

FEB 01 2005

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

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In re:)
)
JIM LEE WIERSMA and PATRICIA)
DARLENE WIERSMA,)
)
Debtors.)

BAP Nos. ID-02-1523-MaPB
ID-02-1541-MaPB
(cross-appeals)

ID-03-1215-MaPB
ID-03-1224-MaPB
(related appeals)

_____)
)
JIM LEE WIERSMA; PATRICIA)
DARLENE WIERSMA,)
)
Appellants and)
Cross-Appellees,)

Bk. No. 01-41874

v.)
)
O.H. KRUSE GRAIN AND MILLING,)
nka FERNDAL E GRAIN,)
)
Appellee and)
Cross-Appellant,)

v.)
)
UNITED CALIFORNIA BANK, nka)
BANK OF THE WEST,)
)
Appellee.)

O P I N I O N

_____)
)
JIM LEE WIERSMA; PATRICIA)
DARLENE WIERSMA,)
)
Appellants,)

v.)
)
UNITED STATES TRUSTEE; O.H.)
KRUSE GRAIN AND MILLING, nka)
FERNDAL E GRAIN;)
UNITED CALIFORNIA BANK, nka)
BANK OF THE WEST,)
)
Appellees.)

1)
2 O.H. KRUSE GRAIN AND MILLING,)
3 nka FERNDALE GRAIN,)
4)
5 Appellant,)
6)
7 v.)
8)
9 JIM LEE WIERSMA; PATRICIA)
10 DARLENE WIERSMA; UNITED)
11 CALIFORNIA BANK, nka BANK OF)
12 THE WEST; UNITED STATES)
13 TRUSTEE,)
14)
15 Appellees.)
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Argued and submitted on July 30, 2004
at Boise, Idaho

Filed - February 1, 2005

Appeal from the United States Bankruptcy Court
for the District of Idaho

Honorable Jim D. Pappas, Bankruptcy Judge, Presiding.

Before: MARLAR, PERRIS and BRANDT, Bankruptcy Judges.

1 MARLAR, Bankruptcy Judge:
2

3 INTRODUCTION
4

5 Idaho dairy farmers Jim and Patricia Wiersma ("Debtors")
6 filed a chapter 11¹ petition and proposed a plan to relocate their
7 failed dairy business to Georgia. Debtors' cows had been
8 subjected to electrical shocks from faulty wiring and had been
9 culled until the herd was completely liquidated. Debtors sued the
10 electrical contractor and, upon settlement of the state court
11 lawsuit for \$2.5 million cash ("Settlement Proceeds"), Debtors
12 proposed to use the Settlement Proceeds to purchase cows and begin
13 anew in Georgia. They proposed to give their major secured
14 creditor, United California Bank, nka Bank of the West ("Bank"), a
15 replacement lien in the new cows, but Bank objected. The
16 bankruptcy court had already determined that Bank and another
17 creditor, O.H. Kruse Grain and Milling, nka Ferndale Grain
18 ("Ferndale") had secured interests in the Settlement Proceeds.

19 At plan confirmation, the bankruptcy court held that new cows
20 were not the "indubitable equivalent" of cash, and further found
21 that Debtors' plan was not feasible. It denied confirmation and,
22 after giving Debtors the chance to file a Third Amended Plan,
23 dismissed the bankruptcy case.

24 These appeals and cross-appeals concern three orders: (1) a
25

26 ¹ Unless otherwise indicated, "chapter" and "section"
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330; rule
28 references are to the Federal Rules of Bankruptcy Procedure ("Fed.
R. Bankr. P."), Rules 1001-9036, which incorporate certain Federal
Rules of Civil Procedure ("Fed. R. Civ. P.").

1 September 24, 2002, order determining the secured interests of the
2 Bank and Ferndale in the Settlement Proceeds ("Order Re Secured
3 Status") (BAP Nos. 02-1523 and 02-1541); (2) a February 11, 2003,
4 order denying confirmation of Debtors' Second Amended Plan and
5 approving Debtors' motion to settle;² and (3) an April 4, 2003,
6 dismissal order (BAP Nos. 03-1215 and 03-1224).

7 In these appeals, we construe Idaho's revised Article 9 of
8 the Uniform Commercial Code ("UCC"),³ and decide whether a cash
9 settlement of a lawsuit for damage to collateral constitutes
10 either proceeds of Bank's livestock collateral or an after-
11 acquired "payment intangible" collateral.

12 We AFFIRM the bankruptcy court's orders with two exceptions.
13 Ferndale's appeal of the Order Re Secured Status granting its
14 secured interest in the Settlement Proceeds and the appeal of the
15 order approving the settlement are both DISMISSED as moot.

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19 ² Debtors did not appeal the February 11, 2003 order. An
20 order denying confirmation of a chapter 11 plan is interlocutory.
21 See Lievsay v. W. Fin. Sav. Bank (In re Lievsay), 118 F.3d 661,
22 662 (9th Cir. 1997) (citing Nicholes v. Johnny Appleseed (In re
23 Nicholes), 184 B.R. 82, 86 (9th Cir. BAP 1995)). It merged into
24 the final order dismissing the case. See Munoz v. S.B.A., 644
25 F.2d 1361, 1364 (9th Cir. 1981). In contrast, the portion of the
26 order which approved the settlement may have been a final order.
27 We do not reach the finality question because we dismiss the
28 appeal of the settlement order as moot. See Discussion below.

29 ³ The bankruptcy court determined that revised Article 9 of
30 the UCC applied because the bankruptcy petition was filed after
31 the revision took effect on July 1, 2001. This ruling has not
32 been challenged on appeal. Revised UCC Article 9, and the
33 official comments thereto, were enacted by the Idaho legislature.
34 See Idaho Code, Secured Transactions, §§ 28-9-101 to 28-9-709. It
35 provides that "this act applies to a transaction or lien within
36 its scope, even if the transaction or lien was entered into or
37 created before this act takes effect." Idaho Code § 28-9-702(a).

1 **FACTS**⁴

2
3 Debtors owned and operated an Idaho dairy consisting of two
4 facilities with 2,000 cows. They filed a chapter 11 petition on
5 October 1, 2001.

6 Debtors' financial problems stemmed from faulty electrical
7 work performed in an expansion of their dairy by Geitzen Electric,
8 Inc. ("Geitzen"). As a result, Debtors' dairy cows were subjected
9 to varying degrees of electrical shocks which caused the cows to
10 produce less milk, become sick or die. The entire herd was
11 eventually lost.

12 Debtors initiated a lawsuit against Geitzen ("Geitzen
13 Lawsuit") in which they sought \$6 million in damages. The Geitzen
14 Lawsuit was brought under both tort and breach of contract
15 theories.

16 Bank was Debtors' largest secured creditor. Following
17 liquidation of the cows, its claim was approximately \$2.2 million.
18 Bank held a valid and perfected security interest⁵ in Debtors'
19 dairy herd and, among other things, in all of Debtors' "Inventory
20 . . . Accounts and Contract Rights . . . General Intangibles . . .
21 Livestock . . . Milk Products Quota . . . [and] Monies, Deposits
22 or Accounts in Possession." Agricultural Credit Agreement, p. 4,
23 Section III, Exh. D to Stipulation of Facts (July 30, 2002). In
24

25 ⁴ The undisputed underlying facts were presented in the
26 parties' Stipulation of Facts and the bankruptcy court's
27 decisions.

28 ⁵ No one challenged the validity of Bank's secured claim,
and the bankruptcy court presumed it was valid and perfected. See
In re Wiersma, 283 B.R. 294, 298 n.3 (Bankr. D. Idaho 2002).

1 addition, Bank had a security interest in after-acquired property,
2 and in "all proceeds and products of the collateral including, but
3 not limited to, the proceeds of any insurance thereon." Id.

4 Debtors also owed about \$550,000 to Ferndale for livestock
5 feed. This debt was evidenced by a promissory note and an
6 assignment for security ("Assignment") of Debtors' right, title,
7 and interest in any proceeds from the Geitzen Lawsuit. Ferndale
8 perfected its security interest by filing a UCC-1 Financing
9 Statement as to "[a]ny and all proceeds received by Debtors from
10 the lawsuit". Financial Statement, exh. J to Stipulation
11 of Facts (July 30, 2002).

12 Additionally, Debtors owed approximately \$125,000 in priority
13 taxes and \$1.2 million in unsecured claims. Debtors' dairies were
14 eventually foreclosed and their dairy operation was terminated.

15 In 2002, Debtors and their Special Counsel reached a
16 settlement with Geitzen and its insurer to pay Debtors \$2.5
17 million. The estate stood to receive approximately \$1.6 million
18 of the Settlement Proceeds upon bankruptcy court approval of the
19 settlement. However, Bank claimed the entire estate's interest as
20 its cash collateral, and Ferndale also claimed against the
21 Settlement Proceeds pursuant to its security agreement and
22 Assignment.

23

24 **Motion to Determine Secured Interests**

25

26 Debtors then filed a § 506(a) Motion to Determine Secured
27 Status. Debtors' position was that neither Bank nor Ferndale had
28 a secured interest in the Settlement Proceeds because the Geitzen

1 Lawsuit sounded in tort, and UCC Article 9 excluded tort claims
2 from the "general intangibles" category.

3 Bank argued that the Settlement Proceeds were either
4 "general intangibles" or livestock proceeds. Ferndale claimed
5 priority over Bank and maintained that it, alone, was entitled to
6 the Settlement Proceeds.

7 Following a hearing, the bankruptcy court rendered a
8 published opinion on the matter. In re Wiersma, 283 B.R. 294
9 (Bankr. D. Idaho 2002). First, the bankruptcy court classified
10 the Geitzen Lawsuit as a contract action and, therefore, held that
11 Article 9 applied to give Bank a secured interest in the
12 Settlement Proceeds as either "general intangibles" or "accounts."
13 Alternatively, the bankruptcy court held that the Settlement
14 Proceeds constituted proceeds of Bank's livestock collateral.

15 Next, the bankruptcy court examined Debtors' transaction with
16 Ferndale. It concluded that the note and Assignment constituted a
17 written security agreement which gave Ferndale rights in the
18 Settlement Proceeds.

19 The Order Re Secured Status was entered on September 24,
20 2002. Debtors timely appealed (ID-02-1523), and Ferndale timely
21 cross-appealed (ID-02-1541). They both challenged Bank's secured
22 interest in the Settlement Proceeds, and Debtors also disputed
23 Ferndale's secured interest, under the same tort theory.

24

25 **Plan of Reorganization and Motion to Settle**

26

27 While the Geitzen Lawsuit was still pending, Debtors filed
28 their first plan of reorganization and disclosure statement, and

1 shortly thereafter, their motion to settle.

2 Although Debtors stated, in their motion, that they believed
3 their damages were at least \$6 million, they agreed to accept a
4 "total value" of \$2.5 million from Geitzen, to be used for "the
5 purchase of dairy cows for Debtors' benefit, to be utilized by
6 Debtors in reorganizing their dairy operation." Motion for Order
7 Approving Settlement (June 26, 2002), at 3. Debtors planned to
8 use the funds to purchase about 800 cows, in Georgia, which they
9 valued at \$1.4 million.

10 Bank and Ferndale filed conditional objections to the
11 settlement. They did not oppose the \$2.5 million amount, but
12 objected to use of the money to purchase new dairy cows.

13 Debtors filed a Second Amended Disclosure Statement and First
14 Amended Plan, in which they discussed their "cows-for-cows" plan.⁶
15 Bank objected.

16 In considering the motion to settle, the court noted
17 unanimous agreement on the amount of settlement but dispute over
18 the secured interests, as well as the cash and non-cash
19 components. Special Counsel for Debtors informed the court that
20 she had negotiated an all-cash settlement, whereas Debtors'

21 _____
22 ⁶ Debtors' Second Amended Disclosure Statement stated, in
23 pertinent part:

24 Debtors have reached an agreement with Geitzen
25 Electric (its insurance company), which provides that
26 Geitzen Electric (its insurance company) shall purchase
27 cows for and on behalf of the debtors. It is the debtors
28 [sic] intent to propose a plan whereby the cows will be
purchased in Florida, or a state near Florida, where the
debtors will operate a dairy. The milk will be sold on
the Florida market and the funds that are derived from the
dairy operation shall be used to fund the debtors' plan.

Second Amended Disclosure Statement (July 29, 2002), at 23.

1 attorney countered that the settlement was instead to be the
2 purchase of a replacement herd. However, because the actual
3 settlement agreement had not been executed or filed, the
4 bankruptcy court continued the hearing.

5 Shortly thereafter, Special Counsel filed (1) a Motion for
6 Order Approving Settlement; (2) an itemization of the proposed
7 disbursements of the Settlement Proceeds, showing that, after
8 paying attorney's fees and costs totaling about \$801,609.21,⁷
9 Debtors would receive a net settlement of about \$1.6 million; and
10 (3) a "Release and Indemnity Agreement" ("Settlement Agreement"),
11 which had been signed by Debtors and Geitzen in December, 2002.

12 The Settlement Agreement stated that Debtors would release
13 their claims against Geitzen in exchange for the "payment of the
14 total sum of (\$2,500,000.00), Two Million Five Hundred Thousand
15 DOLLARS to be paid by Continental Western Insurance Company and
16 Geitzen Electric, Inc." Settlement Agreement (Dec. 20,
17 2002), at 1. Thus, Debtors apparently conceded that they would
18 settle for cash. Still, Debtors clung, in their Second Amended
19 Plan, to their desire to use the cash to purchase cows.

20 The Second Amended Plan had been filed on November 22, 2002,
21 a month before the Settlement Agreement was executed. It proposed
22 that Debtors would purchase new cows in Georgia, where Debtors
23 would move and operate a new dairy, which new facility they would
24 lease for \$10,000 per month. They proposed to fund the plan from
25 the sale of milk product in Florida, where they determined they

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27
28 ⁷ Special Counsel agreed to reduce its fees from 40%, or
\$961,831.05, to 33-1/3%, or \$801,609.21. The additional
\$160,321.84 would be available to Debtors to use in their plan.

1 could get the best price. The allowed secured claims of both Bank
2 and Ferndale were to be secured by liens in the new cows and in
3 the milk and milk proceeds of the new dairy.⁸ Bank's secured
4 claim was estimated to be the value of Debtors' interest in the
5 Settlement Proceeds--\$1.6 million, and Debtors proposed to pay
6 that amount in monthly payments of between \$16,000 and \$23,000,
7 with a balloon payment at the end of seven years.

8 Bank's unsecured claim, as well as other unsecured claims,
9 would be paid from the Settlement Proceeds, on a pro rata basis, a
10 total sum of \$600,000, or about \$7,000 per month.

11 Debtors also proposed to pay over \$125,000 in taxes which
12 they owed in monthly payments over five years, at a rate of about
13 \$2,500 per month. They also proposed to make payments to various
14 other creditors almost \$5,000 per month. The sum of Debtors'
15 payments proposed under the Second Amended Plan exceeded well over
16 \$40,000 per month.

17 Bank objected to these amended plans contending, inter alia,
18 that they were neither fair and equitable nor feasible.

19

20 **Bankruptcy Court Denies Plan, Approves Settlement**

21

22 Plan confirmation hearings and the continued hearing on the
23 motion to settle were conducted over three days.

24 The court first addressed the continued motion to settle,
25 noting the unusual situation where Debtors demanded a settlement
26 for cows, while their Special Counsel and the Settlement

27

28 ⁸ This provision was not in the Second Amended Plan, but was
made with an oral amendment at the hearing.

1 Agreement, which was signed by Debtors, clearly stated that the
2 settlement was for \$2.5 million cash.⁹ The court, finding the
3 terms of the Settlement Agreement to be fair and reasonable,
4 approved it.¹⁰

5 As for the Second Amended Plan, the court focused on two of
6 Bank's objections: failure to provide it with the "indubitable
7 equivalent" of value for its claim, and lack of feasibility. The
8 court ruled against Debtors on both issues, explaining that Bank
9 would be exposed to much greater risk under the plan's provision
10 to purchase cows, rather than by segregating and paying Bank's
11 cash collateral to it. While the court said that feasibility was
12 a "close call," due to Debtors' evidence of projected market for
13 milk product in Florida, it nonetheless found that such a
14 "startup" enterprise, in a new part of the country, could not
15 withstand any period of underachievement without an influx of
16 capital or lower debt service. Mem. Dec. (Feb. 11, 2003), at 48,
17 54. The bankruptcy court concluded that the Second Amended Plan
18 was not feasible. Rather than dismiss the case, the court gave
19

20 ⁹ Debtors explained that they wanted to avoid negative tax
21 consequences and therefore demanded that approval be given only
22 for the purchase of cows. The court was not convinced by Debtors
23 or their tax attorney of the reality of such tax consequences, or
24 that they could not be offset by losses. Order Re Confirmation
25 (Feb. 12, 2003), at 35-36. Later, in the dismissal proceedings,
Debtors' attorney testified that there was new evidence of a
\$281,000 tax liability if the Settlement Proceeds went to Bank
instead of invested in cows. Tr. of Proceedings (March 20, 2003),
at 17.

26 ¹⁰ Debtors then moved for reconsideration of the order
27 approving the Settlement Agreement. The reconsideration motion
28 was denied in a separate order. Debtors did not appeal either
order at that time. We do not need to address any timeliness
problem, however, based on the dismissal of the appeal of this
order on mootness grounds. See Discussion below.

1 Debtors 21 days to file an amended plan and/or negotiate a
2 consensual plan with Bank.

3

4 Third Amended Plan and Dismissal

5

6 Not prone to giving up, Debtors then filed a timely Third
7 Amended Plan. They proposed to reduce the Bank's estimated \$1.4
8 million secured claim (based on the valuation of the new cows) by:
9 (1) a possible surcharge of about \$178,000;¹¹ (2) a cash payment
10 from a home equity loan of \$50,000; and (3) a cash payment (from
11 reduction of Special Counsel's fees) of \$160,000. They would pay
12 Bank the balance of \$1,055,955.64 at 7% interest (increased from
13 6%) in 84 monthly payments, with a balloon payment at the end of
14 three years instead of seven years. Moreover, the approximate
15 highest anticipated monthly payment to Bank would be reduced to
16 \$18,000 instead of \$23,000. Finally, Debtors proposed to give
17 Bank a lien in the new cows and "all livestock replacements," as
18 well as in milk and milk proceeds.

19 Debtors also obtained a \$60,000 loan to be used as startup
20 capital, and reduced their debt service to other creditors by
21 about \$2,600. They revised their budget to indicate an increased
22 cash flow, and presented a letter from one of their employees, who
23 had experience in the South, stating that he would assist Debtors.

24 At the next confirmation hearing, Bank maintained its
25 objection to the proposed plan. Bank argued that the new,
26

27

28 ¹¹ Debtors had since filed a § 506(c) motion to surcharge and
a § 552(b) motion to reduce Bank's secured claim for equitable
reasons.

1 approximate \$200,000 cash "equity cushion" was insufficient
2 protection for an estimated \$1.4 million secured debt, and that
3 Debtors had no cash reserves.

4 The bankruptcy court, in an oral ruling, concluded that, even
5 with the changes proposed by Debtors, its original concerns as to
6 the "indubitable equivalent" and feasibility had not been
7 rectified in the Third Amended Plan, nor could Debtors reach a
8 consensus with Bank. It estimated, without ruling (because the
9 motions were not before it), that Debtors' pending motion to
10 surcharge would not warrant a reduction in Bank's secured claim of
11 more than a few thousand dollars, instead of the \$178,000
12 contemplated by Debtors. Nor did the court expect that it would
13 find equitable reasons to reduce Bank's claim under the pending
14 § 552(b) motion. The bankruptcy court thus concluded that Debtors
15 could not propose a confirmable plan, and granted the United
16 States Trustee's motion to dismiss the case.

17 Debtors timely appealed the order of dismissal, which
18 included therein the 2002 Order Re Secured Status, and the order
19 which denied confirmation of the Second Amended Plan and approved
20 the settlement. Ferndale then filed a notice of appeal as to the
21 Order Re Secured Status, which, it assumed, had merged into the
22 final dismissal order.

23

24

ISSUES

25

26 1. Whether the panel has subject matter jurisdiction over
27 the appeal of the Order Re Secured Status.

28

1 970 (9th Cir. 1993).

2 Whether a reorganization plan is feasible is a question of
3 fact, while the determination of whether a plan provides a secured
4 creditor with the "indubitable equivalent" of its claim is a mixed
5 question of law and fact. See Woods v. Pine Mountain, Ltd. (In re
6 Pine Mountain, Ltd.), 80 B.R. 171, 172 (9th Cir. BAP 1987).

7 The order denying confirmation of the plan and dismissing the
8 case for cause, under § 1112(b), is reviewed for an abuse of
9 discretion. See id.; Pioneer Liquidating Corp. v. United States
10 Trustee (In re Consolidated Pioneer Mortgage Entities, Inc.), 264
11 F.3d 803, 808 (9th Cir. 2001)(converting case for cause under
12 § 1112(b)).

13

14

DISCUSSION

15

I. BAP Jurisdiction: Order Re Secured Status (BAP Nos. 02-1523, 02-1541, 03-1215 & 03-1224)

17

18 Both Bank and the United States Trustee contend that the
19 panel lacks subject matter jurisdiction over Debtors' and
20 Ferndale's appeals of the Order Re Secured Status.

21 In 2002, Debtors and Ferndale filed timely notices of appeal
22 of the Order Re Secured Status. The panel mistakenly believed the
23 orders were interlocutory, and when the appellants failed to
24 respond to a notice of jurisdictional deficiency, it dismissed
25 both appeals for lack of prosecution.

26 In 2003, after the bankruptcy case was dismissed, Debtors and
27 Ferndale renewed their appeals of the Order Re Secured Status, and
28 Bank moved to dismiss those appeals as untimely. See Fed. R.

1 Bankr. P. 8002(a) (a notice of appeal must be filed within ten
2 days after entry of the order appealed).

3 A BAP motions panel then determined that the Order Re Secured
4 Status was not interlocutory, after all, but had always been a
5 final order, a conclusion with which we agree.¹² The motions panel
6 then vacated the previous dismissal orders and reinstated the
7 original appeals, reasoning that it had misled the appellants.

8 Appellees now question the panel's jurisdiction, both in
9 reinstating the previously dismissed appeals and in considering
10 the 2003 appeals.

11 We have inherent authority to rectify an inadvertent
12 misapprehension of the actual facts and correct an order to
13 reflect the court's intentions. See Cisneros v. United States (In
14 re Cisneros), 994 F.2d 1462, 1466 (9th Cir. 1993) (affirming
15 bankruptcy court in sua sponte vacating mistaken discharge order);
16 Ford v. Ford (In re Ford), 159 B.R. 590, 593 (Bankr. D. Or. 1993)
17 (reading Cisneros "as a reaffirmation of a court's inherent power
18 to correct its own clerical errors"). Compare Federal Rule of
19 Civil Procedure 60(a) ("Clerical mistakes in judgments, orders or
20 other parts of the record and errors therein arising from
21 oversight or omission may be corrected by the court at any time of
22 its own initiative"). Fed. R. Bankr. P. 9024/Fed. R. Civ.
23 P. 60(a). We also have inherent power to "rescind, reconsider, or
24 modify an interlocutory order." See City of Los Angeles, Harbor

25

26
27 ¹² We are not bound by the actions of the motions panel. See
28 Bentley v. Bank of Coronado (In re Crystal Sands Props.), 84 B.R.
665, 666 (9th Cir. BAP 1988) (citing Brady v. Andrew (In re
Commercial W. Fin. Corp.), 761 F.2d 1329, 1332 n.6 (9th Cir.
1985)).

1 Div. v. Santa Monica Baykeeper, 254 F.3d 882, 886-87 (9th Cir.
2 2001); 11 U.S.C. § 105(a).

3 We believe that the 2002 appeals were mistakenly dismissed
4 for lack of prosecution when our orders were intended, although,
5 incorrectly so, to dismiss the appeals as interlocutory.

6 In retrospect, the order which requested briefing on the
7 finality issue was misleading and stated, in pertinent part:

8 The routine jurisdictional screening conducted by the
9 BAP suggests that there may be an issue concerning the
10 finality of the order on appeal. . . .

11 If further proceedings will affect the scope of the
12 order on appeal, the order is not final. . . .

13 The order on appeal herein apparently determined the
14 secured status of Bank of the West and O.H. Kruse in a
15 chapter 11 bankruptcy case, prior to confirmation. While
16 the order on appeal does not on its face indicate that
17 there are any issues reserved for future disposition, the
18 bankruptcy docket indicates that plan confirmation
19 proceedings are pending and that both Bank of the West and
20 O.H. Kruse are opposing Debtors' plan. It is unclear
21 whether the confirmation proceedings might affect the
22 scope of the order on appeal.

23 Any party to this appeal shall have FOURTEEN (14)
24 DAYS from the file-stamped date of this order to file and
25 serve a paper addressing the finality issue. . . .

26 Clerk's Order Re Finality Issue (December 5, 2002).

27 Debtors and Ferndale apparently accepted the Clerk's analysis
28 that the order on appeal was interlocutory and did not respond,
resulting in dismissal of the appeal. Unfortunately, the
dismissal was on the basis of lack of prosecution rather than on
the jurisdictional basis. See Fed. R. Bankr. P. 7041/Fed. R. Civ.
P. 41(b) (involuntary dismissal for lack of jurisdiction is not on
the merits).

Since the appeals should not have been so dismissed, we
therefore agree with the reinstatement of the 2002 appeals, as
reflecting the panel's real intentions that the appeal would

1 proceed once a final order was entered.

2 Furthermore, the doctrine of unique circumstances excuses
3 untimeliness when the appellants have relied upon the panel's
4 action. See In re McAuley v. Orange Coast Thrift & Loan Ass'n (In
5 re McAuley), 66 B.R. 696, 700 (9th Cir. BAP 1986). In 2002 and
6 for more than a year thereafter, the appellants were led to
7 believe that their original appeals were interlocutory. See Tr.
8 of Proceedings (March 20, 2003), at 43-44 (counsel informing
9 bankruptcy court that the appeals had been dismissed for lack of a
10 final order.) Then, after the case had been dismissed, the
11 appellants were told that those appeals were not interlocutory,
12 after all. Due to the confusion, the appellants had to cover all
13 their bases and file new appeals in 2003. Debtors and Ferndale
14 relied, in good faith, on the panel's judicial action in renewing
15 their appeals in 2003. Therefore, both the 2002 and 2003 appeals
16 will stand as timely filed.

17
18 **II. Merits of Order Re Secured Status**

19
20 **(a) Bank's Security Interest**

21
22 Debtors and Ferndale challenge the ruling that Bank has a
23 valid and perfected security interest in the Settlement Proceeds.
24 See page 5, supra. Debtors contend that the Geitzen Lawsuit was a
25 commercial tort action and, therefore, that UCC Article 9 was
26 inapplicable.

27 It was undisputed that Bank would have a security interest in
28 the Settlement Proceeds if the Geitzen Lawsuit were a contract

1 action. It was also undisputed that, if the Geitzen Lawsuit were
2 a tort action, it would fall within the meaning of a "commercial
3 tort" as that term is used in revised Article 9.¹³

4 Debtors, Ferndale, and the bankruptcy court painstakingly
5 analyzed whether the Geitzen Lawsuit was a breach of contract or a
6 commercial tort action, because, in some situations, a commercial
7 tort is excluded from Article 9, such as under the definitions of
8 "general intangibles" and "after-acquired" property.

9 Article 9 defines "general intangible" as follows:

10 "General intangible" means any personal property,
11 including things in action, **other than** accounts, chattel
12 paper, **commercial tort claims**, deposit accounts,
13 documents, goods, instruments, investment property, letter
of credit rights, letters of credit, money, and oil, gas,
or other minerals before extraction. The term includes
payment intangibles and software.

14 Idaho Code § 28-9-102(a)(42).

15 "Commercial tort claims" are not considered to be "general
16 intangibles" because, under the revised Article 9, they are a new
17 category of collateral unto themselves. See Idaho Code § 28-9-
18 102(a)(13); § 28-9-109(d)(12) (excluding "an assignment of a claim
19 arising in tort, other than a commercial tort claim").

20
21 ¹³ The bankruptcy court presumed that the tort counts came
22 within the special category of a "commercial tort," and we agree.
See Wiersma, 283 B.R. at 300. In Idaho, it is defined as follows:

23 "Commercial tort claim" means a claim arising in tort
with respect to which:

- 24 (A) the claimant is an organization; or
25 (B) the claimant is an individual and the claim:
26 (i) arose in the course of the claimant's business
or profession; and
27 (ii) does not include damages arising out of
personal injury to or the death of an
individual.

28 Idaho Code § 28-9-102(a)(13).

1 In addition, an after-acquired property clause cannot reach
2 future commercial tort claims. See Idaho Code § 28-9-204(b)(2).
3 For a security interest in a tort claim to attach, the claim must
4 be in existence when the security agreement is created.
5 Therefore, Bank could not have had a security interest in the
6 after-acquired Geitzen Lawsuit itself if it were determined to be
7 a commercial tort claim.

8 Bank responds that any such analysis is irrelevant, because
9 the UCC plainly provides that the Settlement Proceeds were
10 "proceeds." Article 9 provides two ways to capture settlement
11 proceeds of a lawsuit involving damage to collateral. First, if
12 there is a perfected security interest in after-acquired "general
13 intangibles," then once the lawsuit is settled for money, the
14 debtor's right to payment becomes transformed into a "payment
15 intangible" to which the tort exclusion simply does not apply.
16 Second, lawsuit settlement funds stemming from destruction of
17 collateral are considered to be proceeds of the original, damaged
18 collateral. Therefore, we agree with Bank that the Settlement
19 Proceeds were its "proceeds" based on the following analysis.

20

21 **(I) Payment Intangible**

22

23 Revised Article 9 created a new subcategory of "general
24 intangible" called a "payment intangible," which is defined as "a
25 general intangible under which the account debtor's principal
26 obligation is a monetary obligation." Idaho Code § 28-9-
27 102(a)(61). The authorities hold that it is irrelevant whether
28 the payment intangible is based on a tort lawsuit, because the

1 collateral does not consist of the claim, but, rather, the
2 contractual right to payment evident in any settlement involving
3 destruction of collateral. Addressing the scope of Article 9,
4 § 28-9-109 provides that, although it does not apply to “[a]n
5 assignment of a claim arising in tort, other than a commercial
6 tort claim,” yet “sections 28-9-315 and 28-9-322 apply with
7 respect to proceeds and priorities in proceeds.” See Idaho Code
8 § 28-9-109(d)(12).

9 The Official Comment to this section provides:

10 Tort Claims. Subsection (d)(12) narrows somewhat the
11 broad exclusion of transfers of tort claims under former
12 Section 9-104(k). This Article now applies to assignments
13 of “commercial tort claims” (defined in Section 9-102) as
14 well as to security interests in tort claims that
15 constitute proceeds of other collateral (e.g., a right to
16 payment for negligent destruction of the debtor’s
17 inventory). Note that once a claim arising in tort has
18 been settled and reduced to a contractual obligation to
19 pay, the right to payment becomes a payment intangible and
20 ceases to be a claim arising in tort.

21 Id., cmt. 15 (emphasis added).

22 In other words, revised Article 9 considers payment
23 intangibles of either consumer or commercial tort actions to be
24 general intangibles. Once the payment intangible comes into
25 existence, in this case as an after-acquired settlement fund
26 general intangible, it is automatically within the scope of
27 Article 9 as part of the secured creditor’s collateral.

28 “The purpose and effect of these revisions are to enhance
certainty so that lenders will be willing to provide more credit
on the basis of these types of personal property when they are
provided as collateral.” David A. Lander, “Understanding the
Expanded Scope of Revised Article 9 of the UCC,” 9 Norton Bankr.
L. Adviser 1 (2000). It makes sense that the settlement fund

1 should be within the scope of Article 9, "because streams of
2 payment from structured settlements are assigned outright or
3 pledged as collateral in zillions of transactions around the
4 country." Barkley Clark & Barbara Clark, The Law of Secured
5 Transactions Under the Uniform Commercial Code, vol. 1,
6 § 1.08[11][B], p.1-270.4 (2004).

7 The Ninth Circuit Court of Appeals came to the same
8 conclusion, in dicta, in Fifteenth RMA Partners, L.P. v. Pac./West
9 Communications Group, Inc. (In re Pac./West Communications Group,
10 Inc.), 301 F.3d 1150 (9th Cir. 2002) (examining identical
11 California UCC provisions). The issue there was whether "a
12 creditor with a security interest in another's personal property,
13 including general intangibles, and all proceeds thereof, can
14 attach its interest to the proceeds [arbitration award] of a
15 commercial tort claim" Id. at 1151 (alteration added).

16 The court applied the former UCC § 9-104(k), which prohibited
17 as collateral "[a] transfer in whole or in part of any claim
18 arising out of tort," and held that the security interest could
19 not attach to the proceeds. Id. at 1152-54. The court opined
20 that the outcome would have been different under the revised UCC
21 § 9-109, which "now allows a security interest to be attached to
22 the *proceeds* of a tort claim." Id. at 1152 (emphasis in
23 original).

24 In summary, Debtors' argument that the Settlement Proceeds
25 are excluded from Bank's security interest is based on pre-
26 revision case law. The plain language of the current statutes
27 provides that Bank has a security interest in the Settlement
28 Proceeds characterized as after-acquired collateral. We therefore

1 affirm the bankruptcy court's conclusion on this other ground. In
2 re Bankruptcy Petition Preparers, 307 B.R. 134, 140 (9th Cir. BAP
3 2004) (a reviewing court may affirm on any basis supported by the
4 record).

5
6 **(ii) Livestock Collateral Proceeds**
7

8 Alternatively, the bankruptcy court determined that a
9 monetary settlement of a claim for defective electrical work,
10 which harmed and destroyed the livestock collateral, constituted
11 "proceeds" under Idaho Code § 28-9-102(a)(64).¹⁴ Since Bank's
12 security interest in the cows was perfected, so too was the
13 interest in the proceeds under § 28-9-315(a)(2), providing that
14 "[a] security interest attaches to any identifiable proceeds of
15 collateral".

16
17

¹⁴ "Proceeds" are defined as the following property:

- 18 (A) Whatever is acquired upon the sale, lease, license,
19 exchange or other disposition of collateral;
- 20 (B) whatever is collected on, or distributed on account
21 of, collateral;
- 22 (C) rights arising out of collateral;
- 23 (D) to the extent of the value of collateral, claims
24 arising out of the loss, nonconformity, or
interference with the use of, defects or infringement
of rights in, or damage to, the collateral; or
- 25 (E) to the extent of the value of collateral and to the
26 extent payable to the debtor or the secured party,
27 insurance payable by reason of the loss or
nonconformity of, defects or infringement of rights
in, or damage to, the collateral.

28 Idaho Code § 28-9-102(a)(64).

1 Ferndale maintains, however, that the Settlement Proceeds
2 emanated from the insurance coverage of Geitzen's wrongful acts,
3 not damage to the cows. This argument is unpersuasive.

4 It is clear that rights arising from loss or damage to
5 collateral are "proceeds," whether or not insurance covers the
6 loss:

7 (D) to the extent of the value of collateral, claims
8 arising out of the loss, nonconformity, or
9 interference with the use of, defects or infringement
of rights in, or damage to, the collateral;

10 Idaho Code § 28-9-102(a)(64)(D). Moreover, in this case the
11 insurance provides only the source of the settlement funds, and,
12 in itself, is not replacement collateral.

13 The Ninth Circuit has held that legislative intent was to
14 give "proceeds" "the 'broadest possible definition.'" Pac./West
15 Communications Group, 301 F.3d at 1153 (quoting Nolin Prod. Credit
16 Ass'n v. Stone (In re Stone), 52 B.R. 305, 307 (Bankr. W.D. Ky.
17 1985)). The nature of Bank's transaction with Debtors was
18 extensive and related to the complete dairy operation. "Proceeds"
19 under such a scenario must apply in a broad sense in order to
20 compensate the secured creditor.

21 In an analogous case from Washington state, it was held
22 (under former Article 9) that "proceeds" of a dairy herd logically
23 encompassed government payments pursuant to a federal dairy
24 termination program which required the slaughter or export of the
25 cattle. The state Supreme Court opined:

26 The granting of a security interest in a dairy herd,
27 together with the product and proceeds thereof, obviously
28 contemplates security in more than the individual cows.
The herd represents a continuing source of production
resulting in a repetitive income flow. This security is

1 quite different from a security in a single crop to be
2 harvested and sold, or cattle which are raised only for
3 slaughter for meat. It was this type of collateral which
debtors have destroyed and removed from Bank's security
interest

4 Ranier Nat'l Bank v. Bachmann, 111 Wash. 2d 298, 302, 757 P.2d 979,
5 981-82 (1988).

6 Also, Stone was cited approvingly in the Ninth Circuit's
7 analysis of the current UCC in Pac./West Communications Group, 301
8 F.3d at 1154. Stone concerned a debtor's tort action for
9 negligence against a veterinarian, an animal clinic, and a
10 laboratory, for the loss of 300 cattle. The bankruptcy court,
11 there, also applied a broad definition of proceeds and held that
12 the settlement monies for the damage to the cattle were proceeds.
13 Stone, 52 B.R. at 308.

14 The Settlement Proceeds, therefore, are "proceeds" covered by
15 Bank's security interest, but only to the extent of the value of
16 the original collateral. See Idaho Code § 28-9-102(a)(64)(D). On
17 this point, we reject Ferndale's contention that the damages
18 associated with the cows is less than the \$1.6 million net
19 Settlement Proceeds.

20 Debtors summarized their losses as follows:

21	Milk loss - cows in herd	\$2,289,473.00
	Excess Replacements	1,036,225.00
22	Quality loss	613,232.00
	Diminished herd size	393,925.00
23	Miscellaneous costs	217,935.00
	Future losses	1,200,000.00
24	Labor	71,100.00
	TOTAL	\$5,821,890.00

25
26 Stipulation of Facts (July 30, 2002), Exh. G-2.

27 Debtors further provided a description of the losses in each
28 category. The "milk loss," "excess replacements," "quality loss"

1 and "diminished herd size" damages obviously relate to the cows.
2 Those damages exceed \$3 million, whereas Debtors' interest in the
3 Settlement Proceeds is \$1.6 million. Moreover, a review of the
4 "miscellaneous costs," "future losses," and "labor" categories
5 reveals that these losses are also related to expenses caused by
6 the injury to the cows. All of Debtors' claims against Geitzen
7 arose out of the loss of, or damage to, the cows because the cows
8 were "the locus [and measure] of that loss." McGonigle v. Combs,
9 968 F.2d 810, 828 (9th Cir. 1992) (alteration added).

10 In McGonigle, an investor borrowed money to purchase stock in
11 a thoroughbred farm and the lender retained a security interest in
12 the stock. The stock value plummeted two years after the
13 purchase, and the investor sued the farm managers, an appraiser
14 and the lender. When the managers and the appraiser settled with
15 the investor, the lender asserted a security interest in the
16 settlement funds, contending the money was "proceeds" of the
17 stock. McGonigle, 968 F.2d at 815, 827. The Ninth Circuit
18 agreed, holding that "[t]he locus of that loss was in the secured
19 stock, and Central Bank as security holder is entitled to its lien
20 on the settlement payments that were intended to compensate for
21 that lost value." Id. at 828. The same rationale applies in the
22 instant case.

23 A few calculations reinforce the bankruptcy court's
24 determination that the Settlement Proceeds were Bank's "proceeds."
25 For example, the bankruptcy court determined that a commercially
26 reasonable price for 480 cows that were liquidated by Bank was
27 \$650,000. See Mem. Dec. (Feb. 11, 2003), at 24-27. Based on that
28 figure, each of Debtors' cows was worth approximately \$1,354. If

1 we divide the net Settlement Proceeds (\$1,698,391) by the
2 remaining 1,520 cows (from a herd of 2000), the result is a value
3 of \$1,117 per cow. The net Settlement Proceeds, therefore,
4 approximate the value of the lost cows (\$1,354 compared to
5 \$1,117).

6 In addition, the bankruptcy court found that in a good market
7 a healthy cow would bring \$1,600 to \$2,000 per head. See id. at
8 18. Dividing 1,520 cows into the gross settlement amount of \$2.5
9 million yields a fair market value of \$1,645 per cow. Thus, the
10 Settlement Proceeds are consistent with, and roughly equivalent
11 to, the value of Bank's damaged herd collateral.

12 In summary, the bankruptcy court correctly determined that
13 Bank had a valid and perfected security interest in the Settlement
14 Proceeds as UCC "proceeds" of its lost collateral. Furthermore,
15 based on its remaining \$2.2 million secured claim, Bank's interest
16 would encumber the entire \$1.6 million net Settlement Proceeds,
17 and would come entirely ahead of Ferndale's junior interest.

18

19 **(b) Ferndale's Secured Interest**

20

21 _____ Debtors also object to Ferndale's security interest solely on
22 the same grounds: that it could not take a security interest in a
23 tort action. The bankruptcy court determined that Ferndale had a
24 valid security interest in the Settlement Proceeds.

25 The undisputed facts of this appeal show that Bank's secured
26 claim of approximately \$2.2 million encumbers the entire \$1.6
27 million Settlement Proceeds. Therefore, because Ferndale is
28 junior to Bank, it has no secured interest in the Settlement

1 Proceeds and is entirely unsecured.

2 We examine our own jurisdiction de novo. Ernst & Young v.
3 Matsumoto (In re United Ins. Mgmt., Inc.), 14 F.3d 1380, 1383 (9th
4 Cir. 1994). Ferndale's appeal of the Order Re Secured Status
5 presents no live case or controversy. Moreover, in light of our
6 inability to effectuate any meaningful relief as to Ferndale, its
7 appeal is also moot. See Varela v. Dynamic Brokers, Inc. (In re
8 Dynamic Brokers, Inc.), 293 B.R. 489, 493-94 (9th Cir. BAP 2003).
9 We must therefore dismiss Ferndale's appeal as moot.

10
11 **III. Approval of Settlement Agreement**

(BAP No. 03-1215)

12
13 Debtors contend that the bankruptcy court's order approving
14 the settlement agreement between Debtors and Geitzen should be
15 reversed. They maintain that a copy of the agreement was not
16 mailed to all creditors and interested parties and, as a result,
17 the court's order was inconsistent with the properly noticed
18 motion. The original motion, they contend, proposed to use the
19 Settlement Proceeds to purchase cows, while the final, signed
20 agreement and order approved a settlement for cash.

21 Bank responds that the appeal of the settlement order is
22 moot. We agree. An appeal is moot if events have occurred after
23 the entry of the order being appealed that prevent the panel from
24 granting effective relief. See id.

25 Here, following the bankruptcy court's order approving the
26 settlement, the parties fully released their claims, dismissed the
27 claims with prejudice, and Geitzen and its insurer paid over the
28 settlement funds jointly to Debtors and Bank. See Bank Responsive

1 Brief (May 21, 2004), at 14-15 & n.32. Geitzen is no longer
2 before the bankruptcy court or this panel. Moreover, the
3 bankruptcy case has been dismissed, and we herein affirm the
4 dismissal. Therefore, we dismiss Debtors' appeal as to the order
5 approving the settlement as moot.

6
7 **IV. Denial of Plan Confirmation**
8 (BAP No. 03-1215)

9 Debtors timely appealed the bankruptcy court's order denying
10 confirmation of their Second Amended Plan, which interlocutory
11 order merged into the final order dismissing their bankruptcy
12 case. They challenge the following two grounds for denial.

13
14 **(a) Cows for Cash: Failure to Provide Bank with the**
15 **"Indubitable Equivalent" of its Claim**

16 Debtors attempted to cram down the Second Amended Plan over
17 Bank's objection. Before the bankruptcy court may consider
18 cramdown, all of the applicable requirements of § 1129(a),
19 excluding § 1129(a)(8), must be met. See 11 U.S.C. § 1129(b)(1).

20 Debtors challenge the bankruptcy court's finding that their
21 plan to purchase replacement cows with the Settlement Proceeds was
22 not "fair and equitable" under § 1129(b)(2)(A). The Code provides
23 three examples of nonconsensual treatment of an allowed secured
24 claim. The third treatment applies to our facts.¹⁵ It provides:

25 _____
26 ¹⁵ The first treatment is that the secured creditor must
27 retain its lien in the property and also receive "deferred cash
28 payments totaling at least the allowed amount of such claim, of a
value as of the effective date of the plan, of at least the value
of such holder's interest in the estate's interest in such
(continued...)

1 (iii)for the realization by such holders of the
2 indubitable equivalent of such claims.

3 11 U.S.C. § 1129(b)(2)(A)(iii).

4 The Code does not define "indubitable equivalence." The
5 phrase was coined by Judge Learned Hand in Metropolitan Life Ins.
6 Co. v. Murel Holding Corp. (In re Murel Holding Corp.), 75 F.2d
7 941 (2d Cir. 1935). In rejecting a plan, Judge Hand stated:

8 It is plain that "adequate protection" must be
9 completely compensatory; and that payment ten years hence
10 is not generally the equivalent of payment now. Interest
11 is indeed the common measure of the difference, but a
12 creditor who fears the safety of his principal will
13 scarcely be content with that; he wishes to get his money
14 or at least the property. We see no reason to suppose that
15 the statute was intended to deprive him of that in the
16 interest of junior holders, unless by a substitute of the
17 most indubitable equivalence.

18 Id. at 942.

19 Paraphrasing Judge Hand's words, the Ninth Circuit in Crocker
20 Nat'l Bank v. Am. Mariner Indus., Inc. (In re Am. Mariner Indus.,
21 Inc.), 734 F.2d 426 (9th Cir. 1984),¹⁶ stated:

22 Judge Hand concluded that the creditor's right "to get

23 _____
24 ¹⁵(...continued)
25 property." § 1129(b)(2)(A)(i). This treatment does not apply to
26 our facts, since the original cows are gone. The second treatment
27 pertains to a sale of the collateral, which also is inapplicable
28 here. See § 1129(b)(2)(A)(ii); see generally 7 Collier on
Bankruptcy ¶ 1129.05 [2][a]-[c], at 1129-130.1 to 140 (Alan N.
Resnick & Henry J. Sommer eds., 15th ed. rev. 2004).

29 ¹⁶ Am. Mariner Indus., which held that the term "indubitable
30 equivalent," as used in the adequate protection provisions of
31 § 361(3), meant that an unsecured creditor was entitled to receive
32 lost-opportunity payments, was effectively overruled on other
33 grounds in United Sav. Ass'n of Tex. v. Timbers of Inwood Forest
34 Assocs., Ltd., 484 U.S. 365, 368 (1988); see also Cimarron
35 Investors v. WYID Props. (In re Cimarron Investors), 848 F.2d 974,
36 976 (9th Cir. 1988).

1 his money or at least the property" may be denied under a
2 plan for reorganization only if the debtor provides "a
3 substitute of the most indubitable equivalence." Such a
substitute clearly must both compensate for present value
and insure the safety of the principal.

4 Id. at 433.

5 The two components, of compensation and safety, require an
6 analysis that focuses on the value of alternative collateral and
7 a comparison of risks imposed on the creditor. "[S]trict cash
8 equivalence" is not necessary. See Metro. Life Ins. Co. v. San
9 Felipe @ Voss, Ltd. (In re San Felipe @ Voss, Ltd.), 115 B.R. 526,
10 530(S.D. Tex. 1990) (exchange of real property for stock with
11 built-in equity margin was indubitable equivalent). "[T]o the
12 extent a debtor seeks to alter the collateral securing a
13 creditor's loan, providing the 'indubitable equivalent' requires
14 that the substitute collateral not increase the creditor's risk
15 exposure." Arnold & Baker Farms v. United States (In re Arnold &
16 Baker Farms), 85 F.3d 1415, 1422 (9th Cir. 1996) (citation
17 omitted).

18 Evaluating a "dirt for debt" plan, the Ninth Circuit, in
19 Arnold and Baker Farms, held that a debtor's proposal to surrender
20 a portion of a larger tract of land to secured creditor in full
21 satisfaction of the lien was not the indubitable equivalent
22 because of the highly speculative valuation of the land. See id.
23 at 1421-22. In another case, the bankruptcy court denied plan
24 confirmation where the debtor planned to replace a lien on
25 livestock and crops with a lien on future crops. The court found
26 that the substitute lien created too much risk for the creditor.
27 See In re Hoff, 54 B.R. 746, 753-54 (Bankr. D.N.D. 1985).

28 We have held that indubitable equivalence exists when (1)

1 the proposed plan is feasible ("not wholly speculative");
2 (2) it is unlikely that the creditor's claim "would ever become
3 even partially unsecured"; and (3) it is "likely that the value of
4 the property will increase." Pine Mountain, 80 B.R. at 174-75.

5 Debtors' argument here bootstraps their appeal of the
6 settlement order: they maintain that the settlement for cows (cows
7 for cows) would have been the indubitable equivalent of Bank's
8 secured claim. However, the settlement was approved for cash,
9 rather than for cows. Debtors present little argument on appeal
10 that the replacement cows are the indubitable equivalent of cash.
11 As the Bank aptly recognized: "[C]ash is king." Bank's Responsive
12 Brief (May 21, 2004).

13 Moreover, considering the enormous risk to Bank inherent in
14 new cows, not in Idaho, but in a startup operation in Georgia,
15 such a settlement would hardly be the indubitable equivalent. The
16 value of Bank's cash collateral was \$1.6 million. Debtors
17 presented evidence that the value of the 800 cows to be purchased
18 in Georgia was approximately \$1.4 million. Therefore, Bank's cash
19 collateral essentially would be used up in the initial livestock
20 investment, in what the bankruptcy court called "a forced
21 extension of venture capital to a startup concern." Mem. Dec.
22 (Feb. 11, 2003), at 48. And that extension would be at a loan-to-
23 value ratio of 100%.

24 Even though Bank was to be given a lien in the milk and milk
25 products, such product depends on the condition of the cows. Bank
26 would be required to assume all of the risk of loss to the cows,
27 including their well-being, sickness, and death. Debtors
28 testified that they would keep the new herd at the same number,

1 but the Second Amended Plan did not provide a lien for Bank in
2 after-acquired cows. Debtors' ability to purchase replacement
3 cows would depend on their cash flow; cows cost anywhere between
4 \$1,400 to \$1,600 per head. See Tr. of Proceedings (Dec. 31,
5 2002), at 63-64. Also, Debtors did not argue that the bankruptcy
6 court erred in finding that they would have very little, if any,
7 net income, or any surplus for emergencies or unforeseen problems.

8 Given this scenario, the startup dairy, relocation to another
9 part of the country where Debtors had not worked before, and their
10 lack of capital, the bankruptcy court did not err in determining
11 that the plan did not provide Bank with the indubitable equivalent
12 of its cash collateral.

13 14 (b) Feasibility

15
16 Debtors also contend that the bankruptcy court erred in
17 finding that the Second Amended Plan was not feasible.

18 Under the feasibility requirement of § 1129(a)(11), Debtors
19 must demonstrate that the plan "has a reasonable probability of
20 success." Acequia, Inc. v. Clinton (In re Acequia, Inc.), 787
21 F.2d 1352, 1364 (9th Cir. 1986). The proposed plan must not be a
22 visionary scheme which promises more than the debtor can deliver.
23 See Pizza of Haw., Inc. v. Shakey's, Inc. (In re Pizza of Haw.,
24 Inc.), 761 F.2d 1374, 1382 (9th Cir. 1985).

25 Several factors are relevant to whether a plan is feasible
26 including: "(1) the adequacy of the capital structure; (2) the
27 earning power of the business; (3) economic conditions; (4) the
28 ability of management; (5) the probability of the continuation of

1 the same management; and (6) any other related matter which
2 determines the prospects of a sufficiently successful operation to
3 enable performance of the provisions of the plan." In re Sagewood
4 Manor Assocs. Ltd. P'ship, 223 B.R. 756, 763 (Bankr. D. Nev.
5 1998).

6 Debtors contend that the bankruptcy court erred as a matter
7 of law by holding that a startup dairy could not be feasible.
8 They do not dispute the court's findings of facts, but rather the
9 determination that the plan was not feasible.

10 First, the record and the court's decisions do not reflect
11 any error of law; the bankruptcy court applied the correct
12 standard for determining feasibility under § 1129(11). Whether
13 that determination was erroneous is a question of fact. Acequia,
14 787 F.2d at 1358. Under the clearly erroneous standard, we must
15 give due regard to the bankruptcy court's evaluation of witness
16 testimony and any inferences drawn by the court. See Beech
17 Aircraft Corp. v. United States, 51 F.3d 834, 838 (9th Cir. 1995).

18 The bankruptcy court stated that the feasibility of Debtors'
19 plan was a "close call." Mem. Dec. (Feb. 11, 2003), at 54. It
20 was appropriately troubled by the following undisputed facts: (1)
21 relocation to a completely different climate and the effect on the
22 dairy business; (2) a new business environment, new employees and
23 new market, and accompanying personal changes; (3) a different
24 milk product (fluid form in Florida versus product for cheese in
25 Idaho); (4) startup business with no substantial capital reserves;
26 (5) high level of debt service; and (6) seven-year repayment plan
27 for Bank with a balloon payment, the source of which was

28

1 nebulous.¹⁷

2 Debtors presented detailed testimony and documentation which
3 showed that they would be able to meet their expenses and debt
4 service in the beginning. However, there were many uncertainties
5 evident from the testimony of Debtors' witness, Robert Matlick.
6 Although the price for milk might be higher in the South, Mr.
7 Matlick testified that milk production was lower partly due to
8 heat and humidity. He also testified that Debtors, who planned to
9 take over the operation of an existing dairy in Georgia, projected
10 they would have greater milk production, and therefore income, by
11 milking the cows three times a day instead of two. Yet, Debtors
12 had no experience dairying in the South, nor any realistic basis
13 to conclude that a more aggressive milking schedule would produce
14 either more milk or more income.

15 Debtors' optimistic projections for future success in their
16 new dairy might have been possible, but they were neither reliable
17 nor convincing. There was no persuasive evidence that Debtors
18 could maintain the seven-year payment plan or earn enough excess
19 income to make the balloon payment. There was also no evidence to
20 show that they could weather a period of underachievement or any
21 large-scale problems with the new dairy, new employees, or new
22 cows.

23 While the plan may not have been wholly speculative, that it
24 was uncertain was beyond argument. Therefore, our review of the
25

26 ¹⁷ Additionally, Debtors' attorney had testified that there
27 would be tax consequences for the estate, due to the settlement
28 for cash, in the approximate amount of \$281,000. See Tr. of
Proceedings (March 20, 2003), at 17. Such a new tax liability
would reduce available cash resources.

1 record does not leave us with a "definite and firm conviction that
2 a mistake has been committed." United States Gypsum Co., 333 U.S.
3 at 395. We conclude that the bankruptcy court's findings as to
4 feasibility were not clearly erroneous.

5
6 **V. Dismissal - § 1112(b)**
7 (BAP No. 03-1215)

8 Finally, the bankruptcy court gave Debtors the opportunity to
9 file a Third Amended Plan, which they indeed filed (apparently
10 along with new documentary evidence). Debtors also filed a
11 § 506(c) motion to surcharge the collateral, as well as a motion
12 for equitable removal of Bank's lien on the after-acquired
13 property under § 552(b). Although the bankruptcy court did not
14 hear the merits of those motions (and they are not included in the
15 excerpts of record), nevertheless, the bankruptcy court considered
16 their impact and that of the proposed Third Amended Plan on
17 Debtors' ability to reorganize.

18 Debtors contend that the court abused its discretion by
19 dismissing the case without holding another complete confirmation
20 hearing on their Third Amended Plan.

21 Pursuant to § 1112(b), the bankruptcy court may dismiss a
22 case for "cause" including "inability to effectuate a plan," or
23 "denial of confirmation of every proposed plan and denial of a
24 request made for additional time for filing another plan or a
25 modification of a plan." 11 U.S.C. § 1112(b)(2), (b)(5). These
26 enumerated causes are nonexclusive. St. Paul Self Storage Ltd.
27 P'ship v. Port Authority (In re St. Paul Self Storage Ltd.
28 P'ship), 185 B.R. 580, 584 (9th Cir. BAP 1995).

1 Debtors' proposed Third Amended Plan attempted to address the
2 bankruptcy court's concerns. For example, Debtors reduced their
3 monthly debt service by about \$2,600, and obtained a loan for
4 \$60,000 for startup costs. However, these new monies were
5 insignificant considering the proposed total monthly expenses and
6 debt service. In addition, Debtors proposed to give Bank a total
7 of \$210,000 cash (\$160,000 plus \$50,000 from an equity loan). A
8 \$210,000 cash equity cushion was inadequate protection, however,
9 considering that Bank assumed all of the risks of losing its \$1.4
10 to \$1.6 million security.

11 Debtors also proposed to enhance Bank's collateral position
12 by granting Bank a lien in the new cows and "all livestock
13 replacements" as well as in milk and milk proceeds. However,
14 Bank continued to object to its treatment under the Third Amended
15 Plan and to the plan's feasibility.

16 Finally, Debtors have not challenged the bankruptcy court's
17 observations that any estimated § 506(c) surcharge and § 552(b)
18 deductions from Bank's claim would likely far short of Debtors'
19 projections.

20 In summary, Debtors' new proposals were nothing more than
21 "beating a dead horse" (or here a dead cow), and did not remove
22 the court's substantial doubt as to whether Bank was receiving its
23 indubitable equivalent, nor did they improve significantly the
24 likelihood of success of the new plan when it was reviewed in
25 context. In a year and a half, Debtors had proposed four separate
26 plans, but were unable to achieve either a consensual or crammed-
27 down confirmation with respect to their largest creditor. See Tr.
28 of Proceeding (March 28, 2003), at 11:7-11. Since the facts were

1 not disputed, the bankruptcy court did not abuse its discretion in
2 denying Debtors another chance at plan confirmation and finally
3 dismissing the case.

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CONCLUSION

7 Bank's security interest extended to Debtors' interest in the
8 Settlement Proceeds, and the Order Re Secured Status is AFFIRMED
9 as to Bank. Because no collateral exists to satisfy any part of
10 Ferndale's junior secured interest, its appeal is hereby DISMISSED
11 as moot.

12 Debtors' appeal of the order approving the settlement for
13 cash is also DISMISSED as moot, as circumstances have changed so
14 radically as to prevent us from being able to grant any meaningful
15 relief.

16 Debtors' Second Amended Plan satisfied neither the "fair and
17 equitable" rule of § 1129(b)(2)(A)(iii) nor the feasibility
18 requirement of § 1129(a)(11), and the court's denial of
19 confirmation is therefore AFFIRMED.

20 In the absence of a confirmable plan, the bankruptcy court's
21 order dismissing the chapter 11 case is also AFFIRMED.

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24 BRANDT, Bankruptcy Judge, dissenting in part:

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While I join the balance of the foregoing opinion, I respectfully dissent from part I of the discussion, respecting our jurisdiction. I do not see any mistake in the prior dismissals:

1 although the clerk's notices were based on the incorrect premise
2 that the order was interlocutory, Debtors and Ferndale were asleep
3 at the switch.

4 There was neither an inadvertent misapprehension of the
5 facts, nor did the initial dismissals not reflect the panel's real
6 intentions. The unique circumstances exception does not work
7 because the premise, that the order was interlocutory, was not a
8 panel determination. Rather it was in essence a query, and
9 appellants were invited to show the premise incorrect. When they
10 did not respond, the prior appeals were properly dismissed.

11 I would dismiss the appeals of the Order Re Secured Status as
12 untimely.

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