

JAN 05 2015

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:	)	BAP Nos.	AZ-13-1471-KiDJu
	)		AZ-13-1555-KiDJu
SONORA DESERT DAIRY, L.L.C.,	)		(Consolidated Appeals)
et al.,)		
	)	Bk. Nos.	12-00262
Debtors.	)		12-00263
	)		12-00264
	)		12-00265
WELLS FARGO BANK, N.A.,	)		12;00266
	)		(Jointly Administered)
Appellant,)		

v.	)	MEMORANDUM¹
)	
SONORA DESERT DAIRY, L.L.C.;)	
SONORA DESERT DAIRY II,)	
L.L.C.; SONORA DESERT DAIRY)	
III, L.L.C.; LUECK CATTLE)	
COMPANY, L.L.C.; BOB LUECK)	
FARMS, L.L.C.; AGSTAR)	
FINANCIAL SERVICES, FLCA;)	
OFFICIAL JOINT COMMITTEE OF)	
UNSECURED CREDITORS,)	
)	
Appellees.)	

Argued and Submitted on November 20, 2014,
at Phoenix, Arizona

Filed - January 5, 2015

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

Honorable Randolph J. Haines, Bankruptcy Judge, Presiding

Appearances: Robert J. Miller, Esq., of Bryan Cave LLP for
appellant; Michael S. Dove, Esq., of Gislason &
Hunter LLP for appellee AgStar Financial Services,
FCLA.

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.

1 Before: KIRSCHER, DUNN and JURY, Bankruptcy Judges.

2
3 Creditor Wells Fargo Bank, N.A. ("Wells Fargo") appeals:
4 (1) an order authorizing a postpetition financing loan from
5 creditor AgStar Financial Services, FLCA, as loan servicer and
6 attorney-in-fact for First National Bank of Altus ("AgStar"); and
7 (2) a supplemental order authorizing the debtors to receive
8 additional postpetition advances from AgStar. We VACATE and
9 REMAND the first order; we AFFIRM the second order.

10 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

11 A. The parties

12 The debtors ("Debtors") consist of five entities² owned and
13 operated by Robert Lueck ("Lueck"), a dairy farmer with 37 years
14 of experience in the dairy business. Debtors filed their
15 chapter 11³ bankruptcy cases on January 6, 2012, in response to
16 Wells Fargo's assertion that it was going to seek the appointment
17 of a receiver.

18 On the petition date, Debtors' assets consisted primarily of:
19 (1) a 518 acre property on which Debtors conducted their dairy
20 operations (the "Dairy Property"); (2) a 1,373 acre farm known as
21 the Arlington Farm; and (3) a dairy herd of approximately 8,000

22
23 ² The five debtors are: Sonora Desert Dairy, L.L.C.; Sonora
24 Desert Dairy II, L.L.C.; Sonora Desert Dairy III, L.L.C.; Lueck
25 Cattle Company, L.L.C.; and Bob Lueck Farms, L.L.C. The
26 bankruptcy court ordered on January 12, 2012, that Debtors' cases
be jointly administered. Debtors' cases were substantively
consolidated on May 7, 2012. Debtors' chapter 11 cases were
converted to chapter 7 on December 4, 2013.

27 ³ Unless specified otherwise, all chapter, code and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 animals, related feed inventory and milk production. In September
2 2010, an appraisal by AgStar valued the Arlington Farm at \$13.7
3 million and the Dairy Property at \$23 million (the "Debtors'
4 Appraisal") for a total of \$36.7 million.

5 AgStar and Wells Fargo comprise Debtors' two largest secured
6 creditors. Debtors owed AgStar, their real estate lender,
7 approximately \$14.7 million as of the petition date (the "AgStar
8 Prepetition Loan"). Debtors secured this loan by first liens on
9 the Dairy Property and the Arlington Farm. Debtors owed Wells
10 Fargo approximately \$11.5 million on an operational revolving line
11 of credit (the "Wells Fargo Prepetition Loan"). Debtors secured
12 the Wells Fargo Prepetition Loan by Debtors' personal property,
13 including the dairy herd, feed inventory and milk proceeds.

14 The United States Trustee appointed a creditors' committee
15 ("Committee") consisting primarily of Debtors' feed suppliers, who
16 asserted approximately \$3.3 million in unsecured nonpriority
17 claims.

18 Early in the cases, Debtors contended that the value of their
19 assets exceeded \$50 million and that all their prepetition secured
20 and unsecured obligations totaled less than \$27 million. Debtors
21 expected to pay all creditors in full; Lueck expected to retain at
22 least \$20 million in equity.

23 **B. The cash collateral orders**

24 In their first-day cash collateral motion, Debtors contended
25 that as of the petition date the Dairy Property and Arlington Farm
26 had a value no less than \$36.7 million, based on Debtors'
27 Appraisal and Lueck's opinion. Wells Fargo did not dispute these
28 values. Debtors scheduled the Arlington Farm at a value of \$15

1 million, but Debtors expected to sell it for \$13-\$14 million.
2 Debtors further contended that the value of the dairy herd and
3 feed inventory exceeded Wells Fargo's debt by \$1 million. Lueck
4 testified days later in response to Wells Fargo's motion to
5 appoint an examiner⁴ that the value of the dairy herd and feed
6 inventory approximated \$14.5 million, which exceeded Wells Fargo's
7 debt. Debtors agreed to make monthly interest payments of \$30,000
8 to Wells Fargo at the default contract rate.

9 The bankruptcy court entered a stipulated order on Debtors'
10 first interim cash collateral motion on January 24, 2012. In
11 exchange for use of its cash collateral, Debtors provided Wells
12 Fargo a replacement lien for its prepetition collateral. A series
13 of interim cash collateral motions followed; Wells Fargo objected
14 to them. Given concerns with monthly losses in the value of
15 Debtors' dairy herd and feed inventory during the pendency of the
16 case, Wells Fargo contended that its collateral suffered
17 diminution in value since the petition date.⁵

18 The bankruptcy court issued at least sixteen interim cash
19 collateral orders. Beginning with the second interim order and in
20 subsequent interim orders, the bankruptcy court imposed a
21

22 ⁴ Eleven days into the bankruptcy cases, Wells Fargo filed a
23 motion to appoint an examiner, which eventually became an
24 alternative motion to appoint a trustee. Debtors and the
25 Committee opposed it. After a three-day evidentiary hearing on
26 March 22, 28 and 29, 2012, the bankruptcy court denied Wells
27 Fargo's motion on May 8, 2012.

28 ⁵ Wells Fargo also initially accused Lueck of conducting
"cull" sales of cattle and failing to tender all of the sale
proceeds to Wells Fargo, a claim that was later determined to be
unfounded. A "cull" sale is a routine sale of ill, aged or
nonproductive cows.

1 replacement lien for its prepetition collateral and junior liens
2 on Debtors' real property for the benefit of Wells Fargo, which
3 served as adequate protection for the Wells Fargo Prepetition
4 Loan. Despite any losses in the prepetition collateral, Debtors
5 asserted that the junior liens on Debtors' real property
6 adequately protected Wells Fargo. The orders entered after the
7 bankruptcy court approved the Wells Fargo DIP loan, discussed more
8 thoroughly below, also allowed for the priming of AgStar's senior
9 lien on Debtors' real property, giving Wells Fargo a \$500,000
10 superpriority lien.

11 **C. Debtors' proposed chapter 11 plans**

12 Meanwhile, Debtors filed their initial chapter 11 plan and
13 disclosure statement on March 21, 2012. Debtors' plan proposed to
14 implement the orderly sales of the Arlington Farm, the Dairy
15 Property and other assets Debtors used in their business
16 operations, including the dairy herd, feed inventory and various
17 equipment. Debtors opposed Wells Fargo's alleged desire to "fire
18 sale" the dairy herd, contending it would result in significantly
19 less funds for the estate. Debtors intended to continue operating
20 the dairy farm until a suitable buyer could be found and a sale of
21 the Dairy Property could be completed as a going concern. A
22 working dairy farm may be more valuable than a nonoperational or
23 "dark" one. Debtors asserted that the proceeds realized from the
24 sale of the Arlington Farm, the Dairy Property and other operating
25 assets would be sufficient to pay off the AgStar Prepetition Loan,
26 the Wells Fargo Prepetition Loan and other secured creditors; the
27 remaining proceeds would pay all of the allowed unsecured claims.
28 In March 2012, Debtors expected over a six-to-nine month period to

1 sell the Arlington Farm for between \$10-\$12 million (as opposed to
2 the original \$13-\$14 million figure) and to sell the Dairy
3 Property for between \$20-\$25 million.⁶

4 Ultimately, the Arlington Farm sold at auction for \$8.425
5 million on August 9, 2012. From these proceeds, AgStar received
6 \$7.8 million and credited it to its debt of approximately \$14.9
7 million; Wells Fargo received nothing. Wells Fargo now would have
8 to look to the Dairy Property for adequate protection should the
9 Wells Fargo Prepetition Loan not be satisfied by the prepetition
10 collateral plus the replacements liens.

11 Debtors filed their first amended chapter 11 plan and
12 disclosure statement on June 4, 2012. Debtors contended for the
13 first time that the Wells Fargo Prepetition Loan was undersecured
14 by between \$1.4 and \$5.95 million as of the petition date.⁷
15 Debtors' Broker estimated that if operations ceased and the Dairy
16 Property went "dark," its value would decline by at least 20% or a
17 minimum of \$5,000,000, based on a sale price between \$20-\$25
18 million. Thus, Debtors' projected losses of \$875,000 during the
19 summer months were far less than the \$5,000,000 reduction that
20 would be realized if the Dairy Property were sold "dark." Debtors

21
22 ⁶ Debtors' real estate broker Charles Havranek ("Broker")
23 confirmed these numbers at the March 29, 2012 evidentiary hearing
24 on Wells Fargo's motion to appoint an examiner or trustee. Larry
25 Clayton, the Wells Fargo employee in charge of the Wells Fargo
Prepetition Loan, testified that he agreed with the Broker's
figures, which totaled \$30 million for the two properties on the
low end.

26 ⁷ Debtors clarified in their ninth interim cash collateral
27 motion that Wells Fargo was undersecured by at least \$1,491,000 or
28 as much as \$5,684,367, based on Wells Fargo's own internal
inspection conducted on January 4, 2012, just two days prior to
the petition date.

1 ultimately withdrew their first amended plan.

2 **D. Wells Fargo's first motion for relief from stay**

3 Wells Fargo moved for relief from stay with respect to the
4 dairy herd on June 28, 2012. After several postpetition sales of
5 portions of the dairy herd, Debtors still owed Wells Fargo
6 approximately \$10.3 million. Wells Fargo argued that since the
7 petition date, the dairy herd and feed inventory had declined in
8 value by approximately \$2.0 million, from \$11.2 million to \$9.2
9 million and it expected more losses. Wells Fargo disputed the
10 Broker's opinion that the Dairy Property would be devalued by as
11 much as \$5 million if the dairy were shut down and the herd sold,
12 leaving the real property and improvements to be sold alone. The
13 Broker had admitted at deposition that he did no analysis to
14 support this opinion and had no meaningful experience in this
15 factual situation. Further, argued Wells Fargo, Debtors' position
16 that the Dairy Property and Arlington Farm had sufficient value to
17 cover all secured claims was disingenuous. Wells Fargo's recent
18 appraisal of the two properties valued them at only \$27.5 million.
19 Thus, if foreclosure of the properties occurred, Wells Fargo's
20 interest possibly would be wiped out. Wells Fargo disputed
21 Debtors' position that it was undersecured by as much as \$5.95
22 million on the petition date.

23 Debtors and the Committee opposed Wells Fargo's stay relief
24 motion, contending that Wells Fargo was adequately protected with
25 the replacement lien and junior liens on Debtors' real properties,
26 and that the loss of the dairy herd would unnecessarily result in
27 a reduction of the value of Debtors' assets.

28 The bankruptcy court denied Wells Fargo's request for stay

1 relief on November 9, 2012, on the basis that it was adequately
2 protected. At the hearing on November 5, 2012, the bankruptcy
3 court pointed to Wells Fargo's appraisal valuing the Dairy
4 Property at \$21 million, which was consistent with Debtors'
5 Appraisal. Based on the parties' estimates on the sale of the
6 dairy herd and feed inventory at between \$4.9 and \$7.3 million and
7 Wells Fargo's debt of \$10 million, the court calculated that a
8 sale of the collateral would leave Wells Fargo with a deficit of
9 between \$2.7 and \$5.1 million. Subtracting out AgStar's remaining
10 senior debt of \$8 million, a sale of the Dairy Property for \$21
11 million would leave approximately \$13 million in equity for Wells
12 Fargo and other creditors. So, worst case scenario, Wells Fargo
13 had an equity cushion of 39%.

14 However, to protect Wells Fargo's interest in its collateral,
15 the court ordered that: (1) Wells Fargo be given a valid and
16 perfected junior lien in the Dairy Property; (2) the Dairy
17 Property be sold by March 31, 2013, and if no sale was completed
18 by that date, then (i) Debtors had to begin selling the dairy herd
19 on April 1, 2013, to be completed by May 15, 2013, and pay all
20 proceeds to Wells Fargo, who had the right to object and credit
21 bid, and (ii) Wells Fargo would have stay relief as to the dairy
22 herd effective May 15, 2013.

23 **E. AgStar's first DIP motion; Wells Fargo's DIP loan and the**
24 **Final DIP order**

25 Meanwhile, on July 18, 2012, Debtors filed their motion for
26 an order: (1) authorizing postpetition financing from AgStar on a
27 secured basis; (2) compromising and restructuring AgStar's debt
28 under Rule 9019; and (3) granting AgStar relief from stay ("First

1 AgStar DIP Motion"). In short, Debtors sought a \$1 million
2 postpetition line of credit from AgStar, secured by a priming lien
3 on the Arlington Farm and Dairy Property. The terms of the
4 proposed DIP loan included an interest rate of 7% and a \$10,000
5 origination fee. Debtors argued that even with a \$1 million
6 priming lien to AgStar, both AgStar and Wells Fargo were
7 adequately protected by a substantial equity cushion, based on an
8 approximate value of the Arlington Farm and Dairy Property at
9 \$33.5 million.

10 Wells Fargo opposed the First AgStar DIP Motion. Although
11 concerned with the increasing decline in the value of the dairy
12 herd and feed inventory since the petition date, Wells Fargo
13 offered to provide Debtors with a \$ 1 million DIP loan, secured by
14 a superpriority priming lien on the Dairy Property. Wells Fargo
15 offered 6% interest and no origination fee. The initial July 30
16 hearing on the First AgStar DIP Motion was continued to August 16,
17 2012, then continued again to November 5 and November 8 for an
18 evidentiary hearing.

19 Prior to the August 16 hearing, Wells Fargo filed a
20 supplemental brief, which included the detailed terms for Wells
21 Fargo's proposed DIP loan. Wells Fargo explained that it had been
22 forced to negotiate its DIP loan with the Committee rather than
23 Debtors, because it was Debtors' and AgStar's position that Wells
24 Fargo was not entitled to have private negotiations with Debtors.
25 Wells Fargo believed the economic terms of its proposed DIP loan
26 were better than AgStar's.

27 Debtors filed a supplemental declaration from Lueck. Despite
28 Wells Fargo's offer, Lueck continued to believe that AgStar's

1 proposed financing was in the best interest of creditors. Wells
2 Fargo's conditional requirement to sell the dairy herd by
3 December 31, 2012, whether or not the Dairy Property had been
4 sold, concerned Lueck. Lueck believed a forced liquidation of the
5 herd would impair the value of the Dairy Property and would only
6 benefit Wells Fargo. Lueck further declared that he did not trust
7 Wells Fargo to actually provide the funds.

8 At the November 5 evidentiary hearing on the First AgStar DIP
9 Motion, the bankruptcy court expressed its concern that although
10 Wells Fargo had proposed a DIP loan, no motion had been filed.
11 Further, circumstances had changed – i.e., the Arlington Farm had
12 been sold – so AgStar's proposed DIP loan terms were outdated.
13 The court was also concerned with Debtors' failure to negotiate in
14 good faith with Wells Fargo. If competing DIP loans were put
15 before it, the court stated it would choose which one benefitted
16 Debtors; the constant fighting between the parties would no longer
17 be tolerated.

18 The court and parties further discussed the details of
19 AgStar's revised DIP loan terms and Wells Fargo's proposed DIP
20 loan terms at a continued hearing on November 8, 2012.
21 Ultimately, the bankruptcy court approved the DIP loan proposed by
22 Wells Fargo (the "DIP Loan") and denied approval of the First
23 AgStar DIP Motion. Although the court expressed its reluctance to
24 authorize the priming of AgStar's senior lien, it concluded the
25 "very sufficient adequate protection" supported priming. The
26 bankruptcy court overruled AgStar's due process and notice
27 objections regarding the priming of its lien.

28 The bankruptcy court entered an interim order approving

1 Debtors' continued use of cash collateral and approving the DIP
2 Loan for \$500,000 on November 9, 2012. Wells Fargo received, in
3 addition to the junior lien on the Dairy Property for its
4 prepetition debt, a priming lien senior to that of AgStar's lien
5 on the Dairy Property and of any administrative expenses – i.e., a
6 superpriority lien – in exchange for the DIP funds. Wells Fargo's
7 priming lien could not be made subordinate to, or made pari passu
8 with, any other lien under § 364(d). In addition, so long as the
9 DIP Loan remained outstanding, the interim order prohibited
10 Debtors: from granting any liens on all postpetition collateral
11 (the Dairy Property, insurance proceeds, cash proceeds, products,
12 rents, etc.) senior or equal to the DIP lien of Wells Fargo; and
13 from using any cash collateral of Wells Fargo or any proceeds from
14 the DIP Loan for purposes other than those set forth in the budget
15 agreed to by the parties. The bankruptcy court held a hearing for
16 a final DIP order on November 26, 2012, overruled AgStar's and
17 Debtors objections and entered a final order on November 29, 2012
18 ("Final DIP Order"). Debtors ultimately drew the entire \$500,000
19 in available funds from the DIP Loan.

20 **F. Debtors' multiple cattle sales**

21 Over the course of the next few months and pursuant to the
22 conditional stay relief granted to Wells Fargo with respect to the
23 dairy herd, Debtors filed multiple motions to sell portions of the
24 dairy herd under § 363(f). The sale motions were either granted
25 over Wells Fargo's objection or stipulated to by Wells Fargo.
26 Wells Fargo received all sale proceeds.

27 **G. AgStar's motion for relief from stay**

28 On May 9, 2013, AgStar moved for relief from stay under

1 § 362(d)(1) and (d)(2) to foreclose on the Dairy Property. By
2 that time, Debtors owed approximately \$7.4 million on the AgStar
3 Prepetition Loan, which was junior to Wells Fargo's DIP lien and
4 senior to Wells Fargo's junior lien on the Dairy Property. The
5 Dairy Property had initially been listed for \$27 million, then
6 reduced to \$20 million, then reduced again to \$16 million. The
7 total liens on the property approximated \$15.4 million. Because
8 the remaining dairy herd would soon be liquidated pursuant to the
9 stay relief granted to Wells Fargo, AgStar contended the Dairy
10 Property would decline another 10%-20% in value once it went dark.
11 Broker costs amounted to \$240,000 based on a sale price of \$16
12 million. Thus, argued AgStar, relief from stay was warranted as
13 little, if any, equity was available in the Dairy Property.

14 AgStar also revealed for the first time that it had conducted
15 an appraisal of the Dairy Property in June 2012; it was valued at
16 \$15.5 million. Debtors' water rights were valued at \$750,000.

17 **H. Wells Fargo's second motion for relief from stay**

18 Wells Fargo moved for relief from stay again on May 31, 2013.
19 By this time, Debtors had sold the entire dairy herd and paid all
20 proceeds to Wells Fargo. Wells Fargo contended that Debtors had
21 incurred losses of more than \$4.8 million in their dairy
22 operations since the petition date, severely diminishing the
23 bank's cash, herd, feed and other collateral. Wells Fargo
24 contended that based on Debtors' figures in their April operating
25 reports, the Wells Fargo Prepetition Loan exceeded the value of
26 Debtors' remaining personal property (equipment, etc.) by
27 \$210,000. Thus, argued Wells Fargo, it was entitled to stay
28 relief as to the personal property under § 362(d)(1) and (d)(2).

1 AgStar opposed Wells Fargo's second stay relief motion. In
2 short, AgStar argued that because the purpose of the DIP Loan was
3 to provide monies for Debtors' ongoing operations and the monies
4 at issue were generated from Debtors' dairy operations, then those
5 monies should be used to pay back the DIP Loan. AgStar argued
6 that Wells Fargo's attempt to apply all existing monies to its
7 prepetition debt severely prejudiced AgStar and provided a
8 windfall to Wells Fargo by allowing its \$500,000 priming lien to
9 remain intact.

10 **I. AgStar's second DIP motion and related DIP order - the basis**
11 **of Wells Fargo's first appeal**

12 As of May 30, 2013, Debtors owed Wells Fargo approximately
13 \$6 million, including the \$500,000 DIP Loan. On June 6, 2013,
14 Debtors tendered a payment of \$516,826.97 to Wells Fargo to
15 satisfy the DIP Loan and a payment of \$239,006.34 to be applied to
16 the Wells Fargo Prepetition Loan.

17 Just days later on June 12, 2013, Debtors filed a motion to:
18 (1) authorize a DIP loan from AgStar for \$315,000 for winding down
19 purposes (the "AgStar DIP Loan"); (2) grant AgStar and Wells Fargo
20 conditional relief from stay; (3) authorize the sale of the Dairy
21 Property under § 363(f); (4) approve the bidding procedures for
22 the Dairy Property; (5) set the date for the auction; and
23 (6) grant other related relief (the "Second AgStar DIP Motion").
24 As for the proposed AgStar DIP Loan, AgStar agreed to fund
25 Debtors' operation through November 8, 2013, pursuant to an agreed
26 wind down budget. In exchange, AgStar would be given a priming
27 lien on the Dairy Property (including all insurance proceeds, cash
28 proceeds, products, rents, etc.) senior to that of Wells Fargo's

1 DIP lien. To obtain the DIP financing from AgStar, Debtors were
2 required to first pay off Wells Fargo's DIP Loan and satisfy the
3 priming lien. AgStar's DIP lien could not be subordinate to, or
4 made pari passu with, any other lien under § 364(d). Debtors
5 argued that giving AgStar a priming lien over Wells Fargo was
6 warranted because both AgStar and Wells Fargo were adequately
7 protected based on the equity cushion in the Dairy Property.

8 As for the sale of the Dairy Property, Debtors sought
9 authorization to auction it on October 4, 2013. Should the Dairy
10 Property not sell at auction, AgStar and Wells Fargo would be
11 granted stay relief to foreclose on the property after December 2,
12 2013.

13 Wells Fargo opposed the Second AgStar DIP Motion.⁸ It argued
14 that under the Final DIP Order, which was never appealed, Debtors
15 were not allowed to use any of its cash collateral or proceeds
16 from the DIP Loan for any other purpose than what was agreed to in
17 Debtors' budget, unless they had prior written consent from Wells
18 Fargo; repaying its DIP Loan was not an allowed use and Wells
19 Fargo did not consent. In Wells Fargo's opinion, Debtors were
20 attempting to use collateral for a loan for which a significant
21 repayment risk existed (the Wells Fargo Prepetition Loan) to repay
22 a loan for which minimal repayment risk existed (the DIP Loan).
23 Wells Fargo argued that no adequate protection could exist under
24 those circumstances.

25 Wells Fargo further argued that the Final DIP Order

27 ⁸ Wells Fargo also agreed to provide Debtors with additional
28 DIP financing, but Debtors contended the terms were less
favorable.

1 prohibited Debtors from obtaining DIP financing and granting any
2 liens on the prepetition collateral or the postpetition collateral
3 (including the Dairy Property) senior to, or on parity with, Wells
4 Fargo's DIP lien. Despite Debtors' intent to pay off the DIP Loan
5 with its tender of \$516,000, Wells Fargo refused to apply it as
6 such and placed the money into escrow pending resolution of the
7 dispute. Thus, because the DIP lien was still outstanding, argued
8 Wells Fargo, Debtors could not grant AgStar a senior lien. Wells
9 Fargo did not oppose, generally, the sale of the Dairy Property.

10 A hearing on the Second AgStar DIP Motion was held on
11 June 26, 2013. Wells Fargo reiterated its objection to Debtors
12 using the milk proceeds, which secured the Wells Fargo Prepetition
13 Loan, to pay off the DIP Loan. In response, the bankruptcy court
14 inquired why the pay off of the DIP Loan was not, dollar for
15 dollar, adequate protection for Wells Fargo; it eliminated a
16 priority lien that was a lien against all of Wells Fargo's
17 prepetition collateral. Counsel replied that the \$500,000 in milk
18 proceeds was cash collateral and the security for Wells Fargo's
19 prepetition debt; the priming DIP lien was secured by the Dairy
20 Property only, not all of Wells Fargo's prepetition collateral.
21 When the court asked counsel why Debtors could not pay off the DIP
22 Loan with the milk proceeds, counsel stated that Debtors could pay
23 off the DIP Loan with the sale proceeds from the Dairy Property;
24 Debtors could not use the cash collateral that secured Wells
25 Fargo's prepetition debt to pay the postpetition debt obligation
26 or they were not adequately protected. The court disagreed and
27 countered that all Debtors had to show was that Wells Fargo was
28 adequately protected for this particular use of cash collateral,

1 not that Wells Fargo would never incur a loss on its prepetition
2 debt. In other words, Debtors had to demonstrate that this use of
3 cash collateral – to pay off the DIP Loan – would not cause
4 greater loss to Wells Fargo. Since the cash was being used to pay
5 down a lien that otherwise was senior to the Wells Fargo
6 Prepetition Loan, the court could not see how that use of cash
7 collateral created a greater loss to Wells Fargo. Counsel then
8 referred back to the Final DIP Order, which expressly set forth
9 the uses for the cash collateral; paying off the DIP Loan was not
10 an approved use.

11 After further discussion, and in absence of any contrary
12 authority cited by counsel for Wells Fargo, the bankruptcy court
13 ruled:

14 The debtor may use cash collateral to pay Wells Fargo and
15 since the general common law rule is a voluntary payor
16 has the right and power to designate how any payment
17 shall be applied, debtor also has the right and power to
18 designate that upon turning this cash collateral over to
19 Wells Fargo it shall be applied to the DIP [L]oan.

18 Hr'g Tr. 19:18-23, June 26, 2013. The bankruptcy court further
19 found "as a matter of law" that Debtors' use of the \$516,000 in
20 cash collateral to pay off the DIP Loan was adequate protection
21 for the Wells Fargo Prepetition Loan. Accordingly, the Second
22 AgStar DIP Motion was granted. Based on the court's ruling, Wells
23 Fargo's objection as to the priming of its DIP lien by the AgStar
24 DIP lien was overruled.

25 The bankruptcy court entered an order granting the Second
26 AgStar DIP Motion on July 12, 2013 (the "AgStar DIP Order"). The
27 court: ordered Wells Fargo to apply the funds received to the DIP
28 Loan and to release its priming lien on the Dairy Property; gave

1 AgStar a priming lien in the amount of \$315,000 over its own
2 senior lien on the Dairy Property; and declared that AgStar's DIP
3 lien could not be made subordinate to, or made pari passu with,
4 any other lien under § 364(d). The court found AgStar to be a
5 good faith lender entitled to the protections of § 364(e). An
6 auction to sell the Dairy Property was to occur on October 4,
7 2013, but in the event it did not sell, AgStar and Wells Fargo
8 were granted stay relief to foreclose on the property after
9 December 2, 2013. The AgStar DIP Order contemplated that other
10 issues raised in the Second AgStar DIP Motion would be decided at
11 a later hearing.

12 Wells Fargo timely moved to amend the AgStar DIP Order on
13 July 19, 2013. In short, Wells Fargo contended that the AgStar
14 DIP Order, in its form lodged unilaterally by Debtors and signed
15 by the bankruptcy court, contained language contrary to the
16 court's oral ruling with respect to the proposed sale terms of the
17 Dairy Property and to what matters were reserved for further
18 hearing.

19 The bankruptcy court entered a minute entry on September 10,
20 2013, granting Wells Fargo's motion to amend. The minute entry
21 also noted that a status hearing on further DIP financing was to
22 be held on November 7, 2013, unless the parties notified the court
23 that no hearing would be necessary. Now that the AgStar DIP Order
24 was final, Wells Fargo timely filed its notice of appeal on
25 September 24, 2013. The October 4 auction for the Dairy Property
26 never took place.

27 //

28 //

1 **J. The supplemental AgStar DIP order - the basis for Wells**
2 **Fargo's second appeal**

3 On November 6, 2013, Debtors filed a Notice of Lodging
4 Proposed Stipulated Order Regarding Postpetition Financing. In
5 the attached stipulated order entered into by Debtors and AgStar,
6 Debtors stated that they had drawn approximately \$144,000 of the
7 \$315,000 authorized in the AgStar DIP Order entered on July 12,
8 2013. Debtors were in immediate need of additional funds to
9 maintain the Dairy Property until the foreclosure sale scheduled
10 for December 6, 2013, which required an additional draw on the
11 remaining funds in the AgStar DIP Loan but no additional loan
12 beyond the \$315,000 previously authorized. In addition to the
13 existing priming DIP lien authorized on July 12, the bankruptcy
14 court granted AgStar a replacement lien for the AgStar Prepetition
15 Loan on the Dairy Property, which was to be senior to any other
16 liens on the property (excluding the taxing authority's lien).

17 In light of the stipulation filed, the bankruptcy court
18 vacated the status hearing for further DIP financing scheduled for
19 November 7, 2013, and entered Debtors' and AgStar's stipulated
20 financing order as proposed on November 7, 2013 (the "Supplemental
21 AgStar DIP Order"). Wells Fargo timely filed its notice of appeal
22 on November 14, 2013.

23 The Panel issued an order consolidating Wells Fargo's appeals
24 of the AgStar DIP Order and the Supplemental AgStar DIP Order on
25 January 21, 2014.

26 **K. Debtors' cases get converted to chapter 7 and Dairy Property**
27 **is foreclosed**

28 The Committee moved to convert Debtors' cases to chapter 7 on

1 November 19, 2013. In short, the foreclosure sale of the Dairy
2 Property set for December 6, 2013, was expected to yield only
3 enough funds to pay AgStar; no proceeds would be available for any
4 junior lienholders, administrative claimants or the unsecured
5 creditors. Therefore, because no possibility existed for
6 rehabilitation, the Committee argued that conversion was in the
7 best interest of creditors.

8 AgStar filed a limited objection to the Committee's
9 conversion motion, requesting only that the cases not be converted
10 until after the foreclosure sale of the Dairy Property. AgStar
11 believed that insufficient funds would be available from the
12 foreclosure sale to pay the AgStar Prepetition Loan, the AgStar
13 DIP Loan and the additional funds authorized in the Supplemental
14 AgStar DIP Order, much less for anyone else's claims.

15 After a hearing on December 2, 2013, the bankruptcy court
16 ordered that Debtors' cases be converted to chapter 7, effective
17 December 10, 2013, after the foreclosure sale of the Dairy
18 Property on December 6.

19 A third-party bidder purchased the Dairy Property for
20 \$6,936,264.02; one dollar more than AgStar's opening credit bid.
21 AgStar purchased Debtors' water rights through its credit bid for
22 \$999,999.00. Wells Fargo's junior lien on the Dairy Property was
23 extinguished, leaving approximately \$5 million of the Wells Fargo
24 Prepetition Loan left unpaid.

25 **II. JURISDICTION**

26 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
27 and 157(b)(2)(D) and (M). We discuss our jurisdiction below.

28 //

1 **III. ISSUES**

- 2 1. Are the appeals moot?
- 3 2. Did the bankruptcy court err when it ordered Wells Fargo to
- 4 apply its cash collateral to the DIP Loan and that its DIP lien
- 5 was deemed satisfied?
- 6 3. Did the bankruptcy court violate Wells Fargo's due process
- 7 rights when it entered the Supplemental AgStar DIP Order?

8 **IV. STANDARDS OF REVIEW**

9 We review a bankruptcy court's conclusions of law de novo and

10 its factual findings for clear error. Zurich Am. Ins. Co. v.

11 Int'l Fibercom, Inc. (In re Int'l Fibercom, Inc.), 503 F.3d 933,

12 940 (9th Cir. 2007). An adequate protection determination and an

13 authorization to use cash collateral are factual issues reviewed

14 for clear error. See Martin v. United States (In re Martin),

15 761 F.2d 472, 478 (8th Cir. 1985). Factual findings are clearly

16 erroneous if illogical, implausible or without support in the

17 record. Retz v. Samson (In re Retz), 606 F.3d 1189, 1196 (9th

18 Cir. 2010).

19 Whether the bankruptcy court's procedures comport with due

20 process is a question of law reviewed de novo. Price v. Lehtinen

21 (In re Lehtinen), 564 F.3d 1052, 1058 (9th Cir. 2009); Garner v.

22 Shier (In re Garner), 246 B.R. 617, 619 (9th Cir. BAP 2000).

23 **V. DISCUSSION⁹**

24 **A. The appeals are not moot.**

25 On April 23, 2014, a motions panel denied AgStar's motion to

26 _____

27 ⁹ On November 13, 2014, appellant filed a statement of

28 additional authorities and asked this Panel to consider such

authorities. We conclude further consideration of such

authorities is unnecessary given the analysis in this memorandum.

1 dismiss the appeals as moot, determining that effective relief
2 remained available. AgStar asks the merits panel to reconsider
3 that decision, contending that it has met its heavy burden to
4 demonstrate the appeals are moot. See Motor Vehicle Cas. Co. v.
5 Thorpe Insulation Co. (In re Thorpe Insulation Co.), 677 F.3d 869,
6 880 (9th Cir. 2012). Despite the motions panel ruling, we have an
7 independent duty to determine whether appellate jurisdiction
8 exists. Dannenberg v. Software Toolworks, Inc., 16 F.3d 1073,
9 1074 n.1 (9th Cir. 2004). We lack jurisdiction to decide moot
10 appeals. United States v. Pattullo (In re Pattullo), 271 F.3d
11 898, 900 (9th Cir. 2001). If an appeal becomes moot while it is
12 pending before the Panel, we must dismiss it. Id. Therefore, we
13 will consider AgStar's request.

14 AgStar merely rehashes the same arguments raised before the
15 motions panel and offers no new grounds for reconsideration.
16 Nonetheless, AgStar contends the appeals are equitably moot
17 because: (1) Wells Fargo failed to obtain a stay pending appeal;
18 (2) the Dairy Property has been sold to a third party; and (3) we
19 cannot fashion effective relief. Failure to seek a stay can
20 render an appeal equitably moot. In re Thorpe Insulation Co.,
21 677 F.3d at 881 ("We will first look at whether a stay was sought,
22 for absent that a party has not fully pursued its rights.") (citing
23 In re Roberts Farms, 652 F.2d 793, 797-98 (9th Cir. 1981)). For
24 an appeal to be equitably moot, "[t]he question is whether the
25 case 'presents transactions that are so complex or difficult to
26 unwind that the doctrine of equitable mootness would apply.'" Id.
27 at 880 (quoting Lowenschuss v. Selnick (In re Lowenschuss),
28 170 F.3d 923, 933 (9th Cir. 1999)). "Ultimately, the decision

1 whether or not to unscramble the eggs turns on what is practical
2 and equitable." Baker & Drake, Inc. v. Pub. Serv. Comm'n of Nev.
3 (In re Baker & Drake, Inc.), 35 F.3d 1348, 1352 (9th Cir. 1994)
4 (citations omitted).

5 Wells Fargo failed to seek a stay of the AgStar DIP Order or
6 the Supplemental AgStar DIP Order. Under Thorpe, that alone may
7 be enough to render these appeals equitably moot. See also Stokes
8 v. Gardner, 2012 WL 1944552 (9th Cir. May 30, 2012) (citing Thorpe
9 and stating that failure to seek a stay may, "by itself," render a
10 party's claim equitably moot). Nevertheless, the sale of the
11 Dairy Property to a third party does not preclude us from
12 fashioning effective relief for Wells Fargo. AgStar can be
13 ordered to pay an appropriate portion of the sale proceeds to
14 Wells Fargo, should we determine Wells Fargo is entitled to any.
15 Further, such relief would not require the unwinding of the Dairy
16 Property sale or have any effect on the third party not before us.
17 Thus, the third party's absence in these appeals is of no moment.
18 See In re Thorpe Insulation Co., 677 F.3d at 881.

19 We further conclude, although not raised by AgStar, the
20 appeal of the AgStar DIP Order is not statutorily moot under
21 § 364(e).¹⁰ Under that provision, if the bankruptcy court found
22

23 ¹⁰ Section 364(e) provides:

24 The reversal or modification on appeal of an authorization
25 under this section to obtain credit or incur debt, or of a
26 grant under this section of a priority or a lien, does not
27 affect the validity of any debt so incurred, or any priority
28 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 or lien, were

(continued...)

1 that the lender acted in good faith in extending the postpetition
2 loan, a reversal or modification of the unstayed financing order
3 on appeal does not affect the validity of the creditor's loan or
4 any liens or priorities securing the loan. § 364(e); Credit
5 Alliance Corp. v. Dunning-Ray Ins. Agency, Inc. (In re Blumer),
6 66 B.R. 109, 113 (9th Cir. BAP 1986).

7 The AgStar DIP Order does contain a boilerplate "good faith"
8 finding; Wells Fargo has not made any allegations of bad faith.¹¹
9 However, it does not follow that we must dismiss that appeal as
10 statutorily moot. Section 364(e) does not restrict us from
11 reviewing central questions to the AgStar DIP Order: whether the
12 bankruptcy court provided Wells Fargo with adequate protection and
13 whether the court violated Wells Fargo's due process rights. See
14 Desert Fire Prot. v. Fontainebleau Las Vegas Holdings, LLC
15 (In re Fontainebleau Las Vegas Holdings, LLC), 434 B.R. 716, 746
16 (S.D. Fla. 2010) (if existing lienholder did not receive adequate
17 protection for the priming lien, the court is not forbidden from
18 granting the lienholder effective relief) (citing 3 COLLIER ON
19 BANKRUPTCY ¶ 364.06[2] (Alan N. Resnick & Henry J. Sommer eds., 15th
20 ed. rev. 2010)); In re Blumer, 66 B.R. at 113 (although lenders
21 satisfied good faith requirement of § 364(e), the appeal was not
22 moot because the court's order violated appellant's due process
23 rights).

25 ¹⁰ (...continued)
26 stayed pending appeal.

27 ¹¹ No "good faith" finding was made in the Supplemental AgStar
28 DIP Order, so it does not appear to be subject to the protections
of § 364(e).

1 Accordingly, we see no impediment to providing Wells Fargo
2 with effective relief. Thus, the appeals are not moot; we have
3 jurisdiction under 28 U.S.C. § 158.

4 **B. The bankruptcy court erred when it ordered Wells Fargo to**
5 **apply the \$516,000 payment to its DIP Loan and deemed Wells**
6 **Fargo's DIP lien satisfied.**

7 **1. Governing law**

8 To obtain DIP financing that involves a senior or "priming"
9 lien on encumbered property, the debtor-in-possession must show
10 that (1) it was unable to obtain credit without granting such
11 liens and (2) the value of the prepetition lender's lien that will
12 be primed by the DIP lender's lien is adequately protected. See
13 § 364(d)(1). The debtor bears the burden of proof on the issue of
14 adequate protection. See § 364(d)(2).¹² The purpose of the
15 adequate protection requirement under § 364(d) is to protect an
16 existing lienholder from any decrease in the value of its security
17 interest resulting from the priming lien. In other words,
18 adequate protection is provided to ensure that the prepetition
19 creditor receives the value for which the creditor bargained
20 prebankruptcy. MBank Dallas, N.A. v. O'Connor (In re O'Connor),
21 808 F.2d 1393, 1396 (10th Cir. 1987); In re Mosello, 195 B.R. 277,

22 ¹² Section 364(d)(1) and (2) provides:

23 (1) The court, after notice and a hearing, may authorize the
24 obtaining of credit or the incurring of debt secured by a
25 senior or equal lien on property of the estate that is
26 subject to a lien only if—

27 (A) the trustee is unable to obtain such credit
28 otherwise; and

 (B) there is adequate protection of the interest of the
holder of the lien on the property of the estate on
which such senior or equal lien is proposed to be
granted.

(2) In any hearing under this subsection, the trustee has the
burden of proof on the issue of adequate protection.

1 288 (Bankr. S.D.N.Y. 1996).

2 Adequate protection may be provided by (1) periodic cash
3 payments, (2) additional or replacement liens or (3) other relief
4 resulting in the "indubitable equivalent" of the secured
5 creditor's interest. In re Stoney Creek Techs., LLC, 364 B.R.
6 882, 890 (Bankr. E.D. Pa. 2007) (citing § 361). In addition, the
7 requirement to provide adequate protection can be met by showing
8 the existing lienholder is oversecured with a substantial equity
9 cushion. See Pistole v. Mellor (In re Mellor), 734 F.2d 1396,
10 1400 (9th Cir. 1984). What constitutes adequate protection is to
11 be decided flexibly on a case-by-case basis. In re O'Connor,
12 808 F.2d at 1396-97.

13 **2. Analysis**

14 In analyzing the issues in this appeal, the Panel
15 distinguishes Wells Fargo's role as a prepetition secured creditor
16 from its role as a DIP lender and the corresponding differences
17 between the collateral used to secure both debts. Thus, the
18 collateral securing each debt requires specific identification and
19 Wells Fargo's distinguishing roles associated with the two debts
20 warrant a different calculus.

21 Wells Fargo contends the bankruptcy court erred when it
22 forced Wells Fargo to apply the milk proceeds, which provided
23 security for the Wells Fargo Prepetition Loan, to satisfy the DIP
24 Loan, and it further erred in determining "as a matter of law"
25 that using the milk proceeds to pay off the DIP Loan constituted
26 adequate protection on a dollar-for-dollar basis. Wells Fargo
27 also contends the bankruptcy court violated the "law of the case
28 doctrine" by allowing Debtors to use cash collateral in a manner

1 that was expressly prohibited in the Final DIP Order.

2 Paragraph 5 of the Final DIP Order provides that Wells Fargo
3 will receive, in addition to the junior lien it already had on the
4 Dairy Property, a lien on "any and all assets acquired by the
5 Debtors after the Petition Date of the same type as the assets on
6 which Wells Fargo held a lien on the Petition Date." In re Sonora
7 Desert Dairy, LLC, No. 2:12-00262, slip order at 7 (Bankr. D.
8 Ariz. Nov. 29, 2013). Thus, Debtors extended Wells Fargo's
9 security interest in all personal property they acquired
10 postpetition that was of the same type on which Wells Fargo held a
11 security interest prepetition - i.e., the dairy herd, feed
12 inventory and milk proceeds - to secure the Wells Fargo
13 Prepetition Loan. Paragraph 6 of the Final DIP Order provides
14 that the Dairy Property was the collateral securing the DIP Loan,
15 and that Wells Fargo's DIP lien would be senior to or "prime"
16 AgStar's senior lien on the Dairy Property. Id. In addition,
17 Paragraph 1 provides that Debtors could only use any cash
18 collateral of Wells Fargo in the manner set forth in the parties'
19 agreed budget attached to the Final DIP Order. Id. at 5-6.
20 Neither the budget nor the Final DIP Order contemplate that
21 Debtors could use milk proceeds securing the Wells Fargo
22 Prepetition Loan to pay off the DIP Loan secured by the Dairy
23 Property.

24 In reviewing the transcript from the hearing on the Second
25 AgStar DIP Motion, we conclude that Wells Fargo and the bankruptcy
26 court misunderstood each other's positions. The court mistakenly
27 assumed that Wells Fargo's DIP Loan was secured by all of Wells
28 Fargo's prepetition collateral (the dairy herd, feed inventory and

1 milk proceeds) in addition to the Dairy Property, despite
2 counsel's statements to the contrary and his citation to
3 Paragraph 6 of the Final DIP Order. In other words, the court
4 believed all of Wells Fargo's collateral, pre- and postpetition,
5 provided security for the DIP Loan.¹³ On that assumption, it would
6 follow that whether Wells Fargo applied the \$516,000 cash payment
7 to its DIP Loan or the Wells Fargo Prepetition Loan would make no
8 difference; Wells Fargo was receiving its money either way. It
9 would also follow under those facts that because the DIP Loan was
10 being paid in full, Wells Fargo was receiving dollar-for-dollar
11 adequate protection, and thus the AgStar DIP Loan and priming lien
12 could be authorized under § 364(d).

13 However, applying the \$516,000 payment to the DIP Loan did
14 make a difference; it caused Wells Fargo to lose \$516,000 it would
15 have otherwise been able to recover from the sale of the Dairy
16 Property. Put simply, had Wells Fargo's priming lien remained
17 intact, it would have been paid its \$500,000 DIP Loan (plus
18 interest) from the Dairy Property sale proceeds and it would have
19 recovered all of the milk proceeds, which consisted of
20 approximately \$800,000 to apply to the Wells Fargo Prepetition
21 Loan. Accordingly, the bankruptcy court's decision transferred
22 \$516,000 of postpetition collateral protected by the § 552(b)(1)¹⁴

24 ¹³ The judge making the decision on the AgStar DIP Loan was
25 not the same judge who heard the earlier matters and issued the
26 Final DIP Order on November 29, 2012. Immediately after issuing
27 the Final DIP Order, Judge Case reassigned Debtors' cases to Judge
28 Haines, who subsequently issued the AgStar DIP Order on July 12,
2013.

¹⁴ Section 552(b)(1) provides:

(continued...)

1 security interest extension provided in Paragraph 5 of the Final
2 DIP Order to the payment of the DIP Loan, which prevented an
3 equivalent payment to the Wells Fargo Prepetition Loan. Thus, the
4 mechanism provided in the Final DIP Order to adequately protect
5 Wells Fargo was thwarted.

6 Wells Fargo's argument that the "law of the case" doctrine
7 precluded the bankruptcy court from reexamining issues already
8 decided in the Final DIP Order lacks merit. This discretionary,
9 judicially-imposed doctrine precludes a court from reconsidering
10 an issue explicitly or impliedly decided by a prior disposition
11 from the same court or a higher court. Hall v. City of L.A.,
12 697 F.3d 1059, 1067 (9th Cir. 2012). The bankruptcy court did not
13 appear to be reconsidering or reexamining the terms of the Final
14 DIP Order when it made its decision as to the Second AgStar DIP
15 Motion; it simply misunderstood the facts of the case, which led
16 to its error. The Final DIP Order governed the obligations of the
17 parties, particularly Paragraphs 5 and 6 that created the
18 hierarchy of liens and collateral and how Wells Fargo would be
19 paid. Because the bankruptcy court did not expressly overrule any

21 ¹⁴(...continued)

22 Except as provided in sections 363, 506(c), 522, 544, 545,
23 547, and 548 of this title, if the debtor and an entity
24 entered into a security agreement before the commencement of
25 the case and if the security interest created by such
26 security agreement extends to property of the debtor acquired
27 before the commencement of the case and to proceeds,
28 products, offspring, or profits of such property, then such
security interest extends to such proceeds, products,
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.

1 part of that order when it made its ruling, it was required to
2 enforce the order's terms.

3 Because the bankruptcy court erred when it ordered Wells
4 Fargo to apply the \$516,000 payment to the DIP Loan and deemed
5 Wells Fargo's DIP lien satisfied, we must VACATE the AgStar DIP
6 Order and REMAND for further proceedings.¹⁵ The question becomes
7 then, what sort of relief can be granted to Wells Fargo in light
8 of the bankruptcy court's good faith finding under § 364(e). Even
9 if AgStar's priming DIP lien created under § 364(d) must be left
10 in place despite our vacation, allowing Wells Fargo's DIP lien to
11 have priority over the lien securing the AgStar Prepetition Loan
12 would be permissible under § 364(e), because it will not affect
13 the validity or priority of AgStar's DIP lien.

14 **C. The bankruptcy court did not violate Wells Fargo's due**
15 **process rights when it entered the Supplemental AgStar DIP**
16 **Order.**

17 Wells Fargo challenges the Supplemental AgStar DIP Order on
18 an additional ground – that it violated Wells Fargo's due process
19 rights. It contends that Debtors never filed a motion to approve
20 the additional DIP financing authorized in the Supplemental AgStar
21 DIP Order or sought a hearing, but rather simply lodged a proposed
22 form of order the day prior to the previously-scheduled status
23 hearing on November 7, 2013. The bankruptcy court then improperly
24 vacated the status hearing sua sponte and entered the Supplemental
25 AgStar DIP Order as proposed on November 8, 2013. As a result,
26 Wells Fargo argues that it was never given a reasonable

27 ¹⁵ Although Wells Fargo contends the Supplemental AgStar DIP
28 Order must also be reversed, that order did not detrimentally
affect Wells Fargo. Its loss was created by the AgStar DIP Order,
where Wells Fargo lost \$516,000.

1 opportunity to object or be heard and was thereby deprived of its
2 due process rights.

3 "An integral part of Section 364 is the requirement that
4 notice and a hearing be granted before a court order is issued."
5 In re Blumer, 66 B.R. at 113. The phrase "notice and a hearing,"
6 as defined in § 102(1), is a term of art. It does not mean that a
7 hearing must be granted. Id. The bankruptcy court may act
8 without a hearing if notice has been properly given and (1) a
9 hearing has not been requested or (2) there is insufficient time
10 for one. Id. (citing § 102(1)(B)). Notice means "such notice as
11 is appropriate in the particular circumstances[.]" § 102(1)(A)).
12 "Nowhere is there any provision for an action to be taken without
13 notice where 'notice and a hearing' are required." In re Blumer,
14 66 B.R. at 113 (citing In re Monach Circuit Indus., Inc., 41 B.R.
15 859, 861 (Bankr. E.D. Pa. 1984)). "This is true even in emergency
16 situations." Id.

17 Wells Fargo's arguments lack merit. Although it argues that
18 Debtors never filed a motion to approve additional DIP financing,
19 Debtors had filed the Second AgStar DIP Motion, which covered the
20 proposed \$315,000 DIP loan from AgStar that was ultimately
21 authorized by the bankruptcy court. Wells Fargo was given the
22 opportunity to, and did, oppose that motion. Thus, Wells Fargo's
23 claim that the first notice it received of this additional DIP
24 financing request was from the proposed form of order lodged by
25 Debtors is not credible. Further, the bankruptcy court was not
26 required to hold a hearing on the matter since all Debtors were
27 requesting was an additional draw from the \$315,000 AgStar DIP
28 Loan already authorized by the court at a prior hearing, where

1 Wells Fargo's objections had already been overruled.

2 Accordingly, we conclude that Wells Fargo's due process
3 rights were not violated by entry of the Supplemental AgStar DIP
4 Order.

5 **VI. CONCLUSION**

6 Based on the foregoing reasons, we VACATE the AgStar DIP
7 Order and REMAND it to the bankruptcy court for further
8 proceedings consistent with this memorandum. As to the
9 Supplemental AgStar DIP Order, we AFFIRM.

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