

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NOT FOR PUBLICATION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.	)	<b>M E M O R A N D U M</b> <sup>1</sup>
	)	
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.

---

<sup>1</sup> 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 11<sup>2</sup>  
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,<sup>3</sup> was the  
20 manager of West Lakeside.

---

21  
22 <sup>2</sup> 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 <sup>3</sup> 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.

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

[B]y their respective terms, Section 8.4 and paragraph  
(F)(3) of the Confirmation Order deal specifically and  
exclusively with executory contracts and unexpired  
leases. Having determined that the Operating Agreement  
is not an executory contract, the court finds  
Section 8.4 of the Plan and paragraph (F)(3) of the  
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.<sup>4</sup> 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 <sup>4</sup> "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).<sup>5</sup>

---

24 <sup>5</sup> "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),<sup>6</sup> 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 <sup>5</sup>(...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 <sup>6</sup> "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  
27  
28

1 terminate. First, as is important here, § 1123(b)(3)(B)<sup>7</sup>  
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 <sup>7</sup> "(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)<sup>8</sup>

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

---

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

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)<sup>9</sup>. The bankruptcy court found that  
5 §§ 1123(b)(3)(B) and 524(g) were close cousins,<sup>10</sup> 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 <sup>9</sup> "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 <sup>10</sup> 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