

APR 30 2012

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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NOT FOR PUBLICATION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

5	In re:)	BAP Nos.	CC-11-1263-HKiMk
6	TV, LLC,)		CC-11-1264-HKiMk
)		(Related Cases)
7	Debtor.)	Bk. No.	11-14156
8)		
9	CITY OF EL MONTE; EL MONTE)		
10	COMMUNITY REDEVELOPMENT)		
	AGENCY,)		
11	Appellants,)		
12	v.)	M E M O R A N D U M ¹	
13	TV, LLC; JEFFER MANGELS BUTLER)		
14	& MITCHELL, LLP; LANDSBERG &)		
	ASSOCIATES,)		
15	Appellees.)		

Argued and Submitted on February 24, 2012
at Pasadena, California

Filed - April 30, 2012

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Sheri Bluebond, Bankruptcy Judge, Presiding.

Appearances: Howard Kollitz of Danning, Gill, Diamond & Kollitz, LLP, argued for Appellants City of El Monte and El Monte Community Redevelopment Agency; Thomas M. Geher argued for Appellee Jeffer Mangels Butler & Mitchell, LLP; and Ian Scott Landsberg argued for Appellees TV, LLC and Landsberg & Associates.

¹ 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 Before: HOLLOWELL, KIRSCHER, and MARKELL, Bankruptcy Judges.
2

3 The City of El Monte and El Monte Community Redevelopment
4 Agency (together, El Monte) appeal two orders of the bankruptcy
5 court that granted the debtor's applications to employ
6 professionals: (1) Landsberg & Associates, a Professional Law
7 Group (Landsberg) as general insolvency counsel (BAP No. CC-11-
8 1264-HKiMk); and, (2) Jeffer Mangels Butler & Mitchell, LLP
9 (Jeffer) as special litigation counsel (BAP No. CC-11-1263-
10 HKiMk). We DISMISS both appeals for lack of jurisdiction.

11 **I. FACTS**

12 TV, LLC (the Debtor) filed a chapter 11² bankruptcy petition
13 on January 31, 2011. The Debtor continued as debtor-in-
14 possession at all times relevant to this appeal.³ The Debtor's
15 bankruptcy case is a single asset real estate case consisting of
16 property in El Monte, California (Property).

17 On March 4, 2011, the Debtor filed an application to employ
18 Landsberg as general insolvency counsel (the Landsberg
19 Application). The Debtor sought approval of Landsberg
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21
22

23 ² Unless otherwise indicated, all chapter and section
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
25 All "Rule" references are to the Federal Rules of Bankruptcy
26 Procedure, Rules 1001-9037. Local Bankruptcy Rules for the
Central District of California are referred to as "LBR."

27 ³ We have taken judicial notice of the fact that a chapter
28 11 trustee was appointed by order entered June 9, 2011, and on
January 25, 2012, the Debtor's case was converted to chapter 7.

1 retroactively to February 22, 2011.⁴

2 The Landsberg Application set out the proposed scope of
3 Landsberg's representation in assisting the Debtor in all matters
4 concerning the administration of the bankruptcy case. It
5 provided the biographical information for the Landsberg
6 attorneys, the terms of the employment, including billing rates,
7 terms, and practices. It also included a verified statement that
8 Landsberg had no interest adverse to the Debtor and no prior
9 connection with the Debtor, the Debtor's insiders, creditors, or
10 other parties in interest.

11 Additionally, the Debtor requested that the bankruptcy court
12 allow Landsberg's fees and costs to be paid directly, on a
13 monthly basis by the Debtor's majority member, Cross Ocean
14 Holdings (USA), Inc. (Cross Ocean), as a gift on behalf of the
15 Debtor. And, to the extent that Cross Ocean did not, or could
16 not pay the fees and costs, the Debtor requested the fees and
17 costs be paid as an administrative expense of the estate.
18 Included with the Landsberg Application was the Debtor's request
19 that a \$25,000 retainer received from Cross Ocean be approved.
20 Landsberg stated that, for any fees sought from the estate, it
21 would apply to the bankruptcy court for compensation in
22 accordance with §§ 327, 328, 330 and 331.

23 At the time the Debtor filed bankruptcy, Jeffer was
24 assisting the Debtor with two pending disputes. First, the
25

26 ⁴ It is not clear from the record why the February 22 date
27 was proposed. The Debtor substituted its previous counsel, Mr.
28 Duran. An application for the employment of Mr. Duran was not
filed.

1 Debtor asserted that it held an equitable and beneficial interest
2 in the Property, even though the Property's title was held by
3 Dennis Leung (Leung), a former member of the Debtor. The Debtor
4 alleged that Leung was obligated under the terms of the Debtor's
5 operating agreement to contribute the Property to the Debtor but
6 failed to do so. The Debtor and Cross Ocean retained Jeffer in
7 connection with the dispute and filed, prepetition, a complaint
8 in California state court against Leung for breach of contract
9 and to quiet title to the Property in favor of the Debtor (the
10 Leung Action).

11 The second dispute concerned a major development project
12 surrounding the El Monte bus depot (the Project). The Debtor was
13 created to develop the Project with El Monte under a 2008
14 Disposition and Development Agreement (DDA). Sometime in 2010,
15 El Monte terminated the DDA with the Debtor. After filing
16 bankruptcy, in early March 2011, the Debtor filed a complaint in
17 California state court against El Monte for breach of contract
18 (the El Monte Action).

19 At the same time the Debtor filed the El Monte Action, it
20 filed an application to employ Jeffer as special litigation
21 counsel, retroactive to the petition date of January 31, 2011,
22 for the purpose of assisting the Debtor with ongoing litigation
23 in the Leung Action and to prosecute the El Monte Action (the
24 Jeffer Application).

25 The Jeffer Application set out the proposed scope of
26 Jeffer's representation, its billing rates, terms, and practices,
27 and biographical information of its attorneys. The Jeffer
28 Application also included a verified statement that Jeffer did

1 not hold or represent any interest adverse to the Debtor with
2 respect to the Leung Action or the El Monte Action.

3 Jeffer made several disclosures regarding its relationships
4 with the Debtor and Cross Ocean, as well as with some of the
5 Debtor's members that it represented in connection with the DDA,
6 the Leung Action, and in other general business and corporate
7 matters. Jeffer also disclosed that Cross Ocean was paying its
8 own fees and costs, as well as the fees and costs of the Debtor.

9 In the Jeffer Application, Jeffer requested that the
10 bankruptcy court approve the fees already incurred and paid by
11 Cross Ocean. It also requested that the bankruptcy court allow
12 Cross Ocean to continue paying Jeffer directly, on a monthly
13 basis for the Debtor's attorney's fees. To that end, Jeffer
14 disclosed the fees it received prepetition and postpetition for
15 services provided to the Debtor and to Cross Ocean. Jeffer
16 represented that Cross Ocean would pay the fees as a gift to the
17 Debtor and not seek reimbursement from the estate. However, to
18 the extent Cross Ocean did not pay the Debtor's fees and Jeffer
19 sought compensation from the estate, Jeffer stated it would apply
20 to the bankruptcy court for compensation in accordance with
21 §§ 327, 328, 330 and 331.

22 El Monte filed objections to the Landsberg Application and
23 the Jeffer Application. El Monte argued that: (1) neither
24 Landsberg nor Jeffer adequately disclosed all connections with
25 the Debtor, creditors, and parties in interest; (2) having
26 attorneys' fees paid by Cross Ocean created an improper conflict
27 of interest; (3) Jeffer did not provide informed consent waivers
28 from his former clients; and, (4) there were no grounds for

1 approving employment retroactively.

2 The bankruptcy court held a hearing on the Landsberg
3 Application and the Jeffer Application on April 27, 2010
4 (Application Hearing). At the Application Hearing, El Monte
5 pressed its main arguments that Landsberg, and particularly
6 Jeffer, failed to disclose all conflicts with creditors, and that
7 an adverse interest existed to disqualify both Landsberg and
8 Jeffer because Cross Ocean was paying the fees, not the Debtor.

9 The bankruptcy court sought clarification from Jeffer of the
10 fees already paid but otherwise overruled El Monte's objections
11 and granted the Jeffer Application. The bankruptcy court also
12 granted the Landsberg Application after it was satisfied that
13 Landsberg would adequately address any conflict with Cross Ocean
14 that could arise in the future.

15 The bankruptcy court entered an order granting the Jeffer
16 Application on May 11, 2011, and the Landsberg Application on
17 May 12, 2011 (together, the Employment Orders). The Employment
18 Orders granted the Landsberg Application and the Jeffer
19 Application in their entirety, approving all their terms,
20 including the direct monthly payments by Cross Ocean, and Cross
21 Ocean's payment of retainers and other fees. El Monte filed
22 timely notices of appeal.

23 After El Monte appealed, at the close of a hearing on
24 May 25, 2011, the bankruptcy court appointed a chapter 11 trustee
25 replacing the Debtor as debtor-in-possession. Landsberg
26 subsequently submitted two fee statements to the trustee setting
27 out the fees and costs incurred by the Debtor during February and
28 March 2011 (Fee Statements). The Fee Statements indicated that

1 Landsberg would draw against the retainer in its trust account
2 unless an objection was filed. Although El Monte received notice
3 of the Fee Statements, it did not file any objection to them.

4 On June 17, 2011, the Bankruptcy Appellate Panel (BAP) filed
5 orders requiring El Monte to explain how the Employment Orders
6 were final orders subject to appellate jurisdiction. El Monte
7 responded by arguing that the Employment Orders were final in
8 that they authorized the employment and compensation of Landsberg
9 and Jeffer without allowing any further supervision by the
10 bankruptcy court. The BAP granted El Monte's motions for leave
11 to appeal by orders issued on July 26, 2011, reserving for the
12 BAP's merits panel its own jurisdictional review regarding the
13 issue of finality.

14 II. ISSUES

15 Do we have jurisdiction over the appeal?

16 If so, did the bankruptcy court err in entering the
17 Employment Orders?

18 III. JURISDICTION

19 The bankruptcy court had jurisdiction under 28 U.S.C.
20 § 157(b)(2)(A), and § 1334(b). We address below our jurisdiction
21 under 28 U.S.C. § 158(a)(3).

22 IV. STANDARDS OF REVIEW

23 Questions of our own jurisdiction, such as whether an order
24 is final, may be raised sua sponte, and are reviewed de novo.
25 Silver Sage Partners, Ltd. v. City of Desert Hot Springs (In re
26 City of Desert Hot Springs), 339 F.3d 782, 787 (9th Cir. 2003);
27 Beverly v. Wolkowitz (In re Beverly), 374 B.R. 221, 230 (9th Cir.
28 BAP 2007). Whether a bankruptcy court's decision is final is a

1 question of law reviewed de novo. Id.

2 Orders on employment and disqualification of professionals
3 are reviewed for abuse of discretion. COM-1 Info, Inc. v.
4 Wolkowitz, (In re Maximus Computers, Inc.), 278 B.R. 189, 194
5 (9th Cir. BAP 2002). A bankruptcy court abuses its discretion if
6 it bases a decision on an incorrect legal rule, or if its
7 application of the law was illogical, implausible, or without
8 support in inferences that may be drawn from the facts in the
9 record. United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir.
10 2009) (en banc); Ellsworth v. Lifescape Med. Assocs., P.C. (In re
11 Ellsworth), 455 B.R. 904, 914 (9th Cir. BAP 2011).

12 V. DISCUSSION

13 A. Jurisdiction

14 1. Finality/Leave To Appeal

15 A bankruptcy court order may be considered final if it
16 "1) resolves and seriously affects substantive rights, and
17 2) finally determines the discrete issue to which it is
18 addressed." Dye v. Brown (In re AFI Holding, Inc.), 530 F.3d
19 832, 836 (9th Cir. 2008) (internal quotation marks and citations
20 omitted); see also SS Farms, LLC v. Sharp (In re SK Foods, L.P.),
21 - F.3d.- 2012 WL 400421 *3 (9th Cir. Feb. 9, 2012). The Ninth
22 Circuit recognized that even under the "flexible" standard for
23 bankruptcy appeals, orders denying or granting employment are
24 interlocutory. Howser v. U.S. Trustee (In re Howser), 2010 WL
25 610278 *3 (E.D. Wash. Feb. 17, 2010) (citations omitted); Sec.
26 Pac. Bank Wash. v. Steinberg (In re Westwood Shake & Shingle,
27 Inc.), 971 F.2d 387, 389 (9th Cir. 1992).

28 Here, the BAP motions panel determined that leave to appeal

1 was appropriate. 28 U.S.C. § 158(a); Rule 8003(c) (authorizing
2 the Panel to grant leave to appeal an interlocutory order).
3 However, we are not bound by that determination. See Order
4 Granting Leave to Appeal; Universal Life Church, Inc. v. United
5 States (In re Universal Life Church, Inc.), 128 F.3d 1294, 1300
6 n.7 (9th Cir. 1997) ("While we give deference to motions panel
7 decisions made in the course of the same appeal, we have an
8 independent duty to decide whether we have jurisdiction.");
9 Gschwend v. Markus (In re Markus), 268 B.R. 556, 565 (9th Cir.
10 BAP 2001) aff'd in part, rev'd in part, 313 F.3d 1146 (2002)
11 ("[R]ulings on appellate motions, while entitled to deference, do
12 not bind merits panels.").

13 Granting leave to appeal an interlocutory order is
14 appropriate when the order involves a controlling question of law
15 as to which there is substantial ground for difference of opinion
16 and when the appeal is in the interest of judicial economy
17 because an immediate appeal may materially advance the ultimate
18 termination of the litigation. Travers v. Draque (In re
19 Travers), 202 B.R. 624, 626 (9th Cir. BAP 1996); In re Roderick
20 Timber Co., 185 B.R. 601, 604 (9th Cir. BAP 1995); see also In re
21 Howser, 2010 WL 610278 at *4. El Monte's argument for leave to
22 appeal was based on its contention that the bankruptcy court's
23 approval of the Landsberg Application and the Jeffer Application
24 allowed the Debtor to evade any further bankruptcy court scrutiny
25 regarding attorneys' fees. But it is not clear that is the case.

26 According to the Landsberg Application and the Jeffer
27 Application, Cross Ocean's payment of the fees was a "gift" to
28 the estate. Gifts are generally considered to be property of the

1 estate.⁵ Orders authorizing employment of professionals and fees
2 paid from property of the estate may be reviewed by the
3 bankruptcy court at any time. See In re Kings River Resorts,
4 Inc., 342 B.R. 76, 84 (Bankr. E.D. Cal. 2006). Section 328(a)
5 allows the bankruptcy court to "pre-approve" reasonable terms and
6 conditions of employment and compensation of a professional when
7 it approves his employment. Circle K Corp. v. Houlihan, Lokey,
8 Howard & Zukin, Inc. (In re Circle K Corp.), 279 F.3d 669, 671
9 (9th Cir. 2002). However, the bankruptcy court has the ability
10 to later depart from the approved terms if it proves to have been
11 improvident in light of unanticipated developments.⁶ Id.; In re
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13 ⁵ State law governs whether the funds paid by Cross Ocean to
14 Landsberg and Jeffer were gifts to the Debtor, which formed part
15 of its estate. See In re Blixseth 2011 WL 3503155 *3 (Bankr. D.
16 Mont. Aug. 10, 2011); see also Butner v. United States, 440 U.S.
17 48, 55 (1979) (determination of property rights in assets is left
18 to state law).

19 In California, a gift requires "(1) competency of the donor
20 to contract; (2) a voluntary intent on the part of the donor to
21 make a gift; (3) delivery . . . (4) acceptance . . . ;
22 (5) complete divestment of all control by the donor; and (6) lack
23 of consideration for the gift." Burkle v. Burkle, 141
24 Cal.App.4th 1029, 1036 n.5 (Cal. Ct. App. 2006) (internal
25 quotations omitted). The Landsberg Application and the Jeffer
26 Application both stated that Cross Ocean intended to make a gift
27 to the Debtor for the payment of their attorneys' fees.

28 ⁶ An employment application must specify whether it seeks
approval of fees under § 328 or § 330. In re Circle K Corp.,
279 F.3d 669; LBR 2014-1(b)(1)(A). In the absence of pre-
approval under § 328, fees are reviewed at the conclusion of the
proceeding under the reasonableness standard of § 330(a)(1).

However, LBR 2014-1(c)(1) provides that "[i]f the court
approves the terms of a professional's employment, including a
fee based on an hourly rate, fixed or percentage fee, contingency
(continued...)

1 Cal. Farm Supply Co., 110 B.R. 461, 465 (Bankr. E.D. Cal. 1989)
2 ("The bankruptcy court has substantial discretion in altering fee
3 agreements when the circumstances warrant."). Consequently, the
4 bankruptcy court had continued oversight of Landsberg's and
5 Jeffer's employment and payment arrangements.

6 Accordingly, leave to appeal the Employment Orders is not
7 necessary because, contrary to El Monte's contention, the matter
8 can still be addressed by the bankruptcy court. See Sec. Pac.
9 Bank Wash., 971 F.2d at 930. There is no unique issue of law,
10 nor is judicial economy promoted by permitting the appeals to go
11 forward. Therefore, we dismiss the appeals because the standards
12 for granting leave to appeal have not been met.

13 2. Mootness

14 Landsberg contends that these appeals are moot because a
15 chapter 11 trustee has now been appointed to protect the estate's
16 interests. However, because we have already determined that we
17 lack jurisdiction over the appeals as interlocutory, we do not
18 need to reach the question of whether the appeals are also moot.

19 B. Merits

20 Because we do not have jurisdiction of the appeals, we do
21 not reach the merits of El Monte's arguments on appeal.

22 **VI. CONCLUSION**

23 We DISMISS the appeals for lack of jurisdiction.
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26 ⁶(...continued)
27 or success fee, or a combination thereof, the court will not
28 reconsider such terms of employment at a subsequent time except
as provided in 11 U.S.C. 328(a)."