JENNER&BLOCK

Recent Developments in Bankruptcy Law, July 2018

(Covering cases reported through 584 B.R. 811 and 888 F.3d 1)

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1. AUTOMATIC STAY

1.1 Covered Activities

1.1.a **Court enforces stay waiver granted in prior chapter 11 plan.** In its first chapter 11 case, the single asset real estate debtor confirmed a consensual plan with its secured lender. Among other things, the plan provided for a waiver of the automatic stay in a later bankruptcy case and the debtor's agreement not to oppose stay relief in a later case. The debtor filed a new chapter 11 case a little more than three years after confirmation in the first case. A waiver in initial loan agreements of bankruptcy or the protections of the automatic stay are generally unenforceable. But the majority of courts tend to enforce a waiver granted in a confirmed plan or bankruptcy court-approved settlement agreement, absent extraordinary changed circumstances. The prior order is a final judgment, which binds the parties, including the debtor. The doctrines of res judicata and judicial estoppel also militate in favor of enforcing the prior waiver. In this case, there were no extraordinary changed circumstances, and the court enforces the waiver and grants stay relief. *In re A. Hirsch Realty, LLC*, 583 B.R. 583 (Bankr. D. Mass. 2018).

1.2 Effect of Stay

1.3 Remedies

2. AVOIDING POWERS

2.1 Fraudulent Transfers

2.1.a **Fraudulent transferee gets credit for returning transferred property to the debtor.** Facing a judgment against his company, a physician transferred substantial sums from the company to another company he owned. Over the next year, the other company returned all the transferred funds. The first company filed bankruptcy a few years later. The trustee sought to avoid the transfers under the Pennsylvania Uniform Fraudulent Transfer Act as transfers made with actual intent to hinder, delay, or defraud creditors and to recover the transferred sums under section 550(a). The trustee proved actual intent, and the court granted judgment avoiding the transfers. However, courts have limited recovery under section 550(a) based on equitable principles consistent with the Bankruptcy Code's purpose. The purpose here is remedial, not punitive. Because the property was returned, the creditors were not harmed. Permitting recovery of the property that was already returned to the debtor would give the estate a windfall. Therefore, the court denies the trustee's ability to recover the transferred property. *Holber v. Nikparvar (In re Incare, LLC)*, ___ B.R. ___, 2018 Bankr. LEXIS 1339 (Bankr. E.D. Pa. May 7, 2018).

2.1.b **No indemnification claim against fraudulent transfer codefendant.** The debtor transferred cash to its shareholder, who deposited it in, and then used it to purchase a certificate of deposit from bank A, which he pledged to bank B to secure a loan to an unrelated entity. The loan defaulted, and bank B foreclosed on the CD. The trustee sued both banks to avoid the transfer as a fraudulent transfer and recover the cash. Common law indemnity allows an innocent party who is liable to another because of vicarious, constructive, derivative, or technical liability, to claim over against another whose fault caused the plaintiff's loss. Here, the complaint sought direct, not derivative, relief against each bank. Each was potentially independently liable to the trustee for avoidance and recovery. Therefore, indemnity does not apply. *Dunn v. Mercantile Commercebank, N.A. (In re GPC Miami Inc.)*, 582 B.R. 534 (Bankr. S.D. Fla. 2018).

2.2 Preferences

2.3 Postpetition Transfers

2.3.a **Prepetition payment by check that clear postpetition is subject to avoidance under section 549.** On the petition date but before the commencement of the case, the debtor's CFO gave the debtor's attorney a cashier's check drawn on the CFO's personal account and issued a reimbursement check from the debtor to himself, which he deposited. The debtor's check to the CFO cleared four days after the petition. The trustee sued under section 549 to avoid the transfer. Under *Barnhill v. Johnson*, 503 U.S. 393 (1992), a transfer by check is made when the check clears the debtor's bank. Because the transfer cleared after bankruptcy, it was a postpetition transfer to which section 549 applies. Section 547(b) permits the trustee to avoid a prepetition transfer. Section 547(c)(1) creates an exception for an exchange for new value if the transfer was intended to be contemporaneous and was in fact substantially contemporaneous. Thus, a transfer by check that the recipient promptly cashes may qualify under the "date of delivery" rule. But where the check clears postpetition, the transfer itself is made postpetition, so the section 547 date of delivery rule does not apply. Accordingly, the trustee may avoid the transfer. *Lewis v. Kaelin (In re Creesta Tech. Corp.)*, 583 B.R. 224 (9th Cir. B.A.P. 2018).

2.4 Setoff

2.5 Statutory Liens

2.6 Strong-arm Power

2.7 Recovery

3. BANKRUPTCY RULES

4. CASE COMMENCEMENT AND ELIGIBILITY

4.1 Eligibility

4.1.a **Court enforces charter provision that allows bona fide preferred shareholder to block bankruptcy petition.** An investor made a $15 million preferred stock investment in the debtor, which incurred a $3 million unsecured liability to the investor for services rendered. In connection with the investment, the debtor amended its Delaware corporate charter to require the majority vote of each shareholder class to authorize a bankruptcy filing. The debtor's board authorized a petition, which the debtor filed. The investor moved to dismiss on the ground that the debtor did not have authority to file. Authority to file a corporation's bankruptcy petition depends on the corporation's charter and state law. Although many courts have refused to enforce charter provisions that permit a creditor to block a bankruptcy filing, this case differs, because the charter provision was adopted in connection with an equity investment, not a credit extension and does not appear to be a ruse to guarantee a debt. Delaware law permits a corporate charter to reallocate a board's traditional duties. The reallocation here to the shareholders of the power to authorize a bankruptcy filing does not violate Delaware law. Therefore, the court dismisses the case. *Franchise Servs. Of N. Am., Inc. v. U.S. Trustee (In re Franchise Servs. Of N. Am., Inc.)*, 891 F3d 198 (5th Cir. 2018).

4.2 Involuntary Petitions

4.3 Dismissal

5. CHAPTER 11

5.1 Officers and Administration

5.2 Exclusivity

5.3 Classification

5.4 Disclosure Statement and Voting

5.4.a **Creditor may vote claims purchased with intent to block plan to protect the creditor's interest.** The oversecured creditor offered to purchase selected unsecured claims. Its motive was solely to block the debtor's plan, which it had concluded treated it unfairly, not for any ulterior purpose independent of its treatment under the plan. The effect was to give the secured creditor an unfair advantage over the unsecured creditors whose claims it did not offer to purchase and was prejudicial to those creditors. Section 1126(e) permits the court to designate a creditor's vote that was not cast in good faith. The good faith concept is fluid, depending on the facts of the case, but focuses primarily on the creditor's motive. The vote is in good faith if the motive is enlightened self-interest to protect its position in the case and its recovery and not an ulterior motive designed to accomplish some other purpose outside the creditor's treatment under the plan. The concept applies equally to the purchase of claims with the intent to vote them on the plan. Here, the creditor's motive related only to its treatment under the plan. The court allowed the vote. *Pac. W. Bank v. Fagerdala USA-Lompoc, Inc. (In re Fagerdala USA-Lompoc, Inc.)*, 891 F.3d 848 (9th Cir. 2018).

5.5 Confirmation, Absolute Priority

6. CLAIMS AND PRIORITIES

6.1 Claims

6.1.a **Bankruptcy court enforces anti-assignment clause in a note against a claim buyer.** The debtor issued a promissory note under a loan agreement, both governed by Delaware law. The note and the agreement prohibited the lender from assigning the note or the agreement without the debtor's consent and provided that any such assignment without consent would be void. A claims buyer bought the note and filed a proof of claim, to which the debtor in possession objected. Delaware law distinguishes between a right to assign and the power to assign. An anti-assignment clause, without more, restricts the lender's right, not power, to assign, so that an assignment is enforceable but might give rise to a damage claim against the assignor. If the anti-assignment clause renders the assignment void, it restricts the power to assign; the courts will enforce the provision. Here, the note restricted the power to assign, so the assignment was void. The debtor's breach of the note by filing bankruptcy does not render the provision unenforceable. The non-defaulting party may stand on the contract and seek damages for breach or may rescind. But its rights do not increase upon the defaulting party's default, so the provision remains enforceable. U.C.C. section 9-408 renders unenforceable any anti-assignment provision only to the extent the provision prohibits the creation, attachment, or perfection of a security interest or provides that the assignment gives rise to a breach or right of damages. Section 9-406(e) endorses the enforceability of an anti-assignment provision in the sale of a promissory note. The court give effect to each section; section 9-408 does not eclipse section 9-406. Therefore, the court enforces the anti-assignment clause. *In re Woodbridge Group of Cos., LLC*, ___ B.R. ___, 2018 Bankr. LEXIS 1904 (Bankr. D. Del. June 20, 2018).

6.1.b **Resolution of claim objection does not preclude debtor's later action against creditor for damages.** In his chapter 13 case, the debtor objected to a creditor's claim. The court sustained the objection. After bankruptcy the debtor sued the creditor for damages resulting from the creditor's prebankruptcy enforcement efforts, on the ground that the claim was invalid and the enforcement efforts pushed the debtor into bankruptcy. A prior judgment precludes a claim if the claim was adjudicated finally in the first action, the present claim is the same as the claim raised in the first action, and the parties are the same or in privity. Bankruptcy Rule 3007 provides that a claim objection is a contested matter, which may not include a demand for relief of a kind that requires an adversary proceeding. The debtor's claim against the creditor for damages required an adversary proceeding and could have been asserted in the claim objection proceeding. Therefore, claim preclusion does not apply. *Davenport v. Djourabchi*, ___ B.R. ___, 2018 U.S. Dist. LEXIS 97706 (D.D.C. June 11, 2018).

6.2 Priorities

6.2.a **Executive's employment contract does not establish presumptive postpetition compensation rate.** The debtor's plan rejected its executive chairman's employment contract as of the plan effective date. The chairman claimed postpetition salary as an administrative expense at his contractual rate, relying only on the contract as the presumptive value of his services and introducing no evidence of the services he actually performed. Section 503(b)(1)(A)(i) grants priority to administrative expenses, including "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, and commissions for services rendered after the commencement of the case." Generally, an administrative claimant, including for wages and salaries, bears the burden of persuasion by a preponderance of the evidence. The contractual rate is not binding, and although possibly probative, it does not create a presumption either of reasonableness or necessity. An objector need not rebut it; the claimant must prove it. Because the chairman did not prove the value of his postpetition services to the debtor in possession, his administrative expense claim is disallowed. *Boruff v. Cook Inlet Energy LLC (In re Cook Inlet Energy LLC)*, 583 B.R. 494 (9th Cir. B.A.P. 2018).

7. CRIMES

8. DISCHARGE

8.1 General

8.1.a **Intentional act is a willful violation of the discharge injunction, despite a good faith belief to the contrary.** After the debtor received a discharge, the IRS claimed that the debtor's tax obligations had not been discharged and began collection activity. The debtor brought an adversary proceeding to determine dischargeability. The U.S. Attorney defending the action failed to produce evidence to support the IRS's position, resulting in summary judgment for the debtor. The debtor then sued the IRS under IRC section 7433 for having violated the discharge injunction. Section 7433 grants a debtor a right to damages if any officer or employee of the IRS "willfully violates any provisions of section 362 … or section 524." The court construes the phrase "willfully violates" according to its ordinary meaning, the context of the phrase in the statute, its accepted meaning in 1998 when Congress enacted section 7433, and the policy of protecting a debtor's fresh start, which appeared to have animated Congress's enactment of the section. A violation is "willful" when the act alleged to violate the injunction is intentional and done with knowledge of the injunction, even if the actor had a good faith belief that the act did not violate the injunction. Here, the IRS knew of the stay and intentionally took collection action. Even though the IRS believed in good faith that the tax debts had not been discharged, its action was intentional and therefore "willful." The debtor may recover damages for the violation of the injunction. *IRS v. Murphy*, 892 F.3d 29 (1st Cir. 2018).

8.1.b **Good faith belief that the discharge injunction does not apply prevents contempt finding.** Before bankruptcy, creditors sued the debtor and his transferee to recover an LLC interest that the LLC operating agreement required be offered first to the creditors. During the litigation, the debtor filed bankruptcy and received a discharge. The litigation continued against the attorney, but the debtor participated to a degree in opposing the relief the creditors sought. After the creditors prevailed, they sought attorneys' fees from the transferee and from the debtor. While the discharge injunction prohibits collection on a discharged debt, a creditor may pursue a debtor for post-discharge attorneys' fees if the debtor returns to the fray after discharge. The creditors relied on this exception. While the attorneys' fees petition was pending, the debtor moved in the bankruptcy court to hold the creditors in contempt for violating the discharge injunction. Later, the state court determined that the debtor had returned to the fray and granted the petition against the debtor, but the state appeals court reversed. The bankruptcy court also found the debtor had returned to the fray, but on appeal, the district court reversed, finding the creditors in contempt for violating the discharge injunction. A court may hold a creditor in contempt for violating the discharge injunction if the creditor knew the injunction applied and intended the actions that violated the injunction. Here, because the creditor had a good faith belief—even though ultimately wrong—that the debtor had returned to the fray and the injunction did not apply, the creditor did not know the injunction applied, so first test is not satisfied. *Lorenzen v. Taggart (In re Taggart)*, 888 F.3d 438 (9th Cir. 2018).

8.2 Third-Party Releases

8.3 Environmental and Mass Tort Liabilities

9. EXECUTORY CONTRACTS

10. INDIVIDUAL DEBTORS

10.1 Chapter 13

10.2 Dischargeability

10.2.a **A statement about an asset is a "statement respecting financial condition."** To induce his lawyer to continue working on his case without paying currently, the debtor told his lawyer that he was expecting a large tax refund. The refund turned out to be smaller, and the debtor did not tell his lawyer once he received it, continuing to deceive his lawyer into thinking it would become available. As a result, the lawyer kept working. When the case was over, the lawyer presented a large bill, which the debtor could not pay. The debtor filed bankruptcy. Finding out the truth about the tax refund, the lawyer sought to except his claim against the debtor from discharge. Section 523(a)(2)(A) excepts from discharge a debt incurred through fraud, false representation, or false pretenses, except a "false statement respecting the debtor's financial condition." Section 523(a)(2)(B) excepts from discharge a false statement respecting the debtor's financial condition only if the statement is in writing. "Respecting" has a broad meaning, including about, relating to, and connected with. A statement about an asset is a statement "respecting" financial condition and is broader than "a statement of financial condition," which would include assets and liabilities. A statement about a major asset has a direct relationship to financial condition and therefore is a statement respecting financial condition. Because the debtor's statement was not in writing, the debt is dischargeable. *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. ___, 138 S. Ct. 1752 (2018).

10.3 Exemptions

10.4 Reaffirmations and Redemption

11. JURISDICTION AND POWERS OF THE COURT

11.1 Jurisdiction

11.1.a **A bankruptcy court may issue a consent directive.** The debtor in an involuntary case hid assets before bankruptcy. He was under indictment, living in France, and had successfully opposed an extradition request. The trustee sought an order requiring the debtor to sign a "consent directive," which is a letter addressed to banks generally, asking the bank to report to the trustee on any accounts that debtor might have at that bank. It allows the trustee to find assets around the world despite bank secrecy laws, because it purportedly comes from the debtor and thereby waives secrecy. The Supreme Court has ruled that a consent directive is not testimonial and therefore does not violate the Fifth Amendment. A trustee has a duty under section 704(a)(1) to collect property of the estate and under section 704(a)(4) to investigate the debtor's financial affairs. The debtor has a duty under section 521(a)(4) to surrender to the trustee all property of the estate and all related books and records and under section 521(a)(3) to cooperate with the trustee to enable the trustee to perform the trustee's duties. The trustee may seek discovery under Rule 2004, Section 105(a) authorizes the court to issue orders to carry out Code provisions. Based on all these provisions, a bankruptcy court has authority to issue a consent directive. *Rigby v. Mastro (In re Mastro)*, 585 B.R. 587 (9th Cir. B.A.P. 2018).

11.2 Sanctions

11.3 Appeals

11.3.a **Failure to object to an order does not deprive a person aggrieved of standing to appeal.** The chapter 7 trustee moved to assume a contract and gave notice to the counterparties. The counterparties did not appear at the hearing to object to the assumption. After the court announced its ruling granting the motion but before it issued a written order, the counterparties filed a motion for reconsideration. The bankruptcy court denied that motion on the merits and issued the written order granting the assumption motion. The counterparties appealed. Only a "person aggrieved" has standing to appeal a bankruptcy court order. A person is aggrieved if the order affects the person's pecuniary interests. Failure to appear and object does not affect whether the person is aggrieved by the order. Therefore, the failure does not affect the counterparties' standing to appeal. However, the failure might constitute waiver or forfeiture of the person's rights. Here, the counterparties' prompt motion for reconsideration was sufficient to prevent waiver, but the court may still consider whether the failure amounted to a forfeiture. The appellate court remands for that determination. *Harkey v. Grobstein (In re Point Ctr. Fin., Inc.)*, 890 F.3d 1188 (9th Cir. 2018).

11.3.b **Shareholder may not purchase standing to appeal.** The debtor's shareholder objected to the trustee's application to employ special counsel. The bankruptcy court overruled the objection. The shareholder appealed. At the time of the bankruptcy court hearing, any effect on the shareholder's possible recovery in the case based on the outcome of the objection was entirely speculative. As a result, the shareholder was not "a person aggrieved" who had standing to appeal. So while the appeal was pending, he purchased a claim. The purchase did not give him standing to appeal, because standing is determined at the commencement of the suit. *Furlough v. Cage (In re Technicool Syss., Inc.)*, ___ F.3d ___, 2018 U.S. App. LEXIS 19508 (5th Cir. July 16, 2018).

11.4 Sovereign Immunity

12. PROPERTY OF THE ESTATE

12.1 Property of the Estate

12.1.a **Where debtor may consent to release of funds from escrow, debtor retains an interest in escrowed funds.** The creditor asserted a claim against the debtor arising out of a real property transaction. The creditor and the debtor established an escrow to hold the property sale proceeds while they litigated the issue. The escrow instructions provided for release upon the agreement of the parties or a court order and for transfer to the court's registry after a certain date. The transfer occurred, but the terms of release remained the same. The court ruled for the creditor, and the clerk released the funds to him. The debtor filed a bankruptcy petition less than 90 days later. The trustee may avoid a transfer to a creditor of an interest of the debtor in property made within 90 days before the petition if certain other conditions are met. When a debtor deposits money in escrow that is subject to release upon specified conditions, the debtor has divested a sufficient interest in the funds so the release is not a transfer of an interest of the debtor in property. But where the debtor has the right to consent to the release, the debtor retains an interest. As a result, the release here was a transfer of an interest of the debtor in property and subject to avoidance as a preference. *Coulson v. Kane (In re Price)*, ___ B.R. ___, 2018 U.S. Dist. LEXIS 109190 (D. Haw. June 29, 2018).

12.2 Turnover

12.3 Sales

12.3.a **Order approving sale under section 363 precludes later action against debtor, committee, and their professionals relating to validity of the sale.** The chapter 11 debtor in possession conducted an auction of its business. The winning bidder was a new company formed by the debtor's second lien holders. The court approved the sale under section 363 based on findings of adequate notice, fair sale process, and good faith, among other things. After the sale, the debtor converted the case to chapter 7. The chapter 7 trustee sued the second lien holders, the creditors committee, and the debtor's directors and professionals for damages based on fraud, collusion, and nondisclosure of important information during the sale process. Section 363(m) provides that a reversal or modification of a sale order on appeal does not affect the validity of a sale to a good faith purchaser. It protects the reasonable expectations of good faith purchasers who rely on a sale order. A sale order is good against the world. The trustee's complaint contravenes section 363(m)'s policy and the nature of a sale order as binding on the world. Therefore, the court dismisses the complaint. *In re Veg Liquidation, Inc.*, 583 B.R. 203 (8th Cir. B.A.P. 2018).

12.3.b **Taxing agency failed to establish amount of adequate protection to which it was entitled in sale free and clear of successor liability claim against purchaser.** The debtor owed taxes to the state taxing agency, which were secured by a lien on the debtor's real property that was junior to its lender's lien. Under state law, the purchaser in a bulk sale becomes liable to the taxing agency for all taxes that the seller has not paid. The trustee sold the debtor's property in bulk to a single purchaser free and clear of all claims and interests, including the taxing agency's claim against the purchaser, for a price less than the amount owed to the lender. Section 363(e) requires the bankruptcy court to provide adequate protection of an entity's interest in property of the estate to the extent that the estate's sale of the property decreases the value of the interest. The free and clear portion of the sale order decreased the taxing agency's interest in the property, because it prohibited the agency from pursuing the purchaser to collect the delinquent taxes. The interest holder has the burden of establishing the amount of the decrease for which the interest holder is entitled to protection. Having argued only that the decrease was the full amount of taxes owing, it failed to meet its burden, because neither the purchaser nor the lender would have accepted the sale on those terms. *Ill. Dep't of Revenue v. Hanmi Bank*, ___ F.3d ___, 2018 U.S. App. LEXIS 18555 (7th Cir. July 9, 2018).

13. TRUSTEES, COMMITTEES, AND PROFESSIONALS

13.1 Trustees

13.1.a ***Barton* doctrine does not apply to an action against the trustee in the bankruptcy court.** The trustee defended a WARN act claim but failed to raise certain defenses and thereby waived them and lost the action. He then sued principals of the company in the bankruptcy court to recover his losses. They counterclaimed against him for breach of fiduciary duty and breach of trust for inadvertently waiving the defenses and filed a motion under *Barton v. Barbour*, 104 U.S. 126 (1881), for leave to pursue the counterclaim. Under *Barton*, a court does not have jurisdiction to hear an action against a receiver appointed by a different court without the permission of the appointing court. *Barton* serves three principal purposes. It maintains the integrity of the appointing court's jurisdiction by preventing an action in another court from invading the corpus the trustee is charging with administering. It helps control burdensome litigation that could interfere with the administration. And it allows the appointing court to monitor the receiver's performance. *Barton* applies to bankruptcy trustees. However, *Barton* does not apply to an action brought in the appointing court, in this case, the bankruptcy court. None of the three purposes are served by requiring permission to sue in the appointing court, so the doctrine does not apply in this case. The court makes clear that the *Barton* doctrine deprives a court of jurisdiction, addressing the power of the court to hear the case; it is not a grant to a trustee of immunity, which is an affirmative defense. Therefore, the trustee must await the proper time to raise an immunity defense and may not raise it in response to the motion for leave to sue. *In re World Marketing Chicago, LLC*, 584 B.R. 737 (Bankr. N.D. Ill. 2018).

13.1.b **A liquidating trustee need not be disinterested.** A turnaround manager assisted the debtor in its chapter 11 case. The debtor's confirmed plan provided for the creation of a liquidating trust. In accordance with the plan's terms, the liquidating trust oversight committee selected the turnaround manager as the permanent trustee. Section 1104 governs the appointment of a trustee before confirmation of a plan. It requires that a trustee be disinterested, but it does not control the appointment of a post-confirmation trustee. Section 1123(b) permits a plan to vest estate causes of action in a "representative of the estate." A liquidating trust is such a representative. Section 1123(b) and the plan control the requirements and qualifications for a liquidating trustee. Section 1123(b) does not impose a disinterestedness requirement. Therefore, the court approves the appointment. *In re Health Diagnostic Lab., Inc.*, 584 B.R. 525 (Bankr. E.D. Va. 2018).

13.2 Attorneys

13.3 Committees

13.4 Other Professionals

13.4.a **Bankruptcy court affirms Alix Protocol.** Four years before bankruptcy, the debtor hired a restructuring advisory firm and a managing director of the firm to manage day-to-day operations and supplement traditional in-house functions, including to supervise operational, financial, accounting, and treasury functions at the company, assist in cost reductions, and help develop budgets and business plans. The managing director was appointed as Interim Vice President of Operations. His role changed over the years, gaining increasing responsibility and titles. At one point, he became a director of a wholly-owned subsidiary. He spent little time as director; the board merely ratified decisions that the parent company and the officers, including the managing director, had already reached. He never served on the parent board. When the debtor filed chapter 11, he resigned his director position but continued as the debtor's CEO. The debtor sought to employ him and the advisory firm under section 363(b). Section 363(b) permits the debtor in possession to enter into non-ordinary course transactions after notice and a hearing. Courts have routinely permitted restructuring advisors to serve under section 363(b), without requiring that they meet the qualifications of a professional under section 327(a). To address the U.S. Trustee's position in these situations, the Executive Office of the U.S. Trustee had adopted the “Alix Protocol,” under which the U.S. Trustee would not object to a restructuring manager’s employment as an officer of the debtor in possession if the restructuring firm served in only one capacity and was subject to the board’s direction and control. The Protocol was designed to prevent a manager from using a position in one capacity to benefit the manager in another capacity. The Protocol contains an exception when the manager served on the debtor’s board. But the board service here was insignificant and, importantly, not at the parent company. Section 327’s requirements were designed to apply to those brought in to reorganize the debtor and guide it through chapter 11; it was not intended to apply to traditional managers, including officers and directors, who would play a role in the reorganization through their ordinary roles at the company. The manager’s service here as a director was *de minimis*, and he had served for four years as regular management of the company. Under the circumstances, section 327 does not apply to him or his firm, and the court authorizes his employment under section 363(b). *In re Nine West Holdings, Inc.*, ___ B.R. ___, 2018 Bankr. LEXIS 1998 (Bankr. S.D.N.Y. July 2, 2018).

13.4.b **A prepetition custodian’s postpetition expenses are allowable.** The debtor made an assignment for the benefit of creditors. The assignee auctioned the debtor’s assets. After the auction but before the closing of the sale, creditors filed an involuntary petition against the debtor. The debtor did not oppose, and the court entered an order for relief. Section 543(b) generally requires a custodian, including an assignee, to deliver property of the debtor to the trustee, but section 543(d)(2) permits the court to excuse an assignee’s compliance with the turnover requirement. During the involuntary gap period, the court permitted the assignee to remain in possession and consummate the sale. The assignee and his counsel sought compensation from the estate. Section 503(b)(3)(E) permits the court to allow an administrative expense claim for “the actual, necessary expenses … incurred by … a custodian superseded under section 543 of this title, and compensation for the services of such custodian.” Section 503(b)(4) permits an administrative expense for “reasonable compensation for professional services rendered by an attorney … of an entity whose expense is allowable under” section 503(b)(3)(E). Section 543(c)(1) requires the court to “protect all entities to which a custodian has become obligated,” and section 543(c)(2) requires the court to “provide for the payment of reasonable compensation for … costs and expenses incurred by such custodian.” The three provisions overlap to a degree and contain different standards for determining allowable amounts. Section 503(b)(3)’s “actual and necessary” standard should apply to the custodian’s compensation that is to be paid from the estate, and section 543(c)(2)’s “reasonableness” standard should apply to compensation paid from another source. Sections 503(b)(3) and (4) are not limited to compensation and reimbursement for postpetition services, but such services are best reviewed under those sections. Finally, employment approval under section 327 is not required for allowance of postpetition compensation of the custodian or its counsel. *In re Stainless Sales Corp.*, 583 B.R. 717 (Bankr. N.D. Ill. 2018).

13.5 United States Trustee

14. TAXES

15. CHAPTER 15—CROSS-BORDER INSOLVENCIES

15.1.a **Foreign representative may take U.S. discovery despite discovery restrictions in the home court.** The foreign representatives of a Cayman Islands debtor obtained recognition of the Cayman proceeding as a foreign main proceeding and then sought discovery in the United States from the debtor’s accountant, which might not have been permitted under Cayman law. Section 1521(a)(4) authorizes the bankruptcy court, after recognition of a foreign proceeding, to “provide for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor’s affairs, rights, obligations, or liabilities.” This grant of power is independent of the foreign jurisdiction’s discovery rules. Therefore, the court may order discovery, whatever Cayman law may provide. *CohnResnick LLP v. Foreign Representatives (In re Platinum P’ners Value Arbitrage Fund L.P.*), ___ B.R. ___, 2018 U.S. Dist. LEXIS 109684 (S.D.N.Y. June 29, 2018).