

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF ARIZONA

In re: )  
 ) Chapter 11  
MICHAEL KEITH SCHUGG dba ) Substantively Consolidated  
SCHUBERG HOLSTEINS, )  
 )  
Debtor. ) Case No. 2:04-13326-GBN

\_\_\_\_\_  
In re: )  
 )  
DEBRA SCHUGG, ) **FINDINGS OF FACT,**  
 ) **CONCLUSIONS OF LAW**  
Debtor. ) **AND ORDER**

The contested attorney fee and cost reimbursement application of Wells Fargo Bank, N.A. was tried to the court as a bench trial on January 5 and February 13, 2007. An interim order was entered on April 4, 2007, announcing the decision to sustain the trustee's objections to the application and overrule debtor Michael Keith Schugg's objections.

The court has considered sworn witness testimony, admitted exhibits, pleadings and the facts and circumstances of this case. The following findings and conclusions are now entered:

**FINDINGS OF FACT**

1           1. Michael Keith Schugg ("debtor") filed a voluntary  
2 Chapter 11 bankruptcy case in the District of Arizona on July 29,  
3 2004. Debtor's spouse, Debra Schugg filed her Chapter 11 case in  
4 this district on November 1, 2004. These cases have been  
5 substantively consolidated.<sup>1</sup> Debtor filed a motion for use of  
6 cash collateral on August 12, 2004. Wells Fargo did not object.  
7 The parties lodged an agreed order which was subsequently  
8 extended. Wells Fargo and debtor filed a stipulated cash  
9 collateral order on October 11, 2004, that was extended by  
10 agreement on November 5. When debtor and Mrs. Schugg  
11 subsequently could not agree on cash collateral terms, the court  
12 appointed Grant Lyon as Chapter 11 trustee on December 9, 2004.  
13 A stipulation regarding cash collateral was approved the next  
14 day. A subsequent cash collateral stipulation was reached  
15 between the trustee and the bank on January 20, 2005. Thereafter  
16 additional orders regarding cash collateral use were entered by  
17 stipulation. Joint Pretrial Order ("JPO") of December 30, 2006,  
18 at pgs. 2-3, administrative docket item ("dkt.") 672.

19           2. On April 29, 2005, the Gila River Indian Community  
20 ("the Community") objected to cash collateral use and asserted an  
21 aboriginal ownership interest in certain real property ("Section  
22 16") of the bankruptcy estate. Wells Fargo, claiming a security  
23 interest in *inter alia*, Section 16, put Transnation Title  
24 Insurance Company on notice of the Community's claim by letter of  
25

---

26           <sup>1</sup>The debtors are separately represented. Mrs. Schugg did not  
27 prosecute an objection to the requested legal fees and costs.

1 May 4, 2005. The title company had issued a \$4 million lender's  
2 title insurance policy to the bank. The trustee and Wells Fargo  
3 filed an adversary proceeding against the Community on May 25,  
4 2005. On June 6, 2005, the title company sent a letter accepting  
5 the bank's tender of prosecution of the complaint regarding the  
6 Community's claims. The bank's present legal counsel was  
7 retained by the insurer to represent Wells Fargo in the  
8 litigation, effective May 4, 2005. JPO *id.* at 3-4.

9 3. Wells Fargo and the trustee lodged a stipulated  
10 cash collateral order on July 1, 2005, containing terms requested  
11 by the bank that granted a first priority lien on all estate  
12 property, (subject to certain reservations of rights) and a super  
13 priority bankruptcy claim. Debtor and creditor United Dairymen  
14 of Arizona ("UDA") objected, asserting Wells Fargo was already  
15 adequately protected. The court sustained this objection. In  
16 August of 2005, the trustee dealt with a dairy herd tuberculosis  
17 infection through discussions with the U.S. Department of  
18 Agriculture. Trustee was also negotiating with the bank to use  
19 cash collateral for herd eradication. On September 13, the  
20 trustee filed his initial motion seeking authority to sell the  
21 herd, distribute sale proceeds, determine that the bank was  
22 adequately protected and utilize cash collateral. The trustee  
23 withdrew this motion on September 20, 2005. JPO at 4.

24 4. Shortly thereafter, Wells Fargo and the trustee  
25 submitted a fifth stipulated cash collateral order that stated  
26 the bankruptcy estate had no claims against the bank and that  
27

1 should claims actually exist, they were released. Debtor  
2 objected to the release. The court sustained debtor's objection  
3 by order of December 12, 2005. Earlier, the trustee filed his  
4 amended herd liquidation motion on October 7. Under the existing  
5 fifth supplemental cash collateral order, an attempted use of  
6 cash collateral without the bank's prior written consent was a  
7 material default. As so defined, the trustee's amended herd  
8 liquidation motion constituted a material default. The bank's  
9 objection to the amended herd liquidation motion was overruled by  
10 the court. An order was entered on October 24, 2005. JPO at 5-6.

11           5. The bank appealed the herd liquidation order to the  
12 United States District Court for the District of Arizona. Wells  
13 Fargo and the trustee filed appellate briefs in January and  
14 February of 2006. On November 4, 2005, the trustee filed a sale  
15 and settlement motion regarding acquisition of Section 16 by the  
16 Community. Debtor's objection to the sale was overruled. The  
17 sale was approved on December 8, 2005. Debtor appealed to the  
18 United States District Court, which stayed the Community's  
19 purchase and ultimately reversed the sale on May 23, 2006.  
20 Neither the trustee nor the Community appealed this decision.  
21 *Id.* at 6.

22           6. On January 9, 2006, the trustee filed a motion for  
23 use of additional cash collateral of \$58,000 for expenses related  
24 to a herd depopulation agreement with the Agriculture Department.  
25 Wells Fargo objected and obtained discovery orders authorizing an  
26 examination of the trustee and document production. The court  
27

1 subsequently overruled the bank's objection and approved the  
2 additional cash collateral use for herd liquidation. Wells Fargo  
3 then filed a motion seeking an indication whether the bankruptcy  
4 court would agree to hear a reconsideration of the herd  
5 liquidation order. When this court agreed to hear the  
6 contemplated motion, the district court granted remand. The  
7 bank's Rule 60 motion was filed on March 3, 2006. The trustee  
8 filed his objection on March 28 and shortly thereafter, filed a  
9 motion to pay the bank in full.<sup>2</sup> JPO at 6-7.

10 7. On April 6, 2006, this court denied the bank's Rule  
11 60(b) motion. Wells Fargo did not appeal. Debtor withdrew his  
12 objection to the trustee's Wells Fargo payment request. The  
13 trustee thereafter paid all principal and interest, pursuant to  
14 an order of May 22, 2006. Also pursuant to order, the trustee  
15 placed sufficient funds to secure payment of the bank's legal  
16 fees and expenses pending resolution of its contested fee  
17 application of August 1, 2006. Both the trustee and debtor  
18 objected to the application. Debtor's pending Chapter 11 plan  
19 does not identify any claims the estate holds against Wells  
20 Fargo. *Id.* at 7-8.

21 \_\_\_\_\_  
22 <sup>2</sup>The trustee's April 3, 2006, motion asserted that he had spent  
23 thousands of dollars fighting Wells Fargo in district and bankruptcy  
24 court, notwithstanding both courts' recognition that the bank was  
25 adequately protected. The trustee expected the bank to continue its  
26 "relentless pursuit--no matter what the cost--to prohibit the Trustee's  
27 use of Wells Fargo's cash collateral. " Dkt. 494 at p. 5. Trustee  
sought leave to pay the bank in full to eliminate additional legal fees  
regarding cash collateral and a letter of credit obligation drawn down  
by Wells Fargo. *Id.* at 7-8. Trustee emphasized that notwithstanding  
his full payment, the trustee and debtor reserved all causes of action  
held against the bank. *Id.* at 9.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

8. Larry Clayton is a Vice President of Wells Fargo Bank and was responsible for managing the bank's loans to Michael and Debra Schugg. He is the Loan Adjustment Group Team Manager for Arizona and has 43 years experience in commercial banking. Eighteen years has been spent at Wells Fargo. He is responsible for debtor's loans and directed the bank attorneys' work in the bankruptcy. Although he has bank superiors to whom he reports, he made all the case decisions and merely kept his superiors advised. The bank did not precipitate debtor's bankruptcy filing. Rather, debtor filed bankruptcy because he lost a jury trial to the UDA. Because the UDA's judgment was junior to the bank's secured position, debtor's problem with UDA was not particularly troubling to Wells Fargo. What troubled Mr. Clayton in the bankruptcy was the dairy herd's tubercular infection and the Community's claims on the bank's real property collateral. Admitted trial exhibit ("ex.") B at pgs. 1-3; trial testimony ("test.") of Larry Clayton.

9. Mr. Clayton's declaration stated the Community's claim and the herd's infection created a "substantial risk" for the bank during the bankruptcy. Yet, he felt the bank was always oversecured by its collateral. He knew the bankruptcy court had expressly found the bank to be oversecured on at least one occasion. His internal bank reports reflected that the bank was oversecured. Wells Fargo received monthly payments of principal and interest during the bankruptcy. Regardless, he directed his

1 counsel to continue litigation against the trustee's use of cash  
2 collateral, including a threat to file a motion to convert the  
3 case to Chapter 7. He knew the bank's legal fees would be passed  
4 on to the bankruptcy estate and the debtor. He expressed concern  
5 in his declaration of a collateral shortfall. However, this  
6 concern is not expressed in his internal reports. The bank's  
7 internal report of July 15, 2004, reflects a downgrading of the  
8 loan from a five to a six rating (a nine is a loss), based on the  
9 UDA judgment and the possibility of bankruptcy. The collateral  
10 rating did not decline, however. The report estimates the bank  
11 is oversecured. Mr. Clayton felt justified in proceeding as if  
12 the bank did not have a \$4 million title insurance policy  
13 protecting its real property collateral. The fact finder does  
14 not consider this conduct reasonable. Ex. B at p. 6; test., Ex.  
15 95 at ¶ ¶14, 35; Ex. 36 at pgs 2-3.

16           10. In his deposition, Mr. Clayton testified that even  
17 if he had no concerns regarding title policy coverage, he  
18 possibly would take the same litigative posture, to accelerate  
19 payments from the bank's collateral. At the time of the herd  
20 sale, he had no concerns about the bank receiving payment. His  
21 litigative decisions were driven, in part by his belief that the  
22 bank was legally entitled to payment of its cash collateral. Mr.  
23 Clayton is not an attorney. He personally prepared a problem  
24 loan report of August 11, 2004, that does not further downgrade  
25 the loan, does not forecast a loss and indicates the loans were  
26 "well" secured, with a loan to collateral margin of 57.6% and

27  
28

1 cash flow sufficient to pay the institution. The borrower's  
2 rating remained at six (although bankruptcy had been filed), with  
3 a high probability for a future downgrade over time. Mr.  
4 Clayton's report of September 3, 2004, recommended a borrower's  
5 downgrade to seven, based on the bankruptcy filing and lack of a  
6 date certain for repayment of principal. The collateral quality  
7 rating was not downgraded and the loans were listed as "well  
8 secured." Test.; Ex. 32, pgs. 3-5; Ex. 35 at p 2.

9 11. Mr. Clayton's internal report of July 14, 2005,  
10 stated the aboriginal claim to section 16 " . . . appears to be  
11 without merit. . . ." and speculates the Community " . . . is  
12 believed to be making this claim through the bankruptcy court in  
13 order to stall any pending sale, and force the Trustee to sell  
14 the property to GRIC at a price substantially below current  
15 market value (the initial offer by the GRIC has been \$3.2MM for  
16 property worth \$26MM+ to developers in the immediate area). The  
17 GRIC claim to ownership is believed to be without merit, based on  
18 the following chain of events...." This was Mr. Clayton's opinion  
19 at the time. His report continues: "The Bank has a \$4MM ALTA  
20 title policy on the real estate in question, and the title  
21 company has acknowledged their liability to the Bank under the  
22 policy (the title company has also retained counsel for the Bank  
23 to defend this action against GRIC, and they are paying all legal  
24 fees incurred in the defense of the Bank's position)." Ex. 4 at  
25 p. 2; test., Ex 95 at attachments C, D.



1 12. The internal report of October 19, 2005, contains  
2 identical language regarding the lack of merit of the aboriginal  
3 claim, speculation as to the motives for the claim and the  
4 acknowledged availability of a \$4 million title insurance policy.  
5 The problem loan report of January 17, 2006, again states the  
6 aboriginal claim " . . . appears to be without merit...." It  
7 notes that a court must nonetheless decide ownership before title  
8 can be transferred and the district court has advised the matter  
9 would not be heard for two to three years. "In the unlikely  
10 event that GRIC is awarded the property in question, the Bank has  
11 a \$4MM ALTA title policy and the title company has acknowledged  
12 their liability to the Bank under the policy...." Ex. 28 at p.  
13 2241; Ex. 27 at p. 2229.

14 13. On May 12, 2006, Mr. Clayton received approval of  
15 his request to continue to waive the requirement that the debt be  
16 listed as a non accruing, charged off item. The waiver was  
17 granted through June 30, 2006. His waiver request indicated the  
18 bank's remaining loan of \$2,366,005 was secured by cash and real  
19 estate of \$6,565,000 appraised value or \$4,012,000 marginal value  
20 at 65% of appraisal. The loan to collateral value was calculated  
21 to range between 36% and 59%. His request indicated that "Since  
22 11/05 the Bank has received total paydowns of \$4.9MM. The  
23 remaining loan balance of \$2.4MM is believed to be well secured,  
24 and in the process of collection. Interest is current, and will  
25 continue to be paid on a monthly basis until the Bank debt has  
26 been paid in full." Mr. Clayton proposed three alternative  
27

1 courses for the bank through the waiver period: (1) payment in  
2 full from cash currently in the trustee's possession, (2) sale of  
3 the note<sup>3</sup> or (3) the Bank filing a motion to convert the case to  
4 a Chapter 7. The witness' January 31, 2006, annual review  
5 proposes a strategy that:

6 In the short term . . . proceeds  
7 from the herd eradication will  
8 reduce the Bank debt to \$2.4MM. In  
9 the longer term (2-3 years), the  
10 real estate can be sold after  
11 litigation on ownership has been  
12 resolved and the remaining Bank debt  
13 should then be paid in full  
(interest on the Bank debt will be  
kept current during this process).  
If ownership is decided in favor of  
GRIC (and the Bank does not have a  
valid 1<sup>st</sup> DOT), the \$4MM ALTA title  
policy will pay off the remaining  
Bank balance of \$2.4MM.

14 Ex. 9 at 2555, 2558-59, 2563.

15 14. The witness' testimony is that he had a concern  
16 that the Community had a valid claim and that the title insurer  
17 would not honor the policy. He concedes all internal reports fail  
18 to mention such title policy concerns. All recite that the bank's  
19 loans are fully collateralized, unimpaired and performing. The  
20 reports do indicate a desire for a faster payoff of the bank. Mr.  
21 Clayton does not recall discussing his concern over the title  
22 policy with anyone other than bank counsel. He testified this  
23 failure to mention such concern in the bank's internal reports was  
24 a belief they would be discoverable in litigation. While this

---

25  
26 <sup>3</sup>The court has refused to reimburse the bank's legal expenses of  
27 \$9,669.50 for attempting to market the note. Minutes of November 7,  
2006, dkt. 637.

1 results in his superiors not being informed of his concerns, he  
2 explained that the "trigger point" to warn his superiors had not  
3 been reached. The last downgrade to the loans occurred on  
4 September 3, 2004. The last collateral downgrade was made in  
5 October of 2004, when the bank discovered it had failed to  
6 describe 82 acres of Section 16 in its deed of trust. The  
7 witness' testimony is that, although the internal reports do not  
8 reflect this view, no reasonable banker would feel secured by the  
9 Section 16 property, given the aboriginal title claim, even with  
10 a lender's title insurance policy in place. The court does not  
11 find this testimony credible. Test.; Ex. 109, Ex. 95 at p. 3, ¶14.

12 15. The bank negotiated a July 1, 2005, stipulated  
13 cash collateral order granting Wells Fargo additional security of  
14 a first priority lien in all real, personal, tangible or  
15 intangible property of debtors' estates, including all accounts,  
16 contract rights, documents, general intangibles, tax refunds,  
17 payment rights, all causes of action and all proceeds. Mr.  
18 Clayton sought this extra security, although he believed the bank  
19 was oversecured, because he felt some of the bank's liens had  
20 "issues." Had the order become final, it would have allowed the  
21 bank to recover the lien on the mis described 82 acres of Section  
22 16, subject to the Community's aboriginal claim. Debtor and  
23 unsecured creditor UDA objected to this additional lien. On  
24 August 15, 2005, the court sustained the objections, finding the  
25 bank was already adequately secured and no evidence had been  
26 presented that its collateral was depreciating. Order of July 1,

27

28

1 2005 at pgs. 3-4, ¶ 7 C, Dkt. 256; Test., Dkts. 264, 266, 268,  
2 276.

3           16. The bank negotiated an October 4, 2005, stipulated  
4 second supplemented cash collateral order with the trustee that  
5 released all estate claims against the bank arising prior to the  
6 order's date. Mr. Clayton was warned by the trustee at the time  
7 that there might be objections to the release. Nevertheless, the  
8 bank pursued the release, in part, because of the trustee's  
9 allegations the bank wrongfully drew on a collateralized letter  
10 of credit. Although the witness was not aware of any formal  
11 claims pending against the bank, he insisted on obtaining the  
12 release and litigating objections to it. Normally the bank's loan  
13 documentation does not contain such a release. Debtor objected  
14 on October 19, 2005. At a December 9 hearing the court sustained  
15 the objection and struck the release from the cash collateral  
16 order. Dkt. 307 at pgs. 2-3, ¶4; Test., Dkt. 315.

17           17. In August of 2005, the trustee received an offer  
18 from the U.S. Department of Agriculture to purchase the estate's  
19 interest in the infected dairy herd for \$9.3 million. The bank  
20 had not distinctly downgraded the rating of its collateral because  
21 of the infection. Prior to the disease's appearance, the bank  
22 valued the herd at \$5 million. The trustee was concerned over  
23 personal liability in the range of seven figures for federal tax  
24 implications from the herd liquidation. He proposed a payment of  
25 \$4.9 million to the bank. Mr. Clayton's tax analysis, conducted  
26 with the assistance of bank counsel, indicated a tax reserve of

27  
28

1 \$1 million or less would be sufficient to protect the trustee from  
2 personal liability. The bank did not accept or understand the  
3 trustee's tax analysis, which justified a larger tax reserve.  
4 Accordingly, while encouraging the sale, the bank sought a lower  
5 tax reserve. The trustee proposed that should he have  
6 overestimated the tax, that the additional reserve amount be paid  
7 to the bank, with interest. Mr. Clayton refused, preferring a  
8 larger, immediate payment. What the bank ultimately received from  
9 sale proceeds was sufficient to fully pay the herd loan, the feed  
10 loan and a portion of the Section 16 real estate loan. Test.

11 18. The bank was unhappy with the trustee's use of  
12 \$58,000 in cash collateral funds to finish the herd liquidation,  
13 preferring instead that the trustee use unsecured estate monies  
14 to liquidate its collateral. The bank objected and requested  
15 discovery from the trustee. This involved production of 1,700  
16 pages of documents and the opportunity to view or copy a banker's  
17 box of tax documents. While the trustee refused to agree to a  
18 stay pending appeal of the sale order, believing that the bank was  
19 adequately protected, he offered to sequester \$ 2.6 million  
20 pending further agreement and pay the bank \$1.6 million.  
21 Regardless, the witness viewed the trustee's attitude as "take it  
22 or leave it" or "all or nothing" approaches. The court does not  
23 find this to be a reasonable characterization. Test., Ex. 95 at  
24 pgs. 12-13, ¶57.

25 19. The Transnation lender's title policy had  
26 exclusions. The bank put the insurer on notice of the Community's  
27

1 Section 16 claims. The insurer accepted defense of the title  
2 litigation, hired the bank's counsel as its attorneys and never  
3 issued a reservation of rights notice. Regardless, the witness  
4 had concerns the insurer would subsequently refuse to honor the  
5 policy. Although the bank was always oversecured, Mr. Clayton  
6 testified he had concerns. Such concerns do not appear in  
7 internal reports to bank superiors. Mr. Clayton never discussed  
8 his concerns with the insurer. In Mr. Clayton's 43 years of  
9 experience, he has found it infrequent that a title insurer  
10 declines coverage. The witness denies the bank's only concern was  
11 how soon it would be paid. The fact finder does not find the  
12 creditor's title policy concerns credible. Test., Ex. 95 at "B."

13 20. The bank opposed the herd sale liquidation order  
14 because of the size of the tax reserve and other administrative  
15 set asides. This creditor lost, appealed, sought and obtained a  
16 remand from the appellate court, returned to the bankruptcy court  
17 to file a motion for reconsideration, lost that motion, did not  
18 appeal further and was paid in full, except for disputed bank  
19 attorney fees. Mr. Clayton received congratulations when the  
20 trustee paid the bank, but no extra compensation. The court does  
21 not find creditor's litigation strategy to be reasonable in the  
22 context of the bank's secured positions. Test.

23 21. The witness' declaration states the trustee sought  
24 to require the bank to accept a collateral shortfall of more than  
25 \$1 million, leaving the creditor totally dependent on the title  
26 policy. Yet in October of 2005, after receiving \$4.9 million, it  
27

1 was owed \$2.4 million secured by equipment liens, receivables, and  
2 \$1.7 million in cash, (that subsequently grew to \$2 million),  
3 Section 16 (minus 82 acres) and the excess of the tax reserve.  
4 The \$58,000 sought by the trustee to close out the herd  
5 liquidation, opposed by the bank, came from the \$1.7 million cash  
6 collateral. At all times, the bank categorized debtor's loans as  
7 "sub standard," which is a classification that attracts regulatory  
8 attention. This category is below that of "special mention," but  
9 is higher than a "doubtful" rating. After threatening to file a  
10 motion to convert the case to Chapter 7, the bank was paid in full  
11 on May 22, 2006, consisting of \$2.366 million plus accrued  
12 interest of \$4 million. The bank withdrew as a plaintiff in the  
13 district court litigation against the Community. The trustee will  
14 continue to litigate the aboriginal claim. Contested bank  
15 attorney fees of \$342,000 are held in a reserve account. Ex. 95  
16 at p. 6, ¶25, test., Ex.13.

17           22. The court finds Mr. Clayton to clearly be both a  
18 gentleman and the most experienced banker in the room. As a  
19 witness on cross examination, he made no attempt at evasion and  
20 genuinely tried to cooperate with adverse counsel. Nonetheless,  
21 as the decision maker, he is not an unbiased witness. His  
22 explanations of concern over the bank's security position, not  
23 reflected in any significant manner in internal records, as  
24 justification for aggressive litigation is not credible to the  
25 fact finder. Test.

26

27

28

1           23. The trustee objects to the bank's legal fees and  
2 costs associated with its uncompleted appeal of the trustee's  
3 motion to sell the herd and related relief, the bank's motion  
4 requesting a *Crateo* indication from the bankruptcy court regarding  
5 a pending appeal and its unsuccessful motion for reconsideration.  
6 Objector argues such legal services were not reasonably believed  
7 to be necessary to protect the bank at the time they were  
8 rendered. Objectionable fees and costs are calculated by the  
9 trustee as \$115,043. February 13, 2007, testimony of Gary G. Lyon  
10 ("Lyon test."), JPO at 2, Ex. 92 at "A", Ex. 11 at ¶6, p. 2.

11           24. The trustee believed the bank's real property  
12 collateral had a value of \$10.3 million, based on the Community's  
13 purchase offer, as well as hearsay presented by the debtor. He  
14 further believes the bank's total collateral package had a value  
15 of \$16 million. Because of the bank's aggressive, time consuming,  
16 expensive litigation, the trustee felt forced to pay off this  
17 creditor early, to preserve the estate for other creditors. He  
18 believes his relationship with the bank deteriorated at the time  
19 decisions were made to partially pay the bank from herd sale  
20 proceeds. His understanding was Mr. Clayton would pursue every  
21 legal avenue to force full payment by the late Fall of 2005 and  
22 would oppose every subsequent trustee move. Because the  
23 relationship operated appropriately until October of 2005, the  
24 trustee's objections are narrower than those of the debtor.  
25 Although he has previously testified in court as an expert  
26 witness, the trustee does not consider himself an expert on  
27



1 reasonable bank conduct. Mr. Lyon is not a bankruptcy panel  
2 trustee, did not have extensive trustee experience and this  
3 unusual, complex case was his first service as a Chapter 11  
4 trustee. However, the court finds him to be an experienced and  
5 knowledgeable business consultant, with 15-16 years of financial  
6 workout experience and a credible witness. Lyon Test., Ex. 11 at  
7 pgs. 7-10.

8           25. The trustee refused to agree to a stay in February  
9 of 2006, while the bank pursued a district court appeal of the  
10 sale order. This refusal was because the bank had not sought a  
11 stay in bankruptcy court and the trustee was concerned about his  
12 personal tax liability from the transaction. The trustee was  
13 required to produce many pages of documents to the bank, until the  
14 parties agreed to stay discovery. Trustee testified he attempted  
15 to work with Wells Fargo, but as a fiduciary, could not  
16 exclusively act solely in the bank's interests. Prior to  
17 liquidation of the herd, he attempted to reach agreement regarding  
18 allocation of sales proceeds. The bank refused, so the matter was  
19 litigated. The result was court approval on October 21, 2005, of  
20 a distribution scheme essentially proposed to the bank originally.  
21 While the trustee's distribution resulted in a \$700,000 exposure  
22 of the bank, this exposure was more than covered by the bank's  
23 Section 16 lien and title policy. The result of adopting the  
24 bank's distribution proposal would have caused the estate to  
25 become unnecessarily illiquid, in the event the Community's \$10.3

26  
27  
28

1 million sale offer did not close. The fact finder finds this  
2 testimony credible. Lyon test., Ex. 11 at ¶22-30.

3           26. The bank converted approximately \$3.349 million of  
4 long term debt into immediately due debt by refusing to renew a  
5 standby letter of credit in July of 2005. This refusal caused the  
6 bond trustee to draw on the letter, which exacerbated the estate's  
7 liquidity problem. Regardless, since the trustee concluded the  
8 bank legally had a right to cause the draw, he reasoned he was not  
9 giving anything of value in agreeing to release the bank from  
10 liability. However, the trustee believes the draw down was  
11 unreasonable, as it nearly doubled the bank's current debt, at a  
12 time when the creditor claimed it was concerned over the  
13 collateral available to cover its immediate debt. The witness  
14 testified it would have been more advantageous for the estate to  
15 continue to make payments on this long term debt (it was current  
16 in payments at the time) and deal with the obligation in a Chapter  
17 11 plan. Technically however, the letter of credit's bond was in  
18 default because of debtor's bankruptcy filing. Because of the  
19 bank's aggressive and litigious posture, the trustee filed his  
20 motion to pay it in full, shortly after a threat to file a motion  
21 to convert and to stay payment of taxes. The court finds this  
22 testimony credible. Lyon test., Ex. 11 at ¶¶13-21 and 33, Ex. D.

23           27. The debtor presented no evidence in support of his  
24 fee objection that seeks a reduction of \$205,508. His expert  
25 witness, David Zacharias, was excluded from testifying for the

26

27

28

1 reasons announced in open court on January 5, 2007. Debtor's fee  
2 objections will be denied.

3           28. The court finds that the bank was oversecured at  
4 all relevant times until paid in full. There was no reasonable  
5 danger it would not be paid. Regardless, it chose to force the  
6 trustee to pay immediately, rather than await plan confirmation.  
7 An oversecured creditor's desire for an immediate exit strategy  
8 does not require payment of all legal costs and fees by the estate  
9 and junior creditors. A creditor in such an advantageous position  
10 should simply protect its claim and not engage in costly  
11 litigation that frustrates an efficient, effective reorganization.  
12 Since the bank owned neither the dairy, the herd nor the real  
13 property, it had no right to aggressively pressure the estate and  
14 trustee for an early payoff. While now conceding it was  
15 adequately protected and receiving current principal and interest  
16 payments, it nevertheless appealed the adequate protection ruling,  
17 then short circuited the appeal process to seek another ruling  
18 from the bankruptcy court under Civil Rule 60. The court finds  
19 applicant failed to meet its burden of demonstrating that the  
20 legal services identified by the trustee were reasonable at the  
21 time rendered.

22           29. To the extent any of the following conclusions of  
23 law should be considered findings of fact, they are hereby  
24 incorporated by reference.

25

26

**CONCLUSIONS OF LAW**

27

28

1           1. To the extent any of the above findings of fact  
2 should be considered conclusions of law, they are hereby  
3 incorporated by reference.

4           2. Jurisdiction of this bankruptcy case is vested in  
5 the United States District Court for the District of Arizona.  
6 That court has referred all cases, arising under Title 11 of the  
7 United States Code or related to a bankruptcy case, to this court.  
8 28 U.S.C. §157(a) (1994), Amended District Court General Order 01-  
9 15. This case having been appropriately referred, this court has  
10 core bankruptcy jurisdiction to enter a final order resolving the  
11 fee application and objections. 28 U.S.C. §157(b) (2) (B), (O).  
12 No party has argued to the contrary. See JPO at 2.

13           3. Conclusions of law are reviewed *de novo*. Factual  
14 findings are reviewed for clear error. *Hanf v. Summers (In re*  
15 *Summers)*, 332 F.3d 1240, 1242 (9<sup>th</sup> Cir. 2003). Findings of fact,  
16 whether based on oral or documentary evidence, will not be set  
17 aside unless clearly erroneous. Due regard is given to the  
18 opportunity of the bankruptcy court to judge witness credibility.  
19 Rule 8013, *F.R.B.P.* A bankruptcy court's award of attorneys' fees  
20 is not disturbed, unless the court abused its discretion or  
21 erroneously applied the law. *Higgins v. Vortex Fishing Systems,*  
22 *Inc.*, 379 F.3d 701, 705 (9<sup>th</sup> Cir. 2004).

23           4. Under 11 U.S.C. §506 (b), a creditor is entitled to  
24 attorney fees and costs, if (1) the claim is an allowed secured  
25 claim, (2) the claim is oversecured by available collateral, (3)  
26 the fees are reasonable and (4) fees and costs are provided for

27  
28

1 under the agreement between the parties. *Kord Enterprises II v.*  
2 *California Commerce Bank (In re Kord Enterprises II)*, 139 F.3d  
3 684, 687 (9<sup>th</sup> Cir. 1988), *Hassen Imports Partnership v. KWP*  
4 *Financial VI (In re Hassen Imports Partnership)*, 256 B.R. 916, 925  
5 (9<sup>th</sup> Cir. BAP 2000). When fees provided for in the underlying  
6 agreement are reasonable and the creditor is oversecured, an award  
7 is mandatory. *Unsecured Creditors' Committee v. Puget Sound*  
8 *Plywood, Inc.*, 924 F.2d 955, 959 (9<sup>th</sup> Cir. 1991) (Affirming a fee  
9 reduction), *Pasatiempo Properties v. Le Marquis Associates (In re*  
10 *Le Marquis Associates)*, 81 B.R. 576, 578 (9<sup>th</sup> Cir. BAP 1987).

11           5. Here the parties dispute only whether the amount  
12 sought is reasonable. The key determinant is whether the expenses  
13 and fees within the scope of the agreement reflect actions that  
14 similarly situated creditors would take. If the actions and fees  
15 are clearly outside such a range, they are not reimbursed from the  
16 estate. A court inquires whether, considering all relevant  
17 factors, the creditor reasonably believed the services were  
18 necessary to protect its interests. In making such a  
19 determination, the court looks not to state law, but makes an  
20 independent evaluation. 81 B.R. at 578. This court's evaluation  
21 is that not all actions taken were reasonable. Given that the  
22 creditor was oversecured at all times, that the fiduciary trustee  
23 was paying adequate protection payments with interest without  
24 default and that the aboriginal rights challenge to the Section  
25 16 collateral was protected by title insurance, the bank's appeal

26

27

28

1 of the first amended order, its *Crateo* motion and Rule 60 motion  
2 were not within the range of reasonable creditor behavior.

3           6. A secured claim holder has the affirmative burden  
4 of proving the reasonableness of its fee under §506(b). *Atwood*  
5 *v. Chase Manhattan Mortgage Co. (In re Atwood)*, 293 B.R. 227, 233  
6 (9<sup>th</sup> Cir. BAP 2003). The burden is to prove by a preponderance of  
7 the evidence both the reasonableness of fees and that they were  
8 necessary to protect the creditor's interests. *Washington Federal*  
9 *Savings Bank v. McGuier (In re McGuier)*, 346 B.R. 151, 158 (Bankr.  
10 W.D. Pa. 2006). The bank has failed to carry this burden.

11           7. The reasonableness requirement prevents  
12 overreaching or collusive fee arrangements. A court should not  
13 reward aggressive legal actions that harass and oppose a debtor  
14 or trustee at every stage. Oversecured creditors do not have a  
15 blank check to incur fees and costs that will be automatically  
16 reimbursed. *In re Circle K Corp.*, 141 B.R. 688, 692 (Bankr. D.  
17 Az. 1992). The court concludes that the bank's above actions  
18 constituted overly aggressive behavior that crossed into  
19 harassment. While bank counsel's legal actions were skilled and  
20 precisely met the creditor's demands for extremely conservative  
21 protection of its secured interests, these services should be  
22 borne by the client that requested them, not by the estate and  
23 unsecured creditors.

24           8. By contrast, debtor did not support his more  
25 extensive fee objection with admissible testimony or documents.  
26 The requested fee amount cannot be considered unreasonable simply  
27

1 because a party feels it is excessive. Objectors have the  
2 responsibility to challenge the information and produce evidence  
3 controverting that produced by the applicant. A gestalt reaction  
4 that there was too much time spent is not sufficient. *In re*  
5 *Blackwood Associates, L.P.*, 165 B.R. 108, 111-12 (Bankr. E.D.N.Y.  
6 1994). The trustee met this burden. The debtor did not.

7  
8 **ORDER**

9  
10 The trustee's objection is sustained. The debtor's  
11 objection is overruled. The trustee and applicant will confer to  
12 reach a stipulation as to the amount of fees to be reduced, based  
13 on these findings and conclusions and lodge a stipulated judgment.  
14 In the event the parties cannot agree, trustee will lodge and  
15 serve a proposed judgment, subject to objections as to form.

16 Dated this 10th day of April, 2007.

17  
18   
19 \_\_\_\_\_  
George B. Nielsen, Jr.  
20 UNITED STATES BANKRUPTCY JUDGE

21  
22 Copies emailed this 10th  
23 day of April, 2007, to:

24 Christopher H. Bayley  
25 SNELL & WILMER, L.L.P.  
26 One Arizona Center  
27 400 E. Van Buren  
28 Phoenix, AZ 85004-0001  
Email: [Cbayley@swlaw.com](mailto:Cbayley@swlaw.com)  
Attorney for Trustee Grant Lyon

1 Robert J. Miller  
BRYAN CAVE, LLP  
2 Two N. Central Avenue, Suite 2200  
Phoenix, AZ 85004  
3 Email: [rjmiller@bryancave.com](mailto:rjmiller@bryancave.com)  
Attorney for Wells Fargo Bank, N.A.

4 Dale C. Schian  
5 SCHIAN WALKER, P.L.C.  
3550 N. Central Avenue, #1700  
6 Phoenix, AZ 85012-2115  
Email: [ecfdocket@swazlaw.com](mailto:ecfdocket@swazlaw.com)  
7 Attorney for Debtor

8 By: /s/Rachael M. Stapleton  
Judicial Assistant

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28