NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re: WILLIAM A. TOSO, Debtor.	BAP Nos. EC-05-1290-PaBuMo EC-05-1389-PaBuMo (Cross-Appeals) BAP Nos. EC-06-1148-PaBuMo EC-06-1149-PaBuMo (Consolidated)
WILLIAM A. TOSO, Appellant/ Cross-Appellee, v. BANK OF STOCKTON, Appellee/ Cross-Appellant	Bk. No. 04-31993 **M E M O R A N D U M**[1]
BANK OF STOCKTON, Appellant, v. WILLIAM A. TOSO, Appellee.	

Argued and Submitted on October 18, 2006
at San Francisco, California

Filed - January 10, 2007

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[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Honorable Robert S. Bardwil, Bankruptcy Judge, Presiding.[2]

Before: PAPPAS, BUFFORD[3] and MONTALI, Bankruptcy Judges.

These four related appeals arise from the chapter 12 bankruptcy[4] case of William A. Toso ("Debtor"). EC-05-1290 is Debtor's appeal from the bankruptcy court's decision denying confirmation of his proposed chapter 12 plan. EC-05-1389 is a cross-appeal by secured creditor Bank of Stockton ("Bank") challenging the same order to the extent it also overruled several of Bank's objections to confirmation.

In EC-06-1148 and EC-06-1149, Bank appeals both the order entered February 8, 2006, by the bankruptcy court determining that its security interest would not attach to Debtor's post-bankruptcy asparagus crops, and the bankruptcy court's amended order entered on March 31, 2006, concerning the same motion. These two appeals were consolidated for consideration by the Panel.

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[2] The bankruptcy case in which these appeals arose was reassigned from the Honorable Thomas C. Holman to the Honorable Robert S. Bardwil on July 6, 2005. The decisions of the bankruptcy court reviewed in EC-05-1290 and EC-05-1389 were made by Judge Holman. Judge Bardwil rendered the decisions examined in EC-06-1148 and 1149.

[3] Hon. Samuel L. Bufford, United States Bankruptcy Judge for the Central District of California, sitting by designation.

[4] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. § 101-1330 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as in force prior to the effective date (October 17, 2005) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

The four appeals were argued and submitted to the Panel at the same time; this decision disposes of the issues raised in all of them. For the reasons stated below, we AFFIRM in part and DISMISS in part.

FACTS[5]

Debtor's family has been farming in the San Joaquin valley of California for over 40 years. From January 1, 1976, to July 1, 2002, the family operated a farm under the name Arnold Toso & Sons, a partnership. The partnership was composed of Debtor, his parents Arnold C. and Georgette Toso,[6] and his brother Arnold L. Toso. The partnership obtained agricultural business loans from Bank.

In July, 2002, the partnership ceased doing business and the Toso family members undertook three independent farming

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[5] There is substantial agreement between Debtor and Bank regarding the facts relevant to these appeals. At the time of plan confirmation, neither the Debtor, Bank nor the chapter 12 trustee submitted separate statements of disputed material fact, as authorized by Eastern District of California Bankruptcy Local Rule 9014-1(f)(1)(ii) and (iii). And Bank explicitly acknowledges the accuracy of most portions of Debtor's Statement of the Case.

[6] Debtor's parents also filed for relief under chapter 12 ("Parents Case"). Their litigation with Bank in that case generated an appeal and cross-appeal to this Panel, EC-05-1291 and 1388. Prior to decision, though, the parties settled their differences and stipulated to dismiss those appeals, which occurred on August 1, 2006.

Bank requested on December 20, 2005, that we take judicial notice in deciding these appeals of the transcript of a May 3, 2005, hearing in Parents Case. While these documents may contain information that is not "adjudicative fact" as specified in FED. R. EVID. 201, Debtor did not object to this request. Bank's request is therefore GRANTED to the extent that the Panel will consider the arguments of the parties and the findings of the bankruptcy court as reflected in the record of this hearing. Citations to this transcript are designated herein as: Tr. Hr'g (Parents Case) <page and line> (May 3, 2005).

operations. The partnership assets were divided. Debtor was allocated the asparagus fields, which had been planted by the partnership, as well as packing sheds and certain equipment.[7]

At about the same time, with Bank's consent, the debt that the partnership owed to Bank was converted to separate loans to the three former partners, including Debtor. The new loans were not cross-collateralized.[8]

Sometime in 2004, Debtor's loans matured. Bank allegedly refused to extend the maturity date of the loan, or to extend any new credit to Debtor, in part because Debtor supplied no new operating budget proposal to Bank.

Debtor filed a petition for relief under chapter 11 of the Bankruptcy Code on August 6, 2004. On December 3, 2004, Bank filed two proofs of claim in Debtor's chapter 11 case. Proof of Claim no. 6 was for $160,617.44, with $147,206.72 listed as unsecured debt and $13,410.72 as secured debt. The security for this loan was Debtor's "crops, general intangibles and farm equipment." Proof of Claim no. 8 was for $290,614.08, with $154,614.08 listed as unsecured debt and $136,000 as secured by a security interest in "farm packaging and processing equipment." The security agreements also provided that the Bank's security interest covered Debtor's after-acquired property of the same variety.

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[7] Debtor also conducted a small walnut dehydrating and bell pepper packing operation.

[8] The record does not reveal the exact amount of debt assumed by Debtor at the time the family partnership was dissolved. Bank alleges that Debtor remained obligated as a general partner of the partnership for repayment of any partnership debt not retired by the new loans.

The chapter 11 case was converted to a case under Chapter 12 on January 4, 2005, and a trustee was appointed. On March 21, 2005, Debtor filed his proposed First Amended Chapter 12 Plan ("the Plan").

On March 18, 2005, Debtor filed a Motion for Order Determining Value of Security Held by Bank of Stockton, requesting that the bankruptcy court determine the amount of Bank's allowed secured claims. Bank did not oppose the motion. The bankruptcy court granted the motion without oral argument and entered an order on April 26, 2005 (the "Security Valuation Order"). In its order, the court determined that the value of Bank's secured interest in Debtor's leased asparagus beds on the petition date was $13,850, and that the value of Bank's secured interest in Debtor's equipment on the petition date was $46,400. The order allowed these amounts as secured claims. The balance owing on Bank's claims was allowed as a general unsecured claim. Bank did not appeal the Security Valuation Order.

The bankruptcy court conducted an initial confirmation hearing on the Plan on May 3, 2005. Bank made the only objection to confirmation of the Plan. The court continued the hearing so the parties could offer evidence regarding two questions: the feasibility of the Plan for purposes of § 1225(a)(6); and the adequacy, under § 1225(a)(5)(B), of the six percent interest rate Debtor proposed for Bank's secured claims.

The second plan confirmation hearing occurred on May 19, 2005. The bankruptcy court heard testimony from James Daniel Miller ("Miller"), the Director of Field Operations for Jacobs, Malcolm & Burk ("JMB"), an entity that had agreed to finance and market Debtor’s 2005 asparagus crop. Debtor also testified. At the conclusion of testimony, the court requested additional briefing on Bank’s claimed security interest in the asparagus beds and crops.

The bankruptcy court issued its Memorandum Decision and Order on June 27, 2005. The court considered five separate objections raised by Bank to confirmation of the Plan. It overruled four of the objections, but sustained one. Its decision can be summarized as follows:

1. Bank argued that Debtor was not committing all of his net disposable income to fund the Plan. The bankruptcy court overruled this objection based upon its finding that the Debtor had indeed satisfied § 1225(b)(1)’s requirement that he devote all of his projected (though not, as Bank demanded, his actual) disposable income to payments under the Plan.

2. Bank argued that the Plan was unclear as to the rights and remedies that were available to Bank in the event that Debtor failed to perform his obligations to Bank under the Plan. The court overruled this objection, noting that Bank failed to cite to any statutory authority for the objection, and that the Plan provided that Bank retain all rights existing under the loan documentation unless modified by the Plan.

3. Bank argued that the Plan was not feasible for three reasons. First, Bank contended Debtor failed to provide evidence of adequate financing of its operation. The court overruled this objection, observing that this was the purpose for the evidentiary hearing, and that Debtor had provided sufficient evidence that external financing from JMB was available. Next, Bank argued that

the Plan projected a need for "bank debt," but did not provide for payment of interest on bank debt. The court overruled this objection by accepting Debtor's explanation that the term "bank debt" was a misnomer, and that, instead, Debtor would be financed by external, unsecured financing, which was available. Third, Bank argued that Debtor's income projections were unrealistically high, based on the fact that Debtor admitted at the hearing that he expected to harvest 5,000 cartons of asparagus less than he projected in the Plan budget. The court overruled the objection on the grounds that any shortfall in production had been offset by an increase in actual crop prices.

4. Bank argued that the Plan failed the best interests of creditors' test because it did not apply excess revenue to payments to unsecured creditors. The court overruled this objection, noting that there was no excess revenue contemplated by the Plan, only an offset of lower production costs by higher prices.

5. Finally, Bank argued that the Plan failed to provide for Bank's claimed security interest in the asparagus crop. The bankruptcy court sustained this objection. The court determined that, under the California Commercial Code and § 552(b)(1), Bank's prepetition lien in Debtor's crops extended to Debtor's 2005 post-bankruptcy asparagus crop. Since the Plan did not propose to pay Bank anything on account of its secured interest in that crop (as compared to payments for Bank's interest in the asparagus beds on which the crops were grown), the Plan failed to satisfy the requirements of § 1225(a)(5). However, the court noted its ruling was without prejudice should Debtor thereafter ask the court to

limit the extent of Bank’s security interest in the asparagus crop if he could meet the “equities of the case” exception under § 552(b)(1).[9]

Because Debtor could not show that the Plan satisfied the requirements of § 1225(a)(5) with respect to Bank’s secured claim in crops, the bankruptcy court ordered that confirmation of the Plan be denied. Debtor timely filed an appeal of this order on July 7, 2005. Bank filed a timely cross-appeal on July 15, 2005.

While these appeals were pending, on November 16, 2005, acting on the bankruptcy court’s suggestion, Debtor filed a Motion for Determination of Postpetition Effect of Security Interest. In the motion, Debtor sought an order from the court under § 552(b)(1), determining that Bank’s security interest should not, based upon the equities of the case, extend to its 2005 and 2006 asparagus crops.

A hearing concerning Debtor’s motion was conducted on January 18, 2006. After considering the submissions and arguments of the parties, the bankruptcy court granted the motion and entered its findings on the record:

> The Court finds that none of the bank’s cash collateral was used for production of the 2005 asparagus crop; and that the equities of the case support the determination that the bank’s lien does not go on in perpetuity on this asparagus crop.

Tr. Hr’g 17:25 – 18:4 (January 18, 2006). The court entered an order granting Debtor’s motion on February 7, 2006, and provided

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[9] The court also indicated that Debtor might attempt to surcharge Bank’s collateral under § 506(c) or to assert other rights. The record does not reflect that Debtor has done so.

that Debtor deposit sufficient funds to pay Bank’s allowed secured claim as to the asparagus beds ($13,850 plus interest) in a segregated bank account. Bank moved for reconsideration of this order, and after a hearing, the bankruptcy court denied the motion for reconsideration in a March 30, 2006, order.[10] Bank filed timely appeals of both the February 7 and March 30 orders on April 10, 2006.

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(B), (K), and (L). We have jurisdiction over these interlocutory appeals pursuant to 28 U.S.C. §§ 158(a)(3) and (b).[11]

ISSUES

(Debtor’s Appeal, EC-05-1290)

1. Whether the bankruptcy court erred in determining under § 552(b)(1) that Bank’s pre-petition security interest in Debtor’s crops attached to Debtor’s post-petition asparagus crop.

(Bank’s Cross-Appeal, EC-05-1389)

2. Whether the bankruptcy court erred when it determined that the interest rate for payments to be made on Bank’s allowed secured claim was adequate under § 1225(a)(5)(B)(ii).

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[10] The court slightly modified its February 7 order to provide that the Bank’s lien would attach to the money deposited by Debtor to pay the secured claim. An Amended Order was entered March 31, 2006.

[11] The Panel granted leave to appeal the interlocutory orders on September 12 (no. EC-05-1290) and October 18, 2005 (EC-05-1389), and on May 31, 2006 (EC-06-1148 and EC-06-1149).

3. Whether the bankruptcy court erred when it determined that the Plan was feasible for purposes of § 1225(a)(6).

4. Whether the bankruptcy court erred when it determined that the Plan satisfied the requirements of § 1225(b)(2)(B) requiring that all of a debtor's projected disposable income be applied to plan payments.

(Bank's Appeals, EC-06-1148 and 1149)

5. Whether the bankruptcy court erred when it decided, under § 552(b)(1), that Bank's security interest would not extend to Debtor's 2005 and 2006 asparagus crop based upon the "equities of the case."

6. Whether the bankruptcy court's decision limiting Bank's security interest in Debtor's crops violated the Fifth Amendment as a taking of Bank's property without payment of just compensation.

STANDARDS OF REVIEW

We review the bankruptcy court's factual findings for clear error. Rule 8013. A factual finding is clearly erroneous if the appellate court, after reviewing the record, has a firm and definite conviction that a mistake has been committed. Anderson v. Bessemer City, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

Confirmation of a chapter 12 plan requires analysis and interpretation of the Bankruptcy Code; we review issues of statutory construction and conclusions of law, including interpretation of the Bankruptcy Code and Rules, de novo. Wells

Fargo Bank Nw., N.A. v. Yett (In re Yett), 306 B.R. 287, 290 (9th Cir. BAP 2004), citing Predovich v. Staffer (In re Staffer), 262 B.R. 80, 82 (9th Cir. BAP 2001), aff'd, 306 F.3d 967 (9th Cir. 2002).

Determining the factors to measure the adequacy of a plan provision for a secured claim pursuant to § 1225(a)(5) involves an interpretation of statute that we review de novo, while the application of those factors to a particular case is a question of fact reviewed for clear error, giving "substantial deference" to the bankruptcy court in making cramdown interest rate determinations. Farm Cred. Bank v. Fowler (In re Fowler), 903 F.2d 694, 696 (9th Cir. 1990), citing with approval, Patterson v. Fed. Land Bank (In re Patterson), 86 B.R. 226, 227 (9th Cir. BAP 1988).

Whether a chapter 12 plan that proposes that all of a debtor's projected disposable income will be applied to make payments under the plan satisfies § 1225(b)(1)(B) is a question of law for the Panel. Fobian v. W. Farm Cred. Bank (In re Fobian), 951 F.2d 1149, 1151 (9th Cir. 1991).

Whether a chapter 12 plan satisfies the feasibility test for confirmation under § 1225(a)(6) is a factual determination which we review for clear error. Miller v. Nauman (In re Nauman), 357 B.R. 355, 357 (9th Cir. BAP 1997).

Whether a creditor's security interest extends to property acquired after bankruptcy under § 552(b)(1) is a question of law we review de novo. However, the decision whether to apply the equitable exception under § 552(b)(1) is reviewed for abuse of discretion. J. Cattan Farms v. First Nat'l Bank of Chicago, 779 F.2d 1242, 1247 (7th Cir. 1985).

Whether the bankruptcy court's ruling violated the Constitution is a matter of law for the Panel to decide. Buono v. Norton, 371 F.3d 543, 548 (9th Cir. 2004). A bankruptcy court's determination on mixed questions of law and fact that implicates constitutional rights is reviewed de novo. Cogswell v. City of Seattle, 347 F.3d 809, 813 (9th Cir. 2003).

DISCUSSION

I. Debtor's Appeal, EC-05-1290

The bankruptcy court did not err in determining that, under § 552(b)(1), Bank's pre-petition security interest in Debtor's crops extended to Debtor's post-petition asparagus crop.

The bankruptcy court decided at the May 19, 2005, hearing that Bank's pre-bankruptcy security interest extended to the post-petition crops grown on Debtor's existing asparagus beds. Consistent with its oral decision, in its June 27, 2005, Memorandum Decision, the bankruptcy court denied confirmation of the Plan because, in violation of § 1225(a)(5), the Plan did not provide for Bank's secured claim attributable to the post-bankruptcy asparagus crop.

Debtor asks us to reverse the bankruptcy court's decision. Debtor contends that any security interest held by Bank terminated by operation of § 552(a) as to any crops grown after the filing of his petition. Therefore, Debtor argues, the Plan need not recognize a secured claim in Bank's favor as to any asparagus crops he raised in 2004 and later years.

Section 552(a) provides, as a general rule, that "Except as provided in subsection (b), property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by debtor before commencement of the case." But, as the Supreme Court has noted: "Section 552(b)[(1)] sets forth an exception, allowing postpetition 'proceeds, product, offspring, rents, or profits' of the collateral to be covered only if the security agreement expressly provides for an interest in such property, and the interest has been perfected under 'applicable nonbankruptcy law.'" United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs, Ltd., 484 U.S. 365, 374 (1988) (citations omitted).[12] The question presented by Debtor's appeal is whether Bank's security interest in his post-bankruptcy asparagus crops was extinguished by § 552(a) when he filed his petition, or whether the effect of that security interest was saved by the § 552(b)(1) exception.

Specifically, the bankruptcy court found that

> . . . [A]sparagus grows in beds that produce commercial crops over a period of ten to twelve years. The asparagus beds on debtor's real property are seven to eight years old;

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[12] Section 552(b)(1) provides:

> [I]f the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, product, offspring or profits of such property, then such security interest extends to such proceeds, product, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

> thus, they were planted before August 6, 2004, the date of the bankruptcy filing. The 2004 crop did not first appear until the Spring of 2005, well after the filing. Nevertheless, the post-petition asparagus constitutes crops as defined in the Agricultural Security Agreement dated June 27, 2002 (the "Security Agreement"). . . . In re Dettman, 84 B.R. 662 (9th Cir. BAP 1988); In re Beck, 61 B.R. 671 (Bankr. D.Neb. 1985). The bank's security interest in crops includes rights in proceeds of the crops. Cal. Comm. [sic] Code §§ 9203(f) and 9315. . . Under 11 U.S.C. § 552(b)(1), the Bank's security interest under the Security Agreement extends to all collateral acquired by the debtor prior to the bankruptcy filing and to all proceeds, product, offspring, or profits acquired by the estate after the commencement of the case "except to the extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise."

Contrary to the bankruptcy court's analysis, Debtor contends that the 2005 asparagus crop did not come into existence until after the commencement of the case. Since this was a "new crop," Debtor insists Bank's security interest would not be subject to Bank's lien under § 552(a). Debtor provides a complex analysis of California Commercial Code provisions in an attempt to explain how the asparagus crop should be deemed free and clear of Bank's interests. He discusses whether the asparagus beds are "fixtures" or "equipment" as those terms are defined in the UCC, and the distinctions between a growing crop as personalty or real estate under the UCC.[13]

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[13] Debtor, in passing, cites an article recounting an interview with Professor Peter F. Coogan, the author of Secured Transactions Under the Uniform Commercial Code (Lexis, 2000) to support his argument. Peter F. Coogan, Crop Financing and Article 9: A Dialogue With Particular Emphasis on the Problems of Florida Citrus Crop Financing, 22 U. Miami L. Rev. 13, 32-33 (1967-1968).
(continued...)

Rather than engage in an extensive UCC analysis, we believe the bankruptcy court undertook the correct approach. For example, the bankruptcy court relied in part on In re Beck, 61 B.R. 671 (Bankr. D. Neb. 1985), a bankruptcy court decision in which we think the issue is correctly analyzed.

The debtors in Beck were alfalfa farmers. The Beck court determined that alfalfa is a perennial crop, in that each spring the existing alfalfa plants grow to maturity, thereby yielding a new crop for cutting. The debtor entered into a security agreement with a bank and granted it a security interest in "all farm products including but not limited to . . . crops . . . both annual and perennial crops and the natural increase and products thereof." In re Beck, 61 B.R. at 671. In debtor's subsequent bankruptcy case, debtor asked the bankruptcy court to determine the bank's secured status as to the post-petition cuttings of alfalfa produced on a field that was planted before bankruptcy.

The Beck court concluded that the bank's security interest

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[13] (...continued)
From his interview comments, the professor apparently believes: (1) The UCC is unclear whether, when the term "crop" is used in a UCC security agreement, it refers to only a single crop, or to the cumulative output of crops from a particular source, the essential question presented to the Panel; (2) an agreement [here, such as that between Debtor and Bank] that grants a security interest to a creditor in the debtor's future crops is binding as to the parties to the agreement; and (3) Professor Coogan cannot imagine a situation in which a creditor with a properly recorded financing statement evidencing a security interest on future crops would be deprived of its priority under the UCC. In short, Professor Coogan opines that while the UCC may have some relevance in understanding when a secured party may assert rights under the UCC (e.g., whether a personal property security interest can be terminated in a real estate foreclosure proceeding), the UCC is either unclear, or of limited legal significance, in determining under bankruptcy law whether a pre-petition security interest in asparagus crops extends to the debtor's post-bankruptcy crops.

continued in the successive cuttings of the alfalfa crop raised after bankruptcy. Noting the dearth of case law interpreting § 552(a) and (b)(1), the court observed "That may be because the language of the security interest is clear, the language of the Code is clear and it is clear to counsel for most debtors that alfalfa plants are perennials and the successive crops are the natural increase and products of the original plant." In re Beck, 61 B.R. at 673. The court ruled that the bank's security interest was not terminated by operation of § 552(a) when debtor filed his petition.

The central holding in Beck was that the security interest continued in the natural increase and products of alfalfa because it was a perennial. This conclusion agrees with the California courts, which have consistently held that asparagus is a perennial. "Asparagus is grown from roots which are perennial, and being once planted produce the asparagus of commerce for many successive years." Meek v. Cunha, 8 Cal. App. 98 , 100 (Ct. App. 1st Dist. 1908); Chan Kiu Sing v. Gordon, 171 Cal. 28 (1915)("The roots of asparagus are perennial . . . the profits come from the shoots which grow therefrom each year."); Eberhardt v. Bass, 39 Cal. 2d 1, 8 (1952)(asparagus beds are perennials). The one federal court to address whether asparagus was a perennial dealt with a California farm. Sonoda v. United States, 154 Ct. Cl. 130 (1961)("Asparagus is a perennial crop and will keep producing for as much as 25 years before playing out.").[14]

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[14] Other state courts have also ruled that asparagus is a perennial. E.g., Leigh v. Lynch, 493 N.E.2d 1040, 1043 (Ill. 1986)("asparagus is a perennial crop").

Beck is also consistent with our own interpretation of § 552(b) in In re Dettman, 84 B.R. 662 (9th Cir. BAP 1988). In that appeal, the panel analogized certain government diversion payments made to a farmer to raisins produced from a perennial grapevine. In holding that the creditor's security interest attached to the post-bankruptcy government program payments, the panel made these instructive comments concerning interpretation of § 552:

> A security interest in crops attaches when the crops are planted. As a result, under section 552, where crops are planted prepetition, a proceeds clause in a security agreement protects the creditor's interest in the crop and its proceeds postpetition. See 11 U.S.C. § 552(b). However, where crops are planted postpetition, a proceeds clause does not protect the creditor's security interest because the crops were not in existence prior to the bankruptcy filing.

In this case, there is no factual dispute that Debtor's post-petition crops were grown on asparagus beds which he had acquired and planted several years before Debtor filed for bankruptcy relief. While Debtor may have utilized bankruptcy estate assets in producing the post-petition crops (something which the bankruptcy court found significant later in its "equities of the case" analysis), the 2004 and later asparagus crops were clearly products of the Bank's pre-bankruptcy collateral: the asparagus beds and plants. Bank's security interest, outside bankruptcy, would attach to Debtor's yearly crop, something Debtor does not seem to challenge. And while the general rule under § 552(a) is that a security interest does not extend to property a debtor acquires after bankruptcy, Bank's security interest continued in effect in the crops raised on existing asparagus beds after bankruptcy under the statutory exception in § 552(b)(1).

We conclude that the bankruptcy court's decision recognizing that Bank's security interest extended to Debtor's post-petition asparagus crops produced by the existing asparagus beds was based upon a sound analysis of the undisputed evidence and a proper application of the Code and case law. As a result, we believe that the bankruptcy court did not abuse its discretion in declining to confirm Debtor's plan because the Plan did not treat Bank's allowed secured claim attributable to the asparagus crops as required by § 1225(a)(5).

II. Bank's Cross-Appeal, EC-05-1389

Because the Panel, in the above discussion, affirms the decision of the bankruptcy court to deny confirmation of the Plan, the issues raised by Bank in its Cross-Appeal are rendered moot, and that appeal must be dismissed. Put another way, since Bank's complaints all focus on the bankruptcy court's unwillingness to endorse Bank's other objections to confirmation, this Panel need not take a position on the propriety of the court's rulings on Bank's specific objections.

But even though the Cross-Appeal will be dismissed, we feel it is useful to comment on the substance of the issues raised by Bank. As noted above, this is an interlocutory appeal, and further proceedings will occur in the bankruptcy court after our decision. It is possible, perhaps even likely, that the bankruptcy court will allow Debtor an opportunity to propose yet another amended plan in light of this Panel's decision concerning Debtor's appeal, and the bankruptcy court's decision that Bank's security interest not attach to Debtor's 2005 and 2006 asparagus crops, a ruling reviewed below. Since the issues raised by Bank in its Cross-Appeal involving appropriate interest rates, feasibility and disposable income requirements may potentially recur in connection with the bankruptcy court's consideration of confirmation of another amended plan, in the interests of justice and judicial economy, the Panel deems it prudent to review and discuss those issues here. While the Panel's observations that follow are not binding, hopefully the insight provided in this following analysis will be helpful.

A. The bankruptcy court must make express findings and conclusions regarding the adequacy of any interest rate for payments to be made on Bank's allowed secured claim under § 1225(a)(5)(B)(ii) based upon the evidence presented in this bankruptcy case.

In its Cross-Appeal, Bank argues that the bankruptcy court's determination of the adequacy of the six percent interest rate proposed by Debtor for its secured claims was error. Debtor replies that "there are many factors which support the bankruptcy court's finding that a 6% rate of interest for the Bank's secured claims was appropriate under the Till formula approach." However, even though the parties' arguments presume a decision was made by the bankruptcy court, in our review of the record, we can find no indication that the court ever made any express determination of the adequacy of the interest rate in Debtor's case under Till.

We think the considerable confusion in the record concerning whether the bankruptcy court considered the adequacy of the interest rate on Bank's allowed secured claims in Debtor's bankruptcy case arises from at least two sources.

First, there were two closely related, but separate, bankruptcy cases pending before the bankruptcy court: the Debtor's case and the Parents Case. Counsel for the debtors and Bank were the same in both cases, as was the trustee. "Back-to-back" hearings were conducted on May 3 and 19, 2005, in both cases, and there are occasional cross-references in the transcripts of those hearings to events occurring in the "other" case.

Second, the bankruptcy court made a reference in its Memorandum Decision that it had continued the May 3, 2005, hearing in the Debtor's case to May 19, 2005, for determination of two issues, one of which was adequacy of the interest rate. However, the Memorandum Decision then makes no further reference to the interest rate issue and, as noted below, there was no mention of the adequacy of the proposed interest rate in the hearings in the Debtor's case.

Indeed, we have examined all the pleadings filed by the parties in the bankruptcy court in Debtor's case, and it appears there was no objection to the interest rate raised by Bank, nor any defense of the proposed interest rate offered by Debtor. However, we have also examined the transcript of the May 3, 2005, hearing in the Parents Case, of which we have taken judicial notice,[15] and there was extensive discussion of the interest rate

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[15] See, supra, note 6.

in the Parents Case.[16]

The bankruptcy court made no findings at the May 3, 2005, hearing in the Parents Case on the adequacy of the interest rate in the Parents Case. We also have no explanation in the record before us of the court's reasoning for its final determination of the adequacy of the six percent interest rate in the Parents Case. However, even if we did, it would be irrelevant to our consideration of the adequacy of the interest rate in any plan proposed by Debtor. The bankruptcy court must determine the adequacy of that rate based upon the evidence presented in Debtor's case, not the Parents Case. The reason for this distinction is found in the cases interpreting the Code.

The parties agree that the controlling law concerning the standard for determining the appropriate rate of interest to be paid to a secured creditor under a cramdown plan provision is Till v. SCS Credit Corp., 541 U.S. 465, 479-80 (2004):[17]

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[16] We have taken judicial notice only of the transcript of the May 3, 2005, Parents Case hearing. Although we do not take judicial notice of any other documents in the Parents Case, we are also aware of the later developments in that case because, as noted above, it was also before us on appeal. We are therefore aware that the bankruptcy court at the May 19, 2005, hearing in the Parents Case approved a six percent interest rate for the Bank's secured indebtedness.

[17] Bank appears to understand that Till was a chapter 11 case. See Bank's Reply Brief at 9 (after citing Till - and no other cases - Bank comments, "The leading treatise reflects that the standards developed in chapter 11 cases are generally relevant to chapter 12 cases.") Of course, Till was a chapter 13 case, and the court was interpreting § 1325(a)(5)(B). In any event, while the Supreme Court did not hold so expressly, because the language of § 1225(a)(5)(B)(ii) mirrors that of the provision addressed in Till, we agree with the parties that Till provides the appropriate analytical framework for determining plan interest rates under chapter 12. Till, Id. at 474 n. 10 (indicating that it was "likely" that same approach to fixing interest rate in plans applied under other reorganization chapters).

> The approach begins by looking to the national prime rate, reported daily in the press, which reflects the financial market's estimate of the amount a commercial bank would charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default. Because bankrupt debtors typically pose a greater risk of nonpayment than solvent commercial borrowers, the approach then requires a bankruptcy court to adjust the prime rate accordingly. The appropriate size of that risk adjustment depends, of course, on such factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan.

In this excerpt, the court describes the so-called "formula" approach whereby, in determining the adequacy of a plan interest rate, a bankruptcy court first considers "no risk" rate for interest, and then adjusts it to reflect the various risk factors implicated by the facts of a particular bankruptcy case.[18] Specifically, those criteria include the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan. The evidentiary burden of justifying an upward adjustment in the risk-free rate is on the creditor. Id. at 480.

Whatever decision the bankruptcy court may have reached in the Parents Case is irrelevant to determining whether the Plan's interest rate is adequate because the facts and circumstances

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[18] While Till controls, we note its lessons are consistent with those announced in the Ninth Circuit and this Panel's prior decisions. In Patterson v. Fed. Land Bank (In re Patterson), 86 B.R. 226, 229 (9th Cir. BAP 1988), we affirmed the bankruptcy court's determination that a plan interest rate in a chapter 12 case was adequate where the bankruptcy court applied a formula approach, beginning with the Prime Rate, and adjusting upward for case-specific risks. See also, Farm Cred. Bank v. Fowler (In re Fowler), 903 F.2d 694, 696 (9th Cir. 1990).

surrounding Debtor's operation will be fundamentally different. Debtor is not his parents – he is younger, with a shorter work history. Debtor's crops are different from those produced in his parents' operation. The total secured indebtedness is significantly different (approximately $60,000 for Debtor and $550,000 for Parents). And the duration of the proposed reorganization plans is different (three years for Debtor and four to five months for Parents).

In summary, any decision concerning the adequacy of an interest rate proposed for payment on Bank's allowed secured claim must be supported by appropriate findings of fact based upon the evidence to be submitted in Debtor's case, and analyzed in light of the Till factors. See, Idaho Watersheds Project v. Hahn, 307 F.3d 815, 834 (9th Cir. 2002)(holding that findings must be "sufficiently specific to permit fair appellate review of the manner in which the trial court resolved the issues upon which its judgment depends.")

B. The bankruptcy court conducted an appropriate analysis of the feasibility of the Plan for purposes of § 1225(a)(6).

To secure confirmation of a plan, § 1225(a)(6) required Debtor to establish that he "will be able to make all payments under the plan and to comply with the plan." Whether a plan is feasible is a factual determination made by the bankruptcy court and reviewed by the Panel under a clearly erroneous standard. In re Nauman, 213 B.R. at 357. In making his showing, Debtor is not required to guarantee the ultimate success of the Plan, but only to provide a reasonable assurance that the Plan can be effectuated. Id., citing In re Hopwood, 124 B.R. 82, 86 (E.D. Mo. 1991). Simply put, § 1225(a)(6) does not require a plan to be "bomb proof." In re Nauman, 213 B.R. at 361. Many courts have held that a chapter 12 debtor should be given the benefit of the doubt regarding the issue of feasibility when the debtor's plan projections, based upon reasonable inputs in light of the current economic climate, indicate that it is probable that the debtor can make the plan payments. Farmers Home Admin. v. Rape (In re Rape), 104 B.R. 741, 748 (W.D.N.C.1989); see also, In re Hopwood, 124 B.R. at 86 (purpose of chapter 12 is to promote reorganizations of family farmers, and court should give benefit of doubt to debtor on issue of feasibility); In re Krause, 261 B.R. 218, 224 (8th Cir. BAP 2001)(feasibility showing in chapter 12 only requires reasonable assurance that the plan can be completed and that there will be sufficient cash flow).

In this case, Debtor supported the feasibility of the Plan by submission to the bankruptcy court of a nine-page projection of income and expenses. Debtor's budget forecast projected farm income for the 2004-2005 season at $655,978, and projected operating expenses of $653,741, resulting in a positive margin of $2,237. The bankruptcy court also had access to earlier budgets from 2002 and 2003.

In addition to income and expense forecasts, at the May 19, 2005, hearing, Debtor submitted the declaration and testimony of Miller, whose employer, JMB, is a direct marketer of asparagus for asparagus growers. According to Bank,

> Mr. Miller provided testimony to the effect that JMB was in the position to, and would, advance such funds as were necessary to fund the Debtor's 2005 asparagus operations, with

> the implication being that JMB would continue to do so in future crop years. On appeal, the Bank does not dispute that testimony.[[19]]

(Emphasis added). Thus, contrary to the Bank's suggestion that Debtor provided inadequate information as to the feasibility of his proposed operation, it instead appears that the bankruptcy court was given substantial competent evidence on this issue.

Bank apparently bases its appeal of the bankruptcy court's feasibility finding on what it contends is the "illusory" nature of Debtor's income and expense projections. In this regard, Bank cites Miller's testimony that Debtor would produce approximately 5,000 cartons of asparagus less in 2005 than Debtor had projected in 2004. However, Miller also stated that the 2005 price would be $35 per carton, an increase of $4 per carton over projections.

On August 26, 2004, Debtor filed an amended Schedule J adjusting his projected 2005 asparagus production volume up to 18,700 cartons. Debtor testified at the confirmation hearing that such production estimates were based upon a normal crop harvest for his asparagus beds. Debtor explained that by the time of harvest in April and May 2005, it was apparent he would not meet his projected production volume because of unfavorable weather conditions. Debtor also explained that asparagus is a cash crop highly dependent upon supply and demand. On the other hand, Debtor's expenses also declined with the reduced volume.

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[19] The Miller Declaration reads, in part:

> ¶ 7. JMB anticipates continuing to serve as the debtor's direct marketer of asparagus throughout the three-year term of the debtor's First Amended Chapter 12 Plan and anticipates continuing to extend asparagus crop financing for that period on the same terms and conditions.

Farming operations are subject to certain risks, including natural factors like the weather, market influences, and even changes in government farm policies. In re Davenport, 158 B.R. 830, 833 (Bankr. E.D. Cal. 1992)(any farming operation is subject to loss on occasion). Consequently, projections submitted by a chapter 12 debtor to support feasibility of a proposed plan will, of necessity, include assumptions and educated guesses about factors beyond the debtor's control. In re Konzak, 78 B.R. 990, 994 (Bankr. D.N.D. 1987) (instructing that chapter 12 plan feasibility must be established based upon "presently existing" information, because "[n]o one can predict what prices will be in the future and it is folly to peg feasibility upon future yields and market prices which are at best often unpredictable and at worst even imaginary.").

In this case, the bankruptcy court observed that, although weather may have caused a decline in Debtor's production in 2004, it also resulted in higher per carton income for the asparagus Debtor produced. As a result, while Debtor's preseason budget projections about yields and prices were not precisely accurate when compared to actual results, Debtor's projections of net income had been validated. This evidence was sufficient to support the bankruptcy court's finding that the Plan was feasible.

The bankruptcy court considered Debtor's evidence that, based upon his projections, his operation would "cash flow" and he could generate sufficient income to make the payments proposed in the Plan. The court also was given the testimony and declaration of Miller showing that JMB would provide financing for Debtor's operation. Bank did not effectively challenge Miller's testimony or Debtor's projections. Finally, Debtor's projections, while perhaps incorrect in some of the details, were validated by the actual results of the farming operation. Bank's argument that Debtor's projections were illusory because they were based on a one-year aberration in the market was considered by the bankruptcy court, which determined that any alleged inconsistency was of no moment.

In reviewing the bankruptcy court's finding that a plan is feasible for purposes of § 1225(a)(6), we give special deference to its credibility findings. Here, the bankruptcy court did not clearly err in finding that the Plan was feasible for purposes of § 1225(a)(6).

C. <u>The bankruptcy court correctly decided that the Plan satisfied the requirements of § 1225(b)(1)(B) requiring that all of a debtor's projected disposable income be applied to plan payments.</u>

Section 1225(b)(1)(B) provides:

> (b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan . . .
>
> (B) the plan provides that all of the debtor's <u>projected disposable income</u> to be received in the three-year period . . . will be applied to make payments under the Plan.

(Emphasis added.)

As it did in the bankruptcy court, Bank persists in arguing on appeal that the Plan failed to satisfy this confirmation standard:

> Unsecured creditors are not substantively being provided with any payment dividend on

> unsecured claims. This in part occurs because the Debtor refused to commit all of his net disposable income to payment of such claims but would only commit to pay his projected income.

Bank's argument implies that Debtor must devote his actual disposable income, rather than his projected disposable income, to making payments under the Plan. This argument was rejected by the bankruptcy court because "Section 1225(b) is satisfied if the Plan requires the debtor to devote all of his projected disposable income to the Plan for a three-year period or longer if necessary" (emphasis in original), citing Anderson v. Satterlee (In re Anderson), 21 F.3d 355 (9th Cir. 1994).[20]

The bankruptcy court's reliance upon the Anderson analysis is apropos because in its decision the Ninth Circuit directly addressed the issue raised by Bank's objection, i.e., whether the Bankruptcy Code requires a debtor to devote all of its actual net disposable income to payment of claims. The Ninth Circuit held:

> This argument [that a debtor must pay all actual disposable income into the plan] has a fatal flaw: § 1325(b)(1)(B) does not require debtors to give such an assurance. Instead, § 1325(b)(1)(B) requires provision for "payment of all projected disposable income" as calculated at the time of confirmation, and we reject the Trustee's attempt to impose a different, more burdensome requirement on the debtors' plan as a prerequisite to confirmation.

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[20] Anderson is a chapter 13 case interpreting § 1325(b). However, because the confirmation criteria of § 1225 are nearly identical to those of § 1325, "case law interpreting section 1325 will be relevant in interpreting section 1225." 8 Lawrence P. King, et al., COLLIER ON BANKRUPTCY ¶ 1225.01, 1225-3 (15th ed. rev. 2005); In re Kjerulf, 82 B.R. 123, 126 (Bankr. D.Or. 1987)(chapter 12 closely modeled on chapter 13). In particular, except for a restriction only applicable to chapter 12 debtors, § 1225(b)(1)(B) is identical to § 1325(b)(1)(B).

In re Anderson, 21 F.3d at 358 (9th Cir. 1994)(emphasis in original). The Ninth Circuit elaborated that the intention of Congress was clear on the face of the statute that it was projected, not actual, disposable income that a debtor must devote to plan payments and there was no need to examine the legislative history to determine Congress' intention. Id. at 358 n. 6.

The Plan provides that all of Debtor's future income will be submitted to the trustee as is necessary for execution of the Plan. The Plan also provides that all of Debtor's projected disposable income to be received during the next three years would be paid, pro rata, to unsecured creditors, but not less than a total of $5,000. Despite these provisions committing Debtor's projected disposable income to payments under the Plan, and the Ninth Circuit's unambiguous ruling in Anderson, Bank insists the Plan does not comply with the requirements of § 1225(b)(1). Bank cites no authority for its position. We conclude that the bankruptcy court did not err in overruling Bank's objection.

III. Bank's Appeal, EC-06-1148 and 1149

A. The bankruptcy court did not abuse its discretion when it decided, under § 552(b)(1), that Bank's security interest should not extend to Debtor's 2005 and 2006 asparagus crop based upon the "equities of the case."

As noted above, § 552(b)(1) provides that a prepetition security interest will attach to certain types of bankruptcy estate property "except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise." Under authority of this provision, the bankruptcy court, after a hearing, ordered that Bank's lien would not attach to Debtor's 2005 and 2006 asparagus crop.

Bank argues that the bankruptcy court erred in doing so for several reasons. Bank argues in its briefs that § 552(b)(1) is vague and unconstitutional. We dispose of Bank's constitutional challenge below. However, with respect to Bank's contention that the phrase "equities of the case" is "vague and contains no standards upon which a lender can establish a formula upon which it can properly assess and thereby attempt to price credit", we simply disagree.

"Equities of the case," as that phrase is used in § 552(b)(1), is anything but vague. Four courts of appeal have assigned a nearly identical meaning to this provision. For example, in New Hampshire Bus. Dev. Corp. v. Cross Baking Co., Inc. (In re Cross Baking Co., Inc.), the court explains:

> [T]he equities of the case proviso is a legislative attempt to address those instances where expenditures of the estate enhance the value of proceeds which, if not adjusted, would lead to an unjust improvement of the secured party's position. In such cases, Congress intended for courts to limit the secured party's interest in the proceeds according to the equities of the case so as to avoid prejudicing the unsecured creditors.

818 F.2d 1027, 1033 (1st Cir. 1987). Another court observed that

> The equity exception is meant for the case where the trustee or debtor-in-possession uses other assets of the bankruptcy estate (assets that would otherwise go to the general creditors) to increase the value of the collateral. . . . The proceeds . . . would be added to the secured creditor's collateral unless the court decided that it would be inequitable to do so – as well it might, since the general creditors were in effect responsible for much or all of the increase in

> the value of the proceeds over the original collateral.

In re J. Catton Farms, Inc., 779 F.2d 1242, 1246-47 (7th Cir. 1985), citing In re Village Properties, Ltd., 723 F.2d 441, 444 (5th Cir. 1984) (approving limitation of secured creditor's pre-bankruptcy lien "where raw materials are converted into inventory at the expense of the estate (which would thus deplete the fund available for the general unsecured creditors)"); accord United Va. Bank v. Slab Fork Coal Co., 784 F.2d 1188, 1191 (4th Cir. 1986).

No circuit case law attributes a different meaning to this phrase. Contrary to Bank's position, the cases interpreting the equities of the case exception make clear its principal purpose is to prevent secured creditors from reaping unjust benefits from an increase in the value of collateral during a bankruptcy case resulting from the debtor's use of other assets of the estate, or from the investment of non-estate assets. Those creditors are presumably able, and expected, to consider the operation of this statute, and any accompanying risk, when crafting and pricing credit arrangements with their borrowers.

Given the universal meaning assigned to this provision, we conclude the bankruptcy court correctly applied the statute to the facts. Indeed, this appeal presents a near classic scenario for operation of this provision of the Code.

The bankruptcy court conducted a hearing concerning Debtor's Motion for Determination of Postpetition Effect of Security Interest on January 18, 2006. At the hearing, the court was given the declarations of counsel for the Bank and from Debtor, and heard further representations and argument from counsel for both parties.

Debtor provided evidence that he had used $36,626 of estate funds that were not subject to the Bank's security interest, and that would otherwise have been available to pay creditors, during the season to preserve the asparagus beds and cultivate the 2005 crop. The total surplus of income over expenditures in the 2005 crop was approximately $20,000. The bulk of the money to finance production of the asparagus crop production was "fronted" by the buyer of the crop. Although Bank asserted that $12,000 of its cash collateral was used in the harvesting of the 2005 crop, the court found that "none of the bank's cash collateral was used for production of the 2005 asparagus crop."[21]

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[21] Bank introduced confusion in the record regarding this $12,000 payment and, in context, appeared to assert that it was used in production of the 2005 crop. At the hearing on January 18, 2006, the following exchange occurred between counsel for Bank and the court:

> THE COURT: But does the Bank acknowledge that none of its collateral–cash collateral was used for harvesting the 2005 crop?
>
> HAUSER: No. The debtor has already indicated he used $12,000 of what we contend is bank money for some purpose.

Tr. Hr'g 14:17-22 (January 18, 2006).

The $12,000 at issue here, according to debtor, was $12,109 of cash income from the 2005 crop used to prepare for the 2006 crop. Tr. Hr'g 8:2-4. Based on this conflicting testimony, we cannot determine whether the $12,109 of cash proceeds was used to finance the completion of the 2005 or preparation of the 2006 harvests. But regardless of the actual purpose to which the $12,109 was put, the court's ruling is consistent with its determination that cash proceeds in either year were not subject to the bank's liens.

As a condition of the court's order, Debtor was required to place sufficient funds in a segregated interest-bearing account to satisfy Bank's secured claim attributable to its interest in the Debtor's leasehold in the asparagus beds. Debtor also provided evidence that he had sufficient income to fund the other payments under the Plan, including those to Bank for its secured claim on Debtor's equipment. In other words, under the court's order and the terms of the Plan, while the asparagus beds and equipment subject to Bank's lien had been used to produce the current asparagus crop, Debtor was prepared to compensate Bank by payments on its secured claims relating to that collateral. The evidence suggested that the results of the 2006 season would be similar.

Based on this evidence, and in light of the purpose of the statute and the case law interpreting "equities of the case" in § 552(b)(1), the bankruptcy court did not abuse its discretion in determining that Bank would receive an inequitable windfall at the expense of the unsecured creditors if its lien attached to the 2005 and 2006 asparagus crop. Freeing up the crop proceeds would allow Debtor to fund the Plan, pay his plan payments to creditors, and continue his operation. In limiting the reach of Bank's security interest, the bankruptcy court struck "an appropriate balance between the rights of secured creditors and the rehabilitative purposes of the Bankruptcy Code." United Va. Bank v. Slab Fork Coal Co., 784 F.2d at 1191.

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B. Because Bank failed to properly raise the constitutional issue in the bankruptcy court, we decline to review it on appeal.

In an ambitious argument to the Panel,[22] Bank contends that the decision of the bankruptcy court to terminate Bank's security interest in Debtor's post-petition asparagus crops pursuant to §552(b)(1) without requiring compensation be paid to Bank constituted a violation of the Takings Clause of the United States Constitution.[23] Both Bank and Debtor agree that there is sparse case law on the constitutionality of §552(b)(1).[24]

As Bank's counsel conceded at oral argument, Bank did not fairly challenge the constitutionality of application of § 552(b)(1) in this context in the bankruptcy court.[25] Generally,

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[22] The Bank, in its brief states: "In the pending action under a vague clause which is otherwise undefined in the Code, a valuable property right of the Appellant [Bank] was taken for which the Appellant [Bank] will receive no compensation." Respondent's Opening Brief at 13. To the extent that the Bank is arguing that § 552(b) is unconstitutionally vague, the legislative history and case law discussed in the last section above demonstrate otherwise. We focus here on the Bank's express argument that the application of the statute violated its Fifth Amendment right to just compensation.

[23] ". . . nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

[24] The one case cited by either party that considered the constitutionality of § 552(b) was In re Hamilton, 18 B.R. 868 (Bankr. D.Colo. 1982). As can be seen from the citation, this is a 25-year old trial court decision from another circuit. A review of the case law indicates that it has never been cited by an appeals court for any purpose. However, we note in passing that the Hamilton court held that § 552 was constitutional in its entirety.

[25] In Bank's Supplemental Opposition to Debtor's Motion to Determine Postpetition Effect of Security Interest, Bank suggests that the constitutionality of § 552 is "unclear" and that "[t]his Court need not reach the constitutional issue if it decides that the equities of the case otherwise requires [sic] that the status quo be maintained while an appellate court addresses the legal

(continued...)

appellate courts do not consider arguments "that are not 'properly raise[d]' in the trial courts." O'Rourke v. Seaboard Sur. Co. (In re Fegert, Inc.), 887 F.2d 955, 957 (9th Cir. 1989). Concrete Equip. Co., Inc. v. Fox (In re Vigil Bros. Constr., Inc.), 193 B.R. 513, 520 (9th Cir. BAP 1996). The Ninth Circuit recognizes three narrow, discretionary exceptions to the general rule: (1) to prevent a miscarriage of justice or to preserve the integrity of the judicial process; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law. Jovanovich v. United States, 813 F.2d 1035, 1037 (9th Cir. 1987), citing Bolker v. Comm'r, 760 F.2d 1039, 1042 (9th Cir. 1985).

Although Bank's constitutional challenge presents an issue of law, because this is an interlocutory appeal, and no plan has yet been confirmed, Bank is free to raise this issue again in the bankruptcy court at the time Debtor proposes another plan for confirmation. The constitutionality of the application of the "equities of the case" exception to Bank's lien can then be examined in the specific context of a plan's provisions. Since this remedy is available to Bank, we do not find that any of the three exceptions above to the rule against considering new arguments on appeal should apply here. Consequently, we decline to consider this issue on appeal.

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[25] (...continued)
issue of the extent of the Bank's security interest in postpetition revenues." Bank did not explain this argument to the bankruptcy court, support it with any law or reasoning, or argue it in any additional pleading or hearing. We agree with Bank's counsel's comments at oral argument acknowledging that the constitutional argument was not adequately raised in the bankruptcy court.

CONCLUSION

In Debtor's Appeal, EC-05-1290, we AFFIRM the bankruptcy court's denial of confirmation of the Plan because it failed to provide for Bank's allowed secured claim as to the asparagus crops.

While we have provided guidance to the parties concerning the issues raised in Bank's Cross-Appeal, EC-05-1389, because we affirm denial of confirmation of Debtor's plan for other reasons, those issues are moot, and that appeal is DISMISSED.

We AFFIRM the orders of the bankruptcy court in Bank's Appeal, EC-06-1148 and 1149.