

(28)

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re: ) Case No. 15-20840-B-11  
)  
TOLLENAAR HOLSTEINS, a )  
6 California general partnership, ) Jointly Administered with  
) Case Nos. 15-20842-B-11 and  
) 15-20844-B-11  
7 Debtor. )  
) DC No. RAL-9  
8 FRIENDLY PASTURES, LLC, an )  
9 Oklahoma limited liability )  
company, )  
)  
10 Debtor. )  
)  
11 T BAR M RANCH, LLC, an Oklahoma )  
12 limited liability company, )  
)  
13 Debtor. )

FILED

OCT - 5 2015

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

MEMORANDUM DECISION GRANTING TRUSTEE'S MOTION TO SURCHARGE  
COLLATERAL

INTRODUCTION

Presently before the court is a *Motion to Surcharge Collateral* filed by Russell K. Burbank, the trustee appointed in the above-captioned jointly-administered chapter 11 cases. The trustee seeks to surcharge the collateral of secured creditors Bank of the West and Hartford Accident and Life Insurance Company under 11 U.S.C. § 506(c) for expenses incurred in the administration of the Tollenaar Holsteins, Friendly Pastures, and T Bar M Ranch chapter 11 cases. Section 506(c) permits a trustee to surcharge a secured creditor's collateral for the reasonable and necessary expenses incurred in preserving or disposing of

1 collateral for the benefit of a secured creditor.<sup>1</sup> The surcharge  
2 initially requested was \$278,794.43. That amount appears to have  
3 been revised by the trustee to \$269,354.82, and is allocated  
4 \$153,393.46 to Bank and \$115,961.36 to Hartford.

5 The trustee's surcharge motion was initially heard on August  
6 11, 2015. Proper notice was given to all required parties and  
7 parties in interest. Appearances were noted on the record.

8 During the initial hearing on August 11, 2015, the court  
9 expressed skepticism as to whether the trustee sufficiently  
10 identified and quantified any benefit to Bank and Hartford  
11 related to the expenses for which the trustee seeks to surcharge  
12 these secured creditors' collateral. The court also noted there  
13 appeared to be an absence of any express consent to a surcharge  
14 by Bank and/or Hartford. Nevertheless, the court requested  
15 additional briefing on the consent issue. The initial hearing  
16 was continued to September 6, 2015, then to September 15, 2015,  
17 and finally to October 6, 2015. The October 6, 2015, was  
18 rendered unnecessary by this decision.

19 The court has reviewed and considered the entire docket in  
20 this matter including, but not limited to, the trustee's motion,  
21 Bank's and Hartford's oppositions, the trustee's reply, and the  
22 exhibits and declarations (including all supplemental  
23

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24 <sup>1</sup>11 U.S.C. § 506(c) states as follows:

25 The trustee may recover from property securing an  
26 allowed secured claim the reasonable, necessary costs  
27 and expenses of preserving, or disposing of, such  
28 property to the extent of any benefit to the holder of  
such claim, including the payment of all ad valorem  
property taxes with respect to the property.

1 declarations) submitted in support of the motion, oppositions,  
2 and reply. The court has also considered the trustee's, Bank's,  
3 and Hartford's supplemental points and authorities on the consent  
4 issue. And the court heard and has fully considered the  
5 statements and arguments of counsel made on the record in open  
6 court on August 11, 2015.

7 The court is persuaded that the trustee has demonstrated  
8 that some reasonable and necessary expenses benefitted Bank and  
9 Hartford directly and those benefits have been sufficiently  
10 quantified. The court is also persuaded that § 506(c)  
11 incorporates the pre-Code practice that allowed a bankruptcy  
12 court to surcharge a secured creditor's collateral based on  
13 express or implied consent, or when the secured creditor caused  
14 the expenses to be surcharged. And the court is persuaded that  
15 by their active involvement in these cases that was more than  
16 mere cooperation with the trustee, Bank and Hartford consented to  
17 a surcharge. Therefore, for the reasons explained below, the  
18 trustee's motion will be GRANTED.

19 This memorandum decision constitutes the court's findings of  
20 fact and conclusions of law pursuant to Federal Rule of Civil  
21 Procedure 52(a) made applicable by Federal Rule of Bankruptcy  
22 Procedure 7052 and 9014.

#### 23 24 **JURISDICTION AND VENUE**

25 Federal subject-matter jurisdiction is founded on 28 U.S.C.  
26 § 1334. This matter is a core proceeding that a bankruptcy judge  
27 may hear and determine. 28 U.S.C. §§ 157(b) (2) (A), (B) and  
28 (0). To the extent it may ever be determined to be a matter that

1 a bankruptcy judge may not hear and determine without consent,  
2 the parties nevertheless consent to such determination by a  
3 bankruptcy judge. 28 U.S.C. § 157(c)(2). Venue is proper under 28  
4 U.S.C. § 1409.

5  
6 **BACKGROUND**

7 Each of the three debtors in these jointly-administered  
8 cases filed voluntary chapter 11 petitions on February 4, 2015.  
9 At the commencement of these chapter 11 cases, each of the  
10 debtors served as debtors in possession and continued to operate  
11 their California and Oklahoma dairies.

12 After several hearings, numerous filings, and argument by  
13 the parties, a trustee was ordered appointed on March 17, 2015.  
14 Russell K. Burbank was appointed as the trustee in these jointly-  
15 administered chapter 11 cases on March 24, 2015.

16 The court ordered the appointment of a trustee after Bank  
17 refused to consent to the debtors' use of its cash collateral  
18 without adequate protection, which the debtors were unable to  
19 provide. In the absence of adequate protection, Bank would only  
20 consent to the use of its cash collateral by a trustee.  
21 Ultimately, Bank and Hartford persuaded the court that the  
22 appointment of a trustee was in the interest of creditors and the  
23 estate.

24 Bank and Hartford are the debtors' primary secured  
25 creditors. They hold liens on substantially all of the debtors'  
26 assets. Bank is owed approximately \$4,400,000.00. It is secured  
27 by the debtors' California and Oklahoma dairy herds, feed, milk  
28 and milk proceeds, machinery, and other personal property of the

1 debtors. Hartford is owed approximately \$8,400,000.00. It is  
2 secured by first deeds of trust on California and Oklahoma dairy  
3 facilities and equipment, and a security interest in the debtors'  
4 dairy products and proceeds.

5 The trustee maintains that a surcharge of Bank's and  
6 Hartford's collateral for expenses incurred in the administration  
7 of these estates is warranted. In addition to expenses that  
8 produced a direct and quantifiable benefit to Bank and Hartford,  
9 the trustee maintains that Bank and Hartford each consented to a  
10 surcharge for the fees and expenses incurred by the trustee and  
11 the trustee's professionals.

12 Their collateral now having been either liquidated or  
13 recovered, and thus both secured creditors having milked the  
14 proverbial cow dry, Bank and Hartford oppose the trustee's  
15 surcharge motion. Both secured creditors maintain the trustee  
16 has not satisfied § 506(c) and they did not consent to any  
17 surcharge. Bank alternatively maintains that even if a surcharge  
18 is warranted, any surcharge must be allocated between it and  
19 Hartford.

20  
21 **DISCUSSION**

22 Surcharges have traditionally been authorized under one of  
23 two tests: (1) an objective test which requires the surcharge  
24 claimant to satisfy the § 506(c) elements by demonstrating  
25 reasonable and necessary expenses that provided a quantifiable  
26 benefit to the secured creditor or (2) a subjective test under  
27 which the surcharge claimant may establish the secured creditor  
28 "consented to" or "caused" the expenses to be surcharged. See

1 Compton Impressions, Ltd. v. Queen City Bank, N.A. (In re Compton  
2 Impressions), 217 F.3d 1256, 1260 (9th Cir. 2000) (citing In re  
3 Cascade Hydraulics & Utility Serv., Inc., 815 F.2d 546, 548 (9th  
4 Cir. 1987); see also Debbie Reynolds Hotel & Casino, Inc. v.  
5 Calstar Corp., Inc. (In re Debbie Reynolds Hotel & Casino, Inc.),  
6 255 F.3d 1061, 1068 (9th Cir. 2001); Security Leasing Partners,  
7 LP v. ProAlert (In re ProAlert), 314 B.R. 436, 440 (9th Cir. BAP  
8 2004) ("Unless the secured creditor consents to the surcharge, a  
9 trustee seeking to recover under § 506(c) must establish that  
10 expenses relating to the preservation or disposition of  
11 collateral were (1) reasonable, (2) necessary, and (3) provided a  
12 quantifiable benefit to the secured creditor."). Each is  
13 applicable here and each is discussed below.

14 I. Surcharge Under the Objective Test: Direct and Quantifiable  
15 Benefit.

16 The objective test is not easily satisfied because it  
17 requires the surcharge claimant to prove that the expenses were  
18 reasonable, necessary, and provided a concrete and quantifiable  
19 benefit to the secured creditor. Debbie Reynolds, 255 F.3d at  
20 1068. Recovery is also limited to the amount of any benefit and  
21 must be proven with specificity. Id. Nevertheless, the court is  
22 persuaded that the trustee has met this burden with respect to a  
23 limited portion of the surcharge requested.

24 Hartford's collateral will be surcharged \$24,543.79 for  
25 expenses incurred in keeping the California dairy a "wet" dairy  
26 solely for Hartford's benefit from April 14, 2015, when the  
27 trustee's motion to liquidate the California dairy herd was  
28 granted, until May 15, 2015, when Hartford's state court receiver

1 took control of the California dairy.<sup>2</sup> These expenses were  
2 reasonable. They were also necessary to prevent the loss of  
3 valuable permits if the dairy ceased operations as a "wet" dairy  
4 and also to prevent a corresponding diminution in value if the  
5 permits were lost.<sup>3</sup> The court is persuaded that the trustee has  
6 identified and quantified both the expenses solely attributable  
7 to Hartford and the benefit that Hartford derived from these  
8 expenses sufficient to satisfy § 506(c).<sup>4</sup>

9 Hartford's collateral will also be surcharged \$11,419.50 for  
10 expenses incurred in the operation of the Oklahoma dairy from May  
11 15, 2015, when the last cow was transported off the property,  
12 until June 10, 2015, when Hartford's state court receiver took  
13 control of the property. These expenses were reasonable and  
14 necessary to secure the Oklahoma property from vandalism, to  
15 comply with environmental monitoring regulations mandated by the  
16 State of Oklahoma, and to prevent a loss of value if the property  
17  
18  
19

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20 <sup>2</sup>This amount takes into account Hartford's \$55,000.00 loan  
21 to the estate to allow for the redemption of cows from Bank and  
22 the repayment of \$36,704.68 upon the subsequent sale of  
California dairy cows.

23 <sup>3</sup>This is consistent with Hartford's position in this case:  
24 "Cessation of dairy operations on the [California dairy] could  
25 result in loss of operating permits, greatly reducing the value  
of the [California dairy]." [dkt. 237 at 2:3-3:3].

26 <sup>4</sup>Alternatively, these expenses could be allowed on the basis  
27 of consent, see, discussion in Section II infra, given Hartford's  
28 statement that the "expenses for which Hartford consented were  
those related to the Tollenaar Holsteins bankruptcy involving the  
Elk Grove property after liquidation of the livestock[.]"

1 became pasture land rather than a licensed dairy.<sup>5</sup> The court is  
2 persuaded that the trustee has identified and quantified expenses  
3 attributable solely to Hartford related to these matters and the  
4 benefit Hartford derived from these expenses sufficient to  
5 satisfy § 506(c).

6 Based on detailed time records, Bank's collateral will also  
7 be surcharged \$46,958.71 and Hartford's collateral will also be  
8 surcharged \$24,490.00 for fees that the trustee and the trustee's  
9 professionals incurred for services rendered solely for the  
10 benefit of each of these secured creditors and their respective  
11 collateral. These fees were approved and allowed without  
12 objection by Bank or Hartford. And inasmuch as they reflect  
13 specific and detailed activity, the court is persuaded they  
14 describe direct and quantifiable benefits to Bank and Hartford.

15 In sum, the court is persuaded that the trustee has  
16 satisfied his burden of demonstrating reasonable and necessary  
17 expenses that produced a direct and quantifiable benefit to Bank  
18 and Hartford which are chargeable against their respective  
19 collateral. Therefore, on the basis that the trustee has  
20 persuaded the court that the elements of § 506(c) and the  
21 objective test are satisfied, at least with respect to the  
22 expenses identified hereinabove, the court will surcharge  
23 Bank's collateral in the initial amount of \$46,958.71 and

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24  
25 <sup>5</sup>This is also consistent with Hartford's position in this  
26 case: "In addition, Hartford lacks adequate protection of its  
27 interest in [the Oklahoma property], which is in danger of losing  
28 its operating permits unless remediation and repair of the  
Oklahoma waster [sic] treatment and disposal system is commenced  
immediately, and is concluded expeditiously." [dkt. 316 at 3:11-  
14].



1 Hartford's collateral in the initial amount of \$60,453.29 for a  
2 total surcharge under the objective test of \$107,412.00. That  
3 leaves a balance of \$161,942.82 to be addressed under the  
4 subjective test.

5 II. Surcharge Under the Subjective Test: Based on the Consent of  
6 Bank and Hartford.

7 Determining whether Bank and/or Hartford consented to a  
8 surcharge requires the court to consider four issues:

9 (1) Whether consent remains a viable basis upon which a  
10 bankruptcy court may surcharge a secured creditor's  
11 collateral?

12 (2) If consent remains a viable basis upon which a  
13 bankruptcy court may surcharge a secured creditor's  
14 collateral, must a trustee still demonstrate  
15 reasonable, necessary expenses that resulted in a  
16 quantifiable benefit in addition to consent?

17 (3) If consent remains a viable basis upon which a  
18 bankruptcy court may surcharge a secured creditor's  
19 collateral, did Bank and Hartford consent to a  
20 surcharge?

21 (4) How should a surcharge based on consent, if any, be  
22 allocated?

23 A. First and Second Issues: Viability and Parameters of  
24 Consent.

25 The first issue arises from the BAP's decision in Comerica  
26 Bank California v. GTI Capital Holdings, LLC, (In re GTI Capital  
27 Holdings, LLC), 2007 WL 7532277 (9th Cir. BAP 2007) - and that is  
28 whether consent remains a viable basis under § 506(c) to  
surcharge a secured creditor's collateral.<sup>6</sup> The second issue is  
related to the first, and that is whether the § 506(c) elements  
must be satisfied in addition to consent. As explained below,

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<sup>6</sup>The court recognizes that Comerica is an unpublished  
memorandum decision. Nevertheless, the decision is well-reasoned  
and the court finds the BAP's analysis highly persuasive.

1 the court concludes that consent remains a viable basis to  
2 surcharge a secured creditor's collateral and a surcharge may be  
3 ordered if either the statutory elements of § 506(c) are  
4 satisfied, i.e., the "objective test," or the secured creditor  
5 consented to the surcharge or caused the expenses to be  
6 surcharged, i.e., the "subjective test."

7 Consent, or the subjective test, pre-dates the 1978 Code and  
8 is inherently an equitable standard. See In re Hotel Associates,  
9 6 B.R. 108 (Bankr. E.D. Pa. 1980) (discussing early cases and  
10 noting that consent was often inferred from circumstances or  
11 acquiescence, especially when there were no free assets).  
12 Section 506(c) has its roots in § 77B of the Bankruptcy Act of  
13 1933 under which "mortgaged property could be charged with any  
14 allowances which were fairly attributable to activities  
15 benefitting a secured creditor, or to which he expressly or  
16 impliedly consented, or which he caused." First Western Savings  
17 & Loan v. Anderson, 252 F.2d 544, 547 (9th Cir. 1958). That  
18 principle was carried over and adopted in § 246 of chapter X of  
19 the Bankruptcy Act of 1938 (11 U.S.C. § 646) which gave "the  
20 judge discretion to determine whether, and to what extent,  
21 mortgage creditors should be charged with the general costs of an  
22 unsuccessful reorganization proceeding." Id.<sup>7</sup>

23 These pre-Code equitable principles were captured and  
24 codified in § 506(c). See In re Los Gatos Lodge, Inc., 278 F.3d  
25 890, 893 (9th Cir. 2002) ("Section 506(c) had its origins in the  
26 \_\_\_\_\_

27 <sup>7</sup>First Western also identified factors to consider in  
28 exercising this discretion. Those factors closely resemble those  
cited in Comerica. See First Western, 252 F.2d at 548 n. 8.

1 equitable principle that where a court has custody of property,  
2 administration and preservation expenses are a dominant charge  
3 against the property."); see also ProAlert, 314 B.R. at 442  
4 (Congress intended § 506(c) to be a codification of the pre-Code  
5 equitable principle that a lienholder may be charged with the  
6 reasonable costs and expenses incurred by the trustee which are  
7 required to preserve or dispose of the property subject to lien).

8 Comerica, however, questioned the continued vitality of  
9 consent under § 506(c) in light of the Supreme Court's decision  
10 in Hartford Underwriters Ins. Co. v. Union Planters Bank N.A.,  
11 530 U.S. 1 (2000). In Comerica, the BAP noted that the Supreme  
12 Court focused on the plain and unambiguous language of § 506(c)  
13 and made no significant mention of the consent standard.  
14 Comerica, 2007 WL 7532277 at \*14 (citing Hartford Underwriters,  
15 530 U.S. at 6). The BAP also noted that about six weeks after  
16 the Supreme Court decided Hartford Underwriters, the Ninth  
17 Circuit decided Compton Impressions in which the court of appeals  
18 stated that a surcharge under § 506(c) was appropriate if either  
19 the objective test or the subjective test were satisfied. Id. at  
20 \*14 n. 22. Indeed, Compton Impressions framed the question as an  
21 "either" "or" standard: "Under § 506(c), therefore, Compton must  
22 demonstrate that the expenses it seeks to surcharge against the  
23 Banks were reasonable, necessary, and beneficial to the Banks'  
24 recovery, or that the Banks caused or consented to those  
25 expenses." Compton Impressions, 217 F.3d at 1260 (citing Cascade  
26 Hydraulics, 815 F.2d at 548). Nevertheless, the BAP noted that  
27 Compton Impressions did not cite or discuss Hartford  
28 Underwriters. And because of that, although it affirmed the

1 bankruptcy court's surcharge on the basis of consent, the BAP  
2 concluded it was without clear direction from the Ninth Circuit  
3 or the Supreme Court as to the continued vitality of consent.  
4 Comerica, 2007 WL 7532277 at \*14.

5 About a year after the BAP decided Comerica, the Ninth  
6 Circuit decided Weinstein, Eisen & Weiss v. Gill (In re Cooper  
7 Commons LLC), 512 F.3d 533 (9th Cir. 2008). Although the facts  
8 of that case differ somewhat from the facts of this case, the  
9 underlying legal principle is applicable. In Cooper Commons, the  
10 debtor's attorneys objected to the payment of administrative  
11 expenses incurred by the trustee and his professionals from a  
12 carve-out the lender initially created from its collateral and  
13 which the trustee later unilaterally and without objection  
14 supplemented from the lender's funds it was holding as additional  
15 collateral. Id. at 535. Debtor's attorneys argued that the  
16 trustee's surcharge of lender's collateral to pay for the  
17 estate's administrative expenses required the application of  
18 § 506(c) which had not been satisfied. Id. at 536. The Ninth  
19 Circuit rejected that argument and, in doing so, stated that  
20 "[i]n light of the Lender's consent, there was no need for  
21 § 506(c) as a statutory hook." Id.

22 Cooper Commons is significant for two reasons. First, it  
23 recognizes that consent remains a viable basis under § 506(c) to  
24 surcharge a secured creditor's collateral even after Hartford  
25 Underwriters and Comerica. Second, it also recognizes that the  
26 statutory elements and consent are alternative grounds upon which  
27 a court may order a surcharge under § 506(c).

28 Of course, an alternative reading of Cooper Commons might be

1 that the Ninth Circuit did not address the impact of Hartford  
2 Underwriters on the continued vitality of consent because that  
3 issue was not raised on appeal. But even assuming that to be the  
4 case, the holding of Cooper Commons that it was unnecessary for  
5 the trustee to satisfy the elements of § 506(c) because the  
6 lender consented to the surcharge, and therefore consent remains  
7 a viable and alternate basis upon which a bankruptcy court may  
8 surcharge a secured creditor's collateral under § 506(c), is  
9 binding on this court.

10 Cooper Commons is also consistent with the weight of recent  
11 decisions that find consent - including implied consent as the  
12 Ninth Circuit recognized nearly sixty years ago in First Western  
13 - remains valid and relevant under § 506(c). See First Western,  
14 252 F.2d at 547; see also In re Strategic Labor, Inc., 467 B.R.  
15 11, 22 (Bankr. D. Mass. 2012) ("[W]hile § 506(c) does not require  
16 advance consent by the secured creditor, consent is still a  
17 relevant consideration."); In re McClean Wine Co., Inc., 463 B.R.  
18 838, 855 (Bankr. E.D. Mich. 2011) (surcharge claimant must prove  
19 three elements of § 506(c), i.e., reasonableness, necessity, and  
20 benefit or, in the alternative, direct or implied consent or  
21 expenses were caused); In re Computer Systems, 446 B.R. 837, 842  
22 (Bankr. N.D. Ohio. 2011) ("[T]he Court notes that implied consent  
23 is a basis for surcharging a secured creditor's collateral  
24 pursuant to 11 U.S.C. § 506(c)."); In re Cass, 2015 WL 2194796 at  
25 \*15 (Bankr. C.D. Cal. 2015) ("In the Ninth Circuit, the trustee  
26 is entitled to a surcharge to the extent that the costs incurred  
27 were (1) reasonable and necessary and that they benefitted the  
28 secured creditor, or (2) consented to by the secured creditor.").

1 Based on the foregoing, the court concludes that consent -  
2 express and implied - remains a viable basis upon which a  
3 bankruptcy court may surcharge a secured creditor's collateral  
4 under § 506(c). The court further concludes that a secured  
5 creditor's collateral may be surcharged under § 506(c) if the  
6 trustee (or debtor in possession) either (1) satisfies the  
7 statutory elements of § 506(c), i.e., reasonableness, necessity,  
8 and benefit, or (2) persuades the court that the secured creditor  
9 expressly or impliedly consented to a surcharge, or caused the  
10 expenses to be surcharged.

11 B. Third Issue: Existence of Consent.

12 After careful consideration and weighing of the factors  
13 listed below, the court is persuaded that Bank and Hartford  
14 consented to a surcharge of their collateral for expenses and  
15 fees the trustee and the trustee's professionals incurred in  
16 these administratively insolvent chapter 11 cases.

17 The court recognizes that limited cooperation with a  
18 trustee, even under a consensual cash collateral order, is  
19 insufficient from which to infer consent. Cascade Hydraulics,  
20 815 F.2d at 548; In re Flagstaff Foodservice Corp., 739 F.2d 73,  
21 76-77 (2d Cir. 1984); but see In re Croton River Club, Inc., 162  
22 B.R. 656, 660 (Bankr. S.D.N.Y. 1993) (implying consent from  
23 creditor's consent to cash collateral stipulation). There is  
24 also some disagreement over whether seeking the appointment of a  
25 trustee is more than mere cooperation and, thus, rises to the  
26 level of implied consent. Compare In re Stein and Day, Inc., 89  
27 B.R. 290 (Bankr. S.D.N.Y. 1988) (seeking appointment  
28 insufficient) with Hotel Assoc., 6 B.R. 108 (seeking appointment

1 sufficient) and In re Bob Grissett Golf Shoppes, Inc., 50 B.R.  
2 598, 609 (Bankr. E.D. Va. 1985) ("A secured creditor who knows  
3 the debtor's estate has no unencumbered assets and nevertheless  
4 moves for appointment of a trustee cannot by that means transfer  
5 to a third party, such as the trustee, the burden of financing  
6 the liquidation.").

7 However, in these cases, involvement by Bank and Hartford  
8 extended well beyond mere cooperation or seeking to have a  
9 trustee appointed. A review of the docket and record in these  
10 cases persuades the court that Bank and Hartford orchestrated the  
11 preservation, liquidation, and/or recovery of their collateral  
12 through the trustee and the trustee's professionals. And in so  
13 doing, they consented to the resulting administrative expenses.

14 1. Factors Weighed and Considered in Determining  
15 Implied Consent.

16 In affirming the bankruptcy court's conclusion that the  
17 secured creditor bank in Comerica consented to a surcharge, the  
18 BAP focused on a number of factors the bankruptcy court used to  
19 establish implied consent.<sup>8</sup> Comerica, 2007 WL 7532277 at \*6-8.  
20 Those factors are applicable here.

- 21 (1) Comerica caused the bankruptcy court to appoint an  
22 examiner with pervasively broad powers. Because  
23 Comerica asked the court to empower the Examiner

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24 <sup>8</sup>The bankruptcy court developed these factors after  
25 evidentiary hearings. In this case, the court has the benefit of  
26 facts developed through numerous hearings on the use of cash  
27 collateral, the appointment of a trustee, stay relief motions,  
28 sale motions, and status conference reports. Facts developed in  
those proceedings fit neatly into Comerica factors. Statements  
by the parties and their counsel may also be treated as  
evidentiary admissions under Fed. R. Evid. 801(d)(2). In re  
Applin, 108 B.R. 253, 259 (Bankr. E.D. Cal. 1989).



1 to perform these duties, Comerica consented to or  
2 caused Examiner and his professionals to perform  
these duties. Comerica, 2007 WL 7532277 at \*6.

3 There is no dispute that Bank moved for the appointment of a  
4 trustee in each of the three chapter 11 cases. Bank knew the  
5 expansive powers a trustee would have under § 1106 and Bank  
6 capitalized on those powers. Bank even located its own  
7 individual with dairy experience and it urged the court to  
8 appoint that individual as the trustee in these cases. And in  
9 proposing a trustee, Bank also emphasized that the purpose of a  
10 trustee would be to liquidate Bank's collateral rather than  
11 reorganize the debtors' affairs.

12 Facing a surcharge, Hartford attempts to distance itself  
13 from Bank on this point. During argument on August 11, 2015,  
14 Hartford's counsel emphatically stated that Hartford did not seek  
15 the appointment of a trustee. Technically, that statement is  
16 accurate. It is, however, disingenuous. Although Hartford did  
17 not move for the appointment of a trustee, it asked the court to  
18 appoint the functional equivalent of a trustee, an estate  
19 fiduciary in the form of a court-appointed chief restructuring  
20 officer with powers and authority nearly identical to those of a  
21 trustee under § 1106.

22 Doubling down on the statement by its attorney during the  
23 hearing on August 11, 2015, Hartford's supplemental points and  
24 authorities state that what it refers to as a "Response" [dkt.  
25 170], "simply did not constitute a request for the court to  
26 appoint a trustee, or consent for doing so. It was a suggested  
27 resolution to the problem, offered in the mistaken belief that  
28 the parties had an agreement for an appointment of a [chief



1 restructuring officer]." [dkt. 420 at 6:20-22]. Hartford also  
2 suggests that even if it somehow consented to the appointment of  
3 a chief restructuring officer, it consented only in the Tollenaar  
4 case and not in the Friendly Pastures or T Bar M cases.  
5 Hartford's argument is not persuasive, and it is not credible.

6       The conclusion of the document referenced above as  
7 Hartford's "Response" unambiguously states: "For the reasons set  
8 forth above, Hartford respectfully requests that the court order  
9 the employment of a [chief restructuring officer] under the terms  
10 and conditions set forth above, and such additional terms and  
11 conditions consistent therewith." [Id. at 6:20-21]. That  
12 "Response" also states that "Hartford requests that the court  
13 appoint a [chief restructuring officer] in the above-referenced  
14 cases under the following terms and conditions[.]" [dkt. 170 at  
15 2:15-16]. Hartford requested the appointment of a chief  
16 restructuring officer on the basis that such an appointment was  
17 "in the best interest of the creditors and the estate[.]" [dkt.  
18 170 at 2:21-22]. To the court, that sounds an awful lot like the  
19 standard for appointment of a trustee under § 1104(a)(2).

20       Hartford also sought to empower its court-appointed chief  
21 restructuring officer with the authority to: (1) manage and  
22 control all of the day-to-day operation of debtors' dairy  
23 business; (2) complete all required reports; (3) market and sell  
24 assets; (4) appear and be heard in all contested matters and  
25 adversary proceedings; (5) inspect and maintain all real property  
26 on which the debtors maintain dairy operations; (6) insure the  
27 existence and maintenance of all required permits to operate the  
28

1 California and Oklahoma dairies; (7) provide information to the  
2 parties; and (8) retain professionals. To the court, those  
3 powers sound no different from the powers a trustee would have  
4 under § 1106.

5       Significantly, Hartford filed the document referenced as its  
6 "Response" "in each of the above-referenced cases." [Id. at  
7 2:3-5]. The "above-referenced cases" is a reference to the  
8 caption which identifies all three debtor entities, i.e.,  
9 Tollenaar, Friendly Pastures, and T Bar M. The caption also  
10 includes a darkened box next to "Affects ALL DEBTORS." Thus,  
11 despite how Hartford now tries to spin it, the court is persuaded  
12 that Hartford asked for affirmative relief in each of the chapter  
13 11 cases in the form of an appointment of a certified  
14 restructuring officer with powers equal to that of a trustee.  
15 And now, as with Bank, Hartford must be bound by the consequences  
16 that flow from its request.

17       (2) Early on in the case Comerica decided it was  
18 beneficial to employ an examiner with expanded  
19 powers to divest the debtor's management from  
20 control of the debtor's finances and to sell the  
21 debtor's assets (consisting primarily of  
22 Comerica's collateral) quickly. Comerica, 2007 WL  
23 7532277 at \*7, 14.

24       Out of concern over an unauthorized and unexplained  
25 disappearance, removal, and disposition of its collateral, Bank  
26 sought the immediate and urgent appointment of a trustee eight  
27 days after the voluntary petitions were filed. Bank also sought  
28 to have a trustee appointed to protect and preserve the value of  
its collateral which Bank maintained was deteriorating rapidly  
and was not adequately protected. Bank even located and

1 suggested an individual with dairy experience and urged the court  
2 to appoint that individual as the trustee. Thus, Bank was  
3 motivated not by an effort to foster the debtors' reorganization  
4 or rehabilitation, rather, it was motivated by a desire to have a  
5 trustee immediately appointed to preserve, protect, and rapidly  
6 liquidate its collateral solely for its benefit.

7 As noted above, early in the case Hartford also urged the  
8 court to divest the debtors of control of all dairy operations  
9 and to vest that authority in a court-appointed fiduciary with  
10 extensively broad powers that included the authority to inspect  
11 and maintain Hartford's real property collateral (with particular  
12 emphasis on and attention to permits and environmental concerns  
13 unique to Hartford).

14 These events are corroborated by the trustee. Immediately  
15 after he was appointed, the trustee arranged conference calls  
16 with, among others, Bank's and Hartford's counsel and "during  
17 th[o]se calls [he] was reminded by the Bank of the West of the  
18 perishable and depreciating condition of the dairy herds and by  
19 the real estate brokers of the potential loss in value of the  
20 real properties at both of the Debtor's ranches should either  
21 ranch lose its operating permits and/or certificates." [dkt. 425  
22 at 2:6-15]. In short, both secured creditors sought to have the  
23 trustee move quickly to secure and preserve their respective  
24 collateral.

25 (3) Comerica was aware early in the case that asset  
26 liquidation would not net sufficient amounts to  
27 pay administrative expenses and Comerica's claim  
28 in full. Comerica, 2007 WL 7532277 at \*14.

Early in this case, Bank was aware the estates were

1 administratively insolvent and there were insufficient assets to  
2 pay its secured claim in full and other administrative costs.

3 Hartford also took the position that there was no equity in  
4 its California and Oklahoma real property collateral. It also  
5 asserted that the estates lacked and estimated \$1.2 million  
6 necessary to remediate the Oklahoma dairy. From this the court  
7 can infer that Hartford was equally aware that the debtors lacked  
8 the \$8.4 million necessary to pay its claim in full, the \$4.4  
9 million necessary to pay Bank's claim in full, and sufficient  
10 funds to pay all other administrative claims in the cases. In  
11 other words, Hartford also knew the estates were administratively  
12 insolvent.

13 (4) Comerica controlled the Examiner's actions by  
14 limiting the examiner's use of its cash  
15 collateral. Comerica, 2007 WL 7532277 at \*6.

16 Bank controlled trustee's use of its cash collateral. In  
17 fact, Bank consented to the trustee's limited use of its cash  
18 collateral for purposes beneficial to the bank, primarily,  
19 liquidation of its collateral and operation of the dairy  
20 facilities while its collateral was liquidated.

21 Hartford also placed restrictions on the use of its cash.  
22 It loaned the estate \$55,000.00; however, it directed the trustee  
23 to use those funds to preserve the value of its collateral by  
24 acquiring cows for the California dairy in order to avoid the  
25 loss of valuable permits.

26 By restricting what the trustee could do with funds, Bank  
27 and Hartford effectively limited the trustee's focus to matters  
28 affecting their respective interests and collateral. Put another

1 way, by restricting the use of their funds, Bank and Hartford  
2 exerted control over the trustee and the trustee's professionals  
3 and thereby caused the trustee to act for their respective  
4 benefits rather than the benefit of the estates and creditors as  
5 a whole.

6 (5) Comerica was closely apprised of, and involved in,  
7 the marketing and sale of its collateral (Comerica  
8 counsel found the successful bidder, reviewed and  
9 approved purchase agreements, and generally  
approved the terms of the agreement). Comerica,  
2007 WL 7532277 at \*3.

10 Bank worked closely with the trustee in the sale of the  
11 California and Oklahoma dairy herds. Bank even set the price at  
12 which some of its cows were sold. Bank also wanted its  
13 collateral liquidated immediately.

14 Hartford also demanded immediate action and attention from  
15 the trustee with respect to its collateral inasmuch as it sought  
16 to maintain ongoing dairy operations to prevent the potential  
17 loss of operating permits which it feared would adversely affect  
18 the value of the real property. The trustee also worked closely  
19 with Hartford to preserve the value of Hartford's California real  
20 property by maintaining that collateral as a "wet" dairy and with  
21 regards to remedial actions at the Oklahoma property.

22 (6) Comerica used the bankruptcy process to accomplish  
23 its pre-petition goals of selling collateral, i.e.,  
24 use of the bankruptcy court and process to seek an  
examiner with expanded powers to sell its  
collateral. Comerica, 2007 WL 7532277 at \*7.

25 Bank's pre-petition goal was to liquidate its collateral  
26 under a forbearance agreement with the debtors. Rather than  
27 moving for stay relief in order to pursue that goal on its own,  
28 Bank worked with and encouraged the trustee to sell the

1 California and Oklahoma dairy herds. Bank thus accomplished its  
2 pre-petition business objective post-petition through the trustee  
3 and the trustee's professionals.

4 Hartford's plan to sell the California and Oklahoma dairies  
5 also appears to have originated pre-petition. Hartford's pre-  
6 petition broker was retained post-petition to continue Hartford's  
7 marketing and sale efforts related to its California and Oklahoma  
8 collateral. Hartford also references "offers" on those  
9 properties and its broker notes that the value of those  
10 properties would be adversely affected by the loss of permits and  
11 a failure to address remediation issues associated with the  
12 Oklahoma dairy. Thus, through the trustee's efforts, Hartford  
13 was able to avoid significant disruption in its efforts to market  
14 and sell its real estate collateral which facilitated and  
15 furthered its pre-petition goal.

16 (7) Comerica filed, but didn't follow through, on a  
17 stay relief motion preferring instead to allow the  
18 examiner to sell through the bankruptcy court.  
Comerica, 2007 WL 7532277 at \* 7.

19 Bank never moved for stay relief, opting instead to have the  
20 trustee sell its collateral.

21 Hartford sought stay relief, but only after the trustee had  
22 taken significant steps to preserve value of its collateral  
23 through permit retention and remediation efforts.

24 (8) Comerica ultimately benefitted from the Examiner's  
25 sale of the debtors' assets through the bankruptcy  
26 court, thereby avoiding cost of stay relief  
litigation, marketing, liquidation, - and general  
expenses associated with personal property sales.  
Comerica, 2007 WL 7532277 at \*7.

27 By allowing the trustee to sell substantially all of its  
28

1 collateral through the bankruptcy court, Bank avoided the cost of  
2 stay relief litigation. It also avoided the physical,  
3 logistical, and financial burden associated with assuming care  
4 and control over dairy herds consisting of over a thousand cows  
5 located in two different states and with moving those cows off  
6 the debtors' California and Oklahoma dairy properties. Overall,  
7 Bank benefitted tremendously from the efforts of the trustee and  
8 the trustee's professionals. Indeed, Bank received a significant  
9 benefit with very little, if any, associated burden.

10 Hartford also benefitted from the efforts of the trustee and  
11 the trustee's professionals. The trustee maintained the  
12 California dairy as a "wet" operation which resulted in a  
13 retention of valuable permits associated with that dairy facility  
14 and the preservation of value. The trustee also facilitated  
15 remedial actions on the Oklahoma property sufficient to avoid the  
16 loss of permits associated with that property and, likewise,  
17 preserve significant value in that property as well.

18 2. Factors Weigh in Favor of Finding Implied Consent.

19 The court agrees with and is persuaded by the BAP's ultimate  
20 conclusion in Comerica: When a secured creditor with a lien on  
21 almost all of a debtor's assets secures the appointment of a  
22 trustee immediately after a petition is filed, persuades the  
23 trustee to delve into the debtor's financial affairs, works  
24 closely with the trustee to liquidate, protect, and/or preserve  
25 its collateral exclusively for its benefit, and all the while  
26 knows that the estate is administratively insolvent, the secured  
27 creditor impliedly consents to a surcharge of its collateral for  
28

1 expenses resulting from those acts which may include the costs of  
2 administration. This is precisely what occurred here.

3 Bank and Hartford - the debtors' two primary secured  
4 creditors with liens on nearly all of the debtors' assets -  
5 milked these estates for what they were worth. Both secured  
6 creditors knew that the estates were administratively insolvent  
7 and, yet, both encouraged the trustee to engage in acts from  
8 which they benefitted significantly. As explained above, their  
9 involvement with the trustee and their participation in the  
10 affairs of these chapter 11 cases exceeded mere cooperation.  
11 Therefore, on balance of the factors set forth above and for the  
12 reasons stated therein, the court is persuaded that Bank and  
13 Hartford both consented to a surcharge of their respective  
14 collateral for the expenses the trustee and the trustee's  
15 professionals incurred in the administration of these chapter 11  
16 cases. The question now is how the amount of the surcharge which  
17 the court will allow based on consent, less the amount previously  
18 authorized under the objective test, should be equitably  
19 allocated.

20 C. Fourth Issue: Allocation of Surcharge Based on Implied  
21 Consent.

22 The surcharge authorized under the objective test totals  
23 \$107,412.00. That leaves a balance of \$161,942.42 subject to  
24 surcharge under the subjective test based on Bank's and  
25 Hartford's implied consent. The parties have proposed two  
26 methods by which a surcharge based on consent should be  
27  
28



1 allocated.<sup>9</sup>

2 Bank proposes a collateral-based formula by which the court  
3 would prorate the consent surcharge between Bank and Hartford  
4 based on the size of their respective secured claims. Bank notes  
5 that the ratio of its \$4,399,456.00 secured claim to Hartford's  
6 \$8,114,267.00 secured claim is approximately 1.8 to 1.

7 Translated into percentages, this results in Bank paying 35% and  
8 Hartford paying 65% of the total outstanding surcharge. Applying  
9 this ratio to the \$161,942.82 referenced above, Bank's prorata  
10 share would be \$56,679.99 and Hartford's prorata share would be  
11 \$105,262.83.

12 The trustee, on the other hand, proposes a benefit-based  
13 formula based on a ratio of documented trustee and attorney time  
14 spent on each creditor's respective operations. According to the  
15 trustee, this results in a ratio that allocates 66% to Bank and  
16 34% to Hartford. Translated to dollars, of the \$161,942.82  
17 consent surcharge referenced above, Bank would pay \$106,882.26  
18 and Hartford would pay \$55,060.55 - almost the reverse of the  
19 Bank's proposed formula.

20 The court will adopt the trustee's formula. Although  
21 Hartford's debt exceeds Bank's, Bank's collateral consisted  
22 primarily of live animals making that collateral more labor  
23 intensive with respect to care, feeding, maintenance,  
24 transportation, and disposition. Hartford, on the other hand,  
25

---

26  
27 <sup>9</sup>Hartford proposes no formula for allocation. Its position  
28 is simply that it did not consent to a surcharge in the first  
instance. As noted above, the court has determined otherwise.

1 holds passive collateral in the form of real estate. And  
2 although that real estate collateral required some attention with  
3 respect to permits and remediation, Hartford assumed control over  
4 both processes by seeking stay relief and the appointment of a  
5 receiver in state court whereas Bank allowed the trustee to  
6 service and liquidate its collateral for its benefit throughout  
7 the case. It would not be equitable under these circumstances to  
8 charge Hartford with a greater share of the outstanding consent  
9 surcharge. Therefore, in addition to the amounts ordered above,  
10 the court authorizes an additional surcharge of Bank's collateral  
11 in the amount of \$106,882.26 and an additional surcharge of  
12 Hartford's collateral in the amount of \$55,060.55 based on each  
13 respective secured creditor's implied consent.  
14

15 **CONCLUSION**

16 For the reasons stated above, the trustee's surcharge motion  
17 will be GRANTED.

18 The total surcharge to Bank shall be \$153,840.97.

19 The total surcharge to Hartford shall be \$115,513.84,  
20 reduced by Hartford's \$55,000 loan to the estate which has a  
21 remaining balance of \$18,295.32 leaving the total due from  
22 Hartford of \$97,218.52.<sup>10</sup>

23 A separate order will issue.

24 Dated: October 5, 2015.

25   
26 UNITED STATES BANKRUPTCY JUDGE

27 \_\_\_\_\_  
28 <sup>10</sup>For reference, a chart of the court's calculations is  
attached as Appendix 1.

**APPENDIX 1****Objective Standard Surcharge (Direct, Quantified Benefit)**

<b>Bank</b>		<b>Hartford</b>
\$ --	CA Dairy	\$ 24,543.79
\$ --	OK Dairy	\$ 11,419.50
<u>\$ 46,958.71</u>	<u>Allocated Prof. Fees</u>	<u>\$ 24,490.00</u>
\$ 46,958.71		\$ 60,453.29

**Subjective Standard Surcharge (Consent)**

<b>Bank</b>		<b>Hartford</b>
<u>\$106,882.26</u>	<u>Implied Consent</u>	<u>\$ 55,060.55</u>
\$106,882.26		\$ 55,060.55

**Surcharge Totals**

<b>Bank</b>		<b>Hartford</b>
\$ 46,958.71	Obj. Std. Total	\$ 60,453.29
<u>\$106,882.26</u>	<u>Sub. Std. Total</u>	<u>\$ 55,060.55</u>
\$153,840.97		\$115,513.84
\$ --	<u>Estate Loan</u>	<u>\$ (18,295.32)</u>
\$153,840.97	Total Due	\$ 97,218.52

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:

Richard A. Lapping  
540 Pacific Avenue  
San Francisco CA 94133

Bruce A. Emard  
400 Capitol Mall, 27th Floor  
Sacramento CA 95814

Hanno T. Powell  
7522 N Colonial Ave #100  
Fresno CA 93711

Jason M. Blumberg  
501 I St #7-500  
Sacramento CA 95814

Jason E. Rios  
400 Capitol Mall, Suite #1750  
Sacramento CA 95814

Riley C. Walter  
205 E. River Park Circle, Ste. 410  
Fresno CA 93720