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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. CC-10-1137-KiPaD  
 )  
 FLEETWOOD ENTERPRISES, INC., ) Bk. No. 09-14254-MAJ  
 ET AL., )  
 )  
 Debtors. )  
 \_\_\_\_\_ )  
 )  
 OFFICIAL COMMITTEE OF )  
 UNSECURED CREDITORS, )  
 )  
 Appellant, )  
 )  
 v. ) **M E M O R A N D U M**<sup>1</sup>  
 )  
 BANK OF AMERICA, N.A., )  
 )  
 Appellee. )  
 \_\_\_\_\_ )

Argued and Submitted on January 21, 2011  
at Pasadena, California

Filed - June 5, 2012

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

Honorable Meredith A. Jury, Bankruptcy Judge, Presiding

Appearances: Michael Schatzow of Venable LLP argued for  
 Appellant Official Committee of Unsecured  
 Creditors; Wayne S. Flick of Latham & Watkins LLP  
 argued for Appellee Bank of America N.A.

Before: KIRSCHER, PAPPAS, and DUNN, Bankruptcy Judges.

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<sup>1</sup> 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.

1 Appellant, the Official Committee of Creditors Holding  
2 Unsecured Claims ("Committee"), appeals an order from the  
3 bankruptcy court denying the turnover of a commitment fee paid to  
4 appellee, Bank of America, N.A. ("BoFA"), administrative agent  
5 for the lenders ("Lenders"), in connection with a postpetition  
6 financing agreement. We AFFIRM.

7 **I. FACTS AND PROCEDURAL BACKGROUND**

8 Fleetwood Enterprises, Inc. ("FEI") and its affiliates  
9 (collectively "Debtors") each filed a voluntary chapter 11<sup>2</sup>  
10 petition on March 10, 2009. Thereafter, Debtors acted as  
11 debtors-in-possession ("DIP") pursuant to §§ 1107 and 1108. The  
12 Committee was appointed on March 19, 2009.

13 Prior to filing bankruptcy, FEI and certain direct or  
14 indirect subsidiaries were parties to a prepetition secured  
15 credit facility with a syndicate of lenders led by agent BoFA.  
16 As of the petition date, the outstanding amount of the  
17 prepetition facility was approximately \$60 million, which  
18 (a) consisted entirely of the Lenders' contingent liability on  
19 issued and outstanding letters of credit, and (b) was secured by  
20 prepetition collateral with an aggregate value of \$156 million  
21 that consisted of cash collateral, accounts receivable, real  
22 estate, and other collateral.

23 On March 24, 2009, Debtors filed a Motion for Entry of  
24 Interim and Final Orders (1) Authorizing Debtors to Obtain  
25

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26 <sup>2</sup> Unless otherwise indicated, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
28 The Federal Rules of Bankruptcy Procedure, Rules 1001-9037, are  
referred to as "Rules." The Federal Rules of Civil Procedure are  
referred to as "Civil Rules."

1 Postpetition Secured Financing, (2) Authorizing the Use of Cash  
2 Collateral, (3) Granting Liens and Superpriority Claims,  
3 (4) Modifying the Automatic Stay, and (5) Setting Final Hearing  
4 ("DIP Motion"), in which Debtors sought the approval of the  
5 bankruptcy court to enter into a secured credit agreement with  
6 Lenders ("DIP Credit Agreement") pursuant to § 364(c). Lenders  
7 agreed to lend Debtors an amount not to exceed \$80 million,  
8 including a \$65 million sub-limit for existing letters of credit.  
9 Under the DIP Credit Agreement, Debtors were obligated to pay a  
10 \$2.4 million commitment fee ("Commitment Fee") to Lenders.

11 In the DIP Motion, Debtors contended that postpetition  
12 financing was necessary in order to continue operations and to  
13 administer and preserve and maintain the value of their estates.  
14 Without the funds, Debtors would be forced to cease operations,  
15 which would likely (1) result in irreparable harm to their  
16 business, (2) deplete going concern value, and (3) jeopardize the  
17 Debtors' ability to reorganize and maximize value. Debtors  
18 asserted that they had engaged in extensive, good faith arm's-  
19 length negotiations with Lenders regarding the terms and  
20 conditions of the DIP Credit Agreement, which they believed in  
21 their sound business judgment were fair and reasonable.  
22 Specifically, Debtors' CFO testified that the DIP Credit  
23 Agreement had been in the works for several weeks before Debtors  
24 filed bankruptcy and, given the current economic environment and  
25 lack of alternatives, the DIP Credit Agreement was the best deal  
26 possible for Debtors in order to maintain their businesses and  
27 search for buyers.

28 Due to Debtors' urgent need for access to funds, the

1 bankruptcy court held three expedited hearings on the DIP Motion  
2 on March 26, 27, and 31, 2009. At the Thursday, March 26  
3 hearing, Debtors again asserted that the financing they sought to  
4 be approved on an interim basis was not just the best deal they  
5 could find, but the only deal. The Committee objected to the DIP  
6 Motion, contending, inter alia, that the \$2.4 million Commitment  
7 Fee was "outrageous," and requested that any interim order  
8 include an absolute reservation of rights for the Committee. In  
9 response, the bankruptcy court stated that it was prepared to  
10 grant the DIP Motion on an interim basis, but it wanted the  
11 parties to prepare a form of order that reserved argument for  
12 everything not needed by Sunday, March 29.

13 Unable to reach any resolution on certain issues, the  
14 parties appeared before the bankruptcy court again on Friday,  
15 March 27. Lenders' counsel informed the bankruptcy court that  
16 the Committee and Deutsche Bank<sup>3</sup> believed that the Commitment Fee  
17 issue should be reserved for the final hearing. Lenders' counsel  
18 also indicated that before Lenders would proceed with interim DIP  
19 financing, they needed to know the rights and protections under  
20 which they were operating. Hr'g Tr. 4:7-8, 18-20, Mar. 27, 2009  
21 ("Mar. 27 Hr'g Tr."). In response, the court asked Lenders'  
22 counsel: "Is it your position that the commitment fees have to be  
23 paid before a final hearing?" Mar. 27 Hr'g Tr. 7:19-20.

24 Lenders' counsel replied: "Your honor, it is. The view of our  
25 lender group is that they are making the commitment now. They

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27 <sup>3</sup> Deutsche Bank Trust Company Americas is indenture trustee  
28 for certain senior secured note holders whose claims are junior  
to those of the Lenders.

1 are agreeing that their capital will be set aside for these loans  
2 and as a result they should be entitled to the commitment fee  
3 when the commitment is actually made." Mar. 27 Hr'g Tr. 7:21-25.  
4 The Committee responded that a \$2.4 million Commitment Fee seemed  
5 "obscenely high" for what was basically a \$20 million facility.  
6 Mar. 27 Hr'g Tr. 13:15-19.

7 After much debate about various issues, Debtors reiterated  
8 that without the interim DIP financing they would be out of  
9 business by Monday morning, and even though the Commitment Fee  
10 seemed high, it provided Debtors with a much lower interest rate  
11 compared to the 20% rate plus \$1 million commitment fee offered  
12 by other lenders, so it was a balance between the interest rate  
13 and the Commitment Fee. The court then observed that Lenders  
14 wanted at least two items they considered "nonnegotiable," one  
15 being the Commitment Fee. Considering that the Commitment Fee  
16 bought down the interest rate from 20% to about 8%, the court  
17 stated that the extra \$1.4 million to buy down the interest rate  
18 to 8% was "certainly a reasonable price . . . . So I think I  
19 would order that." Mar. 27 Hr'g Tr. 36:5-12. In order to  
20 facilitate further negotiations among the parties, the court  
21 decided to extend the existing cash collateral order to prevent  
22 Debtors from shutting down and to continue the hearing on the DIP  
23 Motion until Tuesday, March 31, 2009.

24 At the March 31, 2009 hearing, the Committee's counsel  
25 expressed some confusion about what the court was determining on  
26 an interim basis and whether the Commitment Fee would be paid  
27 before or after the final hearing. However, the Committee's  
28 counsel acknowledged that at the March 27, 2009 hearing the court

1 had indicated its initial thoughts on the issue. When the  
2 Committee's counsel began discussing details about professional  
3 carve-outs and their treatment in a default situation, the  
4 bankruptcy court responded: "Why are we doing this detail about  
5 that type of thing in an interim order?" Hr'g Tr. 9:17-18,  
6 Mar. 31, 2009 ("Mar. 31 Hr'g Tr."). The Committee's counsel  
7 replied, "Because I asked for a general reservation of rights and  
8 I haven't gotten it." Mar. 31 Hr'g Tr. 9:22-23. The bankruptcy  
9 court then asked the Lenders' counsel if the 53-page proposed  
10 interim order could contain a provision reserving argument on  
11 certain items for the final order:

12 I mean if - first of all, it is an interim order only.  
13 And I quite frankly think when I do anything interim,  
14 that I have the power to order something different as a  
15 final order. Although, certainly in, you know, fee  
16 settings, the Court has that. I think my interim order  
17 is only effective as to the date in which I have a  
18 final hearing . . . . So it seems to me that if it is  
19 a requirement of the lending group that they suddenly  
20 want their commitment fee up front - if they at the end  
21 of the day don't earn it, maybe we get it back but they  
22 get it up front?

23 Mar. 31 Hr'g Tr. 12:13-19; 12:24-13:3. The Lenders rejected the  
24 proposed reservation of rights provision. After much debate  
25 about the issue, the court asked the Committee's counsel to  
26 explain what "dire things" would happen if it approved the  
27 interim order "as-is," to which counsel responded: "Your honor, I  
28 guess it comes down to the issue of, what do we mean by an  
interim order?" Mar. 31 Hr'g Tr. 18:4-7, 16-17. To that  
statement, the court replied: "Yeah, I'm beginning to wonder  
myself." Mar. 31 Hr'g Tr. 18:18. The court then went on to  
explain:

[I]f the agreement on the commitment fee is in order to

1 have this lending facility last more than 30 days, we  
2 pay them 2.4 million dollars. I have no problem paying  
3 2.4 million dollars. If the 2.4 million dollars means,  
4 "we get that, but we can back out before the final  
5 order if we want to," then I'd have a problem with  
6 that. . . . [T]here are certain things in this interim  
7 order that I could not reverse in the final order is  
8 what I'm saying.

9 Mar. 31 Hr'g Tr. 19:9-14, 17-18. Nothing further was said about  
10 the Commitment Fee.

11 After hearing argument on issues not related to the  
12 Commitment Fee, the court announced:

13 Then I believe that I should approve the interim order,  
14 because I don't know that we have a lot of options to  
15 keep this Debtor operating past 4:00 o'clock today.  
16 And, in that approval, what I perceive I am doing, that  
17 is irreversible. As far as something that might be  
18 modified at the time of the final order, are those  
19 things that will protect the lending banks for any  
20 steps that they take during this interim period, such  
21 as advancing further advances . . . . They get their  
22 commitment fee, and they - and anything else that  
23 essentially carries forth past the final hearing  
24 date. . . . And that's really the intent of what an  
25 interim order is.

26 Mar. 31 Hr'g Tr. 29:10-18, 19-21, 23-24 (emphasis added).

27 Although several parties made further statements on the record,  
28 the Committee was silent.

On April 1, 2009, the bankruptcy court entered an interim  
order granting the DIP Motion ("Interim DIP Order"). The Interim  
DIP Order authorized payment of the Commitment Fee to the Lenders  
as a superpriority administrative expense under § 364(c)(1).

Paragraph 26 provided that the Interim DIP Order was entitled to  
the protections of § 364(e), and further stated:

Any stay, modification, reversal or vacatur of this  
Interim Order shall not affect the validity of any  
Postpetition Obligations outstanding immediately prior  
to the effective time of such stay, modification or  
vacatur . . . .

1 The Interim DIP Order set a final hearing on the DIP Motion for  
2 April 21, 2009, which was continued to April 29, 2009.

3 Interested parties had the opportunity to file objections  
4 prior to the final hearing. The Committee filed its objection on  
5 April 13, 2009 ("DIP Objection"). The Committee objected to,  
6 inter alia, payment of the Commitment Fee, contending that a \$2.4  
7 million fee bordered on "unconscionable." The Committee asserted  
8 that Debtors had yet to borrow a single dollar under the DIP  
9 Credit Agreement and really only \$5 million was available to  
10 borrow under a "\$20 million" facility. Therefore, Debtors had  
11 paid \$2.4 million to potentially borrow \$5 million. The  
12 Committee also asserted that the Commitment Fee was paid without  
13 any review or approval by the court as to its "reasonableness."  
14 Finally, the Committee contended that Debtors were able to  
15 operate on \$26.8 million of cash collateral, which is what  
16 Debtors used to pay the Commitment Fee.

17 The DIP Objection was never heard because on April 29, 2009,  
18 Debtors filed a Motion for Entry of Interim and Final Orders  
19 (A) Authorizing Use of Cash Collateral and Providing for Adequate  
20 Protection, (B) Modifying the Automatic Stay, and (C) Scheduling  
21 a Final Hearing (the "Cash Collateral Motion"), in which Debtors  
22 withdrew the DIP Motion. The bankruptcy court in the recitals of  
23 its order of May 11, 2009, set forth that the final hearing on  
24 the Interim DIP Order was set for April 21, 2009, and was  
25 continued to April 29, 2009, on the motion of the Committee; that  
26 Debtors filed the emergency Cash Collateral Motion on April 29,  
27 2009, and set the matter for hearing on April 29, 2009; that the  
28 Debtors withdrew their DIP Motion prior to the scheduled final



1 hearing, which motion had been the basis, in part, for the  
2 Interim DIP Order; and that the balance of the Interim DIP Order  
3 governing the use of cash collateral would remain in place after  
4 April 29, 2009, until a hearing could be held on May 13, 2009.<sup>4</sup>

5 In August 2009, the Debtors and the Committee stipulated to  
6 the Committee prosecuting various claims on behalf of Debtors'  
7 estates. On August 10, 2009, the bankruptcy court entered an  
8 order approving the stipulation ("August 2009 Stipulation"). The  
9 order provided that the Committee could pursue an action "to  
10 recover a \$2.4 million commitment fee paid by the Debtors."

11 As for Debtors' Cash Collateral Motion, on September 10,  
12 2009, the bankruptcy court entered a final order authorizing  
13 Debtors to use cash collateral until January 31, 2010  
14 ("September 10 Order"). Paragraph 18 of the September 10 Order  
15 provides:

16 [N]othing herein shall be deemed a waiver of the right  
17 of the Committee, whether acting on its own behalf or  
18 on behalf of the estates, to seek recovery of the  
19 \$2.4 million commitment fee paid to the Secured Parties  
20 (the "Commitment Fee Issue"); provided, further that .  
21 . . (ii) except to the extent set forth herein, nothing  
22 herein shall render any of the provisions of the  
23 Interim DIP Order final (and in particular any  
24 provisions of the Interim DIP Order relating to the  
25 Commitment Fee Issue), it being the intent of the  
26 parties that the Commitment Fee Issue be reserved for  
27 future proceedings . . . .

28 On November 2, 2009, the Committee filed a Motion for

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25 <sup>4</sup> In reaching our decision, the Panel has reviewed the  
26 bankruptcy court docket. See Clinton v. Deutsche Bank Nat'l  
27 Trust Co. (In re Clinton), 449 B.R. 79, 82-83 & n.5 (9th Cir. BAP  
28 2011) (citing O'Rourke v. Seaboard Surety Co. (In re E.R. Fegert,  
Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989) and indicating that  
an appellate court may take judicial notice of underlying  
bankruptcy court records).

1 Turnover of Property of the Estate ("Turnover Motion") in which  
2 the Committee sought turnover of the Commitment Fee Debtors paid  
3 Lenders under the Interim DIP Order.<sup>5</sup> In sum, the Committee  
4 argued that because final financing never materialized, Debtors  
5 received no discernable benefit in exchange for the \$2.4 million  
6 paid to Lenders. Hence, the Committee asserted, the Commitment  
7 Fee was not entitled to administrative expense priority under  
8 § 503(b)(1)(A) because Lenders could not establish that it was an  
9 actual and necessary expense of Debtors' estates. Specifically,  
10 the Committee contended that at no time during any of the interim  
11 DIP Motion hearings, or in the Interim DIP Order, did the court  
12 indicate an intention that the Commitment Fee was to be "earned  
13 on receipt" or was otherwise nonrefundable regardless of whether  
14 the DIP Credit Agreement materialized for the benefit of Debtors'  
15 estates. Further, because the Interim DIP Order was an interim,  
16 rather than a final, order, the bankruptcy court was free to  
17 reexamine and modify it. Alternatively, if the Interim DIP Order  
18 was a final order, the Committee believed it was subject to  
19 reexamination and modification under Civil Rule 60(b)(6),  
20 incorporated by Rule 9024.

21 Lenders opposed the Turnover Motion contending that no basis  
22 existed to require Lenders to turn over the Commitment Fee to  
23

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24 <sup>5</sup> Section 542(a) provides in relevant part:

25 Except as provided in subsection (c) or (d) of this section,  
26 an entity . . . in possession, custody, or control, during  
27 the case, of property that the trustee may use, sell, or  
28 may exempt under section 522 of this title, shall deliver to  
the trustee, and account for, such property or the value of  
such property . . . .

1 Debtors. Lenders argued that the Commitment Fee was thoroughly  
2 considered at each of the three hearings on the DIP Motion, and  
3 based on the evidentiary record presented, which the Committee  
4 never challenged, the court found that it supported payment of  
5 the Commitment Fee and entry of the Interim DIP Order. The  
6 Commitment Fee was an express precondition to the Lenders'  
7 agreement to extend financing, and payment of the earned  
8 Commitment Fee as an administrative expense was an explicit  
9 provision of the Interim DIP Order on which Lenders relied.  
10 Lenders also contended that the express language in ¶ 26 of the  
11 Interim DIP Order, in conjunction with the order's good-faith  
12 finding under § 364(e), precluded the Committee's requested  
13 relief. Finally, Lenders asserted that the Interim DIP Order was  
14 a final order, and the Committee was improperly invoking  
15 Rule 9024 as a substitute for an untimely appeal. Contrary to  
16 the Committee's contentions, Lenders represented that the  
17 Commitment Fee was charged against Debtors' account on April 1,  
18 2009, and that Debtors utilized the funds before they withdrew  
19 their DIP Motion.

20 The bankruptcy court held a hearing on the Turnover Motion  
21 on December 16, 2009. Before taking argument from the parties,  
22 the court announced that it had tentatively decided the Turnover  
23 Motion should be denied, but noted that, in all fairness, the  
24 Commitment Fee resulted in a windfall to Lenders. The court then  
25 went on to explain how the Committee could have misunderstood  
26 its ruling on the Commitment Fee at the March 31, 2009 hearing  
27 because of the way the record had been transcribed, and proceeded  
28 to clarify:

1 What I was trying to say and I certainly didn't  
2 articulate it particularly well is I thought there were  
3 two discreet things that I had to be making essentially  
4 a final ruling on at the time of that hearing. . . .  
5 The second part of it was a commitment fee because it  
6 had been made very clear to me in the colloquy that I  
7 had with the bank's counsel that the lenders were  
8 committing and they were committing at that time, . . .  
9 and if they didn't get their commitment fee for  
10 committing, there would be not only no interim  
11 financing.[sic] There would be no final financing and  
12 that was a non-negotiable position of the lenders and  
13 that was very clear.

14 So when I made that ruling I expected those two parts  
15 of the ruling to be final. It is possible for an order  
16 which is called an interim order to be a final order  
17 under the flexible finality standards of the [N]inth  
18 [C]ircuit. . . .

19 . . . I made a decision that was final on that  
20 [discrete] issue of the commitment fee. . . . I do  
21 think that the order that the Court made at that time -  
22 even in the interim order was the final order was  
23 [sic] not appealed.

24 Hr'g Tr. 6:3-7:10, Dec. 16, 2009 ("Dec. 16 Hr'g Tr."). After  
25 hearing argument from the parties, the court retreated from its  
26 tentative ruling in favor of Lenders and decided to take the  
27 matter under submission. Dec. 16 Hr'g Tr. 37:24-25.

28 On April 8, 2010, the bankruptcy court issued its decision  
denying the Turnover Motion ("Turnover Decision"). In re  
Fleetwood Enters., 427 B.R. 852 (Bankr. C.D. Cal. 2010). The  
bankruptcy court concluded that the Interim DIP Order was a final  
order that was not timely appealed, and the Committee provided no  
basis for relief from that order under either § 105(a)<sup>6</sup> or

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<sup>6</sup> Section 105(a) provides that the bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

1 Rule 9024, incorporating Civil Rule 60. Further, based upon the  
2 plain language of § 364(c)(1), which allowed the Commitment Fee  
3 superpriority status, the bankruptcy court concluded that it was  
4 not required to also find that the Commitment Fee was a necessary  
5 expense that benefitted the estate under § 503(b)(1)(A).  
6 Finally, the court determined that it was precluded from ordering  
7 turnover of the Commitment Fee because of the "safe harbor"  
8 provision of § 364(e) and the protective language provided in  
9 ¶ 26 of the Interim DIP Order. The court entered an order in  
10 accordance with its Turnover Decision on April 21, 2010  
11 ("Turnover Order"). The Committee timely appealed that order.

## 12 **II. JURISDICTION**

13 The bankruptcy court had jurisdiction under 28 U.S.C.  
14 §§ 157(b)(2)(D) and 1334. We have jurisdiction under 28 U.S.C.  
15 § 158.

## 16 **III. ISSUES**

17 Did the bankruptcy court err in denying the Committee's  
18 Turnover Motion.

## 19 **IV. STANDARD OF REVIEW**

20 The bankruptcy court's conclusions of law are reviewed de  
21 novo, and its findings of fact are reviewed for clear error.  
22 Nichols v. Birdsell, 491 F.3d 987, 989 (9th Cir. 2007). Whether  
23 property is included in a bankruptcy estate and the procedures  
24 for recovering estate property are questions of law that we  
25 review de novo. White v. Brown (In re White), 389 B.R. 693, 698  
26 (9th Cir. BAP 2008).

27 We review a bankruptcy court's interpretation of its own  
28 order for an abuse of discretion. Arenson v. Chicago Mercantile

1 Exch., 520 F.2d 722, 725 (7th Cir. 1975). "We owe substantial  
2 deference to the bankruptcy court's interpretation of its own  
3 orders and will not overturn that interpretation unless we are  
4 convinced that it amounts to an abuse of discretion.'" Marciano  
5 v. Fahs (In re Marciano), 459 B.R. 27, 35 (9th Cir. BAP 2011)  
6 (quoting Ill. Inv. Trust No. 92 7163 v. Allied Waste Indus., Inc.  
7 (In re Resource Tech. Corp.), 624 F.3d 376, 386 (7th Cir. 2010);  
8 see also Bass v. First Pac. Networks, Inc., 79 F.3d 1152 at \*1  
9 n.1 (9th Cir. 1996)(unpublished decision); Rogers v. Alaska  
10 Steamship Co., 290 F.2d 116, 123 (9th Cir. 1961).

11 In applying an abuse of discretion test, we first "determine  
12 de novo whether the [bankruptcy] court identified the correct  
13 legal rule to apply to the relief requested." United States v.  
14 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009)(en banc). If the  
15 bankruptcy court identified the correct legal rule, we then  
16 determine whether its "application of the correct legal standard  
17 [to the facts] was (1) illogical, (2)implausible, or (3) without  
18 support in inferences that may be drawn from the facts in the  
19 record." Id. (internal quotation marks omitted). If the  
20 bankruptcy court did not identify the correct legal rule, or its  
21 application of the correct legal standard to the facts was  
22 illogical, implausible, or without support in inferences that may  
23 be drawn from the facts in the record, then the bankruptcy court  
24 has abused its discretion. Id. The decision of the bankruptcy  
25 court will not be reversed for harmless error. Va Bene Trist,  
26 LLC v. Wash. Mut. Bank (In re Va Bene Trist, LLC), 2012 WL 37346  
27 \*1 (D. Ariz. Jan. 9, 2012).

28

1 **V. DISCUSSION**

2 The Committee, on behalf of Debtors' estates, filed its  
3 Turnover Motion to recover the Commitment Fee pursuant to § 542.  
4 Section 542 requires persons "in possession, custody, or control,  
5 during the case, of property that the trustee may use, sell, or  
6 lease, . . ." to "deliver to the trustee, and account for, such  
7 property or the value of such property."

8 To satisfy these three factors, the Committee must  
9 demonstrate that: (1) the Commitment Fee is or was in the  
10 Lenders' possession, custody, or control during the pendency of  
11 the case; (2) the Commitment Fee could be used by the Debtors;  
12 and (3) the Commitment Fee has more than inconsequential value or  
13 benefit to the estate. Bailey v. Suhar (In re Bailey), 380 B.R.  
14 486, 490 (6th Cir. BAP 2008). The Committee failed to satisfy  
15 the first factor for the following reason. "[I]f an entity has  
16 previously obtained a bankruptcy court order authorizing it to  
17 retain the property in question, [§] 542(a) will not require  
18 turnover of the property." 5 COLLIER ON BANKRUPTCY ¶ 542.02 (Alan  
19 N. Resnick & Henry J. Sommer, eds., 16th ed. 2011) (citing  
20 124 Cong. Rec. H11096-97 (daily ed. Sept. 28, 1978); S17413  
21 (daily ed. Oct. 6, 1978) (remarks of Rep. Edwards and  
22 Sen. DeConcini)).<sup>7</sup> Although the other two factors:  
23 (1) beneficial use; and (2) consequential value, are apparent,  
24

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25 <sup>7</sup> COLLIER cites to the Daily Edition (temporary) and not to  
26 the bound edition of the Congressional Record (permanent). The  
27 permanent citation is 124 Cong. Rec. 32399-32400 and 33999 (1978)  
28 (remarks of Rep. Edwards and Sen. DeConcini) ("This section is  
not intended to require an entity to deliver property to the  
trustee if such entity has obtained an order of the court  
authorizing the entity to retain possession, custody, or control  
of the property.").

1 the statute requires conjunctive proof of all three factors. As  
2 to the first factor, Lenders received the Commitment Fee pursuant  
3 to the Interim DIP Order issued after evidentiary hearings.  
4 Pursuant to the Interim DIP Order, Lenders earned the Commitment  
5 Fee and disbursed money on the Closing Date to Debtors. See  
6 In re Four Seasons Nursing Ctrs. of Am., Inc., 483 F.2d 599, 603  
7 (10th Cir. 1973).

8 In a cursory analysis of the § 542(a) factors, one might  
9 believe that all factors were satisfied. The Commitment Fee was  
10 paid to the Lenders; so, it is in the possession of the Lenders,  
11 could have been used by Debtors and has consequential value to  
12 the estate. If such analysis is applied, one might be distracted  
13 with whether the Interim DIP Order is the order on appeal and  
14 whether it was the final order from which a timely appeal was not  
15 filed, thereby warranting a dismissal of this appeal on  
16 jurisdictional grounds.

17 A more thorough analysis is, however, required. As  
18 explained above, entities that receive property from a debtor  
19 pursuant to a court authorized transfer will not be required to  
20 turn over the property for the benefit of the bankruptcy estate,  
21 unless such prior authorization is determined to be inappropriate  
22 for some legal or factual reason. In this instance, the  
23 Committee, in order to prevail on its motion, needed the  
24 bankruptcy court to reexamine the Interim DIP Order authorizing  
25 the payment of the Commitment Fee to determine if it was  
26 inappropriately approved. The bankruptcy court, in considering  
27 the Turnover Motion, needed necessarily to review its Interim DIP  
28 Order and determine if it required modification to provide the



1 basis for the turnover of the Commitment Fee. In considering the  
2 bankruptcy court's review of its orders, we will follow the  
3 established standard of review. "We owe substantial deference to  
4 the bankruptcy court's interpretation of its own orders and will  
5 not overturn that interpretation unless we are convinced that it  
6 amounts to an abuse of discretion." Marciano v. Fahs (In re  
7 Marciano), 459 B.R. at 35 (quoting Ill. Inv. Trust No. 92 7163 v.  
8 Allied Waste Indus., Inc. (In re Resource Tech. Corp.), 624 F.3d  
9 at 386); see also Bass v. First Pac. Networks, Inc., 79 F.3d 1152  
10 at \*1 n.1; Rogers v. Alaska Steamship Co., 290 F.2d at 123.

11 What bases exist to determine that the Interim DIP Order  
12 inappropriately authorized Lenders to receive payment of the  
13 Commitment Fee and that they should be required to turn over the  
14 Commitment Fee in accordance with the first factor of § 542(a)?  
15 The Committee argues on appeal that (1) the Interim DIP Order is  
16 not a final order; (2) Lenders have failed to establish  
17 administrative expense priority for the Commitment Fee; and  
18 (3) the Commitment Fee is not protected by § 364(e).

19 **A. Whether The Interim DIP Order Is A Final Or An Interlocutory**  
20 **Order Is Not Determinative.**

21 In considering the Turnover Motion, the bankruptcy court  
22 reviewed its prior Interim DIP Order issued based upon its  
23 analysis of the evidence and pursuant to the requirements of  
24 § 364. The bankruptcy court concluded, given the balance of  
25 equities, that modification or reconsideration of the Interim DIP  
26 Order was not warranted for the purposes of granting a turnover  
27 of the Commitment Fee. "As we owe substantial deference to the  
28 bankruptcy court's interpretation of its own orders, we will not

1 overturn that interpretation unless we are convinced that it  
2 amounts to an abuse of discretion." In re Marciano, 459 B.R. at  
3 35. The record on appeal establishes that the bankruptcy court  
4 carefully reviewed the requirements of § 364 and the evidence  
5 used to support its Interim DIP Order and concluded that Debtors  
6 needed the interim credit facility or risked going out of  
7 business; concluded that the DIP Credit Agreement provided the  
8 most viable lending package in comparison to other alternative  
9 credit facilities, if any; and concluded that Lenders had the  
10 financial means to perform under the DIP Credit Agreement  
11 authorized by the Interim DIP Order and did perform on the  
12 Closing Date after being paid the Commitment Fee upon the signing  
13 of the DIP Credit Agreement. None of this evidence is in  
14 dispute.

15 The bankruptcy court considered paragraph 26 of the Interim  
16 DIP Order, and alternatively reasoned, even if it narrowly  
17 construed § 364(e) as protecting postpetition lenders from  
18 reversal or modification of a bankruptcy court's financing orders  
19 on appeal and not from a bankruptcy court's subsequent reversal  
20 or modification of its own orders, it was precluded from  
21 disturbing the Interim DIP Order because the language in ¶ 26  
22 provided essentially the same protections to Lenders as did  
23 § 364(e). In re Fleetwood Servs., 427 B.R. at 861. Although  
24 under § 105 or under Civil Rule 60(b) a court may modify an order  
25 to clarify its meaning, that authority is limited by the  
26 interests of justice, and whether parties may be restored to  
27 their prior positions. See Zurich Am. Ins. Co. v. Int'l  
28 Fibercom, Inc. (In re Fibercom, Inc.), 503 F.3d 933, 940

1 (9th Cir. 2007) (citing Meyer v. Lenox (In re Lenox), 902 F.2d  
2 737, 740 (9th Cir. 1990). This power is further limited because  
3 a court may not remove a material part of an agreement over the  
4 objection of one of the parties and order the balance of the  
5 agreement enforced. A & A Sign Co. v. Maughan, 419 F.2d 1152,  
6 1155 (9th Cir. 1969). The bankruptcy court made findings that  
7 Lenders' good faith was not in question, both in the Interim DIP  
8 Order and the Turnover Decision. In re Fleetwood Servs.,  
9 427 B.R. at 860. In order to grant the Turnover Motion the  
10 bankruptcy court would have had to modify the Interim DIP Order,  
11 which in turn would have altered the DIP Credit Agreement,  
12 thereby modifying a material part of the agreement between  
13 Debtors and Lenders after performance of the terms of the DIP  
14 Credit Agreement had been completed in accordance to the Interim  
15 DIP Order. Consequently, based on the other facts established  
16 during the interim hearings, no other bases existed upon which  
17 the bankruptcy court could modify the Interim DIP Order. We  
18 conclude the bankruptcy court applied the correct legal standard  
19 and its fact finding is not illogical, implausible or without  
20 support in inferences that may be drawn from the facts in the  
21 record. The bankruptcy court's analysis of the law and its  
22 proper application of the law to the facts does not warrant the  
23 modification of the Interim DIP Order urged by the Committee,  
24 pursuant to the power authorized under § 105(a). The Committee  
25 fails to satisfy the first factor of § 542(a).

26 ///

27 ///

28 ///

1 **B. The Bankruptcy Court Did Not Err When It Determined That It**  
2 **Was Not Required To Find That The Commitment Fee Was A**  
3 **Necessary Expense That Benefitted The Estates Under**  
4 **§ 503(b)(1)(A).**

5 The Interim DIP Order provided that fees incurred in  
6 connection with the DIP financing, including the Commitment Fee,  
7 would be paid on a superpriority basis under § 364(c)(1).  
8 Specifically, ¶ 9(c), entitled "Superpriority Claims," provides  
9 in relevant part:

10 All Postpetition Obligations [including the Commitment  
11 Fee], subject only to the Carve-Out, hereby constitute  
12 under Section 364(c)(1) allowed superpriority  
13 administrative expense claims . . . .

14 If a debtor is unable to obtain an unsecured loan by  
15 providing an administrative expense priority under § 364(b),<sup>8</sup>  
16 under § 364(c) the court may authorize the DIP to obtain credit  
17 or incur postpetition debt entitled to a "superpriority" claim  
18 over all administrative expense claims specified in § 503(b)  
19 (administrative expenses) or § 507(b) (other superpriority  
20 administrative claims for failed adequate protection). See  
21 § 364(c)(1).<sup>9</sup> The term "superpriority" is not found in the

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22 <sup>8</sup> Section 364(b) provides:

23 The court, after notice and a hearing, may authorize the  
24 trustee to obtain unsecured credit or to incur unsecured  
25 debt other than under subsection (a) of this section,  
26 allowable under section 503(b)(1) of this title as an  
27 administrative expense.

28 <sup>9</sup> Section 364(c)(1) provides:

If the trustee is unable to obtain unsecured credit  
allowable under section 503(b)(1) . . . as an administrative  
expense, the court, after notice and a hearing, may  
authorize the obtaining of credit or the incurring of debt  
with priority over any or all administrative expenses of the  
kind specified in section 503(b) or 507(b). . . .

1 Bankruptcy Code; however, it is frequently used to identify the  
2 priority conferred by § 364(c)(1) over administrative expense  
3 claims. In re Mayco Plastics, Inc., 379 B.R. 691, 701-02 (Bankr.  
4 E.D. Mich. 2008).

5 In its Turnover Motion, the Committee contended that,  
6 although the Interim DIP Order authorized Debtors to pay the  
7 Commitment Fee as an administrative expense, Lenders had not  
8 established an administrative expense priority for the Commitment  
9 Fee under § 503(b)(1)(A). Specifically, the Committee contended  
10 that Lenders could not establish an administrative expense claim  
11 for the Commitment Fee because the proposed DIP financing was  
12 never necessary, it never materialized, and Lenders never  
13 advanced a single dollar to Debtors under the DIP Credit  
14 Agreement. In short, it argues that Lenders had not shown that  
15 payment of the Commitment Fee directly and substantially  
16 benefitted the estates. Notably, the Committee never raised this  
17 issue at any of the interim DIP Motion hearings.

18 Section 503(b)(1)(A) allows postpetition administrative  
19 expenses for "the actual, necessary costs and expenses of  
20 preserving the estate." Einstein/Noah Bagel Corp. v. Smith  
21 (In re BCE West, L.P.), 319 F.3d 1166, 1172 (9th Cir. 2003). The  
22 burden of proving an administrative expense claim under  
23 § 503(b)(1)(A) is on the claimant. Id. To establish such a  
24 claim, the claimant must show that the debt: (1) arose from a  
25 transaction with the DIP; and (2) directly and substantially  
26 benefitted the estate. Id. The terms "actual" and "necessary"  
27 are construed narrowly in order to keep fees and administrative  
28 costs at a minimum. Burlington N.R.R. Co. v. Dant & Russell,

1 Inc. (In re Dant & Russell, Inc.), 853 F.2d 700, 706 (9th Cir.  
2 1988).

3 Lenders argue that the Commitment Fee directly and  
4 substantially benefitted Debtors' estates by providing access to  
5 the DIP loan to borrow funds during the interim period. Plus,  
6 the commitment of Lenders to provide DIP financing in and of  
7 itself conferred a direct and substantial benefit on Debtors'  
8 estates during the interim period irrespective of whether Debtors  
9 ultimately decided to proceed with the financing. As reflected  
10 in the testimony of Debtors' CFO submitted in support of the DIP  
11 Motion, the availability of interim DIP financing (1) would  
12 provide Debtors with immediate and ongoing access to borrowing  
13 availability to pay their current and ongoing operating expenses,  
14 including postpetition wages, utilities, and vendor costs,  
15 (2) would necessarily provide confidence to Debtors' creditors in  
16 order to encourage continued relationships, and (3) would be  
17 viewed favorably by Debtors' vendors, employees and customers,  
18 and assure these parties of Debtors' ability to meet their near-  
19 term obligations, thereby promoting a successful reorganization.  
20 Debtors' CFO further testified that without the interim DIP  
21 financing, Debtors would be unable to meet their obligations,  
22 which would have a long-term negative impact on the value of  
23 Debtors' businesses, and would result in accelerated cash demands  
24 on the Debtors. The Committee offered no evidence or arguments  
25 challenging this testimony. Additionally, Lenders argued, at the  
26 interim hearings on the DIP Motion, that Debtors established the  
27 critical need for the DIP financing for the businesses and that  
28 they would cease operations by the following Monday if the court

1 did not authorize it. Lenders made clear on the record that the  
2 Commitment Fee was an express precondition to extend the DIP  
3 financing, and payment of the Commitment Fee as an administrative  
4 expense was an explicit provision of the Interim DIP Order.

5 In its Turnover Decision, the bankruptcy court noted that  
6 the Committee failed to raise the issue of whether Lenders could  
7 establish an administrative expense claim for the Commitment Fee  
8 during the interim DIP Motion hearings. It further noted that  
9 the Interim DIP Order made no reference to § 503(b)(1)(A).

10 After comparing §§ 364(b) and 364(c), the court observed  
11 that a debtor's authority to obtain unsecured credit under  
12 § 364(c)(1) is expressly premised on its inability to obtain  
13 credit under § 503(b)(1), i.e., as an allowable administrative  
14 expense under § 364(b). "There is no other legislative  
15 requirement under the statute." In re Fleetwood Servs., 427 B.R.  
16 at 858. The court further observed that the plain language of  
17 the statute "does not say that to establish priority 'over any or  
18 all administrative expenses' under § 364(c)(1), lenders must also  
19 independently prove their claim qualifies as an allowable  
20 administrative expense under § 503(b)(1)(A)." Id. While  
21 recognizing that § 364(b) requires a finding that the debt was an  
22 actual, necessary cost and expense of preserving the estate,  
23 § 364(c)(1), which grants priority over § 364(b) claims, does not  
24 contain such a requirement. Id. at 859. To require such a  
25 finding would render § 364(b) "superfluous and put additional  
26 burdens on lenders who do not agree to administrative expense  
27 priority but instead require priority over those very types of  
28 claims." Id. at 858-59. Accordingly, the bankruptcy court

1 concluded that it was not required to find that the Commitment  
2 Fee was a necessary expense which actually benefitted Debtors'  
3 estates under § 503(b)(1)(A). In re Fleetwood Servs., 427 B.R.  
4 at 859 (citing In re Mayco Plastics, 379 B.R. at 701-02  
5 (statutory requirement that a § 364(c)(1) claim must be paid  
6 before all administrative expenses precludes such claims from  
7 also, simultaneously, being a type of administrative expense  
8 allowable under § 503(b)(1))).

9 On appeal, rather than setting forth any argument as to how  
10 the bankruptcy court erred in its interpretation of § 364(c)(1),  
11 the Committee continues to argue that Lenders failed to meet  
12 their burden of proof that the Commitment Fee was an actual and  
13 necessary expense which benefitted the estates. This misstated  
14 argument is without merit.

15 We agree with the bankruptcy court's well-reasoned  
16 interpretation of § 364(c)(1). Lenders were not required to  
17 show, nor was the bankruptcy court required to find under  
18 § 503(b)(1)(A), that the Commitment Fee was an actual, necessary  
19 expense, which directly and substantially benefitted the estate.  
20 "In any extension of debt financing under § 364, traditional  
21 issues such as borrowing conditions, interest rates, loan fees,  
22 covenants and remedies upon default will have to be negotiated.  
23 Often the debtor in possession will be able to obtain only  
24 onerous terms, which the bankruptcy court must balance against  
25 the debtor in possession's apparent lack of alternatives."  
26 3 COLLIER ON BANKRUPTCY ¶ 364.04[2][d] (Alan N. Resnick & Henry J.  
27 Sommer, eds., 16th ed. 2011) (citation omitted). "Whether or not  
28 borrowing under § 364(c) is an ordinary course transaction, both



1 the loan and its terms must be approved by the court, after  
2 notice and a hearing." Id. at ¶ 364.04[3]. "A claim that has  
3 been granted such a priority is not, however, properly treated as  
4 an administrative expense, because it has priority over  
5 administrative expenses and is permitted only if the debtor 'is  
6 unable to obtain unsecured credit allowable . . . as an  
7 administrative expense,' even though the plan of reorganization  
8 must provide for payment of the claim as a condition of  
9 confirmation." Id. at 364.04[2][a] (citations omitted).

10 The bankruptcy court properly applied § 364(c)(1) and  
11 concluded it did not need to find that the Commitment Fee was an  
12 actual, necessary expense, which directly and substantially  
13 benefitted Debtors' estates under § 503(b)(1)(A). The Committee  
14 fails again to satisfy the first factor of § 542(a).

15 **C. The Bankruptcy Court Erred In Its Interpretation Of**  
16 **§ 364(e), But Such Error Was Harmless.**

17 Section 364 generally defines the circumstances under which  
18 a debtor may incur postpetition financing and provides certain  
19 protections for postpetition lenders who are willing to  
20 facilitate such potentially risky financing. One protection is  
21 codified in § 364(e), also known as the "safe harbor" provision.  
22 It provides:

23 The reversal or modification on appeal of an authorization  
24 under this section to obtain credit and incur debt, or of a  
25 grant under this section of a priority or a lien, does not  
26 affect the validity of any debt so incurred, or any priority  
27 or lien so granted, to an entity that extended such credit  
in good faith, whether or not such entity knew of the  
pendency of the appeal, unless such authorization and the  
incurring of such debt, or the granting of such priority of  
lien, were stayed pending appeal. (emphasis added).

1 Thus, under the express terms of § 364(e), absent a stay pending  
2 appeal, an appellate court may not reverse an authorization to  
3 obtain credit or incur debts unless the lender did not act in  
4 good faith. Burchinal v. Cent. Wash. Bank (In re Adams Apple,  
5 Inc.), 829 F.2d 1484, 1487-88. See also Weinstein, Eisen &  
6 Weiss, LLP v. Gill (In re Cooper Commons, LLC), 430 F.3d 1215,  
7 1219 (9th Cir. 2005) (holding that the court could not invalidate  
8 postpetition financing agreement because to do so would clearly  
9 "affect the validity of any debt incurred" which is prohibited by  
10 § 364(e)).

11 As a threshold matter, we conclude, given the issue on  
12 appeal in this case, i.e., the denial of the Turnover Motion,  
13 that § 364(e) does not apply. The decision we render in this  
14 appeal, however, advances the public policy underpinnings of  
15 § 364(e). Once again, we are reviewing the extent of the power  
16 the bankruptcy court had to modify or review the Commitment Fee  
17 provisions in the Interim DIP Order. The bankruptcy court  
18 suggests in the context of the Turnover Motion that § 364(e) is  
19 implicated anytime an order by a bankruptcy court is challenged  
20 after a lender relies upon such order's protection and that if  
21 the order incorporates a contractual provision similar to the  
22 statutory provision contained in § 364(e), it effectively  
23 protects the Lender advancing pre-appeal credit pursuant to such  
24 order. The bankruptcy court concluded that if a court is  
25 requested to review a previously issued order under § 105 or  
26 Civil Rule 60(b), then modification of such order would "pose the  
27 same risks as does reversal on appeal." In re Fleetwood Servs.,  
28 427 B.R. at 860 (citing Kham & Nate's Shoes No. 2, Inc. v. First

1 Bank of Whiting (In re Kham & Nate's Shoes No. 2, Inc.), 908 F.2d  
2 1351, 1355 (7th Cir. 1990)). In closer review, we discern that  
3 the Seventh Circuit panel further qualified the above statement  
4 by concluding that "§ 364(e) does not apply by its own  
5 terms . . . [even though] its principle applies. . . ."  
6 In re Kham & Nate's Shoes No. 2, 908 F.2d at 1355. The Ninth  
7 Circuit in In re Adams Apple, 829 F.2d at 1487-88, agreed with  
8 the Seventh Circuit by generally stating that an "appellate court  
9 may not reverse the authorization to obtain credit or incur debts  
10 under [§] 364 if the authorization was not stayed pending appeal  
11 unless the lender did not act in good faith." The plain meaning  
12 of the statute limits any reversal or modification under § 364(e)  
13 to the appellate courts. See Lamie v. United States Tr.,  
14 540 U.S. 526, 534 (2004). In interpreting the Bankruptcy Code,  
15 the U.S. Supreme Court has held "as long as the statutory scheme  
16 is coherent and consistent, there generally is no need for a  
17 court to inquire beyond the plain language of the statute."  
18 BFP v. Resolution Trust Corp., 511 U.S. 531, 566 (1994).  
19 Consequently, § 364(e) is not available to the bankruptcy court  
20 for the purposes of "reversal or modification" of one of its own  
21 orders. The utilization of § 364(e) by the bankruptcy court to  
22 conclude that it would not modify its Interim DIP Order when  
23 considering the Turnover Motion, however, is harmless error. The  
24 decision of the bankruptcy court will not be reversed for  
25 harmless error. In re Va Bene Trist, LLC, 2012 WL 37346 at \*1.  
26 Neither party is harmed by the bankruptcy court using § 364(e) in  
27 its analysis because the Committee is arguing that it should not  
28 be applied, and the Lenders prevail on appeal without the

1 application of the statutory provision.

2 **VI. CONCLUSION**

3 For the foregoing reasons, the bankruptcy court did not err  
4 in denying the Turnover Motion. Therefore, we AFFIRM.

5  
6  
7 PAPPAS, Bankruptcy Judge, Concurring.

8  
9 I agree we should affirm the order of the bankruptcy court  
10 refusing to require a return of the loan commitment fee paid by  
11 Debtors to BofA. I write separately to emphasize that, while I  
12 might have reached a different result, the bankruptcy court did  
13 not abuse its discretion in making its decision.

14 In the early days of a complicated chapter 11 case, after  
15 three days of hearings, at Debtors' urging, but over the genuine  
16 objections of the Committee, the bankruptcy court approved the  
17 Debtors' interim financing arrangement with BofA. Though the  
18 Committee railed against it for what might be good reasons,  
19 Debtors insisted that the BofA deal was the only credit available  
20 to fund their reorganization efforts. After considerable  
21 questioning and deliberation, the bankruptcy court eventually  
22 relented and granted Debtors' request. Of course, BofA's  
23 commitment to "help" Debtors did not come cheap; while the  
24 interest rate on the BofA financing package was supposedly a  
25 reduced one, the up-front fee payable to BofA for its commitment  
26 to provide modest additional credit to Debtors was a whopping  
27 \$2.4 million. As things turned out, Debtors never drew upon the  
28 BofA credit line (other than to pay BofA), and as the Committee

1 predicted, BofA received a fee that was likely out of proportion  
2 to any risk it incurred.

3 This appeal results from the Committee's disappointment that  
4 the bankruptcy court refused to reconsider its approval, and  
5 direct the return of the BofA fee. The Committee's frustration  
6 with this outcome is understandable. In blessing the deal, the  
7 bankruptcy court's comments at the hearings were, at times,  
8 equivocal concerning whether the parties and court could, down  
9 the road, take a second look at the propriety of the BofA  
10 commitment fee. Early in the hearings, the court indicated that,  
11 if after approving the financing package it later appeared that  
12 BofA had not "earned" the fee, "maybe we can get it back." Then,  
13 at the eleventh hour of the proceedings, when BofA's attorney  
14 reminded the bankruptcy court about the terms of the financing  
15 agreement (i.e., "no fee, no credit"), the court approved the  
16 generous fee, indicating that the court's approval of the fee  
17 would be "irreversible."

18 Whether to approve the Debtors' motion and the BofA loan,  
19 with the attendant commitment fee, was a hard choice for the  
20 court, and under the Code, clearly a matter requiring the  
21 exercise of discretion by the bankruptcy judge. While the  
22 Committee argues BofA received a windfall, which in retrospect  
23 appears fairly obvious, at the time it made the decision, the  
24 bankruptcy court had been given evidence and heard testimony to  
25 show that the BofA credit facility was not just necessary, but  
26 essential, and that given Debtors' dire circumstances, it was the  
27 only deal in town. Faced with management's claims that, if the  
28 BofA arrangement were not approved, the company might close down,

1 the bankruptcy court certainly had an adequate factual basis to  
2 approve the financing terms under § 364(c) of the Bankruptcy  
3 Code.

4       Though the commitment fee was approved, the Committee argues  
5 that the bankruptcy judge could have changed her mind because the  
6 approval of the BofA fee was not "final," but instead was only  
7 "interim," subject to ready reconsideration depending upon  
8 subsequent events. The bankruptcy court rejected this argument,  
9 holding that the provisions of the order approving the BofA  
10 commitment fee were indeed final, even if other aspects of the  
11 order were not. As we must, I defer to the bankruptcy court's  
12 plausible interpretation of the terms of its own order.

13       The bankruptcy court also did not abuse its discretion in  
14 declining the Committee's invitation to modify its approval of  
15 the BofA fee by using its § 105(a) powers, or under  
16 Rule 9024/Civil Rule 60(b). However, in its thoughtful,  
17 comprehensive decision, the bankruptcy court explained its view  
18 that modifying an important term of a negotiated credit  
19 agreement, even when viewed in the rear-view mirror the deal  
20 appears improvident, would be unfair to the parties and have  
21 serious implications for the integrity of the reorganization  
22 process. This conclusion is also defensible. While it is also a  
23 serious concern that a post-petition lender may have unduly  
24 profited at the unsecured creditors' expense, I reject the  
25 Committee's suggestion that this Panel should reverse the  
26 bankruptcy court simply because we may disagree with the outcome  
27 here. Until such time as bankruptcy judges are issued a crystal  
28 ball to assist in making difficult decisions, this Panel should

1 defer to a bankruptcy court's discretionary decision when based  
2 upon the best proof available at the time.<sup>10</sup>

3 In sum, though Debtors were eventually able to finance their  
4 post-bankruptcy operations with cash collateral, and did not need  
5 the credit extended by BofA, because bankruptcy judges are not  
6 clairvoyant, the Panel must measure a bankruptcy court's exercise  
7 of its discretion based upon the record at the time of that  
8 decision, not based on facts that only later come to light.  
9 Moreover, sometimes a deal is a deal; despite subsequent events,  
10 the bankruptcy court must have the discretion to decline to  
11 modify its prior order if to do so could be unfair to the parties  
12 or detrimental to the bankruptcy process. While I regret the  
13 impact on the unsecured creditors in this case, and though I may  
14 have come to a different result, on this record, the bankruptcy  
15 court's decision not to modify the BofA commitment fee was  
16 justified and should be affirmed.

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25 <sup>10</sup> I agree with the majority that § 364(e), which applies  
26 only to reversals or modifications of credit orders "on appeal,"  
27 provided no protection to BofA in this context. I also endorse  
28 the notion that, under these facts, BofA was not required to  
satisfy the § 503(b)(1) elements to retain the commitment fee.  
In other words, the bankruptcy court committed no reversible  
legal error in this case.