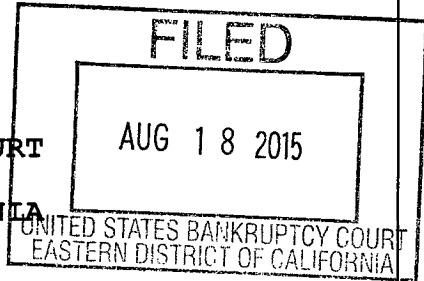


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1 UNITED STATES BANKRUPTCY COURT  
 2 EASTERN DISTRICT OF CALIFORNIA

3  
 4 In re: ) Case No. 13-30690-B-11  
 5 WILLIAM V. PRIOR, ) DC No. TCB-1  
 6 Debtor(s). )  
 7 \_\_\_\_\_ )

8  
 9 MEMORANDUM DECISION DENYING MOTION FOR APPROVAL OF ATTORNEYS'  
 10 FEES AND COSTS INCURRED BY SECURED CREDITOR TRI COUNTIES BANK

11 INTRODUCTION

12 Presently before the court is a *Motion for Approval of*  
 13 *Attorneys' Fees and Costs Incurred by Secured Creditor Tri*  
 14 *Counties Bank*. Secured creditor Tri Counties Bank moves under 11  
 15 U.S.C. § 506(b) for an allowance of the post-petition attorney's  
 16 fees and expenses it incurred in this chapter 11 case. Section  
 17 506(b) permits an over-secured creditor to recover reasonable  
 18 post-petition attorney's fees and expenses under an agreement or  
 19 state law. Debtor William V. Prior has opposed the motion. The  
 20 bank has replied to the debtor's opposition.

21 The motion was heard on July 7, 2015. Robert E. Izmirian,  
 22 Esq., appeared for the bank. George C. Hollister, Esq., appeared  
 23 for the debtor. Notice of the motion was properly given to all  
 24 required parties in interest.

25 The court has reviewed and considered the motion,  
 26 opposition, reply, all related declarations and exhibits, and the  
 27 debtor's confirmed third amended plan of reorganization. The  
 28

1 court also heard and considered the arguments of counsel stated  
2 on the record in open court. This memorandum decision  
3 constitutes the court's findings of fact and conclusions of law  
4 under Federal Rule of Civil Procedure 52(a) made applicable by  
5 Federal Rule of Bankruptcy Procedure 7052 and 9014.

6  
7 **BACKGROUND**

8 The bank holds two promissory notes executed by the debtor.  
9 The debtor's obligations under those promissory notes are  
10 classified as "Allowed Secured Claims" in Class 1(a) and Class  
11 1(b) of the third amended plan. The Class 1(a) claim is secured  
12 by real property known as 750, 760, 770, and 780 Lincoln Way,  
13 Auburn, California. The third amended plan describes this  
14 property collectively as the 750 Lincoln Way property. The Class  
15 1(b) claim is secured by real property known as 905-907 Lincoln  
16 Way, Auburn, California. The third amended plan describes this  
17 property collectively as the 905 Lincoln Way property.

18 Based on provisions in the aforementioned promissory notes,  
19 the bank requests the attorney's fees and expenses it incurred  
20 from the petition date through July 7, 2015. Attorney's fees  
21 total \$112,430.50 and expenses total \$455.56. The bank also  
22 requests an additional \$3,000 for preparation of the motion and  
23 an appearance by counsel at the hearing on the motion.

24 The bank relies *exclusively* on the third amended plan to  
25 establish that its allowed secured claim is over-secured. The  
26 extent of the bank's evidence that its claim is over-secured  
27

1 consists of a statement in the bank's motion that "[t]he  
2 confirmed Plan treats [the bank] as fully-secured." The bank  
3 submitted a declaration and exhibits with its motion; however,  
4 that declaration addresses the reasonableness of the attorney's  
5 fees and expenses requested and says nothing about the treatment  
6 of the bank's secured claim. The bank also submitted a  
7 supplemental declaration and additional exhibits with its reply.  
8 As explained further below, the supplemental declaration and the  
9 exhibits submitted with it corroborate admissions by the bank in  
10 its reply that "at no time has [it] alleged to be over-secured"  
11 and, in fact, "[it] was not over-secured." As a result of those  
12 admissions, the court is not persuaded by the bank's argument  
13 that its claim is over-secured in or by confirmation of the third  
14 amended plan. That means the bank has failed to satisfy its  
15 burden of proof (both as to production and persuasion) on an  
16 essential element of its § 506(b) claim. And that also means the  
17 bank's motion will be denied.

#### 18 19 JURISDICTION AND VENUE

20 Federal subject-matter jurisdiction is founded on 28 U.S.C.  
21 § 1334. This matter is a core proceeding that a bankruptcy judge  
22 may hear and determine. 28 U.S.C. §§ 157(b)(2)(A), (B), and (0).  
23 To the extent it may ever be determined to be a matter that a  
24 bankruptcy judge may not hear and determine without consent, the  
25 parties nevertheless consent to such determination by a  
26 bankruptcy judge. 28 U.S.C. § 157(c)(2). Venue is proper under  
27 28 U.S.C. § 1409.

1 **DISCUSSION**

2 The bank's motion is brought under § 506(b) which states:

3 To the extent that an allowed secured claim is secured  
4 by property the value of which, after any recovery  
5 under subsection (c) of this section, is greater than  
6 the amount of such claim, there shall be allowed to the  
7 holder of such claim, interest on such claim, and any  
8 reasonable fees, costs, or charges provided for under  
9 the agreement or State statute under which such claim  
10 arose.

11 U.S.C. § 506(b).

12 The provision on its face sets up four basic requirements  
13 for the allowance of post-petition attorney's fees and expenses  
14 to a secured creditor: (1) the claim must be an allowed secured  
15 claim; (2) the creditor holding the allowed secured claim must be  
16 over-secured; (3) the entitlement must be provided for under some  
17 agreement or state statute; and (4) the fees and expenses sought  
18 must be reasonable. Kord Enters. II v. Cal. Commerce Bank (In re  
19 Kord Enters. II), 139 F.3d 684, 687 (9th Cir. 1998). As the  
20 § 506(b) applicant, the bank bears the burden of proving each  
21 element. In re Scarlet Hotels, LLC, 392 B.R. 698, 703 (6th Cir.  
22 BAP 2008). The bank has failed to prove the second element.

23 Based on the Class 1(a) and Class 1(b) debt amounts stated  
24 in Articles 6.02, 6.02.1, and 6.02.4 of the third amended plan  
25 and the values of the 750 and 905 Lincoln Way properties in  
26 Articles 5.05 and 5.06 characterized as "assumptions," the third  
27 amended plan treated the bank's claim as fully-secured.  
28 According to the bank, however, that treatment did not establish  
that the bank's allowed secured claim was actually over-secured.

1 The bank's reply to the debtor's opposition states as  
2 follows:

3 Prior assets, without proof whatsoever, that at all  
4 times [the bank] was over-secured, arguing that because  
5 it was well secured it should not have taken steps to  
6 protect itself. **At no time has TCB alleged that it was  
7 over-secured. Prior's Plan, as confirmed, assumed such  
8 based entirely on Prior's personal opinion of values.**  
9 In fact, the value of the real property collateral has  
10 never faced a judicial determination. **Attached to the  
11 Supp. Decl. are the summary pages of TCB's appraisals  
12 of the [750 and 905 Lincoln Way] properties  
13 demonstrating that TCB was not over-secured.**

14 Dkt. 236 at 2:10-19 (emphasis added). These statements are  
15 consistent with the bank's declaration and supplemental  
16 declaration, and their related exhibits. Therefore, they will be  
17 treated as admissions for purposes of this proceeding. See In re  
18 Applin, 108 B.R. 253, 259 (Bankr. E.D. Cal. 1989); see also Fed.  
19 R. Evid. 801(d)(2)(A).

20 The declaration that the bank submitted with its motion  
21 states that time entries the bank also submitted with its motion  
22 are true and correct. The following time entries submitted by  
23 the bank reflect the bank's pre-confirmation recognition that its  
24 secured claim was not over-secured:

25	3/10/15	REI	REVIEW/ANALYSIS OF LEGAL RESEARCH RE: \$ 506 RIGHTS TO ATTORNEY'S FEES FOR UNDERSECURED CREDITOR	.2	120.00
26	3/10/15	VBP	REVIEW/ANALYSIS OF WHETHER TRI COUNTIES MAY SUBMIT A CLAIM FOR ATTORNEYS FEES AS AN UNDERSECURED CREDITOR (1.1); DRAFT SUMMARY OF CONCLUSIONS REGARDING SAME	1.7	552.50

1       The bank also filed a supplemental declaration with its  
2 reply which included - and authenticated - payoff invoices for  
3 the Class 1(a) and Class 1(b) secured claims. The supplemental  
4 declaration also included - and authenticated - appraisals of the  
5 750 and 905 Lincoln Way properties obtained by the bank.<sup>1</sup> To be  
6 clear, these are the bank's records submitted by the bank to  
7 support and corroborate the bank's admissions in the reply that  
8 at no time was it or did it claim to be over-secured. And they  
9 do indeed corroborate those admissions.

10       The supplemental declaration identifies a payoff of  
11 \$1,004,921.05 for the Class 1(a) claim/750 Lincoln Way property  
12 obligation and a payoff of \$995,406.51 for the Class 1(b)/905  
13 Lincoln Way property obligation. The supplemental declaration  
14 also states those payoffs do not include the delinquent property  
15 taxes the bank advanced the debtor under the third amended plan  
16 in the amounts of \$167,432.31 for the 750 Lincoln Way property  
17 and \$165,738.92 for the 905 Lincoln Way property. When those tax  
18 advances are added to the bank's payoffs, the totals, according  
19 to the supplemental declaration, become \$1,172,353.36 owing on  
20 the Class 1(a)/750 Lincoln Way property obligation (\$1,004,921.05  
21 + \$167,432.31) and \$1,161,145.43 owing on the Class 1(b)/905  
22 Lincoln Way property obligation (\$995,406.51 + \$165,738.92). And  
23

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24  
25       <sup>1</sup>Although the reply states these appraisals are not  
26 submitted to prove the precise values of the 750 and 905 Lincoln  
27 Way properties, they are submitted to support the bank's position  
28 that it was not over-secured and the treatment of its secured  
claim as fully-secured in the third amended plan was an  
unsubstantiated assumption.

1 when those payoffs are compared to the bank's appraisals of  
2 \$1,160,000 for the Class 1(a)/750 Lincoln Way property obligation  
3 and \$1,070,000 for the Class 1(b)/905 Lincoln Way property  
4 obligation the bank's supplemental declaration shows that,  
5 consistent with the admissions in the reply, the bank's claim is  
6 not over-secured on the 750 Lincoln Way property/Class 1(a)  
7 obligation by \$12,353.36 (\$1,160,000 [bank appraisal] -  
8 \$1,172,353.36 [bank payoff]) and not over-secured on the 905  
9 Lincoln Way property/Class 1(b) obligation by \$91,145.42  
10 (\$1,070,000 [bank appraisal] - \$1,161,145.43 [bank payoff]).

11       Given the temporal breadth of the bank's admission, *i.e.*,  
12 "at no time" has it alleged to be over-secured and the  
13 unequivocal statement that it was in fact not over-secured, both  
14 supported by the bank's own evidence, the court is not persuaded  
15 by the bank's argument that its claim is over-secured in or by  
16 confirmation of the third amended plan. In other words, although  
17 the bank's secured claim may have been treated as fully-secured  
18 in the third amended plan, by the bank's own admission, evidence,  
19 and argument that treatment did not establish that the bank's  
20 secured claim was actually over-secured.<sup>2</sup> Accordingly, that

21 \_\_\_\_\_  
22       <sup>2</sup>The court is also not persuaded this determination could  
23 have been made in the confirmation proceedings which further  
24 supports the court's conclusion, based on the debtor's  
25 admissions, that this element of § 506(b) was not determined in  
26 or by confirmation of the third amended plan. Article 1.06  
27 excepts post-petition attorney's fees and expenses from the  
28 definition of an "Allowed Secured Claim" unless they are provided  
for in the plan or subsequently determined in accordance with  
Article 9.01. The bank's post-petition attorney's fees were not  
provided for in the third amended plan and, in fact, were  
expressly carved-out of the bank's allowed secured claim by

1 means res judicata does not apply. See Miller v. U.S., 363 F.3d  
2 999, 1004 (9th Cir. 2004); Trulis v. Barton, 107 F.3d 685, 691  
3 (9th Cir. 1997).

4  
5 **CONCLUSION**

6 The bank has not satisfied its burden of proof on an  
7 essential element of its § 506(b) claim. That is, the bank has  
8 not demonstrated or persuaded the court that its secured claim is  
9 over-secured in or by confirmation of the third amended plan.  
10 Therefore, for the reasons stated above, the bank's motion and  
11 its request for post-petition attorney's fees and expenses under  
12 § 506(b) are DENIED.

13 A separate order will enter.

14 Dated: August 18, 2015.

15  
16   
17 UNITED STATES BANKRUPTCY JUDGE

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23 \_\_\_\_\_  
24 Article 6.02 because there was no agreement between the bank and  
25 the debtor. That means the bank could recover its attorney's  
26 fees and expenses, if at all, under the procedure in Article 9.01  
27 which required a post-confirmation proceeding. And that also  
28 means the issue of whether the bank was over-secured had to be  
determined after confirmation and not by the plan itself.  
Indeed, the court expressly retained post-confirmation  
jurisdiction in Article 16 for that purpose.



**INSTRUCTIONS TO CLERK OF COURT  
SERVICE LIST**

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

George C. Hollister  
655 University Ave #200  
Sacramento CA 95825

Robert E. Izmirian  
55 Second Street, 17th Floor  
San Francisco CA 94105

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