

Mar 5 2014

NOT FOR PUBLICATION

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. CC-13-1333-PaTaKu
)
 ALAMEDA INVESTMENTS, LLC,) Bankr. No. 09-10348-PC
)
 Debtor.)
 _____)
)
 PHOENIX, LLC,)
)
 Appellant,)
)
 v.) **M E M O R A N D U M**¹
)
 THE ALAMEDA LIQUIDATING TRUST;)
 AKT INVESTMENTS, INC.,)
)
 Appellees.)
 _____)

Argued and Submitted on February 20, 2014
at Pasadena, California

Filed - March 5, 2014

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

Honorable Peter H. Carroll, Chief Bankruptcy Judge, Presiding

Appearances: Chris D. Kuhner of Kornfield, Nyberg, Bendes &
 Kuhner, PC, argued for appellant Phoenix, LLC;
 Aaron B. Bloom argued for appellee Alameda
 Liquidating Trust.

Before: PAPPAS, TAYLOR and KURTZ, Bankruptcy Judges.

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 Appellant Phoenix, LLC ("Phoenix") appeals the order of the
2 bankruptcy court determining that appellee, the Alameda
3 Liquidating Trust ("the Trust"), succeeded to the entire interest
4 in West Lakeside, LLC ("West Lakeside") held by chapter 11²
5 debtor Alameda Investments, Inc. ("Debtor"), and that the Trust
6 enjoys the same Alameda membership interest in West Lakeside as
7 Debtor had prior to bankruptcy. We AFFIRM the bankruptcy court's
8 order.

9 **FACTS**

10 The Woodside Group, LLC ("Woodside") and its affiliates,
11 including Debtor, collectively formed one of the largest
12 privately held homebuilders in the United States. Together and
13 with its subsidiaries, Woodside engaged in homebuilding
14 operations in eight states. Woodside used Debtor as a "land
15 bank" to purchase, hold, and secure title to land that would then
16 be transferred to another subsidiary for development.

17 Debtor and Phoenix each owned a 50 percent membership
18 interest in West Lakeside, a California LLC; AKT Development Co.
19 ("AKT"), an entity apparently related to Phoenix,³ was the
20 manager of West Lakeside.

21
22 ² Unless otherwise indicated, all chapter and section
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
24 "Rule" references are to the Federal Rules of Bankruptcy
25 Procedure. All "Civil Rule" references are to the Federal Rules
of Civil Procedure.

26 ³ Angelo K. Tsakopoulos is the manager and owner of AKT,
27 and the manager and controlling member of Phoenix (58.4% of
28 Phoenix membership interests owned by Tsakopoulos or his
controlled family trust).

1 In May of 2003, Debtor, Phoenix, and AKT executed an
2 "Operating Agreement" for West Lakeside, an LLC created to
3 facilitate development of a 133-acre tract of land in Sacramento
4 County, California. Of note for this appeal is ¶ 16.1.1 of the
5 Operating Agreement, entitled "Prohibition Against Transfer,"
6 which states in part:

7 Basic Prohibitions. Alameda has entered into this
8 Agreement because of the trust and confidence it places
9 in Angelo K. Tsakopoulos, the sole owner of AKT, and
10 AKT and Phoenix have entered into this Agreement
11 because of the trust and confidence they place in
12 Alameda and its affiliates. . . . In light of the
13 parties' reliance on the continuing interests of the
14 other Members . . . none of the following sales,
15 transfers, assignments or hypothecations (individually
16 and jointly, a "Transfer"), shall be permitted without
17 the prior written approval of a Majority of the
18 Members, and any such attempted Transfer shall be void
19 and ineffectual: (i) a Transfer, directly or
20 indirectly, for consideration or gratuitously, by a
21 Member or its successors or assigns, of all or any
22 portion of its Member Interest or Economic Interest;
23 (ii) a Transfer of beneficial interest of a Member to
24 any other individual or entity other than its
25 constituent owners as of the date of the execution of
26 this Agreement; or (iii) a Transfer which results in a
27 change in the "Principal Owner" of the Member or Member
28 Group, as applicable.

19 Article XXI of the Operating Agreement also provides two
20 pertinent definitions:

21 "Economic Interest" shall mean the right to receive
22 distributions of the company's assets and all
23 allocations of income, gain, loss, deduction, credit
24 and similar items from the Company pursuant to this
25 Agreement and the Act, but shall not include any other
26 rights of a Member, including, without limitation, the
27 right to vote or participate in the management, or,
28 except as provided in Section 17106 of the Corporations
Code, any right to information concerning the business
and affairs of the Company.

"Member Interest" means a Member's entire interest in
the Company, including the Member's Economic Interest,
the right to vote on or participate in the management,
and the right to receive information concerning the

1 business and affairs of the Company.

2 Involuntary chapter 11 petitions were filed against Woodside
3 and 184 of its affiliates, not including Debtor, on August 20,
4 2008. Orders for relief were entered in those cases
5 on September 16, 2008. In re Woodside Group, LLC, et al., case
6 no. 08-20682. Debtor, in turn, filed a voluntary chapter 11
7 petition on January 9, 2009. On January 16, 2009, the bankruptcy
8 court ordered that Debtor's bankruptcy case be jointly
9 administered with the cases of Woodside and its affiliated
10 debtors.

11 On November 25, 2009, the bankruptcy court confirmed the
12 Second Amended Joint Plan of Reorganization of Woodside Group,
13 LLC and Affiliated Debtors (the "Plan"). Debtor and its assets
14 were dealt with in the Plan, which became effective at the close
15 of business on December 31, 2009.

16 The Plan established the Trust in Plan § 6.3.1. The primary
17 purpose of the Trust is "liquidating and distributing [Debtor's]
18 assets," according to the Plan. The assets to be transferred to
19 the Trust are generally described in Plan § 6.3.2:

20 Except as specifically set forth in the Plan, all of
21 [Debtor's] right, title and interest in and to the
22 Alameda Trust Assets shall be, and shall be deemed to
23 be, irrevocably transferred, absolutely assigned,
conveyed, set over and delivered to the [Trust], in
trust to and in trust for the Alameda Trust
Beneficiaries[.]

24 The "Alameda Trust Assets" are defined at Plan § 1.22 to include:
25 "All assets of Alameda and its Estate of any kind, except the
26 claims being assigned to the Reorganizing Debtors[.]" The
27 Alameda Trust Beneficiaries are defined in Plan § 1.23 to include
28 the holders of claims against Alameda, but not the other

1 affiliated debtors.

2 From 2009 through mid-2011, the Trust and Hugh Scheffy, the
3 Liquidating Trustee, apparently were involved in the management
4 of West Lakeside. According to the declaration of the
5 Liquidating Trustee, he continued to receive operating reports
6 concerning West Lakeside until June 2011, and participated in
7 discussions with the manager of West Lakeside, AKT, regarding the
8 settlement strategy of a pending lawsuit. Natomas Unified School
9 Dist. v. Steiner, Sacramento Super. Ct. Case no. 34-2009-00058030
10 (the "NUSD Lawsuit"). The Liquidating Trustee, however, alleges
11 that, beginning in November 2011, AKT, as manager of West
12 Lakeside, started to question whether the Trust had voting rights
13 in West Lakeside, or was instead the holder of only an economic
14 interest. Eventually, West Lakeside and AKT ceased to provide
15 operating reports to the Liquidating Trustee or to involve the
16 Trust in management of its operations.

17 On June 5, 2013, the Trust filed a Motion for Order
18 Determining that Membership Interest in West Lakeside LLC was
19 Unaffected by Plan in the bankruptcy court. In it, the Trust
20 argued that the Plan transferred Debtor's Membership Interest in
21 West Lakeside to the Trust. AKT responded to this motion,
22 asserting that, in the absence of an express court order,
23 Debtor's Membership Interest could not be transferred to the
24 Trust without the consent of a majority of members of West
25 Lakeside, so that neither the plan, nor the bankruptcy court's
26 Confirmation Order, could effectively transfer Debtor's
27 Membership Interest to the Trust. Phoenix also filed a response
28 to the motion, essentially repeating the same arguments as AKT.

1 The Trust replied to both responses on June 5, 2013,
2 repeating its earlier arguments, disputing the allegations of AKT
3 and Phoenix, and suggesting that it would be prejudiced if it was
4 stripped of its voting rights and other non-economic rights in
5 West Lakeside.

6 The bankruptcy court heard extensive argument regarding the
7 motion and thereafter entered a Memorandum Decision on June 25,
8 2013. In it, the court ruled that: (1) the Operating Agreement
9 was not an executory contract; (2) all interests of Debtor in
10 West Lakeside were transferred to the Trust through confirmation
11 of the plan; (3) § 541(c)(1)(A) prevented the enforcement of any
12 anti-assignment provisions of the Operating Agreement or Cal.
13 Corp. Code § 17301(a)(1); (4) the Liquidating Trust is a
14 representative of the bankruptcy estate within the meaning of
15 § 1123(b)(3)(B); and (5) therefore, the Trust enjoyed the same
16 Membership Interest in West Lakeside that Debtor had prior to
17 filing its bankruptcy petition.

18 The bankruptcy court entered an order granting the relief
19 requested in the Trust's motion on July 3, 2013. Phoenix filed a
20 timely appeal.

21 JURISDICTION

22 The bankruptcy court had jurisdiction under 28 U.S.C.
23 §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C.
24 § 158.

25 ISSUE

26 Whether the bankruptcy court erred in determining that the
27 Trust succeeded to all of Debtor's interest in West Lakeside.

1 provides:

2 Effect of Confirmation Order. The Confirmation Order
3 shall constitute an order of the Bankruptcy Court:
4 (i) approving, as of the Effective Date, the assumption
5 or rejection by the Reorganized Debtors, Liberty or
6 Alameda, as the case may be, pursuant to
7 Sections 365(a) and 1123(b)(2) of the Bankruptcy Code,
8 all of executory contracts and unexpired leases
9 identified under this Article 8 of the Plan; and
10 (ii) that any provisions of a limited liability company
11 agreement or operating agreement of a limited liability
12 company or similar entity which purports to restrict
13 the transfer of an economic interest in such entity to
14 one of its members which is one of the Debtors herein,
15 or its assignee, is invalidated as an "ipso facto"
16 clause under Section 365(e) of the Bankruptcy Code, to
17 the extent that Section 365 applies.

18 Phoenix notes that Paragraph (F)(3) of the Confirmation Order
19 uses identical wording to describe the effect of plan
20 confirmation on Debtor's executory contracts or unexpired leases.

21 Based upon these provisions in the Operating Agreement,
22 Plan, and Confirmation Order, Phoenix reasons: "Since the plan
23 and the Confirmation Order invalidated the Operating Agreement
24 only with respect to the otherwise prohibited transfer of the
25 economic interest, and both documents are completely silent as to
26 the Membership Interest, it must follow that any purported
27 transfer of the Membership Interest was and remains prohibited,
28 void and of no force or effect." Phoenix Op. Br. at 4.

29 In response to Phoenix's argument that Plan § 8.4 expressly
30 limited the transfer to the Trust of the economic interest of the
31 estate in West Lakeside, the bankruptcy court stated:

32 [B]y their respective terms, Section 8.4 and paragraph
33 (F)(3) of the Confirmation Order deal specifically and
34 exclusively with executory contracts and unexpired
35 leases. Having determined that the Operating Agreement
36 is not an executory contract, the court finds
37 Section 8.4 of the Plan and paragraph (F)(3) of the
38 Confirmation Order inapplicable to the Operating

1 Agreement.

2 Memorandum Decision at 9. In our view, the bankruptcy court's
3 analysis is sound and clearly supported by the record and case
4 law. In its Memorandum Decision, the court concluded that the
5 Operating Agreement was not an executory contract. Phoenix has
6 not appealed that conclusion. Plan § 8.4 is part of Article VIII
7 of the Plan, headed "Executory Contracts and Unexpired Leases."
8 Not surprisingly, it directly references § 365, which defines the
9 rights and obligations of parties solely with respect to a
10 debtor's executory contracts and unexpired leases.⁴ Therefore,
11 because § 8.4 of the Plan deals only with executory contracts,
12 and since the Operating Agreement is not an executory contract,
13 § 8.4 does not support Phoenix's argument.

14 A chapter 11 plan is a contract, and courts look to state
15 law rules of contract interpretation to determine its meaning.
16 Dolven v. Bartleson (In re Bartleson), 253 B.R. 75, 84 (9th Cir.
17 BAP 2000) (holding that the law of the state in which the plan
18 was confirmed governs its interpretation.). This plan was
19 confirmed in California, which has a comprehensive system of
20 statutory and case law relating to contract interpretation.
21 According to Cal. Corp. Code § 1641, "Effect [is] to be given to
22 every part of contract." The California Supreme Court has

23
24 ⁴ "Notwithstanding a provision in an executory contract or
25 unexpired lease, or in applicable law, an executory contract or
26 unexpired lease of the debtor may not be terminated or modified,
27 and any right or obligation under such contract or lease may not
28 be terminated or modified, at any time after the commencement of
the case solely because of a provision in such contract or
lease[.]" § 365(e)(1). Section 365 exclusively addresses
executory contracts and unexpired leases.

1 interpreted this statute "to disfavor constructions of
2 contractual provisions that would render other provisions
3 surplusage." Boghos v. Certain Underwriters of Lloyds of London,
4 36 Cal.4th 495, 503 (2005).

5 Phoenix's construction of Plan § 8.4 ignores the context of
6 Article VIII, which only addresses executory contracts and
7 unexpired leases. Phoenix's approach also renders meaningless
8 the plan's explicit reference to § 365 in Plan § 8.4.

9 Cal. Civ. Code § 1641 must be read in conjunction with Cal.
10 Code Civ. Proc. § 1858 (where there are several provisions or
11 particulars in a legal instrument, such a construction is, if
12 possible, to be adopted as will give effect to all). Phoenix's
13 analysis completely ignores Plan § 6.3.2, which provides:

14 [All] of Alameda's right, title and interest in and to
15 the Alameda Trust Assets, shall be, and shall be deemed
16 to be, irrevocably transferred, absolutely assigned,
17 conveyed, set over and delivered to the Alameda
18 Liquidating Trust, in trust to and in trust for the
benefit of the Alameda Trust Beneficiaries for the uses
and purposes stated herein and in the Alameda
Liquidating Trust Agreement.

19 Precisely the same words are used in Paragraph (C) of the
20 Confirmation Order.

21 Cal. Civ. Code § 1644 provides that "The words of a contract
22 are to be to be understood in their ordinary and popular
23 sense[.]" S. Pac. Transportation Co. v. Santa Fe Pac. Pipelines,
24 Inc., 74 Cal.App.4th 1232, 1238 (1999). Phoenix's argument is
25 inconsistent with Cal. Civ. Code § 1644 because it ignores the
26 plain meaning of Plan § 8.4, that it only applies to executory
27 contracts and unexpired leases.

28 Cal. Civ. Code § 1650 provides that specific provisions in

1 an agreement prevail over general provisions that are
2 inconsistent with it. Jackson v. Donovan, 215 Cal.App.2d 685,
3 688 (1963). Plan § 8.4 relates to all of the hundreds of
4 executory contracts engaged in by Woodside and its affiliates.
5 Plan § 6.3.2, on the other hand, specifically deals with the
6 interests of the Trust. Plan § 6.3.2 prevails over Plan § 8.4.

7 For all these reasons, we conclude that the bankruptcy court
8 did not abuse its discretion in ruling that Plan § 8.4 did not
9 limit the Trust's interest in West Lakeside to an economic
10 interest, nor did it abuse its discretion in applying its
11 analysis of § 8.4 to the identical wording in ¶ F(3) of the
12 Confirmation Order.

13 **II.**

14 **The bankruptcy court did not err in ruling that assignment**
15 **of the estate's interests in Alameda to the Liquidating**
16 **Trust was not a transfer to a third party, but rather an**
assignment to a representative of the estate.

17 After concluding that the plan provisions and Confirmation
18 Order concerning § 365 were inapplicable, the bankruptcy court
19 turned to § 541(c), asking whether the plan's transfer to the
20 Trust of the bankruptcy estate's interest in West Lakeside failed
21 because it violated the Operating Agreement and the provisions of
22 Cal. Corp. Code 17301(a).⁵

24 ⁵ "Membership Interests; economic interests, assignments,
25 vote; rights and liabilities of assignees; duties and liabilities
26 of assignors. (A) Except as provided in the articles of
27 organization or the operating agreement: (1) a membership
28 interest or an economic interest is assignable in whole or in
part, provided, however, that no membership interest may be

(continued...)

1 The parties do not dispute that certain tenets of bankruptcy
2 law apply to this case. First, they acknowledge that, under
3 § 541(a)(1), the filing of a bankruptcy petition creates an
4 estate, comprised of "all legal or equitable interests of the
5 debtor in property as of the commencement of the case." In other
6 words, Debtor's interests in West Lakeside became property of its
7 bankruptcy estate when it commenced its case.

8 Second, the parties agree that § 541(c)(1),⁶ in turn,
9 enables the bankruptcy estate to take a debtor's assets free and
10 clear of prepetition contractual or statutory restrictions on
11 transfer. Fursman v. Ulrich (In re First Protection, Inc.),
12 440 B.R. 821, 830 (9th Cir. BAP 2010). Indeed, at oral argument
13 before the Panel, counsel for Phoenix conceded that, through the
14 operation of § 541(c)(1), all of Debtor's prebankruptcy rights in
15 West Lakeside, both management and economic, became part of the
16 Debtor's bankruptcy estate upon the filing of the bankruptcy
17 petition, without regard to any restrictions on transfer of the
18 interests under either the Operating Agreement or state law.

19 While Debtor's interest in West Lakeside came into the
20

21 ⁵(...continued)
22 assigned without the consent of a majority in interest of the
23 members not transferring their interests, as required by
24 Section 17303." Cal. Corp. Code 17301 (2003).

25 ⁶ "Property of the estate. . . . (c) (1) Except as provided
26 in paragraph (2) of this subsection, an interest of the debtor in
27 property becomes property of the estate under subsection (a)(1),
28 (a)(2), or (a)(5) of this section notwithstanding any provision
in an agreement, transfer instrument, or applicable nonbankruptcy
law – (A) that restricts or conditions transfer of such interest
by the debtor[.]" § 541(c)(1)(A).

1 bankruptcy estate without limitations, Phoenix disputes whether
2 the bankruptcy estate could transfer that asset to a third party
3 unencumbered by the prepetition restrictions. In short,
4 Phoenix's basic position is that, while § 541(c)(1) avoids
5 transfer restrictions on Debtor's LLC interest from impacting the
6 bankruptcy estate, those restrictions continue to be effective
7 concerning transfer of the estate's interest to any third
8 parties.

9 The bankruptcy court determined that neither the Operating
10 Agreement's prohibition on transfer to a third party nor the
11 state law was implicated in this case because the transfer of
12 Debtor's interest in West Lakeside was not to a third party, but
13 to an extension of the estate. The bankruptcy court ended its
14 Memorandum Decision by concluding that:

15 Even if the court were to find that either the
16 Operating Agreement or [Cal. Corp. Code] § 17301(a)
17 restricted the transfer of Alameda's interest in West
18 Lakeside to a third party, the Alameda Liquidating
19 Trust is not a third party. See Motor Vehicle Cas. Co.
20 v. Thorp Insulation Co. (In re Thorp Insulation Co.),
677 F.3d 869, 890 (holding that the creation of a trust
under a confirmed plan for the purposes of resolving
certain asbestos-related claims was not a transfer to a
third party in violation of contractual anti-assignment
clauses in insurance contracts).

21 Memorandum Decision at 10. We agree with the bankruptcy court
22 that the Operating Agreement and state law were not violated in
23 this case.

24 As the bankruptcy court recognized, the Code provides two
25 means by which a bankruptcy estate continues to be represented
26 after a chapter 11 plan is confirmed; the estate would ordinarily

1 terminate. First, as is important here, § 1123(b)(3)(B)⁷
2 provides a mechanism for a liquidating trustee to serve as a
3 representative of the estate.

4 The Ninth Circuit recognized that a liquidating trustee may
5 be appointed under § 1123(b)(3)(B), and that its duties are as
6 specified in the plan. Liquidation Est. of DeLaurentiis Entm't
7 Grp., Inc. v. Technicolor, Inc. (In re DeLaurentiis Entm't Grp.,
8 Inc.), 87 F.3d 1061, 1063 (9th Cir. 1996). Indeed, in a somewhat
9 different context, the Ninth Circuit has described a liquidating
10 trustee appointed by the court under a confirmed plan as the
11 "functional equivalent" of a chapter 11 trustee, and a continuing
12 representative of the bankruptcy estate:

13 "[C]ourt appointed officers who represent the estate
14 are the functional equivalent of a trustee." [Allard
15 v. Weitzman (In re Delorean Motor Co.), 991 F.2d 1236,
16 1251(6th Cir. 1993)]. Here, as part of a liquidating
17 Chapter 11 reorganization proceeding, the bankruptcy
18 court chose the mechanism of a liquidating trust to
19 liquidate and distribute the assets of the estate. The
20 bankruptcy court retained jurisdiction over the case.
21 In this context, the Liquidating Trustee is the
22 "functional equivalent" of the bankruptcy trustee[.]

19 Beck v. Ft. James Corp. (In re Crown Advantage, Inc.), 421 F.3d
20 963, 973 (9th Cir. 2005); see also, Starzynski v. Sequoia Forest
21 Indus., 72 F.3d 816, 820 (10th Cir. 1995) (noting that a
22 liquidating trustee may be appointed under § 1123(b)(3)(B) to
23 "retain and enforce any claim or interest belonging to the debtor
24

25 ⁷ "(b) Subject to subsection (a) of this section, a plan
26 may- . . . (3) provide for- . . . (B) the retention and
27 enforcement by the debtor, by the trustee, or by a representative
28 of the estate appointed for such purpose, of any such claim or
interest. § 1123(b)(3)(B) (emphasis added).

1 or the estate."); Alary Corp. v. Sims (In re Assoc. Vintage
2 Grp.), 283 B.R. 549, 560 (9th Cir. BAP. 2002) (explaining that "a
3 plan may provide for the retention and enforcement, by a trustee
4 or specially-appointed representative, of a claim belonging to
5 the estate. 11 U.S.C. § 1123(b)(3)(B)."). In this case, through
6 the confirmed plan, the Trust, acting through a liquidating
7 trustee, is vested with authority under § 1123(b)(3)(B):

8 On the Effective Date, the Alameda Liquidating Trustee
9 shall be a representative of the Alameda Estate within
10 the meaning of § 1123(b)(3)(B) of the Bankruptcy Code
11 and shall have the rights and powers provided for in
the Bankruptcy Code in addition to any rights and
powers granted in the Alameda Liquidating Trust
Agreement and herein.

12 Confirmed Plan, ¶ 6.3.1(d)⁸

13 The bankruptcy court also analogized the provisions of the
14 confirmed plan in this case creating a liquidating trust to a

15
16 ⁸ The rights and powers granted to the Liquidating Trustee
17 by the Confirmed Plan at § 6.3.1 are listed in the Liquidating
18 Trust Agreement, including: "[T]he Liquidating Trustee shall have
19 the authority, power and obligation, in his capacity as
20 Liquidating Trustee or as Estate Representative, as applicable,
hereto [which includes West Lakeside], and exercise all rights as
21 a member of the LLCs. . . . (c) exercise rights of a
22 [chapter 11] trustee under Sections 704 and 1106." Liquidating
23 Trust Agreement at 3.2 (emphasis added). At oral argument,
24 counsel for Phoenix was asked why it had not objected to the plan
25 or provisions for a liquidating trust. Counsel replied that
26 Phoenix was not involved in the case at that point. But
27 Phoenix's position is disingenuous. Although Phoenix may not
28 have formally entered the bankruptcy case until after the plan
was confirmed, AKT, the manager of West Lakeside, owned and
controlled by the same person who controlled Phoenix, was
involved in the chapter 11 case and received notice of the
disclosure statement, Plan and Liquidating Trust Agreement and
did not raise any objection to them.

1 trust created for the benefit of creditors to assume the
2 liabilities of a debtor which at the time of entry of the order
3 for relief has been named as a defendant in claims related to
4 asbestos under § 524(g)⁹. The bankruptcy court found that
5 §§ 1123(b)(3)(B) and 524(g) were close cousins,¹⁰ and therefore,
6 case law holding that a § 523(g) trust was not a third party for
7 purposes of the enforcement of anti-assignment clauses was
8 persuasive. In particular, the bankruptcy court quoted from the
9 Ninth Circuit's decision In re Thorpe Insulation Co., in which

10
11 ⁹ "After notice and hearing, a court that enters an order
12 confirming a plan of reorganization under chapter 11 may issue,
13 in connection with such order, an injunction in accordance with
14 this subsection to supplement the injunctive effect of a
15 discharge under this section. . . . (2)(B) The requirements of
16 this subparagraph are that- (i) the injunction is to be
17 implemented in connection with a trust that, pursuant to the plan
18 of reorganization- (I) is to assume the liabilities of a debtor
19 which at the time of entry of the order for relief has been named
20 as a defendant in personal injury, wrongful death, or
21 property-damage actions seeking recovery for damages allegedly
22 caused by the presence of, or exposure to, asbestos or
23 asbestos-containing products[.]"
24 § 524(g).

25 ¹⁰ Another recent case suggests that §§ 1123(b)(3)(B) and
26 524(g) may be closer than cousins and can actually be used in
27 tandem. In In re Plan Insulation Co., 2012 Bankr. LEXIS 1716
28 (Bankr. N.D. Cal. March 16, 2012), the bankruptcy court confirmed
a plan that included an asbestos trust under § 524(g). To avoid
certain complex anti-assignment provisions for pursuing
litigation, the court also appointed the asbestos trust as a
liquidating trust under § 1123(b)(3)(B) "as estate
representative. . . for purposes of pursuing" the litigation.
Id. at * 14-15. See also In re W. Asbestos Co., 313 B.R. 456,
461 (Bankr. N.D. Cal. 2004) (confirming a plan with a § 524(g)
trust, and noting that pursuant to § 1123(b)(3)(B), the asbestos
trust could pursue litigation as a "representative of the
estate").

1 the court examined the status of a § 524(g) liquidating trust:

2 Here, however, the trust is not a third party. The
3 order confirming the plan provides that the trust is
4 appointed as the estate's representative. The trust is
5 part of the debtor's estate. Instead of attempting to
6 sell or assign anything to third parties, the debtor
7 was attempting to transfer its rights and property to
8 the trust [as] part of the estate.

9 Memorandum Decision at 18, quoting 677 F.3d at 890(emphasis
10 added).

11 We think the bankruptcy court correctly concluded that the
12 Operating Agreement and state law were not violated by the
13 transfer of Debtor's interests in West Lakeside to the Trust. At
14 bottom, there was no transfer out of the estate to a third party;
15 rather, under § 1123(b)(3)(B), the Trust was merely a
16 representative of the estate concerning enforcement of Debtor's
17 interest in West Lakeside.

18 **CONCLUSION**

19 We AFFIRM the order of the bankruptcy court.
20
21
22
23
24
25
26
27
28