

1 untimely and did not meet the standards for altering or amending  
2 a judgment; i.e., the debtor did not demonstrate a manifest  
3 error of law or fact or produce any newly discovered evidence.

4 Citing Pavelich v. McCormick, Barstow (In re Pavelich),  
5 229 B.R. 777, 780-81 (9th Cir. BAP 1999), the bankruptcy court  
6 also found that it had jurisdiction post-dismissal over its own  
7 orders and to dispose of ancillary matters that were otherwise  
8 not moot. However, the court stated that it did not view its  
9 jurisdiction over the amount of the rent or compensation due  
10 debtor's attorney as exclusive. Nonetheless, the court found it  
11 would be unfair to avoid deciding the pending motions because  
12 debtor was holding \$95,000 cash that, without a ruling, it could  
13 freely use after the dismissal of its case to the detriment of  
14 CIC. Accordingly, the court exercised its discretion to decide  
15 the remaining motions.

16 First, the court denied Locricchio's Fee Application in its  
17 entirety. The bankruptcy court found that Locricchio's services  
18 were not beneficial to the estate because he missed the deadline  
19 for assumption of the Lease under § 365(d)(4) and, as a result,  
20 debtor lost its most valuable asset. The bankruptcy court also  
21 denied the application on the alternative ground that it lacked  
22 information required by Rule 2016 and, although the UST pointed  
23 out the deficiencies, Locricchio made no effort to correct them.

24 Next, the court denied debtor's Rent Offset Motion which  
25 alleged CIC's misconduct and interference with its business  
26 relationships was grounds for relieving debtor from the  
27 statutory requirement under § 365(d)(3) of paying postpetition  
28 rent for the months of August and September. The court observed

1 that in response to debtor's allegation that CIC had wrongfully  
2 collected rent from Tony Honda, CIC had produced a 1998 letter  
3 agreement that authorized those payments. The court found that  
4 debtor had never offered any reason why the agreement might be  
5 invalid. Thus, the court concluded that there was no legitimate  
6 dispute that debtor owed the full amount of the rent due under  
7 the Lease, minus any amounts which the subtenants paid to CIC.

8 Third, the court granted CIC's Administrative Rent Motion.  
9 The court noted that debtor filed no opposition to this motion.  
10 The court further noted that debtor failed to comply with its  
11 November 9, 2009 order, which required debtor to timely pay all  
12 postpetition rents until further order. Therefore, the court  
13 directed debtor and its counsel to remit all of the estate's  
14 cash to CIC in partial satisfaction of CIC's administrative  
15 claim and reserved jurisdiction to enforce this requirement.

16 The court entered the order denying Locricchio's Fee  
17 Application on June 29, 2010. The court entered the orders  
18 denying debtor's Set Aside Motion and Rent Offset Motion on  
19 July 13, 2010, and the corresponding judgments on July 26, 2010.  
20 The court entered the order granting CIC's Administrative Rent  
21 Motion on July 13, 2010, and corresponding judgment on July 26,  
22 2010. Finally, the court entered the order granting the UST's  
23 Dismissal Motion on July 13, 2010.

24 Debtor timely appealed each of the orders involved in these  
25 four appeals. Further, as discussed below, Locricchio timely  
26 appealed the order denying his Fee Application.

## 27 II. JURISDICTION

28 The bankruptcy court had jurisdiction over this proceeding

1 under 28 U.S.C. §§ 1334 and 157(b)(2)(A). We have jurisdiction  
2 under 28 U.S.C. § 158.

### 3 **III. ISSUES**

4 A. Whether the bankruptcy court erred in denying debtor's  
5 Recusal Motion;

6 B. Whether the bankruptcy court erred in denying debtor's  
7 Set Aside Motion;

8 C. Whether the bankruptcy court erred in denying  
9 Locricchio's Fee Application;

10 D. Whether the bankruptcy court erred in granting CIC's  
11 Administrative Rent Motion;

12 E. Whether the bankruptcy court erred in denying debtor's  
13 Rent Offset Motion; and

14 F. Whether the bankruptcy court erred in granting the  
15 UST's Dismissal Motion.

### 16 **IV. STANDARDS OF REVIEW**

17 We review under an abuse of discretion standard, a  
18 bankruptcy court's decision to (1) deny a motion for recusal of  
19 a bankruptcy judge, (2) deny a motion for reconsideration under  
20 Rule 9023, (3) grant an award of attorney's fees, and (4) grant  
21 a motion to dismiss a debtor's case for cause under § 1112(b).  
22 See Berry v. U.S. Tr. (In re Sustaita), 438 B.R. 198, 208 (9th  
23 Cir. BAP 2010) (recusal motion); Diker v. Dye (In re Edelman),  
24 237 B.R. 146, 150 (9th Cir. BAP 1999) (reconsideration under  
25 Rule 9023); Leichty v. Neary (In re Strand), 375 F.3d 854, 857  
26 (9th Cir. 2004) (attorney's fees); Marsch v. Marsch (In re  
27 Marsch), 36 F.3d 825, 828 (9th Cir. 1994) (dismissal of chapter  
28 11 case for cause).

1 We follow a two-part test to determine objectively whether  
2 the bankruptcy court abused its discretion. United States v.  
3 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009)(en banc). If we  
4 determine that the court erred under either part of the test, we  
5 must reverse for an abuse of discretion. Id. First, we  
6 "determine de novo whether the [bankruptcy] court identified the  
7 correct legal rule to apply to the relief requested." Id.  
8 Second, we examine the bankruptcy court's factual findings under  
9 the clearly erroneous standard. Id. at 1262 n.20. We must  
10 affirm the court's factual findings unless those findings are  
11 "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in  
12 inferences that may be drawn from the facts in the record.'" Id.

13 Whether CIC was entitled to an administrative rent claim  
14 under § 365(d)(3) involves a question of law. A bankruptcy  
15 court's conclusions of law are reviewed de novo. In re Strand,  
16 375 F.3d at 857. We also review due process challenges de novo.  
17 Price v. Lehtinen (In re Lehtinen), 564 F.3d 1052, 1058 (9th  
18 Cir. 2009).

## 19 V. DISCUSSION

### 20 A. CIC's Motion To Dismiss Or Strike Debtor's Briefs In BAP 21 Nos. 10-1403, 10-1404 And 10-1405

22 CIC moved to dismiss the appeals for BAP Nos. 10-1403,  
23 10-1404 and 10-1405 under Rule 8010, or, alternatively, strike  
24 debtor's briefs under Rule 8006 and debtor opposed.<sup>11</sup> On

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25  
26 <sup>11</sup> Debtor sought and obtained permission to file a single  
27 brief in each of the three appeals not to exceed forty pages.  
28 Debtor explains that it was impossible to cover all the issues in  
a single brief so it abandoned that approach in favor of filing a  
(continued...)

1 February 1, 2011, a motions panel of this court denied CIC's  
2 motion without prejudice for reconsideration by the merits  
3 panel. On reconsideration, we also deny CIC's motion.

4 Rule 8010 requires, among other things, a table of  
5 contents, a statement of the basis of appellate jurisdiction, a  
6 statement of issues presented, the applicable standard of  
7 appellate review, and a statement of the case. Rule  
8 8010(a)(1)(A-D). Rule 8010(a)(1)(E) states that the "argument  
9 shall contain the contentions of the appellant with respect to  
10 the issues presented, and the reasons therefore, with citations  
11 to the authorities, statutes and parts of the record relied on."

12 Although debtor's briefs are mostly noncompliant with  
13 Rule 8010, we decline to dismiss the appeals on this basis. The  
14 issues involved are not complex and we may rely on the relevant  
15 authorities and the record that was before the bankruptcy court  
16 to evaluate the merits of these appeals. Kyle v. Dye (In re  
17 Kyle), 317 B.R. 390, 393 (9th Cir. BAP 2004) (noting that  
18 although summary dismissal is within the Panel's discretion, it  
19 should first consider whether informed review is possible in  
20 light of the record provided).

21 Rule 8006 provides that the record on appeal from a  
22 bankruptcy court decision consists of designated materials that  
23 became part of the bankruptcy court's record in the first  
24 instance. On December 13, 2010, debtor filed a Supplemental  
25 Designation of the Record, seeking to include in the record

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26  
27 <sup>11</sup>(...continued)  
28 separate brief in each of the appeals. Apparently, this change  
caused some compliance problems with Rule 8010.

1 numerous orders, pleadings and documents that were entered on  
2 the bankruptcy court's docket after the entry of the orders and  
3 judgments in these appeals. Rule 8006 does not permit items to  
4 be added to the record on appeal to this Panel if they were not  
5 part of the record before the bankruptcy court. Kirshner v.  
6 Uniden Corp. of Am., 842 F.2d 1074, 1077-78 (9th Cir. 1988).

7 Because debtor may have referred to these documents in its  
8 briefs, CIC seeks to have the briefs stricken with instructions  
9 to debtor not to include or refer to any of these supplemental  
10 orders, pleadings or documents. At this juncture, we consider  
11 it unproductive and unnecessary to strike the briefs, with  
12 instructions to debtor to delete references to these orders,  
13 pleadings or documents. It is sufficient that we simply do not  
14 consider debtor's supplemental designation of the record in  
15 evaluating debtor's arguments and we have not done so.

16 **B. The Order Denying Debtor's Recusal Motion (BAP No. 10-1284)**

17 Debtor's main theory for reversal in all four appeals  
18 centers on the bankruptcy judge's bias and prejudice against it.  
19 Therefore, we review first the court's order denying debtor's  
20 Recusal Motion.

21 Initially, we note that on October 18, 2010, debtor filed a  
22 motion for reconsideration of the May 5, 2010, order denying its  
23 Recusal Motion. In an October 29, 2010 Memorandum Decision and  
24 separate order of the same date, Judge King denied debtor's  
25 motion for lack of jurisdiction due to debtor's pending appeal  
26 of the May 5, 2010 order. On November 30, 2010, debtor filed a  
27 notice of appeal of the order denying its motion for  
28 reconsideration (BAP No. 10-1469). On February 11, 2011, the

1 Panel dismissed the appeal as untimely. Therefore, debtor's  
2 filing of the motion for reconsideration is of no consequence to  
3 us in this appeal.

4 In its appellate brief, debtor describes alleged incidents  
5 of judicial bias and misconduct that are much different than  
6 those raised in the bankruptcy court and addressed by Judge  
7 King's Memorandum Decision. One of the new alleged incidents  
8 includes CIC's attorney submitting the November 9, 2009 order to  
9 Judge Faris which misstated the court's ruling on CIC's motion  
10 for the timely payment of postpetition rent; i.e., debtor  
11 maintains that the court ruled that it did not have to pay  
12 postpetition rent for August or September whereas the order  
13 stated that debtor was to pay all postpetition rent due. Debtor  
14 asserts that the judge's signing of the allegedly fraudulent  
15 order indicates that CIC's counsel and the judge were working in  
16 concert. Debtor further alleges that at the October 19, 2009  
17 hearing on CIC's motion for the timely payment of postpetition  
18 rent, the bankruptcy court threatened to deny debtor an  
19 extension of time to assume or reject the Lease as a consequence  
20 for its nonpayment of the postpetition rent.<sup>12</sup>

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21  
22 <sup>12</sup> Debtor recites these arguments in some fashion in all of  
23 its briefs. Debtor overlooks the fact that the November 9, 2009  
24 order for the payment of postpetition rent – which it contends is  
25 fraudulent – is a final order. Moreover, the bankruptcy court's  
26 comments regarding the consequences to a debtor for nonpayment of  
27 postpetition rent were entirely consistent with Ninth Circuit  
28 case law. See Sw. Aircraft Servs., Inc. v. City of Long Beach  
(In re Sw. Aircraft Servs., Inc.), 831 F.3d 848 (9th Cir. 1987).  
In In re Sw. Aircraft Servs., Inc., the Ninth Circuit held that  
the bankruptcy court had discretion to consider all the  
particular facts and circumstances involved in each bankruptcy  
case and to decide whether the consequence of a violation of

(continued...)

1 Presumably debtor relies on Polaroid Corp. v. Eastman Kodak  
2 Co., 867 F.2d 1415 (1989), as authority for allowing these new  
3 examples of alleged judicial bias and misconduct to be raised  
4 for the first time on appeal. According to debtor, Polaroid  
5 holds that a recusal motion "has no time limits." Thus, debtor  
6 contends that it is not prohibited from raising new examples of  
7 bias for the judge's disqualification at "anytime." We are not  
8 persuaded that the holding in Polaroid stretches so far.

9 In Polaroid, the judge made numerous rulings and issued  
10 orders in the case for six and half years before she  
11 disqualified herself after learning that her mother-in-law had  
12 an interest in Kodak. After she disqualified herself, Kodak  
13 filed a motion to disqualify and sought to vacate orders that  
14 were entered six and half years earlier. The district court  
15 denied the motion and the court of appeals affirmed. The court  
16 held that although there was no time limit to file a motion for  
17 recusal, under the circumstances of the case and due to the  
18 passage of time, granting the motion would produce a result that  
19 was inequitable and unfair. Id. at 1419.

20 The facts of this case are far afield from those in  
21 Polaroid. Judge Faris did not disqualify himself and Judge King  
22 found no basis for granting debtor's Recusal Motion on the facts  
23

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24 <sup>12</sup>(...continued)  
25 § 365(d)(3) should be forfeiture of the unassumed lease, some  
26 other penalty, or no penalty at all. Id. at 854. The court held  
27 that the "failure to make payments under subsection (d)(3)  
28 constitutes simply one element to be considered, along with all  
the other relevant factors, in determining whether cause exists  
under subsection (d)(4) to extend the [120]-day period for  
assumption or rejection." Id. at 853-54.

1 debtor alleged. Moreover, the newly asserted incidents of bias  
2 raised in this appeal were considered in connection with  
3 debtor's second motion to recuse Judge Faris. On August 3,  
4 2011, Judge King issued a Memorandum Decision and separate order  
5 on that motion.<sup>13</sup> That order is now the subject of a separate  
6 appeal (BAP No. 11-1464). Accordingly, we do not address the  
7 propriety of the November 9, 2009 order or debtor's other newly  
8 asserted allegations in this appeal.

9 Otherwise, debtor's opening brief fails to pinpoint with  
10 any degree of specificity how Judge King abused his discretion  
11 by denying debtor's Recusal Motion. Therefore, any assignment  
12 of error has also been waived on appeal. Laboa v. Calderon,  
13 224 F.3d 972, 981 n.6 (9th Cir. 2000) (issues not specifically  
14 and distinctly argued in the appellant's opening brief are  
15 waived on appeal). As debtor's appeal raises no substantial  
16 question, we summarily affirm Judge King's ruling on the merits.  
17 There are simply no facts in the record that could create a  
18 reasonable doubt concerning the bankruptcy judge's impartiality.  
19 See Seidel v. Durkin (In re Goodwin), 194 B.R. 214, 222 (9th  
20 Cir. BAP 1996) (evaluations of bias or prejudice are judged from  
21 an objective perspective).

22 **C. The Order Denying Debtor's Set Aside Motion (BAP No. 10-  
23 1403)**

24 Debtor sought to set aside the Termination Judgment under  
25

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26 <sup>13</sup> We take judicial notice of the documents docketed and  
27 imaged at Dkt. Nos. 353 and 354 in the underlying bankruptcy  
28 case. Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293  
B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 Rule 9023. Rule 9023 provides that a motion to alter or amend a  
2 judgment shall be filed no later than fourteen days after entry  
3 of judgment. The bankruptcy court entered the Termination  
4 Judgment on March 3, 2010, and debtor did not file its Set Aside  
5 Motion until April 5, 2010, thirty-three days later. Thus,  
6 debtor's Set Aside Motion was untimely and the bankruptcy court  
7 properly denied debtor's Set Aside Motion on this ground.

8 Because of the untimely filing, we observe that the scope  
9 of our review in this appeal is limited to the order denying  
10 debtor's Set Aside Motion. Debtor's notice of appeal for BAP  
11 No. 10-1403 designated and attached only the order denying its  
12 Set Aside Motion, not the underlying order that resulted in the  
13 Termination Judgment.<sup>14</sup> Our 9th Cir. BAP Rule 8001(a)(1)  
14 requires the notice of appeal to designate the order or judgment  
15 from which an appeal is taken. There is no reason to depart  
16 from our rule when debtor's Set Aside Motion was untimely filed.  
17 Compare Wall St. Plaza, LLC v. JSJF Corp. (In re JSJF Corp.),  
18 344 B.R. 94, 99 (9th Cir. BAP 2006) (Panel may depart from its  
19 rule when a motion under Rule 9023 is timely filed, there is no  
20 prejudice to the parties and they have fully briefed the  
21 issues).<sup>15</sup>

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22  
23 <sup>14</sup> Any appeal of that Judgment on July 13, 2010, when these  
24 appeals were filed, would have been untimely.

25 <sup>15</sup> In any event, at the hearing on these appeals, Locricchio  
26 offered no satisfactory reason for not seeking an extension of  
27 time to assume or reject the Lease. When questioned by the  
28 Panel, Locricchio explained that he did not move for an extension  
of time because once CIC wrongly declared debtor in default of  
its payments under the Lease, debtor lost its opportunity for a  
(continued...)

1 **D. The Orders Granting CIC's Administrative Rent Motion (BAP**  
2 **No. 10-1404) And Denying Debtor's Rent Offset Motion (BAP**  
3 **No. 10-1405)**

4 Because the subject matter of the orders granting CIC's  
5 Administrative Rent Motion and denying debtor's Rent Offset  
6 Motion are so interrelated, we consider them together.

7 Debtor's briefs in these appeals include its mantra-like  
8 arguments regarding the fraudulent nature of the court's  
9 November 9, 2009 order, the bankruptcy court's alleged threat to  
10 deny debtor's motion for an extension of time to assume or  
11 reject the Lease, and the wrongful nature of CIC's acts or those  
12 of its counsel. None of those arguments were directly before  
13 the bankruptcy court.<sup>16</sup> Debtor offers no other clear legal basis  
14 for reversing the bankruptcy court's decisions in its briefs.

15 Section 365(d)(3) provides:

16 The trustee shall timely perform all the obligations  
17 of the debtor, except those specified in section  
18 365(b)(2), arising from and after the order for relief  
19 under any unexpired lease of nonresidential real  
20 property, until such lease is assumed or rejected,  
21 notwithstanding section 503(b)(1) of this title. . . .

22 "[Section] 365(d)(3) makes clear that a debtor must perform all  
23 obligations owing under a lease – particularly the obligation to  
24

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25 <sup>15</sup>(...continued)  
26 third party to buy out the remaining time on its Lease.  
27 According to Locricchio, moving for more time was irrelevant  
28 because it would not bring the buyer back to life, and without a  
buyer, debtor could not file a plan with any prospect of being  
confirmed. Because of these statements, it is difficult to  
ascertain the reason for debtor's appeal of the order denying its  
motion to set aside the Termination Judgment.

<sup>16</sup> As mentioned by the bankruptcy court in its May 27, 2010  
Memorandum Decision, debtor did not file an opposition to CIC's  
Administrative Rent Motion.

1 pay rent at the contract rate – until the lease is rejected.”  
2 Pac. Shores Dev., LLC v. At Home Corp. (In re At Home Corp.),  
3 392 F.3d 1064, 1068 (9th Cir. 2004). If a debtor fails to  
4 timely pay postpetition rent, the lessor’s right to payment  
5 becomes an administrative claim for the accrued liability on the  
6 unpaid rent. See Towers v. Chickering & Gregory (In re  
7 Pacific-Atlantic Trading Co.), 27 F.3d 401, 403-405 (9th Cir.  
8 1994). Accordingly, through the plain language of § 365(d)(3)  
9 and Ninth Circuit case law, CIC was entitled to an  
10 administrative claim for the unpaid postpetition rent as a  
11 matter of law.

12 Moreover, nowhere did debtor cite any authority which  
13 supported its request for an offset of postpetition rent.  
14 Debtor could not use § 553 for several reasons. Section 553  
15 does not establish independent setoff rights in bankruptcy but  
16 merely preserves setoff rights to the same extent they are  
17 allowed under state law. United States v. Gould (In re Gould),  
18 401 B.R. 415, 423 (9th Cir. BAP 2009), aff’d, 603 F.3d 1100 (9th  
19 Cir. 2010). Debtor has pointed to no Hawaii law which would  
20 authorize offset under these circumstances. Further, the Lease  
21 contained a provision that prohibited the abatement of rent:  
22 “Non-abatement of Rent. Except as otherwise provided herein the  
23 rent shall not abate, diminish or cease.” Thus, the Lease does  
24 not authorize the abatement of rent on these facts and debtor  
25 has not argued otherwise.

26 In addition, the plain language of § 553 demonstrates that  
27 the statute is inapplicable. Section 553 states that a creditor  
28 may assert setoff as a defense to a claim brought by the debtor

1 against a creditor. Carolco Television, Inc. v. Nat'l Broad.  
2 Co. (In re De Laurentiis Entm't Grp. Inc.), 963 F.2d 1269, 1277  
3 (9th Cir. 1992) (emphasis in original). Here, debtor is  
4 asserting offset as a defense to CIC's claim for postpetition  
5 rent. Finally, § 553 requires that "each debt or claim sought  
6 to be offset must have arisen prior to the filing of the  
7 bankruptcy petition." United States v. Carey (In re Wade Cook  
8 Fin. Corp.), 375 B.R. 580, 594 (9th Cir. BAP 2007). Debtor  
9 seeks to offset the prepetition rent paid by Tony Honda to CIC  
10 against its obligation to pay postpetition rent under  
11 § 365(d)(3). Plainly debtor cannot meet the timing requirement  
12 under the statute.<sup>17</sup>

13 In reality, debtor's offset argument is a bit of a red  
14 herring. It was unnecessary for the court to resolve whether  
15 debtor was entitled to offset its postpetition rent owed to CIC  
16 against CIC's alleged wrongful collection of prepetition rents  
17 from Tony Honda before granting CIC's Administrative Rent  
18 Motion. CIC's administrative rent claim was far greater than  
19 what debtor had in its account.<sup>18</sup> Debtor sought a credit or  
20

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21 <sup>17</sup> The bankruptcy court's May 27, 2010 Memorandum Decision  
22 does not discuss § 553. Debtor may have been able to rely on  
23 § 558 which provides that "[t]he estate shall have the benefit of  
24 any defense available to the debtor as against any entity other  
25 than the estate . . . ." However, nowhere did debtor provide any  
26 authority that it had setoff rights under state law. See In re  
27 PSA, Inc., 277 B.R. 51, 54 (Bankr. D. Del. 2002) (holding that "a  
right to setoff must be established under state law so that the  
debtor then may assert the setoff as a defense reserved by  
§ 558.").

28 <sup>18</sup> Debtor never opened a debtor-in-possession bank account.  
Instead, monies were held in Locricchio's trust account.

1 offset of \$85,000 in its Rent Offset Motion; however, the amount  
2 of CIC's administrative rent claim was \$307,975.68 and the  
3 amount remaining in debtor's account was \$95,218.54. Therefore,  
4 even if the court allowed the \$85,000 offset as debtor  
5 requested, debtor's estate would still owe CIC a substantial  
6 amount in administrative rent.

7 Finally, because the court denied Locricchio's fees – a  
8 decision which we affirm on appeal – there were no other allowed  
9 and unpaid administrative expenses asserted against debtor's  
10 estate. Therefore, CIC was entitled to all the funds in  
11 debtor's estate as of the date of the dismissal despite debtor's  
12 asserted offset. In sum, we discern no errors in the bankruptcy  
13 court decision to grant CIC's Administrative Rent Motion and  
14 deny debtor's Rent Offset Motion.

15 **E. The Order Denying Locricchio's Fee Application (BAP No. 10-  
16 1284)**

17 The UST filed a motion to dismiss Locricchio's appeal of  
18 the order denying his Fee Application on the ground that it was  
19 untimely. Citing In re Strand, 375 F.3d at 858, the motions  
20 panel denied the UST's motion on the grounds that the fee order  
21 was interlocutory, the appeal of which became timely by the  
22 July 13, 2010 order dismissing debtor's case

23 On appeal, the UST again raises the issue whether this  
24 court has jurisdiction over the appeal of the bankruptcy court's  
25 order denying Locricchio's Fee Application because it was  
26 untimely. The UST incorporates her arguments concerning lack of  
27 jurisdiction in her previously filed motion to dismiss and  
28 argues that the facts in In re Strand are distinguishable from

1 those in this case. In In re Strand, the court approved an  
2 initial fee application of \$22,012.50 but authorized payment of  
3 \$16,510. The attorney then filed a second, final fee request.  
4 The Ninth Circuit held it was proper for the bankruptcy court to  
5 adjust its first award when determining the final compensation  
6 amount. Id. at 858.

7 While we give deference to motions panel decisions made in  
8 the course of the same appeal, we have an independent duty to  
9 decide whether we have jurisdiction. Couch v. Telescope, Inc.,  
10 611 F.3d 629, 632 (9th Cir. 2010). In re Strand holds that  
11 orders determining interim compensation in an ongoing bankruptcy  
12 proceeding are generally considered interlocutory in nature.  
13 375 F.3d at 858. However, the interim nature of Locricchio's  
14 fee request was rendered final by the entry of the July 13,  
15 2010, order dismissing debtor's case. See Worldwide Church of  
16 God v. Phila. Church of God, Inc., 227 F.3d 1110, 1114 (9th Cir.  
17 2000) (noting that prior interlocutory orders are "merged into  
18 final judgment"); Munoz v. Small Bus. Admin., 644 F.2d 1361,  
19 1364 (9th Cir. 1981) (noting that "an appeal from the final  
20 judgment draws in question all earlier non-final orders and all  
21 rulings which produced the judgment"). Therefore, Locricchio's  
22 appeal was timely and we have jurisdiction to consider its  
23 merits.

24 Locricchio again incorporates the arguments made in all  
25 these appeals regarding the bankruptcy judge's bias against  
26 debtor. Locricchio also vaguely refers to a due process  
27 violation that he describes as an "ambush." According to  
28 Locricchio, the court stated in its tentative ruling that it

1 would not decide his Fee Application and then, at the hearing,  
2 the court changed its ruling and denied his fees. Locricchio  
3 contends that he should have been allowed to amend and add to  
4 his application.

5 The facts alleged by Locricchio do not constitute a due  
6 process violation. "The fundamental requisite of due process of  
7 law is the opportunity to be heard 'at a meaningful time and in  
8 a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333  
9 (1976). Our review of the record shows Locricchio had ample  
10 opportunity to amend and add to his application after the UST  
11 objected to it. The Fee Application was filed on February 4,  
12 2010 and the UST objected on February 25, 2010. Since the  
13 hearing was postponed until after the Recusal Motion was  
14 determined, Locricchio had over two months to amend his  
15 application before the hearing on May 24, 2010. Per the local  
16 bankruptcy rules, replies are due seven days before a hearing.  
17 As a consequence, Locricchio's reply was due before the  
18 bankruptcy court issued its tentative ruling. Furthermore,  
19 Locricchio had the opportunity to present oral argument at the  
20 hearing. Under these circumstances, the court gave Locricchio  
21 his full due process rights.

22 The legal standard to determine the allowance of fees  
23 involves statutory interpretation and construction of § 330(a).  
24 Ferrette & Slater v. U.S. Tr. (In re Garcia), 335 B.R. 717, 722  
25 (9th Cir. BAP 2005). Under § 330(a)(1), after notice and a  
26 hearing, the court may award an attorney employed under § 327:

27 (A) reasonable compensation for actual, necessary  
28 services rendered by the . . . attorney . . . ; and

1 (B) reimbursement for actual, necessary expenses.

2 Under § 330(a)(2), "the court may . . . award compensation that  
3 is less than the amount of compensation that is requested." In  
4 turn, § 330(a)(3) provides:

5 In determining the amount of reasonable compensation  
6 to be awarded, the court shall consider the nature,  
7 the extent, and the value of such services, taking  
8 into account all relevant factors, including-

- 9 (A) the time spent on such services;  
10 (B) the rates charged for such services;  
11 (C) whether the services were necessary to the  
12 administration of, or beneficial at the time at which  
13 the service was rendered toward the completion of, a  
14 case under this title;  
15 (D) whether the services were performed within a  
16 reasonable amount of time commensurate with the  
17 complexity, importance, and nature of the problem,  
18 issue, or task addressed; and  
19 (E) whether the compensation is reasonable based on  
20 the customary compensation charged by comparably  
21 skilled practitioners in cases other than cases under  
22 this title.

23 Finally, § 330(a)(4) provides that "the court shall not allow  
24 compensation for . . .(ii) services that were not -  
25 (I) reasonably likely to benefit the debtor's estate; or  
26 (II) necessary to the administration of the case."

27 The record shows that the court applied the correct legal  
28 standards when making its ruling. First, the record supports  
the court's factual finding that Locricchio's services did not  
benefit the estate. Locricchio missed a crucial deadline that  
caused debtor to lose the main asset of its estate.

Nonetheless, it is plainly evident from the record in these  
appeals that Locricchio seeks to blame everyone else for his  
misstep rather than accept responsibility.

Second, even under the most lenient standards, Locricchio's  
billing statements were woefully inadequate. He simply

1 describes his services as a two-hour "meeting with Jim Slemons"  
2 or a three hour "meeting re Reorganization Plan." Other time  
3 entries simply give the date, the amount of time, and the name  
4 of the document worked on. There simply was not enough detail  
5 for the court to determine whether the fees requested were  
6 reasonable.

7 Locricchio had the burden of proof to demonstrate  
8 entitlement to the requested fees, which includes providing the  
9 proper documentation for the time worked. Hensley v. Eckerhart,  
10 461 U.S. 424, 437 (1983). The record shows that Locricchio  
11 failed to meet his burden of proof. Accordingly, we discern no  
12 error with the court's decision to deny his fees in their  
13 entirety.

14 **F. The Order Granting the UST's Dismissal Motion (BAP No. 10-  
15 1284)**

16 Section 1112(b)(1) provides that a bankruptcy court shall  
17 convert or dismiss a case, whichever is in the best interests of  
18 creditors and the estate, if "cause" is established. The  
19 "substantial or continuing loss to or diminution of the estate  
20 and the absence of a reasonable likelihood of rehabilitation"  
21 constitute "cause" to dismiss a chapter 11 case.

22 § 1112(b)(4)(A).

23 Here, the UST moved to dismiss debtor's case due to its  
24 loss of the Lease. Debtor did not oppose the UST's motion in  
25 the bankruptcy court nor does it argue on appeal that the  
26 dismissal itself was improper. Debtor's only challenge to the  
27 order on appeal rests on its assertion that the court improperly  
28 retained jurisdiction to enforce its directive to debtor and

1 Locricchio to remit the estate's cash to CIC as partial  
2 satisfaction of its administrative rent claim.<sup>19</sup> A bankruptcy  
3 court has ancillary jurisdiction to enforce its own orders. Sea  
4 Hawk Seafoods, Inc. v. State of Alaska (In re Valdez Fisheries),  
5 439 F.3d 545, 549 (9th Cir. 2006).

6 Therefore, based on the record before us, we summarily  
7 affirm the court's decision to dismiss debtor's case.

8 **VI. CONCLUSION**

9 Having determined that there is no basis for reversal for  
10 any of the court's decisions, we AFFIRM each of the orders on  
11 appeal.

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27 <sup>19</sup> The order dismissing the case specifically stated that  
28 the court was retaining jurisdiction to enforce the payment of  
administrative rent.