

DEC 21 2017

SUSAN M. SPRAUL, CLERK  
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NOT FOR PUBLICATION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. NV-16-1304-LTiF )  
) )  
NEVADA FIRE SAFE COUNCIL, ) Bk. No. 3:12-bk-52625-BTB )  
NON-PROFIT CORPORATION, ) )  
) )  
Debtor. ) )

CROSS CHECK SERVICES, LLC, )  
) )  
Appellant, ) )

v. )

MEMORANDUM\*

ALLEN M. DUTRA, Chapter 7 )  
Trustee; NEVADA FIRE SAFE )  
COUNCIL, NON-PROFIT )  
CORPORATION; LAKE TAHOE FIRE )  
PROTECTION DISTRICT; TAHOE )  
DOUGLAS FIRE PROTECTION )  
DISTRICT; MEEKS BAY FIRE )  
PROTECTION DISTRICT; LAKE )  
VALLEY FIRE PROTECTION )  
DISTRICT; NORTH TAHOE FIRE )  
PROTECTION DISTRICT; FRANK )  
CODY; U.S. DEPARTMENT OF )  
JUSTICE, )  
) )  
Appellees. ) )

Argued and Submitted on December 1, 2017  
at Reno, Nevada

Filed - December 21, 2017

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

Honorable Bruce T. Beesley, Bankruptcy Judge, Presiding

\*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 8024-1.



1 not fair and equitable because it violated the Bankruptcy Code's  
2 priority scheme. The bankruptcy court overruled Appellant's  
3 objection and approved the settlement, finding that it was fair  
4 and in the best interests of all creditors. We AFFIRM.

5 **FACTS**

6 Nevada Fire Safe Council ("Fire Safe") is a 26 U.S.C.  
7 § 501(c)(3) nonprofit corporation, established in 1999. Fire  
8 Safe assists communities in creating defensible space within and  
9 around those communities to protect them from wildfire  
10 destruction.

11 Fire Safe entered into nine financial assistance (grant)  
12 agreements with the Bureau of Land Management ("BLM") and two  
13 with the U.S. Forest Service ("USFS"), each of which required  
14 Fire Safe to conduct fuels reduction work (e.g., thinning trees  
15 and removing underbrush) in the Lake Tahoe region. Fire Safe  
16 contracted with third-party vendors to perform the fuels  
17 reduction tasks. In order for vendors to be paid from grant  
18 monies, Fire Safe was required to submit documentation to the  
19 appropriate federal agency - USFS or BLM - for approval.

20 In 2011, the U.S. Department of Agriculture's Office of the  
21 Inspector General ("OIG") audited Fire Safe. OIG found that Fire  
22 Safe had not properly accounted for its grant funds, had  
23 commingled grant monies with its own funds, and had used grant  
24 funds to pay unauthorized expenses. As a result, all grant funds  
25 were frozen.

26 Fire Safe filed for chapter 7 relief on November 18, 2012.  
27 Appellee Allen M. Dutra was appointed chapter 7 trustee (the  
28 "Trustee"). The United States Department of Justice ("DOJ")

1 filed two proofs of claim, one on behalf of USFS for  
2 \$5,735,265.23 and the other on behalf of BLM for \$3,958,795.18.  
3 The claims reflected the "contingent and unliquidated liability  
4 of the Debtor" to USFS and BLM for payments made to third-party  
5 vendors that were potentially unallowable, primarily due to  
6 insufficient documentation.<sup>2</sup>

7 Claims were also filed by vendors, including Appellant Cross  
8 Check Services, LLC ("Cross Check"). Cross Check filed an  
9 unsecured claim for \$249,954.52 based on an arbitration award it  
10 obtained for breach of contract. The principal amount of the  
11 award (\$169,844) represented amounts Fire Safe had refused to pay  
12 for extra fuels reduction work performed by Cross Check after  
13 Fire Safe's project manager, without first obtaining agency  
14 authority, had assured Cross Check it would be paid.<sup>3</sup>

15 In the course of administering the estate, the Trustee took  
16 the position that, notwithstanding DOJ's proofs of claim, Fire  
17 Safe had utilized third-party vendors to provide goods and  
18 services for the benefit of both USFS and BLM in excess of grant  
19 monies paid to Fire Safe, such that the estate had offsetting  
20

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21 <sup>2</sup>The parties did not include DOJ's proofs of claim in their  
22 excerpts of record. We have therefore exercised our discretion  
23 to examine the docket and imaged papers in the underlying  
24 bankruptcy case. See Woods & Erickson, LLP v. Leonard  
25 (In re AVI, Inc.), 389 B.R. 721, 725 n.2 (9th Cir. BAP 2008);  
Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R.  
227, 233 n.9 (9th Cir. BAP 2003).

26 <sup>3</sup>The final arbitration award was entered postpetition after  
27 the court approved the Trustee's and Cross Check's stipulation to  
28 lift the stay to permit Cross Check to pursue a final judgment in  
the arbitration and to present its claim to Fire Safe's insurance  
company (but not to seek collection against estate assets).

1 claims against those entities. DOJ took the position that if  
2 litigation were pursued, it would need to be filed in the Court  
3 of Federal Claims in Washington, D.C. Because there was no money  
4 in the estate to pursue litigation in the District of Columbia,  
5 the Trustee continued negotiating with DOJ, and the parties  
6 eventually reached a settlement.

7 On April 15, 2016, the Trustee filed a motion to approve  
8 compromise (the "Motion"). The settlement called for the United  
9 States to pay \$2,025,906.00 to the Trustee, of which  
10 \$1,412,902.04 was designated the "Grant Sub-Recipient Fund" and  
11 was to be used to pay only specified sub-recipients that had  
12 performed work relating to unpaid claims allowable under the  
13 grants ("Schedule A Sub-Recipients"). The Schedule A Sub-  
14 Recipients were to be paid the lesser of the amount demanded in  
15 their proof of claim or the amount listed on Schedule A to the  
16 settlement agreement. The remaining \$613,003.06, designated as  
17 the "Estate Fund," represented reimbursement to the estate and  
18 was to be used by the Trustee to pay allowed bankruptcy claims  
19 pro rata in order of priority. The settlement provided that the  
20 Trustee's statutory commission and allowed attorney's fees of up  
21 to \$40,000 would be paid from the Estate Fund, with the  
22 commission based upon all amounts distributed to creditors,  
23 including Schedule A Sub-Recipients. The settlement included  
24 mutual releases.

25 The list of Schedule A Sub-Recipients and the amounts they  
26 were to be paid was generated by USFS and BLM based on their  
27 review and analysis of documents and records turned over by the  
28 Trustee and certain third parties. Conclusions as to the amounts

1 due each sub-recipient were based on the relevant grant  
2 agreement, claims submitted to USFS and BLM from Fire Safe, and  
3 documentation of work performed. Cross Check was not among the  
4 Schedule A Sub-Recipients.

5 Several parties, including Cross Check, filed oppositions to  
6 the Motion.<sup>4</sup> The bankruptcy court held status conferences and  
7 continued the hearing on the Motion several times to give the  
8 objecting creditors time to communicate with DOJ regarding the  
9 amounts allocated (or not) to them on Schedule A. During that  
10 period, Cross Check submitted invoices and other documentation to  
11 DOJ in an attempt to have its claim allowed as a Schedule A  
12 claim. The DOJ responded to Cross Check with a letter dated  
13 July 22, 2016 (the "July 22, 2016 Letter"), explaining that  
14 (i) Fire Safe had never submitted any documentation for  
15 reimbursement of Cross Check's claim, and (ii) in any event,  
16 Cross Check's claim would not have been allowable even if Fire  
17 Safe had submitted documentation because Fire Safe's claims  
18 relating to work performed by Cross Check had been "paid in  
19 excess of the amounts that were determined to be allowable after  
20 review by the agencies . . . ." According to the spreadsheet  
21 attached to the July 22, 2016 Letter, the largest portion of the  
22 claim that was disallowed represented cost overruns that had not

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24 <sup>4</sup>Those parties included Appellees North Lake Tahoe Fire  
25 Protection District, Tahoe Douglas Fire Protection District,  
26 Meeks Bay Fire Protection District, Lake Valley Fire Protection  
27 District, North Tahoe Fire Protection District (collectively, the  
28 "Fire Protection Districts"), and Frank James Cody. In this  
appeal, the Fire Protection Districts filed a joinder to the  
Trustee's brief requesting that the Panel affirm the bankruptcy  
court's approval of the settlement.

1 been pre-approved by a federal program manager. The spreadsheet  
2 also indicated that reimbursement for interest, attorney's fees,  
3 and arbitration costs was not allowable under the grant terms.

4 By the August 29, 2016 final hearing on the Motion, the only  
5 remaining objecting creditor was Cross Check; eight other  
6 creditors had sent letters to the Trustee - in response to the  
7 Trustee's request for input - indicating their support for the  
8 compromise. After hearing argument, the bankruptcy court granted  
9 the Motion, making the following oral findings:

10 [T]here is no money in this estate except for the  
11 United States providing a little over 2 million in this  
12 on some conditions, that the people . . . who Fire Safe  
13 processed properly are getting their full claims, in  
14 essence. The people that Fire Safe didn't process  
15 properly are getting a portion of the \$613,000 that is  
16 part of what the government is giving.

17 I don't think that if there was litigation  
18 concerning this there would be any better result. I  
19 think it would cost tens of thousands, if not hundreds  
20 of thousands of dollars to litigate this. So I do  
21 think it's in compliance with [Rule] 9019 as  
22 interpreted by In re A&C Properties. And I'm going to  
23 approve . . . the stipulation.

24 I think that the trustee and his counsel have done  
25 a very good job here. This was a no-asset case when it  
26 started and it's paying a significant amount to many of  
27 the creditors and it's paying a . . . a not  
28 insignificant amount to creditors who were, in effect,  
cheated by [Fire Safe].

**. . . I do think it's a fair settlement. I do  
think it's in the best interest of the creditors.**

23 Hr'g Tr. (August 29, 2016) at 42:23-43:22 (emphasis added).

24 The bankruptcy court entered written findings of fact and  
25 conclusions of law and an order granting the motion on  
26 September 22, 2016. Cross Check timely appealed.

#### 27 JURISDICTION

28 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.

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

3 **ISSUE**

4 Whether the bankruptcy court abused its discretion in  
5 granting the Trustee's motion to approve compromise.

6 **STANDARD OF REVIEW**

7 We review the bankruptcy court's order approving a trustee's  
8 application to compromise controversy for abuse of discretion.  
9 Martin v. Kane (In re A & C Props.), 784 F.2d 1377, 1380 (9th  
10 Cir. 1986). A bankruptcy court abuses its discretion if it  
11 applies the wrong legal standard, misapplies the correct legal  
12 standard, or if its actual findings are clearly erroneous.  
13 TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th  
14 Cir. 2011).

15 **DISCUSSION**

16 **A. Standard for Approval of a Settlement**

17 Before approving a compromise, the bankruptcy court must  
18 find that it is fair and equitable. In re A & C Props., 784 F.2d  
19 at 1381.

20 In determining the fairness, reasonableness and  
21 adequacy of a proposed settlement agreement, the court  
22 must consider: (a) [t]he probability of success in the  
23 litigation; (b) the difficulties, if any, to be  
24 encountered in the matter of collection; (c) the  
25 complexity of the litigation involved, and the expense,  
inconvenience and delay necessarily attending it;  
(d) the paramount interest of the creditors and a  
proper deference to their reasonable views in the  
premises.

26 Id.

27 These factors "should be considered as a whole to determine  
28 whether the settlement compares favorably with the expected



1 rewards of litigation. . . . A trustee seeking approval of a  
2 settlement is not required to prove it would have been impossible  
3 to obtain a superior result by trying the case." Greif & Co. v.  
4 Shapiro (In re W. Funding Inc.), 550 B.R. 841, 851-52 (9th Cir.  
5 BAP 2016).

6 **B. The bankruptcy court's findings were sufficient to support**  
7 **approval of the settlement.**

8 The bankruptcy court found that the settlement was fair. As  
9 to the A & C Properties factors, the bankruptcy court found that  
10 there would have been no difficulty with collection if the  
11 Trustee prevailed in a lawsuit but that the lawsuit would have  
12 been "somewhat complex" because of regulations and audit  
13 requirements. The bankruptcy court also found that the  
14 settlement was in the best interests of all creditors "because  
15 payment of \$613,003.96 to the estate was conditioned upon having  
16 the Trustee pay \$1,412,902.04 to the Schedule "A" Sub-Recipients.  
17 If that condition is not met, then creditors receive nothing."  
18 The bankruptcy court, however, crossed out the proposed  
19 conclusion of law stating that the Trustee would not have had a  
20 high probability of success in litigation because the grant funds  
21 were not property of the estate.

22 Cross Check does not challenge the bankruptcy court's  
23 findings and conclusions but argues that they are insufficient to  
24 support approval of the settlement. Cross Check asserts that the  
25 bankruptcy court did not find the settlement to be fair and  
26 equitable. This is incorrect: the bankruptcy court expressly  
27 found that the settlement was fair - although this finding was  
28 not incorporated into its written findings - and implicitly found

1 it was equitable in finding that it was in the best interests of  
2 all creditors.

3 Cross Check argues, however, that the bankruptcy court's  
4 refusal to make a finding regarding the probability of success in  
5 litigation is fatal to the approval of the settlement. This  
6 argument is not persuasive. While A & C Properties states that  
7 the bankruptcy court "must" consider the factors listed above,  
8 including the probability of success in the litigation, it does  
9 not require an explicit finding as to each factor. In fact, in  
10 A & C Properties, the Ninth Circuit Court of Appeals affirmed the  
11 bankruptcy court's approval of the settlement at issue despite  
12 finding that the bankruptcy court's findings were "rather  
13 general." 784 F.2d at 1383. The Court of Appeals concluded that  
14 the record supported approval of the settlement because it showed  
15 that the bankruptcy judge "was informed and had apprised himself  
16 of all facts necessary to make an intelligent and independent  
17 judgment that the compromise was fair and equitable[,] and that  
18 there was "clear support in the record for our affirming the  
19 findings of fact with respect to the approval of the compromise."  
20 Id. Finding that the evidence supporting the compromise was  
21 thorough and comprehensive, the bankruptcy court was familiar  
22 with the entire record, had addressed the creditors' objections,  
23 and "held directly, expressly or by necessary implication, on  
24 every substantial point of contention," the Court of Appeals held  
25 that the bankruptcy court did not abuse its discretion in  
26 approving the compromise. Id. at 1384.

27 The same can be said here. Despite the lack of an explicit  
28 finding regarding the probability of success in litigation, the

1 record as a whole supports the bankruptcy court's ultimate  
2 conclusion that the settlement was fair and in the best interests  
3 of creditors. Cross Check does not dispute the bankruptcy  
4 court's findings that the litigation would be expensive, that the  
5 estate had no assets to fund such litigation, and that the  
6 settlement would provide a better outcome for creditors than  
7 could be obtained through litigation (except for the unequal  
8 distribution issue discussed below). Given that there was no  
9 money in the estate to fund complex litigation in Washington,  
10 D.C., and Trustee's counsel's representation that the settlement  
11 resulted in a recovery that was \$400,000 greater than what the  
12 Trustee had initially expected to receive, a finding regarding  
13 the probability of success in the litigation would have added  
14 nothing of substance. Overall, the record supported the  
15 conclusion that the settlement compared "favorably with the  
16 expected rewards of litigation." In re W. Funding, Inc.,  
17 550 B.R. at 852.

18 Cross Check also contends that it was "denied due process"  
19 because DOJ refused to review the merits of its claim for the  
20 sole reason that Fire Safe did not submit invoices on Cross  
21 Check's behalf. Based on the terms of the grants, DOJ would have  
22 been within its rights to deny the claim solely on this basis.  
23 Moreover, Cross Check's contention is not supported by the  
24 record: the July 22, 2016 Letter made clear that Cross Check's  
25 claim would not have been approved even if Fire Safe had  
26 submitted the invoices on its behalf because none of the amounts  
27 claimed were allowable under the grants. Moreover, the  
28 bankruptcy court found, and Cross Check does not dispute, that:

1 The creditors of the Debtor did not have any contract,  
2 express or implied in fact, with the United States. As  
3 such, no creditor has the right to directly sue the  
4 United States or any of its agencies, officers or  
5 employees in connection with Fire Safe's grants or work  
6 performed for Fire Safe.

7 Because the United States' only contracts were with Fire Safe,  
8 DOJ had no duties to Cross Check. In its reply brief, Cross  
9 Check concedes that it could not assert any rights against the  
10 United States, but seems to argue that the Trustee could have  
11 successfully litigated the issue on behalf of Fire Safe. Even if  
12 that were true, Cross Check has not shown that the bankruptcy  
13 court erred in finding that the settlement was in the best  
14 interests of all creditors given the costs associated with  
15 litigation.<sup>5</sup>

16 **C. The settlement does not violate the Bankruptcy Code's**  
17 **priority scheme.**

18 The settlement had the effect of reducing - by a significant  
19 amount - the total claims against the estate and bringing  
20 \$613,000 into an administratively insolvent estate. Without the  
21 Settlement, creditors who were not entitled to distributions of  
22 grant funds stood to receive nothing. Cross Check does not

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23 <sup>5</sup>Notably, the only relief requested by Cross Check in this  
24 appeal is for the Panel to vacate the order approving the  
25 settlement and remand to require the bankruptcy court to  
26 condition the settlement on a pro rata distribution of all the  
27 funds among all creditors. This relief seems inconsistent with  
28 an argument that the bankruptcy court's findings were either  
erroneous or insufficient to support approval of the settlement;  
if the Panel were to so hold, the appropriate remedy would be to  
reverse outright, reverse and remand, or vacate and remand.  
Further, the funds allocation is a term of the settlement, and we  
lack power to rewrite the settlement on appeal.

1 dispute any of these points, but takes the position that the  
2 Settlement is not equitable because creditors who are not  
3 Schedule A Sub-Recipients will receive approximately 33 percent<sup>6</sup>  
4 of their claims while Schedule A Sub-Recipients will be paid in  
5 full. Cross Check contends that because of this unequal  
6 distribution, the settlement is contrary to the Bankruptcy Code's  
7 priority scheme, citing Motorola, Inc. v. Official Committee of  
8 Unsecured Creditors (In re Iridium Operating LLC), 478 F.3d 452  
9 (2d Cir. 2007). In that case, the Second Circuit Court of  
10 Appeals remanded an order approving a settlement so the  
11 bankruptcy court could assess the justification for distribution  
12 of funds to junior creditors in violation of the priority rules.  
13 Id. at 465-66. The issue in Iridium Operating, however, was the  
14 distribution of **estate** funds. That case is thus distinguishable.

15 Here, the bankruptcy court found:

16 that **the funds allocated to the Schedule "A" Sub-**  
17 **Recipients are not property of the bankruptcy estate**  
18 **under section 541(a)** because the Debtor lacked any  
19 beneficial or equitable interest in these grant funds  
20 and its use of the funds was limited to budgeted and  
21 allowed uses defined and controlled by its grants and  
22 applicable federal statutes, regulations and agency  
23 policies.

24 (Emphasis added).

25 Cross Check has never disputed, either in the bankruptcy  
26 court or in this appeal, that the funds to be distributed to  
27 Schedule A Sub-Recipients were not property of the bankruptcy  
28 estate. The bankruptcy court's finding that the funds were not

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<sup>6</sup>In its reply brief, Cross Check suggests that the actual distribution will be closer to 17 percent.

1 property of the estate was correct. In general, where a  
2 governmental agency awards grant funds to a private nonprofit  
3 community service organization but maintains control over how  
4 those funds are spent, the nonprofit organization acts merely as  
5 a conduit and does not obtain any interest in the funds such that  
6 the funds become property of the estate if the organization files  
7 a bankruptcy case. See Springfield v. Ostrander (In re LAN  
8 Tamers, Inc.), 329 F.3d 204 (1st Cir. 2003); Westmoreland Human  
9 Opportunities, Inc. v. Walsh, 246 F.3d 233 (3d Cir. 2001);  
10 In re Joliet-Will Cty. Cmty. Action Agency, 847 F.2d 430 (7th  
11 Cir. 1988). In this case, it is undisputed that the terms of the  
12 federal grants and the applicable federal regulations severely  
13 restricted Fire Safe's use of grant funds such that those funds  
14 did not become property of the estate.

15 The Bankruptcy Code's priority distribution rules apply only  
16 to property of the estate. See § 726 (setting forth priority  
17 scheme for distributions of property of the estate). Because the  
18 \$1.4 million allocated to Schedule A Sub-Recipients was not  
19 property of the estate, there was no requirement that those funds  
20 be distributed pro rata. Under the settlement, the \$613,000  
21 deemed to be property of the estate is to be distributed pro  
22 rata; thus the settlement is in compliance with the Bankruptcy  
23 Code.

#### 24 **CONCLUSION**

25 For the reasons explained above, the bankruptcy court did  
26 not abuse its discretion in granting the Trustee's Motion. We  
27 therefore AFFIRM.