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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES DIVISION

In re: BEVERLY COMMUNITY HOSPITAL ASSOCIATION, dba BEVERLY HOSPITAL (A NONPROFIT PUBLIC BENEFIT CORPORATION), *et al*,[1] Debtors,	Lead Case No. 2:23-bk-12359-SK Jointly administered with: Case No. 2:23-bk-12360-SK Case No. 2:23-bk-12361-SK Hon. Sandra R. Klein Chapter 11 Cases **OFFICIAL COMMITTEE OF UNSECURED CREDITORS' NOTICE OF FILING UNPUBLISHED OPINIONS PURSUANT TO LOCAL BANKRUPTCY RULE 9013-2(b)(4)** Related to [**Docket No. 928**]
☒ Affects all Debtors ☐ Affects Beverly Community Hospital Association ☐ Montebello Community Health Services, Inc. ☐ Beverly Hospital Foundation	

TO THE HONORABLE SANDRA R. KLEIN, UNITED STATES BANKRUPTCY JUDGE, THE OFFICE OF THE UNITED STATES TRUSTEE, THE CHAPTER 11 TRUSTEE, AND OTHER INTERESTED PARTIES:

PLEASE TAKE NOTICE that Official Committee of Unsecured Creditors (the "Committee"), appointed in the cases of the above-captioned debtors and debtors-in-possession, has concurrently filed the *Notice of Motion and Motion of the Official Committee of Unsecured*

[1] The Debtors in these chapter 11 cases, along with the last four digits of each debtor's federal tax identification number, are: Beverly Community Hospital Association d/b/a Beverly Hospital (6005), Montebello Community Health Services, Inc. (3550), and Beverly Hospital Foundation (9685). The mailing address for the Debtors is 309 W. Beverly Blvd., Montebello, California 90640.

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Creditors to Expand the Scope of Mediation [Docket No. 928] (the "Motion").

PLEASE TAKE FURTHER NOTICE that the Motion cites two unpublished decisions, and, in accordance with Local Rule 9013-2(b)(4), the Committee attaches copies of the unpublished decisions as **Exhibit "A"** and **Exhibit "B,"** respectively.

Dated: February 15, 2024

Respectfully submitted,

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Exhibit A

Comerica Bank-California v. GTI Capital Holdings, LLC (In re GTI Capital Holdings, LLC), Case No. BAP AZ-06-1096-PaDS, 2007 WL 7532277 (B.A.P. 9th Cir. Mar. 29, 2007)

2007 WL 7532277
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States Bankruptcy Appellate Panel
of the Ninth Circuit.

In re GTI CAPITAL HOLDINGS, L.L.C.; G.H. Goodman Investments Companies, L.L.C., Debtors.
Comerica Bank-california, Appellant,
v.
GTI Capital Holdings, L.L.C.; G.H. Goodman Investment Companies, L .L.C.; Edward M. McDonough, Examiner, Appellees.

No. AZ–06–1096–PaDS.
|
Argued and Submitted on Jan. 18, 2007.
|
Filed March 29, 2007.

Appeal from the United States Bankruptcy Court for the District of Arizona, Honorable Sarah Sharer Curley, Bankruptcy Judge, Presiding.

Before PAPPAS, DUNN and SMITH, Bankruptcy Judges.

MEMORANDUM [1]

***1** Creditor Comerica Bank–California ("Comerica") helped orchestrate the liquidation of the chapter 11 [2] debtors' assets through a court-appointed examiner. When, after the sale, the bankruptcy estates turned out to be administratively insolvent, the bankruptcy court approved a surcharge of Comerica's collateral to pay some of the costs incurred during the cases, including compensation and expenses of the court-appointed examiner, Edward M. McDonough ("Examiner") and his professionals, and certain equipment lessors, in the total amount of $1,399,458.47. Comerica appealed. We AFFIRM.

FACTS

Debtor G.H. Goodman Investment Companies, LLC ("GHG"), is owned in equal shares by Grant Goodman ("Goodman") and his spouse, Terri Goodman. The Goodmans each own 49.5 percent of the equity in Debtor GTI Capital Holdings, LLC ("GTI"). The remaining equity of GTI is owned by GHG. GHG is the managing member of GTI. Unless otherwise noted, we refer to these entities collectively as GTI.

In September 2001, Imperial Bank extended four loans to GTI totaling about $21,250,000. Comerica is the successor by merger to Imperial Bank. As security for the loans, Comerica held security interests in substantially all of GTI's real and personal property (the "Collateral").

Comerica alleges that GTI defaulted on the loans. On April 3, 2003, Comerica commenced an action against GTI in the Arizona superior court for, among other relief, the appointment of a receiver. [3] At a May 6, 2003 hearing, the state court indicated that it would grant Comerica's request and appoint a receiver. GTI and GHG filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code on May 8, 2003. The bankruptcy court granted their motion for joint administration of the cases.

Before GTI filed its bankruptcy petition, Comerica had taken steps in anticipation of GTI's possible insolvency. On March 31, 2003, Comerica placed the GTI loans on non-accrual status and, though the loans were secured by GTI's assets, it established a loss reserve for the loans of $2,553,000 in compliance with applicable accounting standards (Financial Accounting Standards Board (FASB) 114). Shortly after GTI's bankruptcy filing, Comerica increased that loss reserve to $4,600,000. According to a bank document dated July 31, 2003, Comerica had developed a plan of action to "attempt to liquidate all collateral" of GTI by selling GTI as a going concern by the end of 2003.

No trustee was appointed in the bankruptcy cases, nor was a committee of unsecured creditors organized or appointed. From the date of filing of the petitions through at least January 23, 2004, GTI operated its business as a debtor-in-possession. [4]

On June 18, 2003, GTI's § 341(a) meeting was held. Comerica alleges that, at the meeting, Goodman admitted: (1) that GTI was losing almost $500,000 a month, (2) that GTI was not making monthly payments of $432,000 to secured creditors, (3) that Goodman personally was drawing an exorbitant salary ($25,000 per week), and (4) that Goodman was providing himself and his managers with luxury perks.

***2** On June 19, 2003, Comerica filed a motion for the appointment of an examiner. *See* § 1104(c)(providing that, on request of a party in interest, the bankruptcy court may appoint an examiner to "conduct ... an investigation of the debtor as is appropriate...."). The bankruptcy court granted the motion at a July 2, 2003 hearing. After the U.S. Trustee selected McDonough to serve as examiner, with Comerica's support, the bankruptcy court granted him the authority to perform the duties specified in § 1106(a)(3), (a)(4) and (b), and "the power and duty to handle and control all funds, bank accounts and disbursements" of GTI. To assist him in his efforts, again without objection from Comerica, Examiner retained several professionals, including a financial consulting firm, a law firm, and (later) an environmental consulting firm.

GTI was the lessee under a number of equipment and personal property leases. Some of this leased property was necessary for GTI to remain operational. Comerica refused to consent to any payments by Examiner to these lessors from its cash collateral [5] until Examiner had carefully analyzed which leases were essential to GTI's operations. Examiner therefore undertook what was essentially a cash management analysis to determine what funds were available to pay the personal property leases that were determined to be essential to GTI operations.

Examiner filed a report with the bankruptcy court on July 22, 2003, which focused on personal property leases. Supplemental reports were filed on August 28 and September 5 and 12, 2003. Examiner took steps to reduce GTI's operating costs substantially, resulting in savings of approximately $455,000 from August 2003 to January 2004. While reviewing the leases, Examiner also focused on controlling cash and cash collateral. In addition, he provided Comerica with an extensive quantity of financial information regarding cash expenditures and other matters related to cash collateral. [6]

Examiner then submitted a comprehensive "Preliminary Report" to the bankruptcy court on August 6, 2003. The Preliminary Report contained a review of GTI's books and records and recounted discussions with key personnel. Among the Examiner's findings in the Preliminary Report were the following:

- Debtor had made significant pre- and post-petition payments to insiders. There was a lack of timely and reliable accounting data. There were significant problems with the cash collateral budget. There was no supporting documentation for over $2 million of post-petition expenditures. There were questionable dealings with post-petition related third parties.

- Although the business operations had stabilized and the core business was intact, GTI did not have the working capital necessary to increase revenue, GTI could not meet required debt service, and it would require significant infusion of cash to reorganize.

- "The Examiner believes that (based on his investigation to date) the business affairs of the Debtors under the direction and control of Mr. Goodman have been mismanaged both pre- and post-bankruptcy."

***3** On August 19, 2003, Comerica requested that the bankruptcy court expand the Examiner's powers to include the authority to sell GTI's assets. After notice and a hearing, on October 30, 2003, the court issued its order expanding the Examiner's powers:

> The powers of the Examiner shall be, and hereby are, expanded to include all powers necessary and appropriate to facilitate and accomplish a sale of substantially all of the assets (together with any of the Debtors' executory contracts and unexpired leases) on a going concern basis pursuant to Bankruptcy Code [§] 363....

The court's order provided further that, if a private going concern sale of GTI's assets was not arranged by December 31, 2003, Examiner was authorized to sell the assets under § 363 and assume or reject executory contracts and unexpired leases under § 365 in an orderly liquidation process, after notice and a hearing.

Following the bankruptcy court's approval of his expanded powers, Examiner commenced his efforts to market GTI's assets. After soliciting offers, Arizona Materials, LLC ("Arizona Materials") emerged as the leading prospective buyer of the five bids submitted.

Examiner alleges that he kept Comerica closely apprised of, and involved in, the asset marketing and sale process. Indeed,

Comerica's counsel provided the lead by which Examiner contacted the successful bidder, Arizona Materials. Counsel for Comerica also previewed the bids and received drafts of the purchase agreement as it was negotiated between Examiner and Arizona Materials.

On December 31, 2003, Arizona Materials executed an Asset Purchase Agreement in which it agreed to purchase substantially all of GTI's assets as a going concern for an all-cash price of $7.8 million. Examiner filed a motion to approve the sale. While Comerica supported the sale, after a hearing, the bankruptcy court declined to approve the sale and sent the parties back to the negotiating table. Ultimately, Examiner and Arizona Materials agreed to an all-cash purchase price of $8 million. On January 23, 2004, Examiner filed an amended motion to approve the sale. [7]

On February 19, 2004, the bankruptcy court held a final hearing concerning the proposed sale transaction. Comerica again endorsed the sale. There were no bids submitted in excess of Arizona Materials' bid, and the court approved the sale. The sale transaction closed on February 20, 2004. As noted, it generated $8 million in cash proceeds.

On March 16, 2004, Comerica submitted a Motion for Disbursement of Proceeds of Asset Sale. The primary relief requested in this motion was an order directing Examiner to pay Comerica $7,050,000 plus interest from the date of sale from proceeds of the sale. Comerica allowed in this motion that the disbursement would be without prejudice to any claims asserted against Comerica in any avoidance actions by GTI or Examiner. [8]

At a hearing on February 24, 2004, the bankruptcy court had directed the Examiner to prepare and file a summary of all administrative expense claims. The Examiner's report, docketed on April 12, 2004, included recommendations regarding a process for resolving outstanding claims and other key issues remaining in the bankruptcy cases, and in particular a suggestion that Examiner "be authorized to meet and confer with all administrative claimants and secured creditors in an effort to negotiate a final resolution of the asserted claims and payment thereon." Before a status hearing on April 15, 2004, Examiner shared this report on administrative expenses with Comerica's counsel. Comerica also filed a Reply in Support of [Comerica's] Motion for Disbursement of Proceeds of Asset Sale on April 15, 2004, in which it objected to disbursement of sale proceeds (other than to Comerica) until a proper allocation of proceeds had been determined. Comerica suggested modifications of Examiner's protocol, but generally supported the concept of expanding the Examiner's authority to engage in "shuttle diplomacy" with the other creditors "to attempt to negotiate settlements with administrative and secured claimants."

***4** GTI, Examiner and Comerica appeared with counsel at an April 15, 2004 hearing. The parties agreed on the record to adopt a protocol to resolve the remaining major issues in the bankruptcy case based on the Examiner's report as modified by suggestions from Comerica. The protocol was a "joint recommendation of Comerica and the Examiner." It established reserves for payment of administrative and other secured claims, pending their resolution by settlement or court order, and provided an interim distribution to Comerica of $1,698,300 from the sale proceeds. As presented to the bankruptcy court at the hearing, the protocol also endorsed the suggestion in Examiner's report that Examiner's power be expanded to include the authority to negotiate settlements with administrative and secured claimants. In addressing the bankruptcy court, Comerica's counsel strongly endorsed this expansion of the Examiner's powers:

> I do encourage you to empower the examiner to do whatever arm twisting that he can do between now and the next time we're here to see if he can squeeze down those claims a little bit more through a little bit of cajoling, and thereby save all of us the time and energy, and you importantly the time and energy of having to do the claim objection and estimation process.

Tr. Hr'g 17:14–20 (April 15, 2004).

At this April 15 hearing, the issue of surcharging Comerica's collateral was raised by its counsel:

> We can also file—well, I don't know if we've gotten to the point on surcharge. I mean frankly nobody has raised that issue. And if that's something you [the bankruptcy court] think we need to preview with you by then [the next

> hearing], we're happy to do that and it makes sense.

Tr. Hr'g 18:2–6 (April 15, 2004). In response to Comerica's introduction of the surcharge issue, Examiner proposed to file a statement of his position on surcharge. This discussion ensued:

> MILLER [Examiner's counsel]: I do think that the surcharge issue obviously is the elephant in the room. I think we should just take it head on....
>
> THE COURT: [W]e need to get that [Examiner's position on asset allocation, claims estimation and surcharge] out there as quickly as possible....
>
> MILLER: We can do that, judge, and circulate it for everybody, and say what we think a fair surcharge would be.
>
> THE COURT: Okay.
>
> MILLER: Yes, by Monday, end of business Monday.
>
> THE COURT: Understood....
>
> ROTH [counsel for GTI]: I'm assuming that if three days from now, the examiner has a position on surcharge, if somebody has a different position on surcharge, they could file within this objection deadline as well their position on surcharges?
>
> THE COURT: Right. What we're doing is we're basically having the examiner lead off on surcharge, allocation, all of these issues by Monday.... It looks like we've got a game plan....

Tr. Hr'g 19:8–20:9, 30:17–23 (April 15, 2004).

From mid-April through June 2004, Examiner negotiated with the administrative expense claimants and arranged several claim settlements. Examiner filed notice of these settlements with accompanying memoranda to the bankruptcy court for its consideration at a status hearing to be held on June 25, 2004. At the hearing, Examiner and Comerica informed the court that most of the administrative claims had been resolved, and that the framework of an agreement among Examiner, Comerica and the settling claimants was close to being finalized. The court continued the hearing to July 7, 2004.

***5** On June 9, 2004, the bankruptcy court signed another order, with the consent of Comerica, Examiner and GTI, further expanding the Examiner's powers to collect accounts receivable. In the following two months, Examiner collected $261,000 in cash for the bankruptcy estate.

On July 1, 2004, Examiner and Comerica executed a Term Sheet intended by them to establish the framework for an agreement between Examiner and Comerica regarding the various administrative claim settlements and how they would be paid. Examiner filed a motion to approve the Term Sheet.

The Term Sheet is composed of a two-page outline of eleven issues, with two appendices. The following is a synopsis of its major provisions:

- As of May 18, 2003, GTI owed Comerica at least $18.3 million.
- Comerica holds a first priority valid lien on substantially all assets of GTI, except for the Orix lien that is resolved in the Term Sheet. The Orix claim up to $505,520 will be paid out of Comerica collateral. After deducting for settlement payments (Exhibit A), reserve for disputed claims (Exhibit B), and the windup reserve ($200,000), all remaining asset sale proceeds and cash collateral will be turned over immediately to Comerica.
- Examiner and Comerica will seek approval of the compromised administrative claims listed on Exhibit A. Any party objecting to compromised amount will be transferred to Exhibit B as a disputed claim. Examiner and Comerica will seek disallowance of all disputed claims (Exhibit B). Examiner will set aside a reserve in full amount of the disputed claims and will turn over to Comerica any funds in reserve not ordered paid by the court to the holders of disputed claims.
- Conditions precedent to Comerica's willingness to agree to these terms were: (a) settlement of Rolling Stock Avoidance Action against Comerica; and (b) court approval of the Term Sheet's recommendation of settlement of other claims against Comerica.
- Exhibit A lists 17 claims totaling $5,540,266.14, to be settled for a total of $2,420,205.54. Exhibit B lists five disputed claims for $1,317,293.12.

On July 7, 2004, the bankruptcy court conducted its initial hearing on Examiner's motion to approve the Term Sheet. GTI expressed concern about approving a Term Sheet as

opposed to a definitive settlement agreement. The court denied approval of the Term Sheet and instructed the parties to prepare and submit a definitive settlement agreement. Comerica agreed at the July 7, 2004 hearing to work with Examiner to develop a formal settlement agreement. [9]

Unfortunately, Examiner and Comerica could not negotiate a final settlement agreement. The parties dispute the reasons for the breakdown in the settlement process. However, the three issues most frequently mentioned by the parties concern Examiner's addition of two lessors to the settled claims list (Exhibit A) requiring an approximate $500,000 additional expenditure from Comerica's cash collateral; Comerica's demand that the administrative expense claimants receive only 90 percent of the amount of the settlements previously negotiated by Examiner listed in Exhibit A; and Comerica's assertion that Examiner had "overspent." [10]

***6** On August 11, 2004, GTI and Examiner jointly filed a motion to surcharge Comerica's collateral for the fees and expenses of Examiner and his various professionals. On August 25, 2004, the bankruptcy court conducted a scheduling hearing concerning this motion. At the hearing, a lessor, Bombardier Capital, Inc., argued that it also may assert a surcharge claim and that it would be appropriate to get all surcharge claims "on the table" including the claims of the equipment lessors. Tr. Hr'g 6:14 (August 25, 2004). Neither Examiner nor Comerica opposed that approach. Indeed, Comerica endorsed it and indicated that Comerica would prefer "surcharge litigation once and not piecemeal." Tr. Hr'g 7:23–8:1 (August 25, 2004). The bankruptcy court decided that it would allow a supplemental surcharge motion to be filed, on condition that any party wishing to join in the proposed surcharge litigation did not unduly delay the litigation.

On September 1, 2004, GTI and Examiner filed a joint supplemental surcharge motion. This supplemental surcharge motion added July 2004 professional fees and expenses to the earlier motion. It also sought to surcharge Comerica's collateral for the amounts required to pay claims under nine personal property leases for post-petition rent and taxes under the leases in the approximate amount of $1,500,000.

The bankruptcy court conducted extensive evidentiary hearings concerning the surcharge motions spanning seven days from December 2004 to June 2005. Testimony was provided by Examiner; Diane McDonald, a Comerica officer; and Goodman. Over one hundred documents were admitted into evidence.

The bankruptcy court filed its Memorandum Decision regarding the surcharge on November 22, 2005. In response to Comerica's motion to amend the decision, the court issued a two-page order on March 2, 2006.

The court's decision is an impressive 96–page narrative which contains extensive findings of fact and conclusions of law, and analysis. Summarizing only the most critical points of the bankruptcy court's ruling, it decided that:

- GTI had standing to pursue the surcharge motion. Examiner was also a proper movant given the facts of this case.
- Comerica caused the bankruptcy court to appoint an examiner with pervasively broad powers. Because Comerica asked the court to empower Examiner to perform these duties, Comerica consented to or caused Examiner and his professionals to perform these duties.
- Comerica refused to consent to any payments to personal property lessors from funds in its cash collateral until the Examiner had analyzed which leases were essential to Debtors' operations. Examiner provided Comerica with extensive financial information regarding cash expenditures and other matters related to Comerica's cash collateral. This was unusual in that the court would ordinarily expect Comerica to undertake this thorough review.
- Examiner's Preliminary Report was lengthy, detailed and a significant undertaking in light of time constraints. The Preliminary Report directly and substantially benefitted Comerica and the bankruptcy estate.

***7** • Following the Preliminary Report, Comerica moved to expand Examiner's powers even further to sell GTI's assets. Comerica's internal documents establish that Comerica aspired to have its collateral sold by the end of 2003.

- "The Examiner became convinced, in September to October 2003, that he would be lucky to sell the debtors' assets above the amount that would be due and owing to Comerica. At trial, [Examiner] testified that he was of the view in October 2003 that he would have been ecstatic if these assets had sold in the $12,000,000 to $14,000,000 range. Since the approximate amount of

Comerica's debt was at least $17,000,000 at the time, the Court conclude[d] that Comerica was undersecured as early as October 2003." Comerica had called Examiner as a witness, and it did not object to, nor controvert, this testimony.

- Comerica wanted all of GTI's assets to be sold as one package as a going concern because liquidation of those assets would yield less for the bank.

- Comerica used the bankruptcy process to accomplish its business goals. Comerica decided early in the proceedings that its best course of action was to seek the appointment of an examiner to force sale of its collateral through the court. Comerica filed, but then failed to follow through on, a stay relief motion, preferring, instead, to grant Examiner the power of sale through the bankruptcy court.

- Comerica repeatedly sought the expansion of Examiner's powers with knowledge that the bankruptcy estates did not have the resources to pay the accrued and accruing professional fees and equipment lease payments.

- Comerica knew of the likely administrative insolvency of the bankruptcy estates when it consented on the record at the April 14, 2004 hearing that Examiner and his professionals should proceed with at least an initial surcharge analysis. In doing so, Comerica consented to having at least initial costs of Examiner and his law firm surcharged against its collateral.

- The court was unable to conclude that all costs on the surcharge issue should be the sole responsibility of Comerica. As a result, the court analyzed the different expenses, deducted certain costs of the professionals, and indicated that they must be addressed at another hearing.

- At the time of preparation of the Term Sheet, Comerica and Examiner knew that there were limited funds available to pay the remaining claimants. The Term Sheet was structured such that Comerica waived claims to a portion of its alleged collateral to create funding to pay the administrative claimants. "Comerica was consenting to its collateral being surcharged to resolve all remaining issues in the case."

- "The evidence at trial establishes, and the Court so finds, that Comerica breached the letter and spirit of the Term Sheet when the Bank demanded that all administrative expense creditors take less than prompt payment in full on their settled claims and absorb the economic risk associated with the outcome of the Registry Funds dispute. Comerica's actions in this regard were taken in bad faith and resulted in the failure of the Examiner and Comerica to enter into a definitive settlement agreement."

***8** - Comerica received a direct, substantial and quantifiable benefit from all of the work of the Examiner and his counsel in connection with: preparation of the Preliminary Report and stabilization of GTI's business; Examiner's efforts in controlling cash, eliminating the possibility of insider defalcations, negotiating and documenting cash collateral budgets, and paring down personal property leases; and in Examiner's quick sale of Comerica's collateral as a going concern when Comerica knew that it would receive less in a liquidation.

- Comerica benefitted from Examiner's sale of GTI's assets through the bankruptcy court, thereby avoiding the costs of stay relief litigation, foreclosure of its real estate collateral, and general expenses associated with personal property sales.

- The efforts of Examiner and his legal counsel resulted in recovery of approximately $1 million in accounts receivable which were Comerica collateral.

- An internal document, Comerica's "Dispute Litigation Settlement Authorization," dated June 30, 2004, establishes that its senior executives approved the Term Sheet because in return for resolving all the issues involved in the administration of the GTI cases, Comerica could also thereby settle the three pending adversary proceedings for the cost of what it already expected to lose in the Rolling Stock Avoidance Action. [11]

- "The court concludes, based on this record, that Comerica consented to have its collateral surcharged to pay a majority of the fees incurred by the Examiner and his professionals in this case."

Based upon these extensive findings and conclusions, on March 1, 2006, the bankruptcy court eventually entered an amended order approving a surcharge against Comerica's collateral in the total amount of $1,399,458.47. Comerica filed a timely appeal on March 9, 2006. [12]

JURISDICTION

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

ISSUES

1. Whether the bankruptcy court erred in determining that Examiner had standing to assert a surcharge claim.

2. Whether the bankruptcy court erred in allowing lessors' claims to be included in the surcharge litigation.

3. Whether the bankruptcy court applied the proper legal standard and burden of proof in ordering a surcharge of Comerica's collateral.

4. Whether the bankruptcy court abused its discretion when it excluded from evidence the report and testimony of Comerica's expert.

STANDARDS OF REVIEW

Standing is a jurisdictional issue that is subject to de novo review. *McClellan Fed. Credit Union v. Parker (In re Parker),* 193 B.R. 525, 527 (9th Cir.BAP1996).

The bankruptcy court's interpretation and application of § 506(c) of the Bankruptcy Code is reviewed de novo. *Debbie Reynolds Hotel & Casino, Inc. v. Calstar Corp. (In re Debbie Reynolds Hotel & Casino, Inc.),* 255 F.3d 1061, 1065 (9th Cir.2001). However, "[t]he issue of whether expenses were reasonable, necessary, and benefitted the secured creditor is a question of fact which we review for clear error." *Golden v. Chicago Title Ins. Co. (In re Choo),* 273 B.R. 608, 611 (9th Cir.BAP2002) citing *Bank of Honolulu v. Anderson (In re Anderson),* 66 B.R. 97, 99 (9th Cir.BAP1986).

***9** A court's decision to exclude expert testimony is reviewed for abuse of discretion. *United States v. Rahm,* 993 F.2d 1405, 1410 (9th Cir.1993).

DISCUSSION

1. *GTI had standing to pursue a surcharge claim against Comerica, and Examiner could properly join in that motion.*

A.

Section 506(c) authorizes a trustee to surcharge the collateral of a secured claimant under certain conditions:

> The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

The bankruptcy court granted the joint motions of Examiner and GTI to surcharge the cash collateral of Comerica for a portion of the costs and expenses of Examiner and his professionals, and for certain payments made by Examiner to equipment lessors during the bankruptcy case. Comerica objected to this request, in part because it contends Examiner lacks standing [13] under the Bankruptcy Code to request a surcharge. Comerica's objection lacks merit.

Had Examiner independently filed the surcharge motions, Comerica's objection might warrant serious consideration. The Supreme Court has ruled that § 506(c) unambiguously provides that only a trustee has standing to bring surcharge actions. *Hartford Underwriters Ins. Co. v. Union Planters Bank,* 530 U.S. 1, 6 (2000) ("We conclude that 11 U.S.C. § 506(c) does not provide an administrative claimant an independent right to use the section to seek payment of its claim.").

However, in this case, Examiner did not file the surcharge motions "independently." Both surcharge motions were filed jointly by Examiner and by GTI as debtor-in-possession. The Supreme Court in *Hartford Underwriters* acknowledged that "Debtors-in-possession may also use [§ 506(c)], because they are expressly given the rights and powers of a trustee by 11 U.S.C. § 1107." 530 U.S. at 3 n.3. Regardless of any question as to the standing of Examiner to assert a right

to a surcharge independently, the surcharge requests in this case were properly initiated by the entity authorized in the Bankruptcy Code to do so, GTI, the debtor-in-possession.

Moreover, there is nothing in *Hartford Underwriters* to suggest that an examiner in a chapter 11 case, especially one with the enhanced powers given Examiner here, may not join in a surcharge motion, as opposed to acting independently of the debtor-in-possession. As the bankruptcy court observed, there is no requirement that the court examine the standing of a co-movant once it has established that one of the parties initiating an action has standing to do so. "The general rule applicable to federal court suits with multiple plaintiffs is that once the court determines that one of the plaintiffs has standing, it need not decide the standing of the others." *Leonard v. Clark,* 12 F.3d 885, 888 (9th Cir.1994)(citing *Carey v. Population Servs. Int'l,* 431 U.S. 678, 682 (1977)). Since the bankruptcy court correctly decided that one of the parties pursuing the surcharge claim had standing, as explained in *Leonard,* that "end[s] the inquiry." 12 F.3d at 888. [14]

***10** We agree with the bankruptcy court in its Memorandum Decision that "because the debtors are proper movants on the surcharge motions, the Examiner's technical standing under § 506(c) is largely irrelevant." Memorandum Decision at 64. [15]

B.

We also agree with the bankruptcy court that, under the facts of this case, it was proper that Examiner "take the lead" in prosecuting the surcharge litigation in this case. Indeed, GTI would be greatly hampered in its ability to pursue the surcharge motions without the benefit of Examiner's insight and familiarity with the facts and circumstances of these cases. Clearly, Examiner is the party most familiar with the financial aspects of these cases, having been placed in control of GTI's cash resources, at Comerica's request, from early on. [16]

Even if Examiner lacked standing independent of GTI to pursue surcharge, Examiner had the right to be heard on the surcharge issue in order to perform those duties authorized by the bankruptcy court. Comerica disputes Examiner's status based upon a narrow reading of § 1109(b), which provides that:

> A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

But the Code's listing of the parties entitled to be heard in a chapter 11 case is not meant to be exclusive. *See* § 102(3) (prescribing that the term "including" is not limiting); 7 COLLIER ON BANKRUPTCY ¶ 1109.03 (15th ed. rev.2001). Courts have extended party in interest status to examiners under a variety of expanded powers. *Williamson v. Roppollo,* 114 B.R. 127, 129 (W.D.La.1990) (examiner given power to recover preferences is party in interest); *In re Torrez,* 132 B.R. 924, 934 (Bankr.E.D.Cal.1991); *Weld v. Sweeney Agcy., Inc. (In re Patton's Busy Bee Disposal Serv., Inc.),* 182 B.R. 681, 686 (Bankr.W.D.N.Y.1995) ("Where the examiner has assumed certain duties of a trustee, that examiner is a party in interest as to the obligations that are so assumed."); *In re Great Barrington Fair & Amusement, Inc.,* 53 B.R. 241 (Bankr.D.Mass.1985) (examiner is a party in interest); *In re Carnegie Int'l Corp.,* 51 B.R 252 (Bankr.S.D.Ind.1984).

In this case, primarily at Comerica's request, the bankruptcy court bestowed broad powers on Examiner to take control of GTI's cash, to liquidate GTI's assets, and to propose the distribution of the proceeds generated in that process. In particular, during that process, at the hearing on April 15, 2004, the bankruptcy court expressly directed Examiner to take the lead on the surcharge question. Comerica participated at that hearing and did not object to the court's suggestion, nor did it oppose Examiner's right to proceed (and be heard) on the surcharge issue. It is clear from the record that, in the unique context of these chapter 11 cases, Examiner was a party in interest with the right to be heard by the bankruptcy court concerning whether Comerica's collateral should be surcharged.

***11** Comerica argues that, because of the provisions of § 1106(b) addressing the statutory duties of an examiner, GTI and Examiner cannot act in concert here. It argues that, under

the Code, an examiner may perform only those duties that the bankruptcy court has forbidden the debtor to perform:

> Under the plain meaning of 11 U.S.C. § 1106(b), besides investigating and reporting on various issues, an examiner is only permitted to do those things "that the Court orders the debtor-in-possession not to perform."

Comerica's Opening Brief at 10 (which is repeated verbatim in Comerica's Reply Brief at 5). According to Comerica, then, the Code prohibits Examiner from pursuing a surcharge because the bankruptcy court did not prohibit GTI from doing so. We disagree.

The provisions of § 1106(b) include an important exception to the general rule suggested by Comerica. The statute provides:

> An examiner appointed under section 1104(d) of this title shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, and, *except to the extent that the court orders otherwise,* any other duties of the trustee that the court orders the debtor-in-possession not to perform.

§ 1106(b) (emphasis added). Subsections (3) and (4) of § 1106(a) require an examiner in a chapter 11 case to investigate the debtor's affairs and file a report. The statute also provides that an examiner shall perform other duties that the debtor-in-possession is ordered *not* to perform. But the statute also allows the court to "order otherwise." In other words, even without prohibiting the debtor-in-possession from, for example, pursuing a surcharge, the bankruptcy court may "order otherwise" that the examiner do so. Contrary to Comerica's assertion, the "plain meaning" of this statute is that the bankruptcy court may (and frequently in practice does) assign tasks and powers to a chapter 11 examiner, in addition to investigating and reporting, without first prohibiting the debtor-in-possession from so acting.

The bankruptcy court did not err in determining that Examiner could join in, and be heard in connection with, the surcharge motions, and that GTI would be seriously hampered in its prosecution of the surcharge without the joinder of Examiner. Nothing in the Bankruptcy Code prevents the bankruptcy court from authorizing an examiner to perform such a role.

2. *Based on the record presented by Comerica, the Panel is unable to determine if the bankruptcy court erred in allowing lessors to "opt-in" to the surcharge litigation.*

Comerica argues that the bankruptcy court erred when it allowed certain personal property lessors to include their administrative claims in the supplemental surcharge motion. We are unable to examine this issue because of the state of the record on appeal provided by Comerica.

Comerica has taken a cavalier approach to helping us review the record. In an attempt to comply with BAP Rule 8009(b)–1(B),[17] it has supplied information in excerpts divided by "tabs" with pages continuously paginated. But in its Opening Brief, Comerica frequently cites to the tabs, rather than to the page numbers of the excerpts. Some of the tabs to which we are referred by Comerica contain over 200 pages of material. When Comerica occasionally does refer in its Opening Brief[18] to a specific page of a document in the record, it cites the internal page number of that document within the tab, not the consecutive numbered pages of the excerpts. This departure from proper procedure is aggravated by the fact that 110 of the 220 tabs in Comerica's excerpts are identified in the table of contents solely by their trial exhibit numbers from the bankruptcy court proceedings,[19] and no conversion table is provided that would allow us to identify the documents to which Comerica refers.

***12** In examining the other issues raised by Comerica, we have made our best efforts to understand its problematic citations to the record, in spite of the notion that opposing parties and the court are not obligated to search the entire record unaided for error. *See Dela Rosa v. Scottsdale Mem'l Health Sys., Inc.,* 136 F.3d 1241 (9th Cir.1998). But we are unwilling to do so as to this particular "opt-in" issue, since Comerica argues that neither Examiner nor GTI did any analysis to determine whether the equipment lessors or other administrative creditors provided any direct or measurable benefit associated with Comerica's collateral as required by § 506(c). In support of that statement, Comerica generally cites to four of the Examiner's reply documents, including responses to interrogatories, spanning 88 pages of responses. However, Comerica fails to provide the Panel with the text of the interrogatories to which Examiner is responding!

Apparently, Examiner was equally confused by Comerica's brief on this issue. In Examiner's Reply Brief, he charges that the opt-in issue was never raised in the bankruptcy court. In

Comerica's Reply Brief, Comerica states that the issue was raised and cites to the record, but at a location that contains no reference to Comerica's position on the opt-in issue. [20]

Appellant bears the burden of providing an adequate record on appeal. *In re Burkhart,* 84 B.R. 658, 660 (9th Cir.BAP1988). Where the inadequacy of the record on appeal is egregious, the Panel may summarily affirm the findings of fact of the bankruptcy court. *Massoud v. Ernie Goldberger & Co. (In re Massoud),* 248 B.R. 160, 163 (9th Cir.BAP2000). In this instance, based upon Comerica's flawed approach to citing the record, we are unable to determine what findings of fact are challenged by Comerica. For that reason, the Panel will not examine the issue raised by Comerica, and we will not disturb the ruling of the bankruptcy court.

Although we are unable to do an effective review concerning Comerica's argument, and therefore decline to modify the bankruptcy court's decision on this point, from what we can discern from the record, it appears Comerica acquiesced to adding the lessors' claims to the surcharge litigation. At the August 25, 2004 scheduling hearing, Comerica did not object to Bombardier Capital's attorney's suggestion that all surcharge claims be put "on the table" via a supplemental motion. Tr. Hr'g 6:14 (August 25, 2004). Instead, Comerica endorsed the approach, and indicated its desire that the bankruptcy court consider all surcharge claims at "once, not piecemeal." *Id.* at 7:23–8:1. Comerica cannot now argue that because GTI and Examiner complied by adding lessor claims in the supplemental motion, the bankruptcy court erred in considering those claims. [21]

3. *The bankruptcy court applied the proper legal standard and burden of proof in ordering a surcharge of Comerica's collateral.*

A.

***13** The bankruptcy court employed a two-pronged legal standard to decide whether it should order a surcharge in this case. Historically, these two approaches have been referred to as the subjective and objective tests. Under these tests, a party seeking to surcharge a secured creditor's collateral must show either: (1) under the subjective test, that the secured creditor "caused or consented to" the expenses to be surcharged; or (2) under the objective test, and consistent with the criteria explicitly stated in § 506(c), that the expenses sought to be surcharged were reasonable, necessary and beneficial to the secured creditor. *In re Compton Impressions, Ltd.,* 217 F.3d 1256, 1260 (9th Cir.2000).

The subjective test is rooted in pre–1978 Bankruptcy Code practice. It is inherently an equitable standard.

> Section 506(c) had its origins in the equitable principle that where a court has custody of property, administration and preservation expenses are a dominant charge against the property.
>
> *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 9, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000).

In re Los Gatos Lodge, Inc., 278 F.3d 890, 893 (9th Cir.2002).

When a reorganization is unsuccessful and the debtor's estate is administratively insolvent, the Ninth Circuit has long recognized that the bankruptcy judge has the authority to decide the extent to which a secured lender's collateral can be surcharged for administrative costs and expenses. *Silver State Sav. & Loan Ass'n v. Young,* 252 F.2d 236, 238–39 (9th Cir.1958) ("Where the free assets involved in an unsuccessful reorganization proceeding are insufficient to cover allowances, the extent to which mortgaged property should be charged therewith rests with the sound discretion of the trial judge.").

Although the subjective test pre-dates the 1978 Bankruptcy Code, according to the Ninth Circuit, it is still an appropriate basis for surcharge where the secured lender expressly or impliedly consents to or causes administrative expenses. *See* *Compton Impressions,* 217 F.3d at 1260 (holding that, under § 506(c), a trustee or debtor-in-possession must demonstrate that the expenses sought to be surcharged are reasonable, necessary and beneficial to the secured creditor or "that the [secured creditor] caused or consented to those expenses"), citing *In re Cascade Hydraulics & Utility Serv., Inc.,* 815 F.2d 546, 548 (9th Cir.1987) (emphasis added).

The objective test arrived with the language of the 1978 Code. As expressed in § 506(c), the trustee or debtor-in-possession may recover "the reasonable, necessary costs and expenses for preserving or disposing of" the secured creditor's collateral, "to the extent of any benefit" to the creditor. In our circuit, the case law makes clear that the objective test is not easily satisfied:

> The parties seeking the surcharge must prove that the expenses were reasonable, necessary and provided a quantifiable benefit to the secured creditor. [Citations omitted.] This is not an easy standard to meet. It is the party seeking the surcharge that has the burden of showing a "concrete" and "quantifiable" benefit.... The § 506 recovery is limited to the amount of the benefit actually proven.... Furthermore, because the amount of a surcharge is limited to the amount of the benefit and must be proven with specificity, the deserving party is easily ascertainable.

***14** *In re Debbie Reynolds,* 255 F.3d at 1068.

The objective test received particular attention after the Supreme Court's decision in *Hartford Underwriters.* As discussed earlier, *Hartford Underwriters* held that only a trustee or debtor-in-possession, and not an administrative claimant, has standing to pursue a surcharge. The Supreme Court in that case emphasized that the language of § 506(c) is plain and unambiguous. *Hartford Underwriters,* 530 U.S. at 6. Since § 506(c) does not include reference to a "consent" standard, it may well foreshadow the ultimate abandonment of the subjective test. But though the objective test appears to be in the ascendant, we have no clear direction from our Court of Appeals or the Supreme Court whether the subjective test has continuing vitality. [22]

Under these circumstances, therefore, it was understandable that the bankruptcy court in this case applied both tests in its extensive Memorandum Decision. For this reason, we will also review the bankruptcy court's decision under both standards.

B.

Regarding the subjective test, the bankruptcy court recited fourteen pages of fact findings to support its conclusion that Comerica caused and consented to the surcharged expenses. For example, the bankruptcy court found that Comerica alone sought the appointment of an examiner to take control of GTI's cash and to guard against alleged fraudulent activities by GTI's management that could threaten its collateral. It was Comerica that persuaded the bankruptcy court to expand Examiner's authority beyond mere investigation and reporting to analyze equipment leases so as to prevent erosion of Comerica's collateral position. Comerica then succeeded in convincing the bankruptcy court to expand Examiner's powers to enable him to liquidate GTI's assets as a going concern, a goal consistent with Comerica's internal plans concerning these loans. And, after the sale, Comerica supported another grant of authority to Examiner to conduct a course of "shuttle diplomacy" with other creditors, hopefully to settle the amounts to be paid on their claims, and presumably because it appreciated that compromising administrative claims as originally planned in the Term Sheet would likely generate a net saving in its litigation costs.

None of the bankruptcy court's fact findings that Comerica caused or consented to Examiner's authority and actions in administering these estates, and incurring the expenses in question here, are clearly erroneous. Indeed, it appears to us from our review of the record that Comerica, from early on in the bankruptcy case, decided it was beneficial to employ an examiner with expanded powers to divest GTI's management from control of GTI's finances, to sell the assets, and later, to settle administrative claims, including those of the personal property lessors. It is also apparent that Comerica appreciated, from almost the inception of Examiner's service, based upon the extensive financial information being supplied by Examiner and otherwise available to Comerica, that it was possible, if not probable, that the asset liquidation would not net sufficient amounts to pay administrative expenses and Comerica's secured claim in full.

***15** In other words, when it appears that a secured creditor in a reorganization case holding a lien on nearly all of the debtor's assets secures and promotes the services of an examiner, not only to investigate the debtor's financial affairs, but also to sell the debtor's business as a going concern and to settle outstanding claims, while all the

time appreciating that the debtor may be administratively insolvent, the bankruptcy court may properly conclude that the secured creditor impliedly consented that the costs of administering that bankruptcy estate be paid from its cash collateral. Here, there is ample competent evidence to support the bankruptcy court's conclusion that Comerica caused and consented to Examiner's professional expenses, and to the payments for certain essential leased personal property, [23] sought to be recovered in the surcharge motions. If the subjective test remains valid, the bankruptcy court properly applied it, and did not err in ordering the surcharge.

C.

Even if the subjective test has been abrogated by adoption of § 506(c), the abrogation is of no consequence in this appeal. This is because the bankruptcy court also correctly analyzed and granted the surcharge requests under the objective test.

The objective test has three components. "The parties seeking surcharge must prove that the expenses were reasonable, necessary and provided a quantifiable benefit to the secured creditor." *In re Debbie Reynolds,* 255 F.3d at 1068. The bankruptcy court provided extensive findings of fact in this case as to the reasonableness and necessity of the expenses, and as to the quantifiable benefit bestowed upon Comerica.

In regards to reasonableness, the court pointed to the 300 pages of detailed billings and extensive analysis of Examiner's and his professionals' time. The court described these services as "excellent" and the time spent and rates "reasonable." These findings are not clearly erroneous. The court also noted that Comerica has submitted no evidence to show the professional fees and expenses were not reasonable.

The bankruptcy court next addressed the necessity requirement of § 506(c). The court carefully audited the services provided and expenses sought to be surcharged. That it performed a proper necessity analysis is evidenced by its explanation of how certain identified services and expenses were not necessary to preserve or dispose of Comerica's claimed collateral. For example, the court identified $39,761.00 from Examiner's attorneys' First and Second Fee Applications which were not necessary under § 506(c). Based on the record, the bankruptcy court likewise declined to surcharge $142,561.00 in fees and costs requested by Examiner's counsel in its Third Fee Application, and all costs in all three fee applications. The court also excluded $20,816 of fees of Examiner and his environmental consulting firm which it determined were not necessary to preserve or dispose of Comerica's collateral. Finally, it determined that all services of Examiner's environmental consulting firm were necessary within the meaning of § 506(c).

***16** The bankruptcy court provided greatest attention to a detailed analysis of benefits to Comerica resulting from the efforts of Examiner and his professionals, and from the lease payments. In a six page section of its decision, the court explained how Comerica received direct, substantial and quantifiable benefit from all Examiner's and professional services in investigating GTI's dealings, preparing the Preliminary Report, cash management, sales and marketing of the assets, collection of outstanding accounts receivable, and settlement of administrative expense claims.

Much of the factual findings detailing these benefits was derived by the bankruptcy court from the testimony of Examiner and Goodman. The bankruptcy court noted that while Comerica called McDonald, a bank officer, to testify, she knew "little to nothing about what transpired in these cases and knew virtually nothing about Comerica's institutional experiences on key issues related to the benefits that Comerica might have obtained from the efforts of the Examiner and his professionals." Memorandum Decision at 81–82. Comerica has an especially difficult burden in asking us to disregard any testimony because of the deference we give the bankruptcy court's opportunity to weigh the importance of witness testimony and judge the credibility of witnesses. *See* Rule 8013 (On appeal, "due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of witnesses.").

Summing up its conclusions about the benefit to Comerica, the bankruptcy court noted that:

> Comerica was the primary beneficiary, and in many respects, the sole beneficiary of the efforts of the Examiner and his professionals. In a case where general unsecured creditors will almost certainly never receive a distribution and administrative expense claimants are faced with an uphill battle to receive more than a fraction of the amount

> of their claims, Comerica's argument that the efforts of the Examiner and his professionals benefitted everyone, and not primarily [Comerica], is sophistry.

Memorandum Decision at 83. We agree with the bankruptcy court's analysis.

Before leaving the objective test issues, we must review the objective test as it applies to the amounts Comerica was surcharged for unpaid rent and taxes under the leases. The bankruptcy court noted that the very first task Comerica expected Examiner to complete after his initial appointment was to pare down the personal property leases to those covering essential equipment. He did so. It is undisputed that Examiner reported to Comerica, and promptly and significantly reduced the number of leases and their attendant expenses which could strain Comerica's cash collateral. The leases not rejected as part of this initial review covered only those items that Comerica agreed were essential equipment.

As the bankruptcy court noted, had the leases not been preserved in a pared-down state, Comerica likely would not have obtained the direct, substantial and quantifiable benefit of the going concern sale of GTI's business negotiated by Examiner. Comerica's internal documents acknowledged that a going concern sale was beneficial to its position, and that a liquidation of the assets would likely return less value on its claim. Thus, the bankruptcy court concluded that the amounts due on the unpaid lease claims were reasonable, necessary and beneficial within the meaning of § 506(c). We agree.

***17** Comerica argues that the leases rejected between August 1, 2003, and the sale of the assets provided no benefit to Comerica. Comerica's argument appears to be in several parts. On the one hand, they insist that the leases rejected after August 1 are in exactly the same category as those leases rejected before August 1 which the court acknowledged had provided no benefit to Comerica and that any amounts due on those leases could not be charged against Comerica. But Comerica does not explain how or why the leases rejected before August 1 are similar to those rejected after August 1. [24]

In any case, even if leases on either side of the dateline are identical, the issue is not the *substance* of the leases but the *timing* of the leases. The Examiner's lease report identified certain leases that, as of July 28, 2003, should be rejected, and another group of leases that, as of that date, were necessary to the continuing operation of the debtors. Leases rejected before August 1 provided no benefit to Comerica. Leases rejected after August 1 were deemed necessary for the continuing operation of the debtors and, thus, necessary to Comerica's and the Examiner's plan to sell the business as a going concern. That certain of the post-August 1 leases were eventually rejected does not mean that, while they were in effect, Comerica received no benefit from retention of the leased property. [25]

Comerica also argues that the benefit to Comerica accruing from these leases was not attributed by the bankruptcy court with sufficient specificity. Apparently, Comerica expected Examiner and the bankruptcy court to examine the benefit to Comerica for each lease.

An evaluation of the benefit of each lease to Comerica is not required. We believe the court correctly found that Comerica received a direct, substantial and quantifiable benefit because GTI's assets could be sold by Examiner as a going concern. Although the court noted that it was difficult to place a precise dollar amount on the benefit to Comerica derived from a going concern sale, it found that Comerica would not have received the benefit of the enhanced sale price without these leases. This finding is consistent with Comerica's own internal analysis and plans for liquidation of its collateral. The bankruptcy court's finding that Comerica benefitted from the leases was not clearly erroneous.

In sum, the bankruptcy court applied the correct legal standard under the objective test, and supported its conclusion that a surcharge was appropriate with ample findings of fact that are not clearly erroneous.

D.

Comerica's arguments suggesting that the bankruptcy court erred in applying the burden of proof also lack merit. We agree with Comerica's assertion that GTI and Examiner bear the burden of proving the facts necessary to establish the right to surcharge its collateral. We disagree with Comerica's argument, however, that the bankruptcy court employed a presumption that all expenses could be surcharged against Comerica's collateral, and then shifted the burden of disproving surcharge to Comerica.

***18** As noted above, the bankruptcy court made extensive findings based on the evidence and testimony to support its

conclusions that the expenses in question were reasonable and necessary, and of quantifiable benefit to Comerica. Where in its decision the bankruptcy court indicated that Comerica had not submitted credible evidence that expenses were unnecessary or unreasonable, it was not shifting the burden of proof to Comerica, but simply noting the absence of sufficient evidence in response to the proof provided by GTI and Examiner that those expenses were necessary or reasonable.

The bankruptcy court applied the correct burden of proof in ordering a surcharge of Comerica's collateral.

4. *The bankruptcy court did not abuse its discretion when it excluded the expert report and testimony offered by Comerica.*

The admission of expert testimony is governed by Federal Rule of Evidence 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Comerica offered the testimony and a report of Morris Aaron, CPA, as an expert witness on the subject of surcharge. The bankruptcy court allowed the witness to testify on direct examination, and withheld ruling on objections to his status as an expert witness and to admission of his testimony in evidence. After direct examination, Examiner's counsel questioned the witness and Aaron disclosed the following regarding his qualifications:

- He is a certified public accountant.
- He had not reviewed any bank records in his analysis.
- He had never communicated with Examiner, officers of GTI, Comerica, or any of the administrative creditors.
- He had only reviewed limited court filings and related documents provided to him by Comerica's counsel.

The bankruptcy court expressed two principal concerns regarding Aaron's testimony. First, the court did not believe that it required expert testimony on the surcharge issue. Second, the court questioned the methodology Aaron employed in preparing his testimony and report.

Ordinarily, a trial court's determination that it did not require expert testimony regarding a proposed surcharge would be dispositive.

> The decision whether to admit expert testimony does not rest upon the existence or strength of an expert's opinion. Rather, the key concern is whether the expert testimony will assist the trier of fact in drawing its own conclusion as to a "fact in issue."

United States v. Rahm, 993 F.2d 1405, 1411 (9th Cir.1993).

Here, the bankruptcy court observed that it had presided over many cases in which surcharge was an issue and had never needed an expert witness on the subject. "It's just not something that the Court believes is an area where I need expert testimony." Tr. Hr'g 64:11–13 (June 29, 2005).

***19** The bankruptcy court also expressed serious reservations about the methodology used by Aaron.

> I have a great deal of concern about your reliance just on the court records. And if I understand your testimony correctly, that really was principally what you looked at.... The court normally is looking in expert testimony for the party really to go out

> and explore the field, and explore the factual information available.

Tr. Hr'g 66:11–20 (June 29, 2005). The court declined to allow Aaron's testimony in evidence. Comerica objects to the court's decision. Comerica is particularly concerned that the court refused Aaron's testimony but accepted, in Comerica's words, the "expert testimony" of Examiner regarding the propriety of a surcharge of his own fees and those of his professionals.

Comerica does not cite any legal authority on the subject of expert witnesses in either of its briefs. Further, Comerica's argument that Aaron's testimony was required to counter the testimony of Examiner misunderstands the function of expert testimony in the federal courts. Examiner was never presented as an expert witness under Rule 702. Examiner was a fact witness, not subject to Rule 702 restrictions.

The decision whether to admit expert witness testimony is committed to the sound discretion of the bankruptcy judge. *Tamen v. Alhambra World Inv. (In re Tamen),* 22 F.3d 199, 202 (9th Cir.1994). Under these circumstances, Comerica has not shown it was an abuse of discretion for the bankruptcy court to exclude Aaron's testimony.

CONCLUSION

For all the above reasons, we AFFIRM the decision of the bankruptcy court to surcharge Comerica's collateral.

All Citations

Not Reported in B.R., 2007 WL 7532277

Footnotes

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.

2 Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001–9036, as enacted and promulgated prior to the effective date (October 17, 2005) of most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. 109–8, April 20, 2005, 119 Stat. 23.

3 Internal Comerica documents indicate that the receivership action was taken in response to a lender liability lawsuit filed by Goodman against Comerica on March 27, 2003.

4 On January 23, 2004, GTI filed a notice with the bankruptcy court that it would not pursue confirmation of a plan. In that notice, GTI advised the court and creditors that it had ceased operations, laid off almost all employees and would not file a plan of reorganization. This information was e-mailed to counsel for Comerica the same day. Although GTI terminated all business operations on that date, no trustee subsequently displaced GTI, and so it continued in its status as a debtor-in-possession. *See* § 1101(a)(providing that "debtor in possession" means the debtor in a chapter 11 case unless a trustee is appointed). GTI therefore retained its authority to exercise the powers of a debtor-in-possession under the Bankruptcy Code that were not vested by the bankruptcy court in the examiner, including its power to pursue a surcharge under § 506(c).

5 Comerica claimed a lien in all of GTI's cash.

6 The bankruptcy court would later note in its memorandum decision that:

> What is unusual is that the Examiner undertook the tasks of an independent thorough review that the Court would normally expect to be undertaken by Comerica's business people or by professionals retained by the Bank.

Memorandum Decision Regarding Surcharge Trial (November 22, 2005)(the "Memorandum Decision") at 11.

7 This was also the date GTI ceased business operations. *Supra* note 4, at 3–4.

8 Examiner had asserted that Comerica's security interest in some of GTI's vehicles was avoidable (the "Rolling Stock Avoidance Action"), and that Comerica may have received avoidable transfers or payments.

9 Ironically, Comerica's counsel warned at the hearing that, if the bankruptcy court later failed to approve a settlement agreement based on the Term Sheet, the resulting disputes could last into 2005. Comerica's counsel stated:

> And the only last thing I would say is the whole framework of this proposed settlement is designed so that there will be a pot of money for creditors to get ... including Comerica. But without that settlement, then we'd be fighting probably into 2005.

Tr. Hr'g 13:20–14:1 (July 7, 2004).

10 Comerica moved to convert the bankruptcy cases to chapter 7 on July 26, 2004. The motion was opposed by GTI, the Examiner and four creditors. The motion to convert was denied by the court in a minute order on August 25, 2004, no appeal was taken by Comerica, and so the cases continue as chapter 11 cases. On July 28, 2004, Comerica also filed an objection to all the claims proposed to be paid by Examiner listed on both Exhibits A and B of the Term Sheet. Comerica ultimately consented to entry of an order on August 25, 2004, approving all the settled administrative claims as priority claims under § 507(a)(1) in the amounts Comerica and Examiner had listed in Exhibit A. The bankruptcy court entered this allowance order shortly after the hearing in which it had praised the "Herculean effort" of Examiner in resolving these administrative claims.

11 Comerica did eventually lose $1,010,581 in the Rolling Stock Avoidance Action (approximately $89,000 less than the $1.1 million it would have given up in the Term Sheet). Obviously, however, it was required to pay the costs of litigating that action. *See* this Panel's unpublished decision in *Comerica v. McDonough, et al.* (BAP no. AZ–05–1045, September 7, 2006).

12 In October 2006, Examiner filed a Motion to Strike Improper Record References from Appellant's Opening Brief. Comerica filed a response to Examiner's motion and Examiner replied to Comerica's response. We do not find merit in Examiner's motion. Examiner's objections to tabs 146, 211, 212, 215, 114, 131, 145, 153, 163, 110 and 207 concern various de minimis defects in the text or requests that they be replaced with the Examiner's copies. None of these objections are material. Examiner's objections to tabs 148, 151, 166, 279, 180, 186, 188 and 189 on the grounds that they were not admitted in the surcharge trial or only conditionally admitted are overruled on the grounds that they are in the docket of the bankruptcy case or adversary proceeding and this Panel may consult the docket of the underlying bankruptcy proceedings. Examiner's objection to tabs 137, 108 and 208 are not material because the Panel did not find it necessary to examine those documents. For these reasons, Examiner's motion to strike is DENIED.

13 As a preliminary matter, we note that the bankruptcy court never ruled that Examiner had *independent* standing to initiate the surcharge motions. Instead, the court described its analysis of this question in terms of "the Examiner's right to be heard in connection with the Surcharge Motions." As the bankruptcy court correctly noted, it is Comerica that has attempted to characterize this issue as one of standing.

14 Comerica reminds us that in *Leonard,* the court ultimately held that the co-plaintiffs did not have standing. The principal plaintiff in *Leonard* was a union and the co-plaintiffs were members of the union. The court determined that the union had waived its right to pursue the action and, therefore, the co-plaintiffs, who derived standing from their membership rights in the union, lost that standing. Here GTI did not waive its right to seek a surcharge, and consequently, the co-movant, Examiner, need not assert independent standing.

15 Even on appeal, GTI continues to act in concert with Examiner concerning the surcharge claims. GTI filed a joinder in the appellate brief of Examiner, in which it “join[s] in and fully support[s] the Answering Brief of Appellee Edward M. McDonough.” GTI Joinder Brief at 2.

16 We are perplexed by Comerica' suggestion that, had GTI solely pursued the surcharge motions, the relief requested would be substantially different and would not include any payments for compensation and expenses for Examiner and his professionals. This notion is apparently premised on a series of letters from Goodman to GTI's attorneys instructing them not to support payments to Examiner or his professionals. But GTI's counsel never implemented these instructions. Instead, GTI joined with Examiner in the original and supplemental surcharge motions filed in the bankruptcy court, both of which provide for recovery of amounts for compensation for Examiner and his professionals. Through counsel, GTI continues its support for the surcharges even now before this Panel. On this record, Comerica's suggestion that GTI's position on the surcharge issue would be, without Examiner's joint status, “different” is at best, speculation.

17 BAP Rule 8009(b)–1(b) *Organization of the Appendix.*

> (1) Documents in the appendix shall be divided by tabs.
>
> (2) The pages of the excerpts shall be continuously paginated.
>
> (3) The appendix shall contain a complete table of contents listing the documents and identifying both the tab and page number where each document is located. If the appendix has more than one volume, the table of contents shall also identify the volume in which each document is located.

18 Comerica's Reply Brief in some places cites to the numbered pages in the excerpts and in other places repeats the errors of the Opening Brief by referring to tab locations, but that is of little assistance in finding the materials cited in the Opening Brief.

19 For example, Tab 219 is identified in the table of contents only as “Examiner's Surcharge Trial Exhibit 102.”

20 This inadequate reference in Comerica's Reply Brief exemplifies the problems the Panel faced in considering Comerica's opt-in issue. Like many of its “block” references, Comerica simply refers to seven pages of the court's Memorandum Decision to show that it raised the opt-in issue at the bankruptcy court. We have examined those pages and find no evidence there that Comerica raised the opt-in issue. In fairness to Comerica, we note that the court referred in those seven pages to portions of an earlier hearing on August 25, 2004. We have examined the three pages cited by the bankruptcy court from the earlier hearing and they also do not include Comerica's position on the opt-in issue. Finally, we read the entire transcript of that hearing (52 pages) and discovered that Comerica may have raised the opt-in issue on pages 21–22, locations that were not cited by either Comerica in its briefs or the bankruptcy court in its Memorandum Decision.

21 There is also evidence in the record that, the day before the August 25, 2004 hearing, Comerica had strongly advocated adding the lessor claims to the surcharge motion. As part of its aborted effort to convert the case to chapter 7 and appoint a trustee, Comerica submitted its “Statement of Position With Respect to: (A) the Debtors' Surcharge Motion; and (B) Surcharge Matters, Generally.” On page 4 of that statement, Comerica argues:

> Comerica should not be subjected to multiple surcharge motions filed by different parties, seeking piecemeal determinations from the Court on how much (if any) of Comerica's collateral should be invaded to pay administrative expenses in these cases that continue to grow at alarming rates.... [P]iecemeal litigation filed by parties (including parties without standing) is not fair to Comerica, and is not an efficient way to handle an issue (surcharge) that quickly is becoming the central issue in the cases. *Accordingly, Comerica requests that the Court direct the Debtors* (or preferably, an independent Chapter 7 trustee) *to prepare and file a single, comprehensive surcharge motion,* and thereafter provide Comerica a fair opportunity for discovery and an evidentiary hearing before ruling on any surcharge motion. Comerica believes that a single surcharge proceeding will conserve judicial resources, and reduce litigation costs by bringing related issues with related arguments and controlling case law before the court in one coordinated proceeding.

(Emphasis added.) The Panel observes that, except for the appointment of a trustee, Comerica received everything that it requested in this passage.

22 The Ninth Circuit decided *Compton Impressions,* wherein it reaffirmed that satisfying *either* the subjective or objective tests could serve as the basis for a surcharge, in July 2000, about six weeks after the Supreme Court decided *Hartford Underwriters.* The Ninth Circuit's decision does not cite or discuss *Hartford Underwriters.*

23 Although most attention in this appeal has been placed on the surcharge of expenses for the Examiner and his professionals, there can be little doubt that Comerica also, and consistently, consented to incurring the lessors' expenses. Comerica had early in the case agreed to pay administrative expenses out of its alleged collateral, but opposed payment to lessors unless an Examiner was appointed and pared down the number of lessors and amount of payments. Examiner in fact did recommend rejection of 30 leases, which the court approved on July 28, 2003, and the court later ruled that Comerica would not be surcharged for expenses resulting from those rejections. The Examiner's report on leases identified 26 other leases that were “necessary to operation of the debtor” and these leases continued in effect after July 28, 2003. The court correctly found that Comerica consented, not only to the leases that were in place on August 1, 2003, but to payment of those leases out of its alleged collateral. When several of those leases were subsequently rejected between August 1, 2003, and the sale of the debtors' assets, the court could properly conclude that “Comerica indeed caused the estates to incur the Unpaid Lease Claims by consenting to the lease payments, choosing the remedy of the Examiner with expanded powers, and pursue a going concern sale of the Debtors' Property through the Examiner” and that “Comerica should be surcharged for that portion of the Unpaid Lease Claims relating to those leases rejected by the Debtors for the period from August 1, 2003 through the closing on the sale transaction.” Memorandum Decision at 85–86.

24 We are also unable to conduct our own examination because we have little or no information in the record on the contents of the leases.

25 It must be remembered that while some leases were eventually rejected before the assets were sold, Comerica had consented to retention of the leases when Examiner made his original recommendations in July 2003.

Exhibit B

In re Cass, Case No. 2:12-bk-16090-RK, 2015 WL 2194796 (Bankr. C.D. Cal. May 7, 2015)

2015 WL 2194796
Only the Westlaw citation is currently available.
OPINION NOT FOR PUBLICATION
United States Bankruptcy Court, C.D. California,
Los Angeles Division.

IN RE: Catherine Z. CASS (Christine Zeman as Administrator of the Estate of Catherine Z. Cass), Debtor.

Case No. 2:12–bk–16090 RK
|
Signed May 7, 2015

Attorneys and Law Firms

Catherine Z. Cass, Santa Ana, CA, pro se.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER TRIAL ON CONTESTED MATTERS OF: (1) TRUSTEE'S MOTION FOR ORDER GRANTING SURCHARGE PURSUANT TO 11 U.S.C. § 506(c); AND (2) JUDGMENT CREDITORS' MOTION TO DISGORGE FEES

Robert Kwan, United States Bankruptcy Judge

***1** Pending before the court in the above-captioned bankruptcy case are the contested matters of:

1. Trustee's Motion for Order Granting Surcharge Pursuant to 11 U.S.C. § 506(c), filed on June 1, 2010 as Docket No. 177 as revised and supplemented by the Trustee's Motion for Order Granting Surcharge Pursuant to 11 U.S.C. § 506(c), filed on November 13, 2012 as Docket No. 272 and Trustee's Supplement to Motion for Order Granting Surcharge Pursuant to 11 U.S.C. § 506(c), filed on September 18, 2013 as Docket No. 331 (collectively, the "Motion to Surcharge"); and

2. Judgment Creditors' Motion for an Order Compelling the Trustee's Attorneys to Disgorge Money Paid to them as Interim Compensation, filed on January 2, 2013 as Docket No. 277 ("Motion to Disgorge").

These contested matters were tried before the undersigned United States Bankruptcy Judge on December 19, 2013. D. Edward Hays, of Marshack Hays LLP ("Marshack Hays"), appeared for Charles W. Daff, Chapter 7 Trustee of the bankruptcy estate of Catherine Z. Cass ("Trustee"). David B. Dimitruk, of the Law Offices of David B. Dimitruk, appeared for Judgment Creditors James Wallace, Rebecca Wallace, and Gloria Suess ("Judgment Creditors").

Having considered the undisputed facts and evidence set forth in the Joint Pretrial Order entered by the Court on June 20, 2013 as Docket No. 321, the evidence admitted at trial and the oral and written arguments of the parties, the court makes the following findings of fact and conclusions of law in these contested matters pursuant to Rules 7052 and 9014 of the Federal Rules of Bankruptcy Procedure. Any finding of fact that should be properly characterized as a conclusion of law should be considered as such, and any conclusion of law that should be properly characterized as a finding of fact should be considered as such.

I. JURISDICTION

The court has jurisdiction over these contested matters pursuant to 28 U.S.C. §§ 1334(b) and 157. These contested matters are core proceedings within the meaning of 28 U.S.C. § 157(b)(2)(A) and (O). The court properly has venue over these matters pursuant to 28 U.S.C. §§ 1408 and 1409.

II. FINDINGS OF FACT

1. On April 22, 2004, Catherine Z. Cass ("Debtor" or "Mrs. Cass") was sued for nuisance and injunctive relief in the Superior Court of Orange County, California, Case No. 04CC05117 (the "First Action") by her neighbors, James Wallace, Rebecca Wallace, and Gloria Suess (collectively, "Judgment Creditors"). Joint Pretrial Order ("JPTO"), Undisputed Facts ("UF") ¶ 1; Declaration of D. Edward Hays in Support of Trial re: Surcharge, filed on August 26, 2013 as Docket No. 323 ("Hays Trial Decl."), ¶ 5.

2. On May 28, 2004, Debtor recorded a Grant Deed with Life Estate ("Grant Deed") which deed named her daughter, Christine Zeman ("Zeman" or "Mrs. Zeman"), as the recipient of a remainder interest in her residence commonly known as 2418 N. Fairmont Avenue, Santa Ana, California 92706 (the "Property"). The Grant Deed is sometimes referred to as the "Transfer." JPTO UF ¶ 2; Joint Compendium ("JC") Exhibit ("Ex") 102; Hays Trial Decl., ¶ 6. [1]

***2** 3. On or about July 8, 2005, Judgment Creditors through their counsel, David Dimitruk ("Mr.Dimitruk") filed a second state court action against Debtor and Zeman in the Superior Court for the State of California, County of Orange, Case

No. 05CC08034 (the "Second Action") seeking judgment, among other determinations and relief, avoiding the Transfer as fraudulent. JPTO UF ¶ 3; Hays Trial Decl., ¶ 7; Declaration of David B. Dimitruk in Opposition to the Motion by Trustee for an Order to Surcharge the Judgment Lien, Docket No. 326 ("Dimitruk Decl."), ¶ 3.

4. On October 28, 2005, Judgment Creditors obtained a money judgment against Debtor in the First Action awarding damages in the amount of $320,000 ("Judgment"). JPTO UF ¶ 6; JC, Ex. 3; Dimitruk Decl., ¶ 6.

5. On November 1, 2005, Judgment Creditors recorded an abstract of the Judgment ("Abstract of Judgment") with the County Recorder's Office for the County of Orange, California. JPTO UF ¶ 7; Dimitruk Decl., ¶ 6; JC, Ex. 4.

6. In the Second Action, filed by Judgment Creditors against Mrs. Cass and Zeman, Zeman filed a cross-complaint on March 2, 2006. JPTO UF ¶ 8; JC, Ex. 5; Dimitruk Decl., ¶ 7.

7. The Second Action was scheduled to commence trial in the Superior Court on January 8, 2007. JPTO UF ¶ 9; Dimitruk Decl., ¶ 8.

8. Judgment Creditors prepared a list of issues for the January 8, 2007 trial in the Second Action. JPTO UF ¶ 10; JC, Ex. 6; Dimitruk Decl., ¶ 8.

9. Judgment Creditors prepared a trial brief for the January 8, 2007 trial in the Second Action. JPTO UF ¶ 11; JC, EX. 7; Dimitruk Decl., ¶ 8.

10. On January 5, 2007, prior to trial in the Second Action, Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C. JPTO UF ¶ 12; Trustee's Request for Judicial Notice in Support of Trustee's Motion for Order Granting Surcharge Pursuant to 11 U.S.C. Section 506(c) filed on November 13, 2012 as Docket No. 273 ("Trustee's RJN"), ¶ 3, Ex. 3, Court's docket re: Bankruptcy Case Number 2:12–bk–16090–RK, Docket No. 1; JC Ex. 8, Petition.

11. Charles W. Daff is the duly appointed and acting Chapter 7 Trustee for the Bankruptcy Estate of Catherine Z. Cass ("Trustee"). *Id.*

12. In her bankruptcy petition, Debtor claimed a homestead exemption of $150,000 in the Property (identified as real property in Orange County, "parcel # 003–09102—title owned by daughter") on Schedule C to the petition, "Property Claimed as Exempt." JC Ex. 8, Petition. On this schedule, Debtor also claimed that the value of the Property was $150,000. *Id.* On Schedule A to the petition, "Real Property," Debtor also indicated that the nature of her interest in the Property was "Life Estate." *Id.*

13. On March 12, 2007, Trustee retained D. Edward Hays and Cathrine Castaldi of the law firm of Rus, Miliband & Smith, APC ("Rus, Miliband & Smith") to represent him as general counsel. JPTO UF ¶ 13; Trustee's RJN, ¶ 3, Ex. 3, Court's docket re: Bankruptcy Case Number 2:12–bk–16090–RK, Docket No. 33, Application of Chapter 7 Trustee to Employ General Counsel (Rus, Miliband & Smith, A Professional Corporation); Declaration of D. Edward Hays in support of Trustee's surcharge motion, filed as Docket No. 272 ("Hays Decl."), ¶ 3; Declaration of D. Edward Hays in Support of Trial Re: Surcharge filed on August 26, 2013 as Docket No. 323 ("Hays Trial Decl."), ¶ 3.

14. On June 22, 2007, the court entered an Order granting Trustee's application to employ Rus, Miliband & Smith. JPTO UF ¶ 13; Trustee's RJN, ¶ 3, Ex. 3; Docket No. 87, Order Granting Chapter 7 Trustee's Application to Employ General Counsel (Rus, Miliband & Smith, A Professional Corporation).

***3** 15. On January 25, 2007, counsel for Judgment Creditors, Mr. Dimitruk, sent a facsimile transmission to Trustee, Mr. Daff, enclosing a copy of a letter agreement between Debtor and Zeman. JPTO UF ¶ 14; JC, Ex. 9; Dimitruk Decl., ¶ 1.

16. On January 30, 2007, the Office of the United States Trustee filed a motion to dismiss Debtor's case because she failed to complete credit counseling prior to filing bankruptcy (the "Motion to Dismiss"). JPTO UF ¶ 15; JC, Ex. 11; Trustee's RJN, ¶ 3, Ex. 3; Docket No. 12; Hays Trial Decl., ¶ 12.

17. The Motion to Dismiss was opposed by Debtor and Trustee. JPTO UF ¶ 16; Trustee's RJN, ¶ 3, Ex. 3; Docket No. 25, Debtor's Objection to Trustee's Motion to Dismiss Case.

18. Judgment Creditors filed a response to the Motion to Dismiss. JPTO UF ¶ 17; Trustee's RJN, ¶ 1, Ex. 1 and ¶ 3, Ex. 3; Docket No. 27, Response to Motion to Dismiss by Creditors James Wallace, Rebecca Wallace and Gloria Suess, JC Ex. 12.

19. In their response to the Motion to Dismiss, Judgment Creditors requested alternative relief as follows: "A. The Creditors ask this court to consider denying the motion because of the abuses by Catherine Cass of the judicial system so that her property may be sold by the Chapter 7 Trustee; B. Alternatively, the Creditors request that if the Court dismisses the petition, it issue a bar against Catherine Cass from filing any further petitions in bankruptcy for the maximum time the court may restrain her ..." Docket No. 27 at 2, JC Ex. 12 at 2.

20. On March 7, 2007, the Office of the United States Trustee filed a notice of withdrawal of its Motion to Dismiss. JPTO UF ¶ 18; Trustee's RJN, ¶ 3, Ex. 3; Docket No. 29, Notice of Withdrawal of United States Trustee's Motion to Dismiss Case Under 11 U.S.C. § 109(h)(1) of the Bankruptcy Code.

21. On March 14, 2007, Debtor filed a document entitled "Request for Court's Reconsideration of Ruling on March 13, 2007 Regarding Replacement of Trustee Charles Daff" ("Motion to Reconsider"). JPTO UF ¶ 80; Trustee's RJN, ¶ 3, Ex. 3; Hays Trial Decl., ¶ 68(c); Docket No. 32, Request for Court's Reconsideration of Ruling on Mar. 13, 2017 Regarding Replacement of Trustee Charles Daff. On March 29, 2007, Trustee filed an Opposition to Motion to Reconsider. Docket No. 39, Opposition to Debtor's Request for Court's Reconsideration of Ruling on March 13, 2007 re Replacement of Trustee Charles Daff; Hays Trial Decl., ¶ 68(d).

22. On March 16, 2007, Mr. Dimitruk spoke to Trustee's counsel, D. Edward Hays ("Mr.Hays"), for the first time in this case regarding several matters including the facts in support of the Second Action which included the fraudulent transfer cause of action against Zeman, and the Judgment obtained against Debtor in the First Action. JPTO UF ¶ 81; Dimitruk Decl. ¶ 20; Hays Trial Decl. ¶ 16.

23. In the March 16, 2007 conversation, Mr. Hays asserted that only Trustee had the standing and the right to prosecute the state court action. *Id.* Mr. Hays also said that Trustee was considering the removal of the Second Action to the Bankruptcy Court. *Id.*

24. On March 20, 2007, Debtor filed a request for voluntary dismissal of her bankruptcy case. JPTO UF ¶ 19; Trustee's RJN, ¶ 3, Ex. 3; Docket No. 45, Opposition to Debtor's Request for Voluntary Dismissal (the motion was "lodged" by Debtor but never filed and therefore does not appear on the docket; Docket No. 45 is Trustee's opposition to the motion and contains an explanation of the situation at 1 n. 1).

***4** 25. On April 2, 2007, Mr. Hays sent an e-mail message to Mr. Dimitruk. JPTO UF ¶ 82; JC Ex. 14; Hays Trial Decl., ¶ 18. The email message stated:

> Today, I received an electronic notice that you filed the attached adversary complaint [8:07–ap–1099–RK which included a claim for relief to deny the Debtor's discharge pursuant to 11 U.S.C. § 727]. The second claim for relief requests that the Court determine that your clients have a lien or interest in the Cass property superior to any interests held by the Debtor and/or her daughter. The second claim for relief does not request that the Court make any determination with regard to the relative rights between your clients and the estate. **Please reply to confirm** that your clients will neither assert any right nor seek entry of any judgment or order that purports to bind the estate as the Trustee is not a named-party to this action.
>
> As you know from our prior discussions, the Trustee contends that the estate's rights in the Property, the claims to avoid and recover the alleged fraudulent transfer made by Debtor and any rights arising from the lis pendens recorded by your clients are superior to that of creditors, including your clients.
>
> Thanks.

Emphasis in original.

26. On April 10, 2007, Trustee filed an opposition to Debtor's Voluntary Request for Dismissal. JPTO UF ¶ 20; Trustee's RJN, ¶ 3, Ex. 3, Docket No. 45, Opposition to Debtor's Request for Voluntary Dismissal, JC Ex. 17.

27. On April 10, 2007, Judgment Creditors filed a response to Debtor's request for voluntary dismissal. JPTO UF ¶ 21 (the JPTO mistakenly says the response was filed on April 12, 2007); Trustee's RJN, ¶ 3, Ex. 3, Docket No. 46, Memorandum of Points and Authorities in Response to the Motion by Catherine Cass to Dismiss Her Petition, JC Ex. 18.

28. In their response to Debtor's request for voluntary dismissal, Judgment Creditors stated that the court should "deny the motion and require the Debtor to require that the property be re-transferred to the Debtor." Judgment Creditors alternatively requested that "if the Court is inclined to grant the Motion, to first require as a condition of dismissal that

the property be re-transferred to the Debtor by recording of an unconditional transfer of title to the property to the Debtor and in any event, issue an injunction against the Debtor from re-filing any further bankruptcy petitions either permanently, for a five-year period, or at least the 180 days, or such other period as the Court considers to be appropriate." JPTO UF ¶ 21; JC Ex. 18 at 1:27–2:4.

29. On April 5, 2007, Trustee substituted into the Second Action as the real party-in-interest and removed that case to the United States Bankruptcy Court for the Central District of California, which action was assigned Adversary Case No. 8:07–ap–1099–RK (the "Fraudulent Transfer Adversary Proceeding"). JPTO UF ¶ 22; Trustee's RJN, ¶ 3, Ex. 3, Docket No. 44, Notice of Removal of State Court Action to Federal Bankruptcy Court (Orange County Superior Court Case No. 05CC08034); Hays Trial Decl., ¶ 19.

30. On April 17, 2007, Debtor filed a Notice of and: 1. Objection to and Motion to Disallow Pleadings of D.E. Hays; 2. Objection to and Motion to Disallow Pleading of D. Dimitruk; 3. Reaffirmation of Debtor's Voluntary Dismissal Request; 4. Denial of Fraudulent Transfer; 5. Recapitulation; 6. Request for Sanctions. Docket No. 48; Hays Trial Decl. ¶ 68(e).

***5** 31. On April 24, 2007, Trustee filed the Declaration of D. Edward Hays Requesting Entry of Order Denying Debtor's Request for Court's Reconsideration of Ruling on March 13, 2007 re Replacement of Trustee Charles W. Daff. Docket No. 49; Hays Trial Decl. ¶ 68(f).

32. On April 26, 2007, the court entered the Order Denying Debtor's Request for Court's Reconsideration of Ruling on March 13, 2007 re Replacement of Trustee Charles W. Daff. Docket No. 50; Hays Trial Decl. ¶ 68(g).

33. On April 26, 2007, Debtor filed the Objection to D. Edward Hays's Request that the Court to Deny Debtor's Request for Reconsideration of Retaining Trustee Daff. Docket No. 52; Hays Trial Decl. ¶ 68(h).

34. On May 8, 2007, Trustee filed a document in this court entitled, "Request for Judicial Notice re Documents Filed in Orange County Superior Court Case No. 05CC08034." Docket No. 54; JPTO UF ¶ 23; JC Ex. 19; Dimitruk Decl. ¶ 26.

35. Attached to the May 7, 2007 Request for Judicial Notice was a copy of the state court complaint filed in the Second Action. Docket No. 54, RJN, Ex. 1. Also attached to the May 7, 2007 Request for Judicial Notice was a copy of Christine Zeman's First Amended Cross–Complaint filed in the Second Action. Docket No. 54, RJN, Ex. 7.

36. On May 10, 2007, Mr. Dimitruk sent Mr. Hays an email message discussing his thoughts on a stipulation to avoid, recover, and preserve Debtor's transfer of the property to Zeman for the benefit of the Estate (the "May 10, 2007 Email"). In this email, Mr. Dimitruk asked for Mr. Hays's thoughts on the "homestead" and "Mrs. Cass's claim to a life estate." Hays Trial Decl., ¶ 20; JC Ex. 92 at 02353.

37. The May 10, 2007 email message is part of an email chain in which Mr. Dimitruk and Mr. Hays discussed how best to avoid the transfer to Zeman and ensure that Debtor did not receive a homestead exemption in the Property upon avoidance and recovery. *Id.*

38. On May 11, 2007, Trustee filed an objection to Debtor's claimed $150,000 homestead exemption. JPTO UF ¶ 39; JC Ex. 23; Hays Trial Decl. ¶ 21; Trustee's RJN ¶ 3, Ex. 3; Docket No. 61, Trustee's Objections to Debtor's Claimed Exemptions.

39. On May 23, 2007, the court entered an Order to Show Cause as to why the bankruptcy case should not be dismissed based on Debtor's failure to obtain credit counseling prior to bankruptcy ("OSC re Dismissal"). JPTO UF ¶ 24 (the JPTO incorrectly states that the order was entered on May 24, 2007); Trustee's RJN ¶ 3, Ex. 3, Docket No. 70, Order to Show Cause Why This Case Should Not Be Dismissed for Debtor's Failure to Obtain Budget and Credit Counseling During the 180–Day Period Preceding the Petition Date or Submit Certification Establishing Exigent Circumstances; Hays Trial Decl., ¶ 22.

40. On June 20, 2007, Trustee, Judgment Creditors and Zeman, through their respective counsel, entered into the Stipulation for Entry of Judgment Avoiding and Recovering Transfer of Real Property (the "Stipulation"). JPTO UF ¶ 26; JC Ex. 42; Trustee's RJN ¶ 2, Ex. 2, Stipulation for Entry of Judgment Avoiding and Recovering Transfer of Real Property and Order Thereon, filed on May 28, 2008 in Adversary Case No. 8:07–ap–01099–RK; Hays Trial Decl., ¶¶ 24 and 25.

41. On July 3, 2007, the court deferred ruling on Debtor's request for voluntary dismissal and its OSC re Dismissal. JPTO UF ¶ 27; Trustee's RJN, Ex. 3 at 3, Court's docket

re: Bankruptcy Case Number 2:12–bk–16090–RK, entries between Docket Nos. 84 and 88. In the interim, the court entered an Order re Suspension of Proceedings pending resolution of Debtor's state court appeal of the Judgment entered against her and in favor of Judgment Creditors. JPTO UF ¶ 27; Trustee's RJN, Ex. 3 at 3, Court's docket re: Bankruptcy Case Number 2:12–bk–16090–RK; Docket No. 88, Order re Suspension of All Proceedings. The dismissal hearings were continued from time to time pending resolution of the appeal. *Id.*; see Docket entries on November 27, 2007, February 26, 2008, April 8, 2008, May 27, 2008, and July 8, 2008.

***6** 42. On July 13, 2007, Trustee filed the Notice of Motion (1) for Leave to File Motion to Abandon Appellate Claims to Debtor; and (2) to Abandon Appellate Claims to Debtor. Hays Trial Decl., ¶ 68(k); Docket No. 93, Notice of Trustee's Motion (1) for Leave to File Motion to Abandon Appellate Claims to Debtor; and (2) to Abandon Appellate Claims to Debtor.

43. On July 18, 2007, Trustee filed the Motion (1) for Leave to File Motion to Abandon Appellate Claims to Debtor; and (2) to Abandon Appellate Claims to Debtor; Memorandum of Points and Authorities; Declaration of Charles W. Daff. Hays Trial Decl., ¶ 68(l); Docket No. 94, Trustee's Motion (1) for Leave to File Motion to Abandon Appellate Claims to Debtor; and (2) to Abandon Appellate Claims to Debtor.

44. On July 19, 2007, Trustee filed the Opposition to Debtor's Objection to Court's Orders: (1) the Law Firm of Rus, Miliband & Smith Can Be Counsel for Trustee Charles Daff (2) Disallowing Debtor's Counterclaim in Adversary Case No. 0099 RK and (3) Disallowing Debtor's Counterclaim in Adversary Case 0094 RK Request for Reconsideration and Request for Leave of Court to File Opposition. Hays Trial Decl., ¶ 68(m); Docket No. 98, Opposition to Debtor's Objection to Court's Orders: (1) the Law Firm of Rus, Miliband & Smith Can be Counsel for Trustee Charles Daff (2) Disallowing Debtor's Counterclaim in Adversary Case No. 0099 RK and (3) Disallowing Debtor's Counterclaim in Adversary Case 0094 RK Request for Reconsideration and Request for Leave of Court to File Opposition.

45. On August 15, 2007, the court entered the Order Granting Trustee's Motion (1) For Leave To File Motion To Abandon Appellate Claims to Debtor; and (2) To Abandon Appellate Claims to Debtor. Hays Trial Decl., ¶ 68(n); Docket No. 108, Order Granting Trustee's Motion (1) For Leave To File Motion To Abandon Appellate Claims to Debtor; and (2) To Abandon Appellate Claims to Debtor.

46. On November 20, 2007, Trustee filed the Status Report re Appeal and Request for Continuance of Review Hearing for 90 Days. Hays Trial Decl., ¶ 68(o); Docket No. 112, Status Report re Appeal and Request for Continuance of Review Hearing for 90 Days.

47. On May 29, 2008, after the Judgment was affirmed by the California Court of Appeal, the court entered a Judgment (the "Avoidance Judgment") pursuant to the Stipulation in the Fraudulent Transfer Adversary Proceeding. Judgment Creditors executed the Stipulation along with Trustee and Zeman. JPTO UF ¶¶ 27 and 28; JC Ex. 42 and 43; Hays Trial Decl., ¶ 25.

48. Debtor appealed entry of the Avoidance Judgment. JPTO UF ¶ 29; Hays Trial Decl., ¶ 26.

49. On August 5, 2008, Judgment Creditors filed a brief detailing their position regarding dismissal of the bankruptcy case in which they stated:

> This memorandum is divided into two principal sections, which turn on whether this Court dismisses Mrs. Cass's bankruptcy petition or not....

JPTO UF ¶ 25; JC Ex. 44, Positions by James Wallace, Rebecca Wallace, and Gloria Suess; Declaration of David B. Dimitruk in Support Thereof at 1:27–2:1.

> On March 20, 2007, Catherine Cass filed a motion to dismiss her own bankruptcy petition and, because of this Court's June 28, 2007 Order (see paragraph 3 below), no ruling has been made on her motion. The Creditors' primary position on April 10, 2007, when they filed their response to the motion, was that the court should deny the request because Christine Zeman had not yet agreed to retransfer the

> residence in which Mrs. Cass resides to Mrs. Cass....

***7** *Id.* at 2:7–11.

> The Creditors now favor a dismissal upon certain conditions and for the following reasons....

Id. at 2:18.

> The Creditors will benefit from a dismissal because a dismissal will avoid the numerous delays and predictable litigation expenses that they have sustained by virtue of the various positions that Mrs. Cass has taken in this court. A dismissal will entitle them to obtain an order from the state court to sell the residence so that the judgment may be satisfied. Denying the motion to dismiss subjects the Creditors to further delays and expenses that are not likely to be sustained by the streamlined procedures available in the state court proceeding for the sale of property. The Creditors will be prejudiced, however, if the court does not also issue an injunction and order the trustee to restore title to the Residence to Mrs. Cass as conditions of the dismissal....

Id. at 8:19–27.

> Should the court dismiss this bankruptcy action, the court should also issue a permanent injunction against Mrs. Cass from filing any further bankruptcy actions..... If the court is unwilling to permanently enjoin Mrs. Cass from filing any bankruptcy petition it should then issue a five-year injunction because the six-month injunction under 11 U.S.C. section 109 is insufficient to prevent Mrs. Cass from causing further delay
>
> ....
>
> For a dismissal of the bankruptcy petition to become effective, the court must also (1) require the trustee to execute such documents as may be necessary to restore actual title to the Residence in the name of Catherine Cass (i.e., it may also be necessary to cause a certified copy of the Separate Judgment to be recorded in the Orange County Recorder's Office in order to effectuate such a transfer), and (2) remand the second lawsuit to the Orange County Superior Court, which the trustee removed to this court ...

Id. at 9:3–8.

Id. at 9:12–17.

> In the event that this Court does not dismiss the bankruptcy case, the Creditors contend that certain determinations must follow the retention of the case as illustrated below. These determinations are dependent on the outcome of the pending appeal before the Bankruptcy Appellate Panel and, therefore, these determinations must also await the ruling from the Bankruptcy Appellate Panel....
>
> Essentially, this Court should (1) vacate its June 28, 2007 Order, which stays all other proceedings in the case, (2) set a time for the filing of proof of claims, (3) require the recordation of the Stipulated Judgment in the Orange County Recorder's Office, (4) require the trustee to sell the residence, and (5) set the pending cases for trial so that a final distribution of the sale proceeds may be made.

Id. at 10:3–12; JPTO UF ¶ 25; JC Ex. 44 (the brief was filed in response to "Debtor's Motion to Reinstate Court's Motion to Dismiss Bankruptcy and Motion to Reinstate Court's Motion to Dismiss; also Motion for Discharge as a viable Alternative"); see Trustee's RJN, ¶ 3, Ex. 3; Docket No. 102, Notice of Motion to Reinstate Court's Motion to Dismiss Bankruptcy and Motion to Reinstate Court's Motion to Dismiss, also Motion for Discharge as a Viable Alternative; Docket No. 129, Positions by James Wallace, Rebecca Wallace, and Gloria Suess; Dimitruk Decl., ¶ 35.

***8** 50. On August 26, 2008, the court denied Debtor's request for voluntary dismissal and vacated the OSC re Dismissal. JPTO UF ¶ 30 (the JPTO stated that orders on the dismissal motion and OSC were entered on September 2, 2008 but no such orders appear on the docket); Trustee's RJN, Ex. 3, Court's docket re: Bankruptcy Case Number 2:12–bk–16090–RK, entries between Docket Nos. 133 and 134.

51. On September 2, 2008, the court entered Orders denying Debtor's request for voluntary dismissal and vacating the OSC re Dismissal. JPTO UF ¶ 30; Hays Trial Decl., ¶ 27.

52. On September 18, 2008, Trustee filed the Opposition to Debtor's Motion for Second Reconsideration as Per the Order of the Bankruptcy Appellate Panel. Docket No. 135, Trustee's Opposition to Debtor's Motion for Second Reconsideration as per the Order of the Bankruptcy Appellate Panel; Hays Trial Decl., ¶ 68(p).

53. In February 2009, Debtor passed away, and Zeman became the administrator for Debtor's probate estate. JPTO UF ¶ 31; see also Trustee's RJN, Ex. 3, Court's docket re: Bankruptcy Case Number 2:12–bk–16090–RK, Docket No. 153, Notice of Lodging Certified Copies of Order for Probate and Letters of Administration for the Estate of Catherine Z. Cass, and Docket No. 154, Order for Substitution of Debtor Catherine Z. Cass by Christine Zeman, Administrator of the Estate of Catherine Z. Cass; Hays Trial Decl., ¶ 28.

54. On May 8, 2009, Trustee substituted Marshack Hays as his general counsel. JPTO UF ¶ 32; Trustee's RJN, Ex. 3, Court's docket re: Bankruptcy Case Number 2:12–bk–16090–RK, Docket No. 137, Substitution of Attorney; Hays Trial Decl., ¶ 30.

55. On June 11, 2009, Debtor's appeal of the Avoidance Judgment was dismissed by the Bankruptcy Appellate Panel of the Ninth Circuit ("BAP") as a result of Debtor's death and the failure of a personal representative for Debtor subsequently to appear in and prosecute the appeal. JPTO UF ¶ 33.

56. On January 27, 2010, Trustee through his attorneys at Marshack Hays filed an adversary proceeding against Judgment Creditors seeking declaratory relief. JPTO UF ¶ 34; JC Ex. 48; Trustee's RJN, Ex. 3, Court's docket re: Bankruptcy Case Number 2:12–bk–16090–RK, Docket No. 156, Complaint for (1) Declaratory Relief Re: Validity, Priority and Extent of Alleged Judgment Lien; and (2) Avoidance, Recovery and Preservation of Unauthorized Post–Petition Transfer.

57. On March 3, 2010, Judgment Creditors filed an answer to the complaint filed by Trustee. JPTO UF ¶ 35; JC Ex. 52; Hays Trial Decl., ¶ 36.

58. On March 3, 2010, Judgment Creditors filed a counterclaim against Trustee. JPTO UF ¶ 36; JC Ex. 53; Hays Trial Decl., ¶ 37.

59. On April 26, 2010, Trustee filed an answer to the counterclaim by Judgment Creditors. JPTO UF ¶ 37; JC Ex. 56.

60. On May 24, 2010, Judgment Creditors filed a first amended counterclaim. JPTO UF ¶ 38; JC Ex. 62.

61. On January 27, 2010, Trustee filed a supplemental brief in support of the objection to the homestead exemption. JPTO UF ¶ 40; JC Ex. 47; Trustee's RJN, Ex. 3, Court's docket re: Bankruptcy Case Number 2:12–bk–16090–RK, Docket No. 155, Notice of Hearing and Trustee's Supplemental Objections to Debtor's Claimed Homestead Exemption; Hays Trial Decl., ¶ 32.

62. On February 16, 2010, Trustee filed a reply to Debtor's opposition to the homestead objection. JPTO UF ¶ 41; JC Ex. 49; Trustee's RJN, Ex. 3, Court's docket re: Bankruptcy Case Number 2:12–bk–16090–RK, Docket No. 158, Reply to Opposition to Trustee's Objections to Debtor's Claimed Homestead Exemption; Hays Trial Decl., ¶ 34.

***9** 63. On March 2, 2010, Trustee filed another supplemental brief in support of the objection. JPTO UF ¶ 42; JC Ex. 50; Trustee's RJN, Ex. 3, Court's docket re: Bankruptcy Case Number 2:12–bk–16090–RK, Docket No. 161, Trustee's Supplemental Brief Re: Objections to Debtor's Claimed Homestead Exemption; Hays Trial Decl., ¶ 35.

64. On March 12, 2010, Judgment Creditors filed a brief with respect to Debtor's claimed homestead exemption. JPTO UF ¶ 43; JC Ex. 54; Trustee's RJN, Ex. 3, Court's docket re: Bankruptcy Case Number 2:12–bk–16090–RK, Docket No. 164, Objections to the Claim of Exemption; Hays Trial Decl., ¶ 38.

65. On May 6, 2010, the court entered an Order regarding Debtor's claim of exemption (the "Exemption Order"). JPTO UF ¶ 44; JC Ex. 57; Trustee's RJN, Ex. 3, Court's docket re: Bankruptcy Case Number 2:12–bk–16090–RK, Docket No. 170, Order Re: Trustee's Objections to Debtor's Claimed Homestead Exemption.

66. In its Exemption Order, the court determined that Debtor's heirs were not entitled to exempt any portion of the proceeds of sale of the Property. JPTO UF ¶ 44; JC Ex. 57; Trustee's RJN, Ex. 3, Court's docket re: Bankruptcy Case Number 2:12–bk–16090–RK, Docket No. 170, Order Re: Trustee's Objections to Debtor's Claimed Homestead Exemption; Hays Trial Decl. ¶ 49.

67. Trustee procured an all cash "as-is" offer to purchase the Property for $200,000. JPTO UF ¶ 45; Hays Trial Decl., ¶ 40.

68. Upon recovery by Trustee of Debtor's residence, it was in substantial disrepair. Trustee cleaned the Property and prepared it for listing. Hays Trial Decl., ¶ 39.

69. Trustee employed a broker to solicit overbidders. JPTO UF ¶ 46; Hays Trial Decl., ¶ 68(a) and (b).

70. On March 30, 2010, Trustee filed a motion to approve the sale of the Property (the "Sale Motion"). JPTO UF ¶ 47; JC Ex. 55; Hays Trial Decl., ¶ 41.

71. In the Sale Motion, Trustee sought to sell the Property for the benefit of the bankruptcy estate. JPTO UF ¶ 48; see also, Dimitruk Decl., ¶ 36.

72. Judgment Creditors filed objections to the Sale Motion. JPTO UF ¶ 49; JC Ex. 59; RJN Ex. 3, Court's docket re: Bankruptcy Case Number 2:12–bk–16090–RK, Docket No. 169, Objections by the Judgment Creditors to the Trustee's Motion for Authorization to Sell Property and to Sell Property as Requested by the Trustee; Hays Trial Decl., ¶ 42.

73. Prior to the hearing on the Sale Motion, Trustee received and accepted an overbid of $280,000. Hays Trial Decl., ¶ 43.

74. At the hearing on the Sale Motion, there were five cash bidders. JPTO UF ¶ 50; Hays Trial Decl., ¶ 44.

75. After conducting an auction in open court, the sales price was increased to $321,000. JPTO UF ¶ 51; Hays Trial Decl., ¶ 45.

76. This amount exceeded Judgment Creditors' opinion as to the value of the Property and they withdrew their objection to Trustee's proposed sale. JPTO UF ¶ 52; Hays Trial Decl., ¶ 46.

77. On June 1, 2010, the court entered an Order approving Trustee's sale of the Property for $321,000. JPTO UF ¶ 53; JC Ex. 63; Trustee's RJN, Ex. 3, Court's docket re: Bankruptcy Case Number 2:12–bk–16090–RK, Docket No. 173, Order Approving Trustee's Motion for Authorization to Employ a Broker to Sell Property (1) Outside the Ordinary Course of Business; (2) Free and Clear of Liens; (3) Subject to Overbid; (4) For Determination of Good Faith Purchaser Section 363(m); (5) To Pay Trustee's Insurance Agency; and (6) To Pay for Property Maintenance; Hays Trial Decl., ¶ 51.

***10** 78. After payment of costs of sale and all known liens, except the abstract of judgment recorded by Judgment Creditors, the net proceeds of the sale were $292,730.95. JPTO UF ¶ 54; Dimitruk Decl., ¶ 19; Hays Trial Decl., ¶ 53.

79. Trustee's attorneys filed separate fee applications seeking allowance of the fees and costs incurred from January 2007 through and including May 31, 2010 as administrative expenses pursuant to 11 U.S.C. §§ 330 and 331. JPTO UF ¶ 55; JC Exs. 64 (Rus, Miliband & Smith) and 65 (Marshack Hays); Dimitruk Decl., ¶ 27; Hays Trial Decl., ¶ 54.

80. Judgment Creditors opposed these fee applications. JPTO UF ¶ 56; JC Ex. 68; Hays Trial Decl., ¶¶ 55, 68(q).

81. On March 24, 2011, the court entered an order approving reimbursement of 100 percent of the expenses and 50 percent of the fees requested by Marshack Hays and Rus, Miliband & Smith, on an interim basis. JPTO UF ¶ 57; JC EX. 74; Trustee's RJN, Ex. 3, Court's docket re: Bankruptcy Case Number 2:12–bk–16090–RK, Docket No. 237, Order on (1) First and Final Fee Application of Rus, Miliband and Smith and (2) First Interim Fee Application of Marshack Hays, LLP, Former and Current Counsel for Chapter 7 Trustee; Hays Trial Decl., ¶ 56. The fee application order reserved ruling on the benefit, reasonableness, and necessity of the remaining 50% of the fees until the litigation between Judgment Creditors and Trustee was resolved. *Id.*

82. On April 6, 2012, the court conducted a trial of the Fraudulent Transfer Adversary Proceeding. JPTO UF ¶ 58; Hays Trial Decl., ¶ 57.

83. On August 31, 2012, the court entered its memorandum decision holding that Judgment Creditors held a lien on the proceeds received by Trustee from the sale of the Property. JPTO UF ¶ 59; JC Ex. 75; Hays Trial Decl., ¶ 58.

84. Trustee appealed the court's decision determining that Judgment Creditors' lien attached to the sales proceeds. JPTO UF ¶ 60; Hays Trial Decl., ¶ 59.

85. On April 11, 2013, the Bankruptcy Appellate Panel affirmed this court's August 31, 2012 decision that Judgment Creditors' lien attached to the sales proceeds. JPTO UF ¶ 61; JC Ex. 98; Hays Trial Decl., ¶ 60. Trustee has timely appealed the Bankruptcy Appellate Panel's decision affirming the court's decision to the United States Court of Appeals for the Ninth Circuit, where the matter currently remains pending. *Id.*

86. Marshack Hays submitted a summary of its time and expense records for the Avoidance Action, homestead exemption objection, and sale of Debtor's residence as kept in the ordinary course of business. JPTO UF ¶¶ 62, 64, 66; JC Exs. 79, 80, and 81, respectively; Hays Decl., ¶¶ 9, 10, 11; Declaration of Charles W. Daff in Support of Trustee's Motion for Order Granting Surcharge Pursuant to 11 U.S.C. § 506(c) filed on June 15, 2010 as Docket No. 186 ("Daff Decl."), ¶¶ 8, 9.

87. Rus, Miliband & Smith submitted a summary of its time and expense records for fees and costs incurred in this case. JPTO UF ¶ 68; JC Ex. 99; Daff Decl., ¶¶ 6, 7.

88. On February 19, 2013, Rus, Miliband & Smith and Marshack Hays filed renewed applications seeking the remaining 50 percent of their fees that were requested in their first interim fee applications. JPTO UF ¶ 71; JC Ex. 85; Hays Trial Decl., ¶¶ 62, 68(r). The court denied the renewed applications pending final fee applications. *Id.*

***11** 89. At the time Mrs. Cass filed her bankruptcy petition on January 5, 2007, the amount due to Judgment Creditors under the October 28, 2005 judgment was $358,048.78. The amount is calculated as follows:

a. $320,000.00 (the judgment debt) × 10% + $32,000.00 annual interest.

b. $32,000.00 annual interest ÷ 365 days per year = $87.67 daily interest.

c. The number of days between October 28, 2005 and January 5, 2007 = 434.

d. $87.67 daily interest × 434 days = $38,048.78.

e. $320,000.00 + $38,048.78 = $358,048.78.

JPTO UF ¶ 73; Dimitruk Decl., ¶ 14.

90. Debtor stated in her Schedule D, filed on January 5, 2007, in conjunction with her bankruptcy petition, that the value of the residence was $500,000. JPTO UF ¶ 74; JC Ex. 100.

91. On July 15, 2010, Trustee filed a "Statement of Property Sold Pursuant to FRBP 6004(F)(1) and LBR 6004–1(g)." JPTO UF ¶ 75; JC Ex. 71.

92. Debtor stated in her Schedule D, filed on January 5, 2007, in conjunction with her bankruptcy petition, and in her Schedule A, that the value of the deed of trust held by Union Bank was $19,000. JPTO UF ¶ 77; JC Exs., 100, 101; Dimitruk Decl., ¶ 17. The amount reported by Trustee as having been paid to Union Bank at the close of escrow on June 15, 2010 was a total of $18,687.33. JPTO UF ¶ 77; JC Ex. 71; Dimitruk Decl., ¶ 17.

93. The sum of $9,655.96 was paid as costs in the close of the escrow on June 15, 2010, which represented slightly over 3 percent of the sale price. JPTO UF ¶ 78; JC, Ex. 71; Dimitruk Dec., ¶ 18.

94. The net proceeds from the sale of the residence were $292,730.95. JPTO UF ¶ 79; Dimitruk Decl., ¶ 19.

95. In conjunction with this surcharge motion, Judgment Creditors propounded written interrogatories to Trustee. A copy of the interrogatory responses is included in the record. JPTO UF ¶ 83; JC, Ex. 97.

96. Interrogatory number 3 posed the following question: "Please describe how you learned that the abstract of judgment that James Wallace, Rebecca Wallace and Gloria Suess caused to be recorded was recorded." Trustee said: "The Trustee does not recall, but it was in the context of his duties as Chapter 7 Trustee for the bankruptcy estate for Catherine Cass." *Id.*

97. On behalf of Trustee, Marshack Hays incurred $9,407.00 in fees and $395.55 in costs avoiding and recovering the Transfer. Hays Trial Decl., ¶ 65; JC Ex 79.

98. On behalf of Trustee, Marshack Hays incurred $15,139 in fees and $106.39 in costs in successfully obtaining an order that Trustee did not have to pay Debtor's claimed $150,000 homestead exemption out of the proceeds of sale of the Property. Hays Trial Decl., ¶ 66; JC Ex 80.

99. On behalf of Trustee, Marshack Hays incurred $14,687.00 in fees and $133.85 in expenses related to selling the Property. Hays Trial Decl., ¶ 67; JC, Ex 81.

100. The total fees and costs described in the three previous paragraphs and detailed in JC, Exhibits 79–81, is $39,233 in fees and $635.79 in costs.

101. On behalf of Trustee, Rus, Miliband & Smith, incurred $55,700 in fees and $4,805.88 in expenses in connection with Trustee's efforts to avoid the Transfer, which included opposing Debtor's numerous attempts to have her case dismissed, negotiating a resolution of the fraudulent transfer adversary proceeding and a suspension of Debtor's bankruptcy case, and objecting to Debtor's claimed homestead. Trial Declaration of Cathrine M. Castaldi re: Trustee's Motion for Order Granting Surcharge Pursuant to 11 U.S.C. § 506(c), filed as Docket No. 324 ("Castaldi Decl.").

***12** 102. Rus, Miliband & Smith incurred $1,275.00 in conferring with Trustee and a real estate broker to establish the value of the Property during various times in the course of the bankruptcy case. Castaldi Decl., ¶ 7.

103. On behalf of Trustee, Rus, Miliband & Smith, incurred $25,550.00 in prosecuting the fraudulent transfer claim against Zeman. Ultimately, Rus, Miliband & Smith was able to circumvent a lengthy trial and dispute with respect to the fraudulent transfer claim by negotiating a resolution with Zeman and Judgment Creditors. According to Rus, Miliband & Smith, this required communication with counsel for Zeman and counsel for Judgment Creditors and resulted in a judgment in favor of the Estate that allowed for recovery of the Property. Castaldi Decl., ¶ 8; JC, Exs. 43, 64.

104. After entry of the Stipulated Judgment, Debtor appealed entry of the Stipulated Judgment to the Bankruptcy Appellate Panel. Trustee incurred $16,425.00 in defending this appeal, which was dismissed upon the death of Mrs. Cass. Castaldi Decl., ¶ 9.

105. Rus, Miliband & Smith incurred $2,962.50 in recovering possession of the Property from the County of Orange after Debtor's death. These activities included corresponding with the County of Orange, reviewing release forms requested by the county and obtaining possession of the keys, and access to the home, so that Trustee could ready the home for sale. Castaldi Decl., ¶ 10.

106. On May 11, 2007, Rus, Miliband & Smith assisted Trustee in objecting to Debtor's claimed homestead exemption in the amount of $150,000. Castaldi Decl., ¶ 11; JC, Ex. 23. Rus, Miliband & Smith incurred $4,575.00 in connection with the objection to Debtor's Homestead Exemption, which objection was ultimately sustained by the court. Castaldi Decl., ¶ 11.

107. Trustee incurred $4,912.50 in prosecuting the Motion to Abandon the Estate's Right to prosecute Mrs. Cass's appeal of the judgment obtained against her by Judgment Creditors to its successful conclusion. Castaldi Decl., ¶ 12.

108. In response to Marshack Hays's Interim Fee Application for the period from April 21, 2009 through May 31, 2010 and the First and Final Application for Allowance of Fees and Costs filed by Rus, Miliband & Smith, APC, for the period from March 12, 2007 through April 30, 2010, the Office of the United States Trustee evaluated all of the fees and costs incurred by Trustee in avoiding and recovering the Transfer. The Office of the United States Trustee stated:

> The U.S. Trustee has reviewed the RMS and MH compensation applications in detail and submits that the fees requested are reasonable as required under 11 U.S.C. § 330(a)(3)(A) through § 330(a)(3)(F) as follows:
>
> (A) Time spent on particular entries appears reasonable. In addition to monthly invoices, the applications contain detailed narrative descriptions of services and costs broken into numerous different categories. As noted above, the bulk of item expended related to litigation necessary for the estate to take title to the Santa Ana Property and time needed to respond to Debtor's numerous motions and objections, many of which appear to be unfounded.
>
> (B) Expenses appear reasonable and are detailed by category;

(C) Services appear reasonable and necessary to the administration of the estate, however, a 20% hold back is suggested to allow the case to conclude;

***13** (D) Both RMS and MH have reasonable blended hourly rates of $375 (RMS) and $277 (MH), evidencing that less complex matters were delegated to employees with lower hourly rates;

(E) Counsel at RMS and MH have vast experience and exceptional knowledge and skill in the Orange County, CA bankruptcy community and were fully capable of handling the services rendered; and

(F) Fees sought appear customary within the local community.

While counsel fees are substantial, they spanned over a three year period and appeared necessary to prevail in litigation regarding title to the Santa Ana Property. Substantial time also was expended to respond to the Debtor's repeated efforts to obviate applicant's efforts....

Trustee's independent review failed to discover any services or costs which are not compensable.

Trustee's RJN, Ex. 4, Docket No. 273, Comment of United States Trustee to Applications Seeking Allowance of Fees and Costs by Counsel for Chapter 7 Trustee; JC Ex. 69.

109. On April 8, 2011, the court entered an order approving payment on an interim basis by Trustee of $30,269 in fees and $1,440.53 in costs to Marshack Hays and $55,856.25 in fees and $4,805.88 in costs to Rus, Miliband & Smith (the "Fee Award"). The Fee Award represented 50 percent of the Firms' fees incurred between October 1, 2008 and May 31, 2010 and 100 percent of the Firms' costs during that time period. The Fee Award was without prejudice to the Firms later applying to be paid the balance of the fees and costs requested. Trustee's RJN, ¶ 3, Ex. 3, Court's docket re: Bankruptcy Case Number 2:12–bk–16090–RK, Docket No. 246, Order Re Applications for Allowance of Fees and Costs Filed by Marshack Hays and Rus, Miliband, & Smith, APC.

110. Judgment Creditors' counsel, Mr. Dimitruk, acknowledged during his deposition that his clients benefited from Trustee's efforts in this case, but also stated that the same result could have been accomplished in the state court action at far less cost. Mr. Dimitruk testified at his deposition as follows:

Q: Do you on behalf of your clients take the position that the stipulation that avoided and recovered the transfer from the debtor to Ms. Zeman benefited your clients in any way?

A: Yes.

Q: And in what way did that stipulation provide benefit to your clients?

A: It achieved, in a summary fashion, a part of what they were attempting to achieve in the state court action that they filed against both of them, which was the setting aside of the transfer as a fraudulent transfer. The result is something that my clients started in a lawsuit that they filed in a state court action.

JC Ex. 95, Deposition of David Dimitruk, 36:20–37:8.

Q: Okay. Do you believe that any of the actions taken by the trustee that resulted in the exemption order benefited your clients in any way?

A: Yes.

Q: And how did your clients benefit?

A: It spared them what I consider to be the meager cost of accomplishing the same thing that they could have accomplished in the state court action.

JC Ex. 95, Deposition of David Dimitruk, 37:20–25–38:3.

Q: In this case, the trustee actually effectuated a sale of the property, correct?

A: Yes, sir.

Q: Do you believe that any of the actions taken by the trustee in effectuating a sale of property benefited or potentially benefited—will benefit your clients in any way?

***14** A: As to all of the above questions, yes.

Q: Okay. And can you describe what you believe to be benefit?

A: In a similar way that I responded to the question about the setting aside of the sale, the conversion, transformation of the property into cash is something that my clients were attempting to do in the state court action, and could have done at a far less cost.

Id., 38:3–18.

111. As discussed herein, the court finds that the preponderance of the evidence shows that as a result of the efforts of Trustee's counsel, Marshack Hays and Rus, Miliband & Smith, Judgment Creditors have benefited in the following ways:

a. Debtor's transfer of title to her residence to her daughter, Mrs. Zeman, was avoided, recovered, and preserved by Trustee for the benefit of creditors, including Judgment Creditors;

b. Through Trustee's avoidance of the transfer, Debtor lost her claimed $150,000 homestead exemption, which would have had priority over the judgment lien of Judgment Creditors; and

c. Debtor's residence was sold for $321,000 through a sale in this bankruptcy case.

See Hays Trial Decl., ¶ 63; *see also, Daff v. Wallace (In re Cass),* 2013 WL 1459272 (9th Cir. BAP2013), slip op. at *12, *citing,* *Hitt v. Glass (In re Glass),* 164 B.R. 759, 762 (9th Cir. BAP1994) and 11 U.S.C. § 522(g).

112. Based on these facts and numbers, Judgment Creditors netted approximately an additional $50,000 over what they would have received in enforcing their rights outside of bankruptcy, that is, specifically, if they had obtained an order from the state court setting aside the fraudulent transfer from Debtor to her daughter, which the court assumes that they would have, the recovery would have been subject to Debtor's homestead exemption. As discussed herein, by avoiding the transfer which removed the homestead exemption and conducting an asset sale in this case through the efforts of Trustee's counsel in this case, this meant an additional $150,000 in equity from the sale of Debtor's residence to pay Judgment Creditors, which they would not have been entitled to outside of bankruptcy, and after deducting litigation costs in the approximate amount of $100,000 claimed by Trustee's counsel for their efforts in Trustee's surcharge motion, this leaves roughly an additional $50,000 to benefit Judgment Creditors on their judgment lien.

III. CONCLUSIONS OF LAW

1. The Motion to Surcharge requires the court to decide whether certain fees and costs incurred by Trustee to the law firms of Marshack Hays and Rus, Miliband & Smith (1) were reasonable, necessary, and benefited Judgment Creditors, or (2) were consented to by Judgment Creditors such that the court should surcharge Judgment Creditors' lien to reimburse the Estate for such fees and costs. *Compton Impressions Ltd v. Queen City Bank, N.A. (In re Compton Impressions, Ltd.)* 217 F.3d 1256, 1260 (9th Cir.2000); *Central Bank of Montana v. Cascade Hydraulics & Utility Service, Inc. (In re Cascade Hydraulics & Utility Service, Inc.),* 815 F.2d 546, 548 (9th Cir.1987); see also, *Debbie Reynolds Hotel & Casino, Inc. v. Calstar Corporation, Inc. (In re Debbie Reynolds Hotel & Casino, Inc.),* 255 F.3d 1061, 1068 (9th Cir.2001) (the bankruptcy trustee is entitled to a surcharge to the extent that the costs incurred were (1) reasonable and necessary and benefited the secured creditor, or (2) consented to by the secured creditor). The fees and costs Trustee seeks to recover were incurred in successfully avoiding and recovering Debtor's transfer of her residence to her daughter, Zeman, objecting to Debtor's claimed homestead exemption, and improving, marketing, and selling the Property realizing value for Judgment Creditors on their lien.

***15** 2. Trustee does not seek to surcharge Judgment Creditors' lien for any fees or costs incurred in litigating against Judgment Creditors with regard to the validity, priority, or extent of their lien.

3. The Motion to Disgorge filed by Judgment Creditors requests that the Court enter an order disgorging the interim fees and costs previously awarded to Marshack Hays in the amount of $30,269 in fees and $1,440.53 in costs and the fees and costs previously awarded to Rus, Miliband & Smith, in the amount of $55,856.25 in fees and $4,805.88 in costs (the "Fee Award").

4. Pursuant to 11 U.S.C. § 506(c), a bankruptcy trustee may recover the reasonable and necessary administrative expenses incurred in the preservation and disposal of property subject to an allowed secured claim. *See,* 11 U.S.C. § 506(c); *see also,* *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 6 (2000); *In re McLean Wine Co., Inc.,* 463 B.R. 838, 854–855 (Bankr.E.D.Mich.2011). In the Ninth Circuit, the trustee is entitled to a surcharge to the extent that the costs incurred were (1) reasonable and necessary and that they benefited the secured creditor, or (2) consented to by the secured creditor. *In re Compton Impressions, Ltd.,* 217 F.3d at 1260; *In re Cascade Hydraulics & Utility Service, Inc.,* 815 F.2d at 548. "Section 506(c) is the statutory basis

for preventing a windfall to a secured creditor." *In re McLean Wine Co., Inc.*, 463 B.R. at 855 (citation omitted).

A. *Lack of Consent by Judgment Creditors*

5. Trustee contends that Judgment Creditors' consent to Trustee's efforts provides a basis to surcharge the lien and that Judgment Creditors' consent can be inferred from their conduct. Judgment Creditors contend that they did not consent to Trustee's efforts. As will be discussed below, the court determines that Judgment Creditors did not consent to Trustee's actions.

6. Because Trustee does not argue that Judgment Creditors expressly consented, the primary issue is the parties' disagreement as to whether there was implied consent, which is defined specifically for the purposes of 11 U.S.C. § 506(c).

7. The payment of administrative expenses from the proceeds of secured collateral is allowed when those expenses are incurred primarily for the benefit of the secured creditor or when the secured creditor caused or consented to the expense. *In re Cascade Hydraulics & Utility Service, Inc.*, 815 F.2d at 548. Consent may be found to have been impliedly given if the creditor "has caused the additional expense." *Id.* at 549 (citation omitted). On the other hand, it is improper to imply consent to the recovery of expenses under Section 506(c) from (i) the mere acquiescence by a secured creditor with respect to an attempt to reorganize under Chapter 11 or with the respect to the liquidation of its collateral in a case, (ii) the creditor's mere failure to object to a proposed liquidation, or (iii) the creditor's mere failure to move to lift the automatic stay or take similar action. *In re Compton Impressions, Ltd.*, 217 F.3d at 1261–1262 (mere cooperation or consent to specific expenses does not establish consent to other expenses).

8. The court finds that consent of Judgment Creditors to Trustee's litigation efforts cannot be inferred from their conduct. Trustee argues that on January 29, 2007, Judgment Creditors' counsel, Mr. Dimitruk, sent Trustee a memorandum impliedly consenting to Trustee seeking turnover of the residence from Debtor. That memorandum stated: "In case you decide to make a demand on Christine Zeman to convey title back pursuant to the agreement, her address is ..." JC, Ex.10 at 00114, January 29, 2007 memorandum from Mr. Dimitruk to Trustee. The memorandum then went on to offer advice for the 11 U.S.C. § 341(a) meeting. *Id.*

***16** 9. Implied consent is generally limited to instances in which the creditor caused the additional expense. *In re Cascade Hydraulics & Utility Service, Inc.*, 815 F.2d at 549. Here, all Mr. Dimitruk's memorandum did was provide Trustee with Zeman's address and some advice for the 11 U.S.C. § 341(a) meeting of creditors. Neither of these pieces of information caused Trustee to incur the expenses sought by the surcharge motion. While Trustee argues that the overall tone of the memorandum expressed Judgment Creditors' "desire to cooperate" with Trustee to avoid and recover the transfer of the residence, "[m]ere cooperation with the debtor does not make the secured creditor liable for all expenses of administration." *In re Compton Impressions, Ltd.*, 217 F.3d at 1261, *citing*, *In re Cascade Hydraulics & Utility Service, Inc.*, 815 F.2d at 548.

10. Trustee also argues that consent can be implied because Judgment Creditors' counsel, Mr. Dimitruk, did not reply to an email from Trustee which claimed that the estate's rights in Debtor's residence were superior to Judgment Creditors. On April 2, 2007, Mr. Dimitruk filed an adversary action against Debtor that included a request that the court determine that Judgment Creditors had a lien on the residence superior to any interest held by Debtor. Shortly thereafter, Trustee's counsel, Mr. Hays, emailed Mr. Dimitruk and requested that he "reply to confirm that [his] clients will neither assert any right nor seek entry of any judgment or order that purports to bind the estate as Trustee is not a named-party to this action." Mr. Hays further asserted to Mr. Dimitruk that "the estate's rights in the residence, the claim to avoid and recover the alleged fraudulent transfer ... and any right arising from the lis pendens ... are superior to that of creditors, including your clients." JPTO UF ¶ 82; JC Ex. 92 at 02332; Hays Trial Decl. ¶ 18. Trustee argues that Mr. Dimitruk implied his approval of Mr. Hays's statements when he did not reply to the email to rebut any of the statements.

11. The court finds that any failure of Mr. Dimitruk as Judgment Creditors' counsel to reply to the email message of Trustee's counsel, Mr. Hays, cannot be construed as implied consent because it did not cause Trustee's pursuit of the avoidance and recovery of the transfer of Debtor's residence. On the contrary, Mr. Hays's email message stated that Trustee alone had the right to pursue the claims to avoid and recover the alleged fraudulent transfer and that his right to pursue the claims was superior to that of Judgment Creditors. The email message of Mr. Hays, Trustee's counsel, actually seems

to indicate that Trustee intended to pursue the avoidance and recovery claims whether Judgment Creditors consented or not. The court is thus not persuaded that any failure of Mr. Dimitruk to reply to Mr. Hays's email message caused Trustee to incur additional expense in pursuing the avoidance and recovery action, and therefore cannot be the basis for inferring consent.

12. Trustee also argues that consent can be implied based on Judgment Creditors' participation in the execution of the June 19, 2007 stipulation that avoided and recovered the transfer. Trustee argues that because the Stipulation is silent with regard to the alleged lien, by signing the Stipulation, Judgment Creditors impliedly, if not expressly, acknowledged that Debtor transferred the beneficial and legal interest in the residence and that the transfer was then being avoided and recovered.

13. It is not clear to the court how Judgment Creditors' acknowledgement that Debtor transferred the beneficial legal interest in the residence and that the transfer was then being avoided and recovered *caused* Trustee to incur expenses in his pursuit of the avoidance and recovery action. It seems that Judgment Creditors' participation in the Stipulation would have enabled Trustee to minimize expenses by cutting short any possible litigation in the avoidance and recovery action.

***17** 14. Trustee also argues that Judgment Creditors impliedly consented based on Mr. Dimitruk's discussion of litigation strategy with Trustee's counsel. Trustee described a series of May 2007 emails between himself and Mr. Dimitruk discussing strategy regarding "how best to avoid the transfer to Zeman and ensure that Debtor did not receive her homestead exemption." Hays Trial Decl. ¶ 20. Trustee went on to state that "In my opinion, in these emails Mr. Dimitruk indicated his implied consent to the Trustee taking action to ensure that the transfer was avoided and Debtor not paid her homestead." *Id.*

15. After reviewing the emails described by Trustee, it is difficult for the court to see how Trustee could infer consent from Mr. Dimitruk's comments in the email message. The only discussion of the homestead exemption was Mr. Dimitruk's question: "what thoughts have you given to the legal effects of a transfer to either Mr. Daff or Mrs. Cass upon (1) the homestead, (2) Mrs. Cass's claim to a life estate, and (3) Mrs. Cass's rights to object to the proposal?" JC Exhibit 92 at 2353. This question or comment is not sufficient to imply consent, especially when this comment is found in the same email message as the following statement: "Acceptance of the offer [referring to the settlement offer that would eventually produce the June 19, 2007, stipulation], as presently framed, is better than rejection of it by a counter-offer that is not accepted by Zeman and the possibility of protracted and expensive litigation should Zeman stand firm on her offer to transfer to her mother." *Id.*

16. Trustee also states that on February 20, 2007, Judgment Creditors filed a response to the United States Trustee's Motion to Dismiss Debtor's case in which Judgment Creditors requested alternative relief. In this response, Judgment Creditors asserted: "A. The Creditors ask this court to consider denying the motion because of the abuses by Catherine Cass of the judicial system so that her property may be sold by the Chapter 7 Trustee; B. Alternatively, the Creditors request that if the court dismisses the petition, it issue a bar against Catherine Cass from filing any further petitions in bankruptcy for the maximum time the court restrain her ..." Docket No. 27 at 2:4–6. Furthermore, on March 20, 2007, Debtor filed a request for voluntary dismissal of her bankruptcy case. JPTO ¶ 19. On April 10, 2007, Judgment Creditors filed a response to Debtor's request for voluntary dismissal in which they stated that the court should "deny the motion and require the Debtor to require that the property be re-transferred to the Debtor." Judgment Creditors alternatively requested that "if the Court is inclined to grant the Motion, to first require as a condition of dismissal that the property be re-transferred to the Debtor by recording of an unconditional transfer of title to the property to the Debtor and in any event, issue an injunction against the Debtor from re-filing any further bankruptcy petitions either permanently, for a five-year period, or at least the 180 days, or such other period as the Court considers to be appropriate." JPTO UF ¶ 21; JC Ex. 18 at 8:14–20.

17. Judgment Creditors' opposition to Debtor's dismissal between February and June of 2007 is consistent with Judgment Creditors' cooperation with Trustee, which appears to have been based on the hope that Trustee would be able to quickly and inexpensively resolve the avoidance and recovery of the Transfer through stipulation or some other means of settlement. On June 20, 2007, Trustee, Judgment Creditors and Zeman, through their respective counsel, entered into a Stipulation for Entry of Judgment Avoiding and Recovering Transfer of Real Property. JPTO UF ¶ 26; JC Ex. 42. On May 29, 2008, the court entered the Avoidance Judgment pursuant to the June 20, 2007 Stipulation in the Fraudulent Transfer Adversary Proceeding. JC Ex. 43. Debtor appealed entry of

the Avoidance Judgment. JPTO UF ¶ 29. Hays Trial Decl., ¶ 26.

***18** 18. On August 5, 2008, Judgment Creditors filed Positions by James Wallace, Rebecca Wallace and Gloria Suess (Docket No. 129), which set forth Judgment Creditors' position regarding dismissal of Debtor's bankruptcy case. JC Ex. 44. In that pleading, Judgment Creditors stated:

> The Creditors will benefit from *a dismissal because a dismissal will avoid the numerous delays and predictable litigation expenses that they have sustained by virtue of the various positions that Mrs. Cass has taken in this court*. A dismissal will entitle them to obtain an order from the state court to sell the residence so that the judgment may be satisfied. *Denying the motion to dismiss subjects the Creditors to further delays and expenses that are not likely to be sustained by the streamlined procedures available in the state court proceeding for the sale of property*. The Creditors will be prejudiced, however, if the court does not also issue an injunction and order the trustee to restore title to the Residence to Mrs. Cass as conditions of the dismissal ...

Id. at 8:19–27 (emphasis added). After Debtor appealed entry of the Avoidance Judgment, it became evident that the Avoidance Litigation was going to be more time consuming and expensive than Judgment Creditors had anticipated. By August 2008, Judgment Creditors moved from opposition to the dismissal of Debtor's bankruptcy case to supporting dismissal because it had become clear that Debtor's position with respect to the Avoidance Judgment was going to make the Avoidance Litigation more protracted and expensive than if Debtor had been content with settlement. Judgment Creditors' August 5, 2008, pleading makes clear that by that time Judgment Creditors believed that they would be better served if Debtor's bankruptcy case were dismissed so that Judgment Creditors could pursue more "streamlined procedures available in the state court proceeding for the sale of property." *Id.*

19. The court finds that Trustee has not shown by a preponderance of the evidence that Judgment Creditors expressly or impliedly consented to the additional expenses incurred by Trustee. While Judgment Creditors may have initially cooperated with Trustee regarding the Avoidance Litigation in bankruptcy court, mere cooperation is not enough to imply consent for the recovery of all of Trustee's expenses. *In re Compton Impressions, Ltd.*, 217 F.3d at 1261. It appears to the court that Judgment Creditors initially believed that the Avoidance Litigation could be quickly and inexpensively resolved by Trustee through a stipulation or other settlement. Furthermore, Trustee was the only party who had standing to pursue the Avoidance Action in bankruptcy, so Judgment Creditors had little choice but to acquiesce to Trustee's actions. Finally, once it became clear to Judgment Creditors that Debtor's position regarding the Avoidance Action was going to lead to time consuming and expensive litigation in bankruptcy court, Judgment Creditors supported dismissal of Debtor's bankruptcy case so that they could pursue more "streamlined procedures available in state court."

20. In the absence of consent by the holder of a secured claim, the facts of a case may justify charging the holder of a secured claim with certain expenses if a clear benefit to the secured creditor can be demonstrated. *In re Compton Impressions, Ltd.*, 217 F.3d at 1262. Here, as discussed below, the actions taken by Trustee benefited Judgment Creditors, and the court determines that Trustee's Motion to Surcharge Judgment Creditors' lien should therefore be granted.

B. *Fees for Services Reasonable, Necessary, and Beneficial to Judgment Creditors*

***19** 21. Trustee contends that Judgment Creditors benefited from the fees and costs incurred by his attorneys. Trustee specifically contends that his attorneys' efforts: (1) recovered Debtor's residence from Debtor's daughter, which made it available to sell to pay Judgment Creditors' lien; (2) prevented Debtor from receiving any of the sale proceeds on account of her $150,000 homestead exemption, making more of the proceeds available to satisfy Judgment Creditors' lien; and (3) and improved and marketed the residence, realizing market value for the Property.

22. Judgment Creditors contend that the burden to show that a bankruptcy trustee's attorneys' fees conferred a benefit on a secured creditor is higher than the burden for other types of surcharge motions, such as those seeking reimbursement of money actually paid by a trustee. Judgment Creditors contend that the burden is so high that it is virtually impossible to meet and that Trustee fails to meet the burden.

23. As discussed above, 11 U.S.C. § 506(c) allows "the trustee [to] recover from property securing an allowed claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." Under this provision, Trustee must demonstrate that the expenses were (1) reasonable, (2) necessary, and (3) beneficial to Judgment Creditors in order to recover. 11 U.S.C. § 506(c). As a threshold matter, in order for Section 506(c) to apply, the relevant expenses sought by Trustee must be "necessary" to preserve or dispose of the secured creditor's property. *In re Compton Impressions, Ltd.,* 217 F.3d at 1260–1261. To satisfy the benefit test of § 506(c), Trustee must establish in quantifiable terms that it expended funds directly to protect and preserve the collateral. *In re Cascade Hydraulics & Utility Service, Inc.,* 815 F.2d at 548. The amount of Judgment Creditors' benefit limits Trustee's recovery of expenses. *In re Compton Impressions, Ltd.,* 217 F.3d at 1261 (citation omitted). "Section 506(c) is not intended as a substitute for the recovery of administrative expenses normally the responsibility of the debtor's estate." *In re Cascade Hydraulics & Utility Service, Inc.,* 815 F.2d at 548.

24. Viewing Debtor's actions in this bankruptcy case retrospectively, it is evident that she intended her actions to delay, hinder and/or defraud her creditors, including Judgment Creditors. After Debtor was sued by Judgment Creditors in state court, she transferred the remainder interest in the Property to her daughter. Judgment Creditors obtained a money judgment against debtor in state court, and commenced a second action in state court against Debtor and her daughter to avoid the transfer as a fraudulent transfer. Shortly before the trial in the second action in state court for fraudulent transfer, Debtor commenced this bankruptcy case by filing her voluntary Chapter 7 bankruptcy petition. The bankruptcy filing gave Debtor temporary relief because the Chapter 7 Trustee started administration of the bankruptcy estate on behalf of creditors, including the Property, in which Debtor had claimed a life estate. Debtor opposed Trustee's efforts to administer the estate for creditors, including filing requests for replacement of Trustee (ECF 18), for voluntary dismissal (ECF 73), for disallowance of pleadings filed by counsel for Trustee and Judgment Creditors (ECF 90), for reconsideration of orders denying voluntary dismissal and replacement of Trustee (ECF 32 and 89), and objections to employment of counsel for Trustee (ECF 90). The United States Trustee had moved for dismissal of the case for Debtor's failure to obtain credit counseling before filing her bankruptcy petition, but later withdrew that motion (ECF 12 and 29). The court on its own motion issued an order to show cause why the bankruptcy case should not be dismissed for Debtor's failure to obtain prepetition credit counseling, which was supported by Debtor, but opposed by Trustee, Judgment Creditors and the United States Trustee (ECF 70). The court did not dismiss the bankruptcy case because, as argued by the United States Trustee, citing *In re Mendez,* 367 B.R. 109, 118 (9th Cir. BAP2007), Debtor was using her failure to obtain credit counseling to seek dismissal not in good faith. To protect creditors and the integrity of the bankruptcy system, Debtor was not allowed to voluntarily dismiss her bankruptcy case by claiming that her bankruptcy filing was improper due to her own failure to obtain credit counseling. Trustee abandoned the estate's rights to Debtor's state court appellate claims against Judgment Creditors, and Debtor was allowed to prosecute her appeal through the state appellate system (ECF 180). Meanwhile, Trustee substituted into the second state court suit to prosecute the claim to avoid the fraudulent transfer of the Property, removed that suit to this court, negotiated avoidance of the transfer of the Property with Debtor's daughter, and defended Debtor's appeal of the judgment avoiding the transfer. Hays Trial Decl. ¶¶ 19–25. After obtaining the avoidance judgment, Trustee marketed and sold the Property to benefit the estate and creditors and obtained a good price through an asset sale with overbidding. Hays Trial Decl. ¶¶ 39–45. Because the court did not dismiss the bankruptcy case in the interest of the estate and creditors, Trustee provided necessary and beneficial services to the estate and creditors in opposing Debtor's litigious efforts to frustrate creditors and administration of the estate described above. Because the case was not dismissed, Trustee was needed to administer the estate on behalf of creditors, and this included opposing Debtor's efforts to frustrate creditors and estate administration. Such efforts were needed from the commencement of the case in 2007 and remained necessary after Debtor's death in 2009 because of the continuing efforts of Debtor's daughter, as probate representative, to assert rights adverse to creditors and the estate, including the assertion of Debtor's homestead exemption to the Property.

a. *Avoidance Action*

***20** 25. Trustee incurred $9,407.00 in fees and $395.55 in costs in avoiding and recovering the Transfer through services provided by Marshack Hays. Trustee incurred $25,550.00 in prosecuting the avoidance action against Zeman while Trustee was represented by Rus, Miliband & Smith. Ultimately, Rus, Miliband & Smith was able to circumvent a trial of the fraudulent transfer claim by reaching a consensual resolution with Zeman and Judgment Creditors. Castaldi Trial Decl. ¶ 8. This required extensive communication with counsel for Zeman and counsel for Judgment Creditors and resulted in a judgment in favor of the Estate that allowed for recovery of the Property. Trustee also incurred $16,425.00 in defending against Debtor's appeal of the Stipulated Judgment from the Avoidance Action. Castaldi Trial Decl. ¶ 9.

i. *Necessity and Benefit of Fees Incurred in Avoidance Action*

26. Trustee's efforts and expenses incurred in avoiding, recovering, and preserving the Transfer were necessary and beneficial to Judgment Creditors because, so long as the bankruptcy case remained open, Judgment Creditors could not have prosecuted avoidance and recovery of the Transfer, and only Trustee had standing to do so. See 11 U.S.C. § 550; *see also, City National Bank v. Chabot (In re Chabot),* 100 B.R. 18, 23 (Bankr.C.D.Cal.1989) (Chapter 7 Trustee has exclusive right to avoid and recover fraudulent transfers made by a debtor); *see also Estate of Spirtos v. One San Bernardino County S.C. Case Numbered SPR 02211,* 443 F.3d 1172, 1176 (9th Cir.2006).

27. Although Judgment Creditors may have initially cooperated with Trustee regarding the Avoidance Litigation in bankruptcy court, once it was clear, around August 2008, that Debtor's position with respect to the Avoidance Judgment was going to make the Avoidance Litigation more protracted and expensive than Judgment Creditors had anticipated, Judgment Creditors began to support dismissal of Debtor's bankruptcy case so that they could pursue recovery of the residence in state court. Judgment Creditors argued that "[d]enying the motion to dismiss subjects the Creditors to further delays and expenses that are not likely to be sustained by the streamlined procedures available in the state court proceeding for the sale of property." JC Ex. 44 at 8:21–24, Position filed by James Wallace, Rebecca Wallace, and Gloria Suess (Docket No. 129). The court finds that Judgment Creditors benefited by the actions taken by Trustee because Judgment Creditors could not have prosecuted the avoidance and recovery of the residence so long as the bankruptcy case remained open.

28. Judgment Creditors argue throughout their Proposed Findings of Fact and Conclusions of Law that "at no time did the Trustee assert that he intended to confer any benefit on the Judgment Creditors" through Trustee's actions. Judgment Creditors' Proposed Findings of Fact and Conclusions of Law at 7:13–15, 15:13–14, 18:16–19. The court is not aware of any intent requirement in 11 U.S.C. 506(c). Judgment Creditors appear to read *In re Cascade Hydraulics* as requiring some type of intent to benefit, stating that "Trustee had no intentions of directly benefit the collateral within the meaning of In re Cascade Hydraulics." *Id.* at 38:1–2. Without a quotation or pin cite to specific case law, the court is unable to follow the thrust of Judgment Creditors' argument. As discussed elsewhere in these findings, the court determines Trustee and his attorneys' actions did benefit Judgment Creditors. Although Trustee unsuccessfully sought a judicial declaration that Judgment Creditors were not secured creditors, Trustee never disputed that Judgment Creditors were proper creditors (Trustee took the position that Judgment Creditors were unsecured on grounds that they did not perfect their judgment lien on the Property, which position was rejected by this court and the Bankruptcy Appellate Panel, *Daff v. Wallace (In re Cass),* 476 B.R. 602 (Bankr.C.D.Cal.2012), *aff'd,* 2013 WL 1459272 (9th Cir. BAP2013)), and even if Trustee were successful, these creditors would have benefited from Trustee's actions regarding the homestead exemption and Avoidance Litigation as unsecured creditors.

ii. *Reasonableness of Fees Incurred in the Avoidance Action*

***21** 29. Debtor filed numerous pleadings of questionable legal merit in her bankruptcy case and repeatedly opposed Trustee's efforts to recover, preserve and administer the residence, which required Trustee's response and increased the expenses incurred. *See, e.g.,* Debtor's "Request for Court's Reconsideration of Ruling ... Regarding Replacement of Trustee Charles Daff," Trustee's response, Debtor's request for voluntary dismissal, Trustee's response, Debtor's "Notice of and 1. Objection to Motion to Disallow Pleadings of D.E.

Hays, etc.," Debtor's Objection to D. Edward Hays's Request that the Court to Deny Debtor's Request for Reconsideration of Retaining Trustee Daff," Debtor's appeal of the judgment avoidance of transfer or the residence. JPTO UF ¶¶ 80, 19, 29; Trustee's RJN, Ex. 3, Court's docket re: bankruptcy case number 2:12–bk–16090–RK, Docket Nos. 32, 45, 46; Declaration of D. Edward Hays in Support of Trial re: Surcharge filed on August 26, 2013 as Docket No. 323 ("Hays Trial Decl."), ¶¶ 26, 68(c)(d) and (e). Given Debtor's litigious tactics, the court finds that Trustee's efforts and the expenses incurred in the avoidance action were reasonable.

30. In addition, in response to Marshack Hays's Interim Fee Application for the period from April 21, 2009 through May 31, 2010, the Office of the United States Trustee evaluated and found reasonable all of the fees and costs incurred by Trustee's counsel, Marshack Hays and Rus, Miliband & Smith, in avoiding and recovering the Transfer. The U.S. Trustee's Office stated:

> The U.S. Trustee has reviewed the RMS and MH compensation applications in detail and submits that the fees requested are reasonable as required under 11 U.S.C. § 330(a)(3)(A) through § 330(a)(3)(F) as follows:
>
> (A) Time spent on particular entries appears reasonable.... As noted above, the bulk of item expended related to litigation necessary for the estate to take title to the Santa Ana Property and time needed to respond to Debtor's numerous motions and objections, many of which appear to be unfounded.
>
> (B) Expenses appear reasonable and are detailed by category;
>
> (C) Services appear reasonable and necessary ...;
>
> (D) Both RMS and MH have reasonable blended hourly rates ...;
>
> While counsel fees are substantial, they spanned over a three year period and appeared necessary to prevail in litigation regarding title to the Santa Ana Property. Substantial time also was expended to respond to the Debtor's repeated efforts to obviate applicant's efforts....
>
> Trustee's independent review failed to discover any services or costs which are not compensable.
>
> JC 69 at 4:6–5:14.

31. The court finds that Trustee took reasonable steps to substitute into Judgment Creditors' state court action, remove it to the this bankruptcy court, prosecute it, respond to Debtor's defenses, and ultimately recover Debtor's residence for the Estate and creditors.

32. Trustee's actions were necessary and reasonable to preserve the residence and liquidate it for the benefit of creditors, including Judgment Creditors.

b. *Debtor's Claimed Homestead Exemption*

33. In Debtor's Schedules A and C to her bankruptcy petition, she claimed a life estate interest in the residence and a homestead exemption in the amount of $150,000. JPTO UF ¶ 39; JC Ex. 8; Hays Decl., ¶ 6; Trustee's RJN, Ex. 3, Court's docket re: bankruptcy case number 2:12–bk–16090–RK, Docket No. 61. Apparently, she claimed a higher homestead exemption in the amount of $150,000 as a person 65 years of age or older pursuant to California Code of Civil Procedure § 704.730(a)(3)(2007). Trustee's counsel filed an objection and several supplemental briefs objecting to Debtor's claimed homestead exemption and arguing that no portion of the exemption should be paid from the proceeds generated from the sale of the Property. The court held that Trustee did not sell anything owned by Debtor on the petition date in which Debtor could claim an exemption. Instead, Trustee avoided and recovered the remainder interest transferred by Debtor to Zeman pursuant to the Grant Deed with Life Estate. The remainder interest recovered by Trustee subsequently became fee simple title upon Debtor's death. Docket No. 170. Trustee incurred $15,139 in fees and $106.39 for out of pocket expenses in opposing Debtor's $150,000 claimed homestead exemption. Hays Trial Decl., ¶ 66. Trustee incurred an additional $4,575.00 in connection with the objection to Debtor's Homestead Exemption for fees for services provided by Rus, Miliband & Smith. Castaldi Trial Declaration ¶ 11.

***22** 34. Trustee's actions were necessary to preserve the amount of $150,000 claimed by Debtor as her homestead exemption for the Estate and benefited Judgment Creditors. Under California law, the allowed homestead would have had priority to payment over Judgment Creditors' involuntary judgment lien upon sale of homesteaded property. California Code of Civil Procedure §§ 704.720 *et seq.* and 704.810. As previously stated, through Trustee's avoidance of the transfer approved by court order in May 2008, Debtor lost her claimed $150,000 homestead exemption, which would have

had priority over the judgment lien of Judgment Creditors. *Daff v. Wallace (In re Cass),* 2013 WL 1459272, slip op. at *12, *citing, In re Glass,* 164 B.R. at 762 and 11 U.S.C. § 522(g). By avoiding the Transfer and obtaining an order denying payment of the claimed $150,000 homestead amount, Trustee effectively added this amount of money available for payment on Judgment Creditors' lien, which was not available to them outside of bankruptcy. *Id.* Accordingly, the court finds that Trustee's efforts in avoiding the Transfer and objecting to the homestead exemption were necessary to payment of Judgment Creditors' lien and necessarily beneficial to them.

35. Judgment Creditors argue in their trial brief that they did not benefit from Trustee's services related to the homestead exemption because Judgment Creditors "could have achieved the same result for less of a cost to them." *Trial Brief by James and Rebecca Wallace and Gloria Suess,* Docket No. 327 at 15:19–20. Judgment Creditors then go on to explain why Debtor's death in February 2009 caused any claimed homestead exemption to lapse under California law. *Id.* at 15:20–16:15. As a result, Judgment Creditors "could have avoided the homestead claim for far less a cost that the Trustee's attorneys charged to get the same result through a much more circuitous way" and on that basis asked the court to disallow the "entire claim associated with the homestead services ..." *Id.* at 16:17–20.

36. The court is not persuaded by Judgment Creditors' arguments. Although Judgment Creditors are correct that Debtor's death prevented the application of a homestead exemption as to Judgment Creditors, Judgment Creditors do not account for the significant period of time between January 5, 2007 when Debtor filed bankruptcy and claimed a homestead exemption, and Debtor's death in February 2009. After Debtor filed her bankruptcy petition, Judgment Creditors worked with Trustee to object to the claimed homestead exemption, and Trustee filed an objection on May 11, 2007. That objection continued to be litigated even after Debtor's death, and her daughter and probate representative, Zeman, filed an opposition to the objection on February 9, 2010. Docket No. 160. On May 6, 2010, the court entered an order determining that the disputed claim of exemption was rendered moot by Debtor's death and that no portion of the proceeds of sale shall constitute proceeds of the sale of the Debtor's interest in her life estate. Docket No. 170. The court is not persuaded by Judgment Creditors' unsupported assertion that they "would have faced little, if any obstacles, [sic] to enforcing the abstract of judgment in a sheriff's sale ..." *Trial Brief by James and Rebecca Wallace and Gloria Suess,* Docket No. 327 at 16:15–16. As has been obvious throughout this case, Debtor and her successor-in-interest, her daughter as probate representative, were both tenacious and unrelenting litigants, and litigating with such adversaries will generally require some expense, if not significant expense.

37. Debtor's death could not have been foreseen at the outset of the litigation over the homestead exemption in the bankruptcy case, and so, at the very least, Trustee is justified in claiming legal fees expended for his attorneys objecting to Debtor's claimed homestead exemption prior to her death in February 2009. Trustee is entitled to the whole amount of attorneys' fees incurred in litigating the homestead exemption because Debtor's probate representative, Zeman, continued to assert the exemption even after Debtor's death, which required some form of litigation expense to oppose in order to protect the interests of the Estate and creditors. Despite Judgment Creditors' belief that they could have handled this task more cheaply, there is insufficient evidence to support such an assertion, and the court determines that Trustee's incurrence of attorneys' fees in objecting to the homestead exemption was reasonable, necessary and benefited Judgment Creditors.

***23** 38. Accordingly, the court determines that the legal fees of $15,139 and costs of $4,682.39 incurred by Trustee for services of his counsel for litigation with Debtor and her probate representative over the validity of the claimed homestead exemption are reasonable.

c. *Sale of Property*

39. Trustee incurred $14,687.00 in fees and $133.85 in expenses related to selling the residence with respect to the efforts of Marshack Hays. Hays Trial Decl. ¶ 67. Prior to Marshack Hays's representation of Trustee, Trustee incurred $2,962.50 in fees in recovering possession of the Property from the County of Orange after Debtor's death. Castaldi Trial Decl. ¶ 10.

40. When Trustee recovered the residence, it was in substantial disrepair, and he incurred costs to clean, maintain and safeguard the residence for sale. Hays Trial Decl. ¶ 39. Trustee procured an all cash "as-is" offer to purchase the residence for $200,000. JPTO UF ¶ 45; Hays Trial Decl. ¶ 40. Trustee then employed a broker who solicited multiple overbidders. JPTO UF ¶ 46; Hays Trial Decl. ¶ 68(a) and (b).

An overbid of $280,000 was received by Trustee and accepted prior to the sale hearing. Hays Trial Decl. ¶ 43. At the sale hearing, five overbidders with cash appeared. JPTO UF ¶ 50; Hays Trial Decl. ¶ 44. After bidding, the sale price was increased to $321,000. JPTO UF ¶ 51; Hays Trial Decl. ¶ 45. This amount exceeded Judgment Creditors' opinion as to the value of Debtor's residence. JPTO UF ¶ 52; Hays Trial Decl. ¶ 46. Trustee's counsel, Marshack Hays and Rus, Miliband & Smith, performed all of the legal work in connection with selling Debtor's residence in this bankruptcy case.

41. It was necessary to sell the residence to obtain proceeds to pay creditors, including the Judgment Creditors' lien, while Debtor's case was in the bankruptcy court. Trustee's efforts resulted in Trustee receiving the highest and best price for the residence, which benefited Judgment Creditors by providing the most possible proceeds for payment of their lien. The court finds that the legal fees and expenses incurred by Trustee of less than $15,000, less than 5 percent of the sale price, were reasonable.

42. Thus, Judgment Creditors benefited from Trustee's litigation efforts in avoiding the transfer of Debtor's residence, objecting to Debtor's homestead exemption, and selling the residence. As noted previously, Judgment Creditors' counsel acknowledged that his clients benefited from Trustee's efforts during his deposition as Mr. Dimitruk testified at his deposition as follows:

> Q: Do you on behalf of your clients take the position that the stipulation that avoided and recovered the transfer from the debtor to Ms. Zeman benefited your clients in any way?
>
> A: Yes.
>
> Q: And in what way did that stipulation provide benefit to your clients?
>
> A: It achieved, in a summary fashion, a part of what they were attempting to achieve in the state court action that they filed against both of them, which was the setting aside of the transfer as a fraudulent transfer. The result is something that my clients started in a lawsuit that they filed in a state court action.

JPTO UF ¶ 25; JC Ex. 95 at 36:20–37:8.

> Q: Okay. Do you believe that any of the actions taken by the trustee that resulted in the exemption order benefited your clients in any way?
>
> ***24** A: Yes.
>
> Q: And how did your clients benefit?
>
> A: It spared them what I consider to be the meager cost of accomplishing the same thing that they could have accomplished in the state court action.

JC Ex. 95 at 37:20–38:2.

> Q: In this case, the trustee actually effectuated a sale of the property, correct?
>
> A: Yes, sir.
>
> Q: Do you believe that any of the actions taken by the trustee in effectuating a sale of property benefited or potentially benefited—will benefit your clients in any way?
>
> A: As to all of the above questions, yes.
>
> Q: Okay. And can you describe what you believe to be benefit?
>
> A: In a similar way that I responded to the question about the setting aside of the sale, the conversion, transformation of the property into cash is something that my clients were attempting to do in the state court action, and could have done at a far less cost.

Id. at 38:3–38:18.

43. Thus, the court finds that the fees and costs incurred by Trustee regarding the sale of the Property were beneficial to payment of Judgment Creditors' lien.

C. *No Judicial Estoppel*

44. Judgment Creditors argued that regardless of the reasonableness, necessity, or benefit of Trustee's efforts, Trustee should be judicially estopped from seeking to surcharge their judgment lien because Trustee previously argued that they did not have such a lien. Judgment Creditors contended that Trustee could not surcharge their judgment lien for his litigation expenses unless he acknowledged the validity of their lien. As previously noted, Trustee had taken the litigating position that Judgment Creditors did not have a valid lien on the Property, but that in the event the court determined that the lien was in fact valid, the lien was subject to surcharge under 11 U.S.C. § 506(c). As previously noted, this court determined that Judgment Creditors held a valid

judgment lien against the Property. Subsequently, Trustee filed his Motion to Surcharge.

45. Judicial estoppel applies "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position" and provides that "he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine,* 532 U.S. 742, 751 (2001). This principle of judicial estoppel, "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Id.* (citation omitted).

46. Several factors are considered in determining whether to apply judicial estoppel in a particular case: (1) whether the party's position is "clearly inconsistent" with its earlier position; (2) whether the party has succeeded in persuading a court to accept that party's earlier position; (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *New Hampshire v. Maine,* 532 U.S. at 750; *accord, Ah Quin v. County of Kauai Department of Transportation,* 733 F.3d 267, 270–271 (9th Cir.2013).

***25** 47. Judicial estoppel does not apply in the present case because Trustee did not succeed in persuading the court to accept Trustee's position that Judgment Creditors' lien was invalid. Indeed, Trustee's argument that the lien was invalid failed as the court held, now affirmed by the BAP, that the lien was valid. JPTO UF ¶ 59; JC Ex. 75; Hays Trial Decl., ¶ 58.

48. In addition, Judgment Creditors do not meet the other two required elements of judicial estoppel. First, Trustee has not taken inconsistent positions. He has consistently argued that if the court determined that the lien was valid then the lien should be surcharged. Second, Trustee will not derive an unfair advantage from a surcharge of the lien. Surcharge will fairly reimburse Trustee for, as explained above, reasonable and necessary expenses incurred for the benefit of Judgment Creditors with respect to their judgment lien.

D. *Disgorgement*

49. By his surcharge motion, Trustee seeks to surcharge Judgment Debtors' lien for $39,868.79 in fees and costs for services of its counsel, Marshack Hays, and $60,505.88 in fees and costs for services of its former counsel, Rus, Miliband & Smith, which the court should grant as set forth herein.

50. By their disgorgement motion, Judgment Creditors seek an order disgorging the fees and costs previously paid to Marshack Hays in the sum of $31,709.53 and Rus, Miliband & Smith in the sum of $60,622.13.

51. Because Judgment Creditors' lien will be surcharged in an amount in excess of the interim fee awards previously made, the court determines that that Trustee's counsel, Marshack Hays and Rus, Miliband & Smith, may retain the interim fees and costs previously awarded and paid to them because Judgment Creditors' Motion to Disgorge should be denied as discussed herein.

IV. CONCLUSION

For the foregoing reasons, the court determines that it should grant Trustee's Motion to Surcharge because Trustee has shown by a preponderance of the evidence that the fees and costs incurred for services of his counsel directly benefited Judgment Creditors with respect to their judgment lien and therefore, directs Trustee to lodge an order surcharging Judgment Creditors' lien for Trustee's fees and costs incurred for services of his counsel that directly benefited Judgment Creditors with respect to their judgment lien in the following amounts: $39,233 for reimbursement of fees and $635.79 for reimbursement of costs incurred by Trustee and owed to the Estate's counsel, Marshack Hays LLP, and $55,700 for reimbursement of fees and $4,805.88 for reimbursement of costs incurred by Trustee and owed to the Estate's former counsel, Rus, Miliband & Smith, APC. Also, for the foregoing reasons, the court should deny Judgment Creditors' Motion to Disgorge the fees and costs previously paid to Judgment Creditors.

Trustee is ordered to lodge proposed final judgments or orders consistent with these findings of fact and conclusions of law within 14 days of entry of these findings of fact and conclusions of law.

IT IS SO ORDERED.

All Citations

Not Reported in B.R. Rptr., 2015 WL 2194796

Footnotes

1 All references to “Ex” are to the Exhibits attached to the JC which were admitted into evidence.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

601 South Figueroa Street, Suite 2500
Los Angeles, California 90017-5704

A true and correct copy of the foregoing document entitled (*specify*): **OFFICIAL COMMITTEE OF UNSECURED CREDITORS' NOTICE OF FILING UNPUBLISHED OPINIONS PURSUANT TO LOCAL BANKRUPTCY RULE 9013-2(b)(4)** will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) February 15,2024, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☒ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:
On (*date*) February 15, 2024, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☒ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) February 15, 2024, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

PERSONAL DELIVERY
United States Bankruptcy Court
Central District of California
Edward R. Roybal Federal Building and Courthouse
The Honorable Sandra R. Klein
255 E. Temple Street, Suite 1582
Los Angeles, CA 90012

☒ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

01/15/2024	Tania M. Moyron	
Date	*Printed Name*	*Signature*

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TOP 30	Allied Universal Security Services	Moises Rodriguez	161 Washington St Suite 600			Conshohocken	PA	19428
TOP 30	Arthrex, Inc	Carla Pitcher	2825 Airview Boulevard			Kalmazoo	MI	49002
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