

NOT FOR PUBLICATION

JUN 02 2017

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 No. AZ-16-1337-JuLB
	)	
ERIK SAMUEL DE JONG and	)	Bk. No. 2:14-bk-00886-PS
DARYL LYNN DE JONG,	)	
	)	
Debtors.	)	
	)	
ERIK SAMUEL DE JONG; DARYL	)	
LYNN DE JONG,	)	
	)	
Appellants,	)	
	)	
v.	)	<b>MEMORANDUM*</b>
	)	
JLE-04 PARKER, LLC,	)	
	)	
Appellee.	)	
	)	

Argued and Submitted on May 18, 2017  
at Phoenix, Arizona

Filed - June 2, 2017

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

Honorable Paul Sala, Bankruptcy Judge, Presiding

Appearances: Michael W. Carmel argued for appellants Erik Samuel de Jong and Daryl Lynn de Jong; Lindsy M. Weber of Gallagher & Kennedy argued for appellee JLE-04 Parker, LLC.

Before: JURY, LAFFERTY, and BRAND, Bankruptcy Judges.

\* 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 8024-1.

1 Appellants-debtors, Erik Samuel de Jong (Erik) and Daryl  
2 Lynn de Jong (collectively, Debtors), operated a dairy farm on  
3 real property leased from chapter 11<sup>1</sup> debtor Sonora Desert  
4 Dairy, LLC (Sonora Desert). During Sonora Desert's bankruptcy,  
5 the property was foreclosed upon and sold at a trustee's sale to  
6 appellee-creditor, JLE-04 Parker, LLC (JLE), thereby  
7 extinguishing Debtors' leasehold interest under Arizona law.  
8 Debtors refused to vacate the property.

9 JLE filed a forcible entry and detainer proceeding (FED)  
10 against Debtors in the Arizona state court. On the eve of  
11 trial, Debtors filed a chapter 11 petition. After JLE obtained  
12 relief from the automatic stay, the state court found Debtors'  
13 leasehold interest was extinguished by the trustee's sale. JLE  
14 then sought relief in the bankruptcy court to have Debtors  
15 vacate the property. Debtors contended that they needed months  
16 to move their cows and silage (feed) off the property. JLE  
17 objected, asserted Debtors were trespassers, and claimed  
18 millions of dollars in damages for Debtors' conscious and  
19 continuing trespass, which were embodied in a proof of claim  
20 (POC). The POC sought damages of \$8,863,250.00, which included,  
21 among other things, restitution damages for disgorgement of  
22 profits. JLE later filed an Application for Administrative  
23 Priority Claim (Administrative Claim) for \$7,900,000.00 for  
24 damages allegedly incurred due to Debtors' postpetition

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25  
26 <sup>1</sup> Unless otherwise indicated, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532,  
28 "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, and "Civil Rule" references are to the Federal Rules  
of Civil Procedure.

1 trespass.

2 After Debtors objected to JLE's POC and Administrative  
3 Claim, the matter proceeded to trial to liquidate JLE's damages.  
4 In a memorandum decision, the bankruptcy court concluded that  
5 JLE had a prepetition claim for \$558,716.24 and a postpetition  
6 administrative claim for \$1,517,069.64. JLE filed a motion for  
7 clarification on the calculation of damages, and Debtors filed a  
8 motion for reconsideration. The bankruptcy court granted JLE's  
9 motion in part and denied Debtors' motion. On September 30,  
10 2016, the bankruptcy court entered an amended order on JLE's POC  
11 finding that JLE had a prepetition claim in the amount of  
12 \$579,072.51 and a postpetition administrative claim for  
13 \$1,571,916.11. This appeal followed.

14 For the reasons explained below, we AFFIRM the bankruptcy  
15 court's findings regarding Debtors' conscious trespass in the  
16 pre and postpetition periods. We VACATE the bankruptcy court's  
17 postpetition damage award and REMAND for a calculation of  
18 damages consistent with this memorandum.

## 19 I. FACTS<sup>2</sup>

### 20 A. Prepetition Events

21 Sonora Desert owned three properties referred to throughout  
22 this case as Dairy I, Dairy II, and Dairy III. Debtors entered  
23 into a lease agreement dated February 27, 2012 (February 27,  
24 2012 Lease), with Sonora Desert and Robert Lueck (Lueck), its  
25 managing member. The lease was for Dairy I with monthly rent of  
26 \$30,000 and a term of three years with an option to extend.

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27 <sup>2</sup> Most of the background facts are set forth in the  
28 bankruptcy court's memorandum decision.

1 Debtors used the property, located in Buckeye, Arizona, to run  
2 their business known as Valkyrie Dairy.

3 When Debtors entered into the lease agreement, Sonora  
4 Desert was a chapter 11 debtor-in-possession in a bankruptcy  
5 case filed in the District of Arizona.<sup>3</sup> Lueck advised Erik that  
6 the bankruptcy court had to approve the lease before Debtors  
7 moved onto Dairy I. Debtors did not wait for court approval,  
8 instead moving 1649 cows onto Dairy I one day after they signed  
9 the lease.

10 In a matter of days, Debtors executed a new lease for  
11 Dairy I dated March 1, 2012 (March 1 Lease). The March 1 Lease  
12 provided that either party could terminate the lease upon  
13 180 days written notice to the other party. Section 18.1 of the  
14 lease gave Debtors the right of first refusal if Sonora Desert  
15 or Lueck sought to sell Dairy I and its other dairy properties.<sup>4</sup>

16 On May 29, 2012, the bankruptcy court in Sonora Desert's  
17 case approved the March 1 Lease with some variations (Sonora  
18 Order). The Sonora Order provided, among other things, that  
19 Debtors, as lessees, acknowledged that the lessors were  
20 currently marketing Dairy I for sale and also that the March 1  
21 Lease was junior to a first priority deed of trust held by  
22 Agstar and a second priority Wells Fargo replacement lien. The  
23 Sonora Order also clarified that the March 1 Lease provided that

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24  
25 <sup>3</sup> Sonora Desert's case was substantively consolidated with  
26 the cases of Sonora Desert Dairy II, LLC, Sonora Desert  
27 Dairy III, LLC, Lueck Cattle Company, LLC, and Bob Lueck Farms,  
28 LLC.

<sup>4</sup> The right of first refusal pertained to all three  
properties.

1 Debtors would pay \$2,615.42 per month for real estate taxes on  
2 the Dairy I property and \$921.46 in real estate taxes on the  
3 nine residential housing units also located on the property.  
4 The order further amended the March 1 Lease, reducing the time  
5 period for Debtors to exercise their right of first refusal if  
6 the leased property were sold.

7 About a year later, in May 2013, Erik communicated with  
8 Brian Van Leeuwen about leasing his dairy farm (Van Leeuwen  
9 Property) to Debtors. Erik learned that if he moved his dairy  
10 operation to the Van Leeuwen Property he would not have room for  
11 all his cows.

12 Lueck mailed Debtors a Notice of Termination (NOT) dated  
13 May 30, 2013, which stated that the March 1 Lease would  
14 terminate on November 30, 2013.<sup>5</sup> In September 2013,  
15 Mr. Havranek, the real estate broker hired to help Sonora Desert  
16 sell its properties, advised Erik that a trustee's sale of the  
17 property was set for December 6, 2013.

18 On October 16, 2013, Sonora Desert's attorney, Mr. May,  
19 mailed and emailed a letter to Erik reminding him of the  
20 termination of the March 1 Lease and the need to vacate Dairy I.  
21 Debtors made no plans to move from the property.

22 At the December 6, 2013, trustee's sale, JLE purchased  
23 Dairy I, Dairy II, and Dairy III for \$6,936,264.02. Erik and  
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25 <sup>5</sup> Whether Debtors received proper notice for termination of  
26 the March 1 Lease is not at issue in this appeal. The bankruptcy  
27 court found that Debtors' trespass began December 6, 2013, the  
28 date of the trustee's sale, and ended when they vacated the  
Property on May 31, 2014. The court calculated JLE's damages  
based on that time period.

1 other family members attended the trustee's sale but did not  
2 bid. The sale included the real property and fixtures used to  
3 operate dairy farms at the Sonora Dairies. The trustee's sale  
4 extinguished any leasehold interest or any other interest that  
5 Debtors had in Dairy I as of December 6, 2013.

6 JLE purchased the properties using all of the funds  
7 available to it from a 1031 exchange sale; a \$1,000,000 loan  
8 from Mr. Accomazzo/Ambien Dairy; and loans from the families of  
9 Joseph Echeverria and Chad Odom. JLE leased Dairy II to the  
10 Accomazzo/Ambien Dairy entity for no rent through May 2014 and  
11 for \$15,000.00 per month thereafter. JLE leased Dairy III to  
12 Rio Loco for \$50,000.00 per month.

13 About a week after the trustee's sale, Mr. Echeverria and  
14 Mr. Odom had multiple conversations with Erik confirming their  
15 prior communications that JLE did not want to enter into a lease  
16 or other arrangement with Debtors and that Debtors needed to  
17 vacate the Dairy I property. Mr. Odom and Mr. Echeverria made  
18 various proposals to Erik for a reasonable and rapid exit from  
19 the property. Erik made no proposals to leave and after further  
20 conversations, Erik insisted he did not have to leave because of  
21 the March 1 Lease and his belief that no court would remove him  
22 from the Dairy I property.

23 JLE's counsel served Debtors with a notice and demand  
24 letter dated December 20, 2013, in which JLE's counsel notified  
25 them of JLE's purchase and current ownership of the property and  
26 explained that any right of possession had been terminated by  
27 the NOT and trustee's sale. The letter gave notice that any  
28 remaining tenancy or leasehold interest that Debtors had in the

1 Property was terminated immediately. Finally, it informed  
2 Debtors that as a holdover tenant at will, they would be liable  
3 to JLE for a fair market rental value of the property from the  
4 date of ownership through the date Debtors vacated. JLE  
5 asserted a right to recover \$30,000 in monthly rent plus other  
6 expenses. In the end, JLE demanded that Debtors vacate Dairy I  
7 by January 14, 2014, and if they did not do so, JLE would file a  
8 FED action against them.

9 Debtors responded to the letter by sending a copy of the  
10 February 27, 2012 Lease to JLE's counsel. This was not the  
11 lease that was approved by the bankruptcy court in the Sonora  
12 Order.

13 On January 7, 2014, JLE's counsel faxed and emailed Debtors  
14 another notice and demand, informing them that the January 14,  
15 2014 date was a typographical error and that they needed to  
16 vacate Dairy I by January 4, 2014. The notice informed Debtors  
17 that JLE would file a FED action against them on January 9,  
18 2014, if they did not comply. Debtors refused to vacate the  
19 property.

20 Prior to the filing of Debtors' bankruptcy petition, Erik  
21 was worried about the loss of the value of Debtors' silage,  
22 which would be worthless if Debtors were forced to move. To  
23 preserve the value of the silage, Erik identified three  
24 potential exit plans and settlement proposals which he  
25 communicated to JLE: (i) sell the feed silage and other feed  
26 inventory to JLE and auction the cattle by the end of February  
27 2014; (ii) feed the silage and other feed inventory to his  
28 cattle and, when exhausted, auction the cattle and likely occupy

1 the property until at least the end of July; or (iii) move to  
2 another dairy, if he could find an affordable dairy, after  
3 selling or using the silage and feed inventory.

4 JLE filed the FED action on January 9, 2014. Prior to the  
5 scheduled January 23, 2014 trial in the FED action, Thomas  
6 de Jong, Erik's father, made an offer on Debtors' behalf to sell  
7 Debtors' cows and feed to JLE. JLE declined. In addition,  
8 counsel for Debtors, Reed Haddock, presented an exit plan  
9 settlement proposal to JLE. On January 21, 2014, Mr. Haddock  
10 advised Erik and his father that JLE had not responded to the  
11 proposal and that there was a good chance that JLE would prevail  
12 in getting a restitution order.

### 13 **B. Bankruptcy Events**

14 On January 23, 2014, Debtors filed a chapter 11 petition  
15 which stayed the FED action. On the petition date, Debtors  
16 owned or leased approximately 3538 cows worth \$2,178.85 per  
17 head.

#### 18 **1. JLE's Emergency Motion For Relief From Stay**

19 JLE filed an emergency motion seeking a determination that  
20 the automatic stay did not apply or, in the alternative, for  
21 relief from the automatic stay to proceed with the FED trial.<sup>6</sup>  
22 The bankruptcy court modified the stay by order entered on  
23 February 13, 2014, allowing the state court to hold the FED  
24 trial and to decide the issue regarding Debtors' right to  
25 possession, including whether the trustee's sale extinguished  
26 the March 1 Lease under Arizona law. At the stay relief

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27  
28 <sup>6</sup> JLE also sought to dismiss the bankruptcy case.



1 hearing, the bankruptcy court had observed that the Sonora Order  
2 stated that Debtors' leasehold interest was subordinated to the  
3 first deed of trust and replacement lien and, therefore, the  
4 March 1 Lease would be affected by the trustee's sale.

5 The stay relief order stated that the parties should  
6 provide the state court with a copy of the Sonora Order and  
7 ordered JLE not to pursue a writ of restitution or otherwise  
8 enforce the judgment until further hearings in the bankruptcy  
9 court. Finally, the order prohibited JLE from removing or  
10 repossessing any of the livestock, personal property, or feed  
11 existing on the Dairy I property as of the petition date without  
12 a further order from the bankruptcy court.

### 13 **2. The FED Trial**

14 The state court held the FED trial on March 10, 2014, and  
15 took the matter under advisement. On March 13, 2014, the state  
16 court issued a minute entry ruling in JLE's favor. The state  
17 court found that Debtors' leasehold interest was terminated by  
18 the nonjudicial foreclosure of the deed of trust. Accordingly,  
19 the state court concluded that when Debtors continued in  
20 possession they became tenants at sufferance and remained on the  
21 property "without any right to be there." The state court  
22 further found that the notices sent by JLE on December 20, 2013,  
23 and January 7, 2014, met or exceeded the procedural requirements  
24 for notice and demand of possession. In the end, the court  
25 concluded that Debtors were guilty of forcible detainer.

### 26 **3. JLE Sells Dairy I**

27 On February 5, 2014, JLE signed a Purchase and Sale  
28 Agreement and opened escrow to sell the Dairy I property to

1 G & K Land & Cattle, LLC (G&K) for \$2,228,006.12. Escrow was  
2 scheduled to close on the earlier of (a) December 31, 2014, or  
3 (b) ten (10) days following written notice from the buyer to the  
4 seller and escrow agent. On September 5, 2014, JLE and G&K  
5 executed a first amendment to the Purchase and Sale Agreement.  
6 The purchase price did not change. Escrow closed on  
7 September 29, 2014, at the purchase price of \$2,228,006.12.

#### 8 **4. The March 18, 2014 Hearing**

9 After the ruling in the FED action, JLE filed a motion in  
10 the bankruptcy court to expedite consideration of that ruling,  
11 seeking to compel Debtors to vacate Dairy I. At the March 18,  
12 2014 hearing, Debtors argued that they needed to remain on the  
13 property until June 1, 2014. JLE objected and put Debtors on  
14 notice that their failure to vacate the property exposed them to  
15 continuing damages for trespass and other claims. The  
16 bankruptcy court acknowledged that JLE claimed damages as a  
17 result of Debtors' delay in vacating the property and set a  
18 pretrial schedule to address those damages. In the end, the  
19 bankruptcy court concluded that Debtors must vacate the property  
20 on June 1, 2014, unless JLE notified the court that an earlier  
21 date was warranted. The bankruptcy court also told JLE to file  
22 its POC.

23 After this hearing, on March 26, 2014, Erik sent a text  
24 message to Mr. Accomazzo, the principal of JLE's purchaser for  
25 Dairy I. In the message, Erik indicated that he got exactly  
26 what he wanted from the bankruptcy court and that he was "making  
27 a sh\*\*load of money off his cows."

1           **5. Debtors Object To JLE's POC**

2           On March 28, 2014, JLE filed its POC, asserting damages in  
3 the amount of \$8,863,240.00, including, among other things,  
4 disgorgement of Debtors' profits and its own lost profits due to  
5 Debtors' trespass. Debtors objected to the POC, arguing that  
6 JLE was not entitled to a claim for disgorgement of profits or  
7 lost profits under any legal theory. In reply, JLE claimed over  
8 \$2 million in its lost profits and sought disgorgement of  
9 Debtors' profits in the amount of approximately \$4.8 million.  
10 JLE argued that under Arizona law, it was entitled to recover  
11 for any physical damages to the property, the cost of restoring  
12 the property, the fair market rental value of the land during  
13 Debtors' trespass, as well as compensation for annoyances and  
14 damages for loss of use of the Property. JLE further asserted  
15 that it was entitled to its actual/compensatory damages as a  
16 result of Debtors' trespass and that those damages included lost  
17 profits of JLE. Finally, JLE argued that under the Restatement  
18 (Second) of Torts, disgorgement of Debtors' profits was an  
19 appropriate element of damages as a result of Debtors' trespass.

20           **6. The April 2, 2014 Hearing**

21           Apparently displeased with the March 18, 2014 ruling, JLE  
22 sought an expedited hearing in the bankruptcy court by filing a  
23 Motion for Clarification and Supplemental Relief Re: Court's  
24 Ruling Regarding Debtors' Continuing Trespass and Wrongful  
25 Possession. At the April 2, 2014 hearing on the matter, the  
26 bankruptcy court reiterated that Debtors would leave the  
27 property by June 1, 2014. The bankruptcy court also appointed  
28 an onsite manager at JLE's request to make sure Debtors left the

1 property by that date.

2 By May 31, 2014, Debtors had moved all of their cows from  
3 Dairy I and were no longer operating their business on the  
4 property.

5 **7. Cross Motions For Summary Judgment on JLE's POC**

6 Meanwhile, Debtors filed a motion for summary judgment  
7 (MSJ) on their objection to JLE's POC. They argued, as a matter  
8 of law, they were not trespassers because (1) they entered the  
9 Dairy I property pursuant to the terms of a valid lease which  
10 was approved by the bankruptcy court in Sonora Desert's  
11 bankruptcy case and (2) the bankruptcy court directed that  
12 Debtors remain on the property and operate their business.  
13 Debtors further maintained that under Arizona law, JLE could  
14 recover damages for rent, or a fair and reasonable satisfaction  
15 for the use and occupation of the property.

16 JLE filed a cross MSJ. JLE argued that, as a matter of  
17 law, the state court conclusively established that Debtors were  
18 in wrongful possession of the Dairy I property after JLE  
19 purchased the property at the trustee's sale on December 6,  
20 2013. JLE maintained that after that point in time, Debtors  
21 were trespassers. JLE asserted that under Arizona law, certain  
22 types of damages were proper to assess for trespass, including  
23 damages for lost profits and disgorgement of profits resulting  
24 from the trespass. Finally, JLE contended that any postpetition  
25 damages should be granted administrative priority.

26 On October 14, 2014, the bankruptcy court heard oral  
27 argument on the cross MSJs and took the matter under advisement.

28 On December 14, 2014, the court granted JLE's MSJ and

1 denied Debtors' MSJ, placing its oral findings of fact and  
2 conclusions of law on the record. The bankruptcy court observed  
3 that central to both motions was the issue of trespass and thus  
4 the undisputed facts must establish one way or another that  
5 Debtors' physical presence on JLE's property after the trustee's  
6 sale was without authorization.

7 The bankruptcy court applied the doctrine of issue  
8 preclusion in granting JLE's MSJ on the issue of Debtors'  
9 prepetition trespass. The court observed that the state court's  
10 findings in the FED action regarding ownership of Dairy I and  
11 Debtors' unauthorized possession of the property were entitled  
12 to preclusive effect. Therefore, the court concluded that  
13 Debtors' continued possession of the property after the  
14 trustee's sale constituted a trespass as a matter of law.

15 The court also independently found Debtors were trespassers  
16 under Arizona law. The court observed that the trustee's sale  
17 extinguished Debtors' right to remain on Dairy I based on Ariz.  
18 Rev. Statutes (A.R.S.) § 33-811(e), which provides that a  
19 trustee's deed conveys title clear of liens, claims, and  
20 interests junior to the deed of trust. Accordingly, Debtors'  
21 right to possess Dairy I terminated on December 6, 2013, and  
22 after that date Debtors' possession of the property was  
23 unauthorized.

24 The bankruptcy court made no determination regarding  
25 Debtors' trespass or liability for their postpetition occupancy  
26 of the property since JLE's POC was based on prepetition  
27 actions. The bankruptcy court also found that JLE presented no  
28 evidence of pre or postpetition damages and thus the court would

1 not offer an advisory ruling.

2 On January 20, 2015, the bankruptcy court entered an order  
3 denying Debtors' MSJ and granting JLE's MSJ in part, solely as  
4 it related to Debtors' prepetition trespass on the Dairy I  
5 property.

#### 6 **8. JLE's Administrative Claim**

7 On December 31, 2014, JLE filed its Administrative Claim  
8 which included a claim for Debtors' postpetition trespass.  
9 JLE then filed an MSJ addressing Debtors' postpetition trespass,  
10 seeking a determination that Debtors' trespass was conscious and  
11 that Debtors were required to disgorge their profits. JLE also  
12 argued that any damages resulting from Debtors' wrongful  
13 postpetition conduct should be granted administrative priority  
14 under the holding in Reading Co. v. Brown, 391 U.S. 471, 483-85  
15 (1968).

16 The bankruptcy court held a hearing on August 20, 2015,  
17 and granted JLE's MSJ in part as to the trespass based on the  
18 state court's ruling in the FED action and its own determination  
19 that Debtors were trespassers since they had no authorization to  
20 remain on the Dairy I property. As to the damages, the court  
21 denied summary judgment finding factual issues on whether  
22 Debtors' trespass was intentional and, if so, the degree to  
23 which they benefitted. The court also denied summary judgment  
24 on the issue of administrative priority, concluding that any  
25 priority issue would be determined after JLE had proved its  
26 damages.

#### 27 **9. The Trial**

28 The bankruptcy court held a trial on the issues of whether

1 Debtors' trespass was conscious and the appropriate measure of  
2 damages. After trial, JLE advised the bankruptcy court that it  
3 was seeking judgment for the following: For the trespass:

4 (a) Loss of use of land: lost opportunities - \$97,500 and lost  
5 profits - \$3,503,831; (b) cost of restoration of land -

6 \$1,200,000, plus additional amounts after March 28, 2014;

7 (c) annoyance/discomfort of owner - \$70,000, plus additional  
8 amounts after March 28, 2014; (d) fair market rental value -

9 \$83,000 as of March 28, 2014; (e) punitive damages - TBD;

10 (f) disgorgement of Debtors' profits: prepetition - \$1,145,000  
11 and postpetition - \$7,632,756. For waste/conversion bailment:

12 (a) physical damage to property - \$2,500. Although included in  
13 its POC, JLE was no longer pursuing claims for (1) damages to a  
14 hay barn, (2) stall cleaning costs, or (3) potential liability  
15 to the Arizona Department of Water Resources. As to JLE's  
16 claims for lost profits, JLE advised the bankruptcy court that  
17 the claim was brought as an alternative to the disgorgement  
18 claim and agreed that it was not entitled to lost profits and  
19 disgorgement. The bankruptcy court took the matter under  
20 advisement.

21 On April 19, 2016, the court issued a memorandum decision  
22 finding that Debtors were conscious trespassers from at least  
23 the time of the trustee's sale on December 6, 2013. The court  
24 determined that due to Debtors' conscious trespass, they were  
25 liable to JLE for the benefits they received for wrongfully  
26 staying on the Dairy I property. In the end, the bankruptcy  
27 court found that disgorgement of Debtors' profits was  
28 appropriate and concluded that JLE's prepetition damage claim

1 was \$558,716.24 and its postpetition administrative claim was  
2 \$1,517,069.64. The court entered an order consistent with its  
3 ruling on the same day.

4 **10. Debtors' Motion for Reconsideration; JLE's Motion For**  
5 **Clarification**

6 On May 2, 2016, Debtors filed a motion for reconsideration  
7 and/or to alter or amend the bankruptcy court's (1) January 20,  
8 2015 order denying Debtors' MSJ regarding Debtors' prepetition  
9 trespass; (2) September 17, 2015 minute entry ruling regarding  
10 Debtors' postpetition trespass; (3) Memorandum Decision; and  
11 (4) Order re proof of claim filed by JLE-04.

12 In the motion, Debtors maintained that the state court  
13 determined Debtors were tenants at sufferance. Since JLE never  
14 appealed that decision, Debtors argued that JLE was bound by  
15 that ruling under the principles of issue and claim preclusion.  
16 Debtors asserted that under these circumstances, JLE was  
17 entitled to damages only in the form of reasonable rent.

18 On September 30, 2016, the bankruptcy court denied the  
19 motion, finding there was no basis to reconsider or alter or  
20 amend the rulings. The bankruptcy court noted that FED  
21 proceedings were limited in scope with the only issue being the  
22 right of actual possession. The court further observed that due  
23 to the narrow scope of FED proceedings, the Arizona legislature  
24 made clear that plaintiffs could pursue claims for damages by a  
25 separate action, including claims for trespass damages. A.R.S.  
26 § 12-1183. Accordingly, the bankruptcy court concluded that the  
27 state court's statement that Debtors were tenants at sufferance  
28 did not preclude JLE from seeking a determination that they were



1 conscious trespassers liable for damages based on restitution.

2       The bankruptcy court also concluded that the state court's  
3 determination that Debtors were tenants at sufferance was not  
4 necessary or essential to its decision regarding whether  
5 Debtors' occupancy was lawful. Rather, once the state court  
6 found that completion of the trustee's sale terminated Debtors'  
7 right to possess the Property, the status attributed to Debtors'  
8 post-termination occupancy was of no import to its decision.

9       Finally, the bankruptcy court noted that the issue of  
10 trespass was not litigated nor was it required to be litigated  
11 in the state court FED proceeding. The court also observed that  
12 JLE obtained limited relief from stay authorizing the FED action  
13 to go forward, but JLE was prohibited from executing on the  
14 judgment if obtained. Therefore, the issues regarding damages,  
15 if any, were to be determined in the bankruptcy court. For  
16 these reasons, the court concluded that the trespass issue was  
17 not and should not have been raised in the summary FED  
18 proceeding. In the end, the court found no grounds to disturb  
19 its rulings that Debtors were trespassers in the pre and  
20 postpetition periods.

21       JLE also filed a motion for clarification of the bankruptcy  
22 court's calculations for the amount of its pre and postpetition  
23 claims. In a September 30, 2016 memorandum decision, the  
24 bankruptcy court granted JLE's motion in part and entered an  
25 amended order on September 30, 2016, finding that JLE had a  
26 prepetition claim for \$579,072.51 and a postpetition claim  
27 entitled to administrative priority in the amount of  
28 \$1,571,916.11. The bankruptcy court entered an amended order on

1 JLE's POC on the same day. Debtors filed a timely appeal from  
2 that order.

## 3 **II. JURISDICTION**

4 The bankruptcy court had jurisdiction over this proceeding  
5 under 28 U.S.C. §§ 1334 and 157(b)(2)(B). We have jurisdiction  
6 under 28 U.S.C. § 158.

## 7 **III. ISSUES**

8 A. Did the bankruptcy court err by applying issue  
9 preclusion to the state court's findings in the FED action and  
10 granting JLE's MSJ on the issue whether Debtors were  
11 trespassers?

12 B. Did the bankruptcy court err by independently deciding  
13 that Debtors were trespassers in the pre and postpetition  
14 periods?

15 C. Did the bankruptcy court err by finding that Debtors  
16 were conscious trespassers?

17 D. Did the bankruptcy court err by applying an incorrect  
18 measure of damages for trespass; i.e., damages beyond the fair  
19 market rental value of Dairy I?

20 E. Did the bankruptcy court err by improperly calculating  
21 JLE's postpetition damages?

## 22 **IV. STANDARDS OF REVIEW**

23 Rulings based on claim and issue preclusion are reviewed de  
24 novo as mixed questions of law and fact in which legal questions  
25 predominate. Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817,  
26 823 (9th Cir. BAP 2006) (citing Robi v. Five Platters, Inc.,  
27 838 F.2d 318, 321 (9th Cir. 1988)). Once it is determined that  
28 preclusion doctrines are available to be applied, the actual

1 decision to apply them is left to the trial court's discretion.  
2 In re Khaligh, 338 B.R. at 823. When state preclusion law  
3 controls, such discretion is exercised in accordance with state  
4 law. Id. (citing Gayden v. Nourbakhsh (In re Nourbakhsh),  
5 67 F.3d 798, 800-01 (9th Cir. 1995)).

6 We review de novo a bankruptcy court's summary judgment as  
7 well as its interpretation and application of relevant state  
8 law. Botosan v. Paul McNally Realty, 216 F.3d 827, 830 (9th  
9 Cir. 2000); Kona Enters. Inc. v. Estate of Bishop, 229 F.3d 877,  
10 883 (9th Cir. 2000).

11 We review factual findings such as the conscious nature of  
12 Debtors' trespass for clear error. Banks v. Gill Distribution  
13 Ctrs., Inc., 263 F.3d 862, 869 (9th Cir. 2001). A bankruptcy  
14 court's factual finding is not clearly erroneous unless it is  
15 illogical, implausible or without support in the record. Retz  
16 v. Samson (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010).

17 Whether the bankruptcy court used the correct legal  
18 standard in computing damages is reviewed de novo. Neptune  
19 Orient Lines, Ltd. v. Burlington N. and Santa Fe Railway Co.,  
20 213 F.3d 1118, 1119 (9th Cir. 2000).

21 The bankruptcy court's "computation of damages is a finding  
22 of fact we review for clear error." Simeonoff v. Hiner,  
23 249 F.3d 883, 893 (9th Cir. 2001).

## 24 V. DISCUSSION

### 25 A. The bankruptcy court did not err by finding Debtors liable 26 for trespass in the pre and postpetition periods.

27 Debtors argue that the bankruptcy court erred by finding  
28 them guilty of trespass on several grounds. First, they contend

1 that the state court's finding in the FED action that Debtors  
2 were tenants at sufferance was preclusive as to their status  
3 regardless of when they vacated the Property. According to  
4 Debtors, they were liable as tenants at sufferance, if at all,  
5 for the reasonable rental value of the Property.

6 Next, Debtors argue that the state court never made any  
7 factual findings or legal conclusions that Debtors were  
8 trespassers. Therefore, Debtors assert that the bankruptcy  
9 court erred by applying issue preclusion as a basis for granting  
10 JLE's summary judgment on the issue of Debtors' trespass and  
11 erroneously drew no distinction between a tenant at sufferance  
12 and a trespasser.

13 Finally, Debtors maintain they could not be trespassers  
14 postpetition when the bankruptcy court directed them to remain  
15 on the Property. As explained below, we are not persuaded by  
16 these arguments.

#### 17 **1. Issue Preclusion**

18 Whether the state court's finding of facts or legal  
19 conclusions are entitled to preclusive effect is determined  
20 under Arizona law. Child v. Foxboro Ranch Estates, LLC  
21 (In re Child), 486 B.R. 168 (9th Cir. BAP 2013). Under Arizona  
22 law, issue preclusion applies when: (1) the issue or fact to be  
23 litigated was actually litigated in a previous suit; (2) a final  
24 judgment was entered; (3) the party against whom the doctrine is  
25 to be invoked had a full opportunity to litigate the matter;  
26 (4) actually did litigate it; and (5) such issue or fact was  
27 essential to the prior judgment. Id. at 172 (citing Chaney  
28 Bldg. Co. v. City of Tucson, 716 P.2d 28, 30 (1986)).

1 Before applying these factors to this case, we briefly  
2 examine the nature of an FED action to place Debtors' "tenants  
3 at sufferance" argument in context. Since Debtors' leasehold  
4 interest was terminated by the trustee's sale, JLE had an  
5 immediate right to the Property. A.R.S. § 33-811(e). Under  
6 Arizona law, an FED action is one way to obtain possession of  
7 one's property. A.R.S. § 12-1173.01 (FED action proper when  
8 property has been sold at a trustee's sale). The FED proceeding  
9 is statutory and meant "to provide a summary, speedy and  
10 adequate means for obtaining possession of premises by one  
11 entitled to actual possession." Heywood v. Ziolo, 372 P.2d 200,  
12 201 (Ariz. 1962). The only issue determined in the proceeding  
13 is the right to actual possession of the property. Id. (citing  
14 A.R.S. § 12-1177(A): "On the trial of an action of forcible  
15 entry or forcible detainer, the only issue shall be the right of  
16 actual possession and the merits of title shall not be inquired  
17 into."). Given the limited scope of FED actions, "the only  
18 appropriate judgment is the dismissal of the complaint or the  
19 grant of possession to the plaintiff." United Effort Plan Trust  
20 v. Holm, 101 P.3d 641, 645 (Ariz. Ct. App. 2004). Because the  
21 state court is not authorized to decide any other issue besides  
22 the right of actual possession, the Arizona Legislature has  
23 provided in A.R.S. § 12-1183 that the FED action and judgment  
24 does not bar a separate action for trespass or trespass damages.

25 Against this background, the state court's finding that  
26 Debtors were tenants at sufferance cannot be given preclusive  
27 effect - their legal status as tenants at sufferance was neither  
28 litigated nor essential to the FED judgment. As noted by the

1 bankruptcy court, once the state court found that the completion  
2 of the trustee's sale terminated Debtors' right to possess the  
3 Dairy I property, the status attributed to Debtors' post  
4 termination occupancy was of no import to its decision.

5 In contrast, the state court's findings regarding JLE's  
6 right to possession of the property are entitled to preclusive  
7 effect on the issue of Debtors' trespass. Issue preclusion bars  
8 relitigation of identical issues that were resolved in a prior  
9 proceeding, even if the later suit involves a different cause of  
10 action. Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1399  
11 (9th Cir. 1992). "At common law, any unauthorized physical  
12 presence on another's property is a 'trespass.'" State ex rel.  
13 Purcell v. Sup. Ct. In and For the Cty. of Maricopa, 535 P.2d  
14 1299, 1301 (Ariz. 1975). Restatement (First) of Torts (1934)  
15 § 329 defines a trespasser as a "person who enters or remains  
16 upon land in the possession of another without a privilege to do  
17 so created by the possessor's consent or otherwise." See  
18 Webster v. Culbertson, 761 P.2d 1063, 1065 n.3 (Ariz. 1988)  
19 (following Restatement (First) of Torts in connection with  
20 landowner's liability towards trespassers).

21 The state court found that the trustee's sale terminated  
22 Debtors' right to possess the Dairy I property and thus Debtors  
23 "had no right to be there." For purposes of determining whether  
24 Debtors were trespassers under the Purcell definition or the  
25 Restatement (First) of Torts definition, the identical issue  
26 regarding Debtors' lawful or authorized possession of the  
27 property was actually litigated in the FED action. In other  
28 words, Debtors' physical presence on Dairy I was unauthorized

1 and they remained on the property without the consent of JLE. A  
2 final judgment was entered, Debtors had a full opportunity to  
3 litigate the matter and actually did litigate it, and the issue  
4 was essential to the prior judgment. Therefore, since all the  
5 elements for issue preclusion were met, we discern no error with  
6 the bankruptcy court's decision granting JLE's MSJ on the issue  
7 of Debtors' trespass based on issue preclusion.

8 Even if issue preclusion was not appropriate, the  
9 bankruptcy court independently decided on summary judgment that  
10 Debtors were trespassers as a matter of law. Under either the  
11 Purcell definition or the Restatement (First) of Torts  
12 definition of trespass, the record shows that JLE never  
13 consented to Debtors' continued possession of Dairy I.  
14 Accordingly, Debtors' possession was unauthorized and they had  
15 "no right to be there." The bankruptcy court thus properly  
16 found that Debtors were trespassers under Arizona law.

17 Debtors' reliance on their "tenants at sufferance" status  
18 in the FED action for their damage claim is misplaced. As the  
19 Arizona Court of Appeal explained:

20 Use of the word 'tenant' in this phrase is unfortunate  
21 as a tenancy at sufferance is not a true landlord-  
22 tenant relationship, but rather an interest in  
23 property. It exists when a party who had a lawful  
24 possessory interest in property wrongfully continues  
25 in possession of the property after its interest  
26 terminated.

24 Grady v. Barth ex rel. Cty. Maricopa, 312 P. 117, 120 (Ariz. Ct.  
25 App. 2013). Contrary to Debtors' view, there is little, if any  
26 distinction, between a tenant at sufferance and a trespasser  
27 under Arizona law. As tenants at sufferance, Debtors had no  
28 right to possession and thus they continued to occupy Dairy I

1 wrongfully. As trespassers, Debtors remained on the property  
2 without JLE's consent and therefore Debtors' possession was  
3 unauthorized. Indeed, the relationship between JLE and Debtors  
4 was that of owner and trespassers absent some agreement as to  
5 Debtors' continued occupancy. In short, whether tenants at  
6 sufferance or trespassers, Debtors were wrongdoers by their  
7 unauthorized continued possession of Dairy I.

8 In the end, the status of Debtors as tenants at sufferance  
9 is not legally inconsistent with being a conscious trespasser  
10 and the bankruptcy court implicitly so found. See generally  
11 Brady v. Scott, 175 So. 724, 725 (Fla. 1937) ("[A] tenant at  
12 sufferance is the most shadowy estate recognized at common law  
13 and practically the only distinction between such a tenant's  
14 holding and the possession of a trespasser is that the landowner  
15 may, by his acquiescence at any time base upon the tenancy at  
16 sufferance the relation of landlord and tenant, which he cannot  
17 establish at law against a mere trespasser, and that the tenant  
18 cannot be subjected to an action in trespass before entry or  
19 demand for possession.").

20 In sum, the FED action did not bar JLE's separate action  
21 for trespass or trespass damages. See A.R.S. § 12-1183. Based  
22 on the record before us, the bankruptcy court properly found  
23 Debtors were trespassers under Arizona law when they continued  
24 in possession of Dairy I after the trustee's sale.

25 **2. The bankruptcy court did not immunize Debtors from**  
26 **liability for their postpetition trespass.**

27 Debtors maintain that the bankruptcy court specifically  
28 directed them to remain on Dairy I until June 1, 2014, and



1 therefore they cannot be deemed trespassers and liable for  
2 trespass damages. This argument is without merit. We found no  
3 place in the record where the bankruptcy court authorized  
4 Debtors' occupancy of Dairy I nor did we find any place where  
5 the court specifically directed them to remain on the property  
6 or indicated an intent to limit the damages available to JLE.  
7 Rather, the court's ruling in its April and May 2014 orders was  
8 that Debtors would leave the property by June 1, 2014. Further,  
9 as the bankruptcy court properly observed, the bankruptcy filing  
10 could not grant Debtors property rights that the state court  
11 ruled did not exist. See Dominic's Rest. of Dayton, Inc. v.  
12 Mantia, 683 F.3d 757, 760-61 (6th Cir. 2012) (a debtor's  
13 bankruptcy filing does not protect the debtor from claims  
14 relating to the tortious use of another's property.). In short,  
15 Debtors' delay in vacating Dairy I after the conclusion of the  
16 FED action had nothing to do with the bankruptcy court's  
17 rulings.

18 **B. Damages**

19 Debtors argue that the bankruptcy court erred by finding  
20 that they were conscious trespassers and awarding damages to JLE  
21 on the basis of the disgorgement of profits. According to  
22 Debtors, the bankruptcy court's use of restitution damages is  
23 not supported by any cases or statutes. Therefore, they are  
24 liable, if at all, for the fair market rental value of the  
25 property. Finally, Debtors maintain that the bankruptcy court's  
26 calculation of postpetition profits was not supported by the  
27 evidence and constitutes clear error.

1           **1. The bankruptcy court did not err in finding Debtors**  
2           **were conscious trespassers.**

3           A "conscious wrongdoer" is one who benefits by his  
4 misconduct and who acts "with knowledge of the underlying wrong  
5 to the claimant," or "despite a known risk that the conduct in  
6 question violates the rights of the claimant." Restatement  
7 (Third) of Restitution and Unjust Enrichment § 51(3) (2011).  
8 Misconduct is defined as "actionable interference by the  
9 defendant with the claimant's legally protected interests for  
10 which the defendant is liable." Id. at § 51(1).

11           The bankruptcy court found that Debtors' trespass was  
12 conscious from the December 6, 2013 trustee's sale until they  
13 vacated Dairy I on May 31, 2014. We need not repeat each of the  
14 facts that support the bankruptcy court's conclusion, as the  
15 record contains ample instances showing Debtors' knowledge that  
16 their right to remain on Dairy I was coming to an end – either  
17 by termination of the March 1 Lease or by its extinguishment at  
18 the trustee's sale. The record demonstrates that Debtors knew  
19 that they had to vacate the Dairy I property at the latest by  
20 the date of the trustee's sale. Furthermore, Erik knew that JLE  
21 was the owner of the property and, based on the email from  
22 Mr. May and Erik's statement to Judge Haines at the June 26,  
23 2014 hearing, Debtors knew that the trustee's sale extinguished  
24 their rights in the March 1 Lease and their right to occupy the  
25 Dairy I property. Nonetheless, Debtors continued to operate  
26 their dairy at the property until May 31, 2014. Given these  
27 facts, the bankruptcy court's finding that Debtors were  
28 conscious trespassers was logical, plausible, and supported by

1 inferences drawn from facts in the record.

2       **2. The bankruptcy court did not err by using a**  
3       **restitutionary measure of damages, including**  
4       **disgorgement of profits, to determine Debtors'**  
5       **liability.**

6       We found no Arizona case or statute that discusses  
7       restitution damages and disgorgement of profits in a trespass  
8       case such as this. Where the state's highest appellate court  
9       has not spoken on an issue, the federal court's role is to  
10      predict what decision the state's highest court would reach.  
11      See Evanston Ins. Co. v. OEA, Inc., 566 F.3d 915, 921 (9th Cir.  
12      2009). A federal court uses "intermediate appellate court  
13      decisions, decisions from other jurisdictions, statutes,  
14      treatises, and restatements as guidance" to predict how the  
15      state's highest court would rule. Assurance Co. of Am. v. Wall  
16      & Assocs. LLC of Olympia, 379 F.3d 557, 560 (9th Cir. 2004).

17      In the absence of controlling law, Arizona courts follow  
18      the Restatements. Keck v. Jackson, 593 P.2d 668, 669 (Ariz.  
19      1979). Restatement (Third) of Restitution and Unjust Enrichment  
20      § 40 states: "A person who obtains a benefit by an act of  
21      trespass . . . is liable in restitution to the victim of the  
22      wrong." In comment b to this section, the Restatement explains  
23      that "[e]nrichment resulting from intentional trespass is not  
24      properly measured by ordinary rental value." Id. § 40, cmt. b  
25      (noting that when restitution takes the form of a money  
26      judgment, the measure of recovery depends on the blameworthiness  
27      of the defendant). "[A] conscious wrongdoer will be stripped of  
28      gains from unauthorized interference with another's property."  
29      Id.

1       There are policy reasons for mandating disgorgement of the  
2 wrongdoer's profits:

3       Restitution requires full disgorgement of profit by a  
4 conscious wrongdoer, not just because of the moral  
5 judgment implicit in the rule of this section, but  
6 because any lesser liability would provide an  
7 inadequate incentive to lawful behavior. If A  
8 anticipates (accurately) that unauthorized  
9 interference with B's entitlement may yield profits  
10 exceeding any damages B could prove, A has a dangerous  
11 incentive to take without asking - since the  
12 nonconsensual transaction promises to be more  
13 profitable than the forgone negotiation with B. The  
14 objection of that part of the law of restitution  
15 summarized by the rule of § 3 is to frustrate any such  
16 calculation.

17       . . .

18       If a conscious wrongdoer were able to make profitable,  
19 unauthorized use of the claimant's property, then pay  
20 only the objective value of the assets taken or the  
21 harm inflicted, the anomalous result would be to  
22 legitimate a kind of private eminent domain (in favor  
23 of a wrongdoer) and to subject the claimant to a  
24 forced exchange. The law of restitution responds to  
25 this anomaly by making the wrongdoer liable to  
26 disgorge profits wrongfully obtained, whenever such  
27 profits exceed recoverable damages.

28       Id. § 40, cmt. c.

      Restatement (Third) of Restitution and Unjust Enrichment  
§ 51(4) states:

      The unjust enrichment of a conscious wrongdoer . . .  
is the net profit attributable to the underlying  
wrong. The object of restitution in such cases is to  
eliminate profit from wrongdoing while avoiding, so  
far as possible, the imposition of a penalty.  
Restitution remedies that pursue this object are often  
called 'disgorgement' or 'accounting.'

      The Arizona Supreme Court has held that the "remedy of  
restitution is not confined to any particular circumstance or  
set of facts. It is, rather, a flexible, equitable remedy  
available whenever the court finds that 'the defendant, upon the  
circumstances of the case, is obliged by the ties of natural

1 justice and equity' to make compensation for benefits received."  
2 Murdock-Bryant Const., Inc. v. Pearson, 703 P.2d 1197, 1202  
3 (Ariz. 1985). Although the facts in Murdock-Bryant are  
4 distinguishable from those here, the Arizona Supreme court's  
5 view on the remedy of restitution demonstrates that it can be  
6 used in a variety of circumstances and its application is left  
7 to the court's discretion. In other words, restitutionary  
8 damages are not per se foreclosed in a trespass case such as  
9 this.

10 Finally, the case of Anderson v. Bureau of Indian Affairs,  
11 764 F.2d 1344, 1348 (9th Cir. 1985), stands for the proposition  
12 that a lessor of real property is not limited to the recovery of  
13 rent and may be entitled to a portion of profits earned by a  
14 holdover tenant who knows that a lease has been terminated and  
15 wrongfully holds over. In Anderson, the Bureau of Indian  
16 Affairs (BIA) appealed from a summary judgment awarding it  
17 \$35,938.00 of \$1,000,000.00 in proceeds from crops planted and  
18 harvested on tribal land by former lessees after termination of  
19 their lease, and awarding the balance of the proceeds to the  
20 lessee. The district court relied upon two Arizona statutes:  
21 A.R.S. § 12-1271, which permits a landowner to bring an action  
22 to "recover rent, or a **fair and reasonable satisfaction** for the  
23 use and occupation of real property . . . when a tenant remains  
24 in possession after termination of his right of possession" and  
25 A.R.S. § 12-1257, which states that "[a] tenant in possession in  
26 good faith, under a lease . . . , is not liable beyond the rent  
27 in arrears at the time the action is brought, and that which  
28 afterward accrues during continuance of his possession." The

1 district court concluded that the tribe was entitled to recover  
2 rent in arrears under A.R.S. § 12-1271 and was limited to the  
3 recovery of the rent under § A.R.S. 12-1257.

4 The Ninth Circuit reversed. The court construed the  
5 meaning of "**fair and reasonable satisfaction**" in A.R.S.  
6 § 12-1271 and concluded that the BIA was not limited to the  
7 recovery of rent when the lessees planted their cotton crop  
8 knowing that the lease had been terminated. The court reasoned  
9 that it would be neither fair nor reasonable to limit the BIA's  
10 and tribe's recovery to an amount equivalent to the rent due  
11 because the tribe members could have chosen to farm the land  
12 themselves, and if they had, the crop proceeds would be theirs.  
13 However, the court found that the lessees should recover the  
14 costs they incurred in producing the crops as otherwise the BIA  
15 would receive a windfall.

16 While the Anderson court does not mention the Restatement  
17 (Third) of Restitution and Unjust Enrichment, the reasoning of  
18 the case supports the conclusion that a landlord is not limited  
19 to the recovery of rent for the wrongful use and occupation of  
20 his or her property. Instead, a court may order the  
21 disgorgement of profits as a remedy under certain  
22 circumstances.<sup>7</sup>

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24 <sup>7</sup> Debtors contend the case is distinguishable because JLE  
25 could not have used the Dairy I property to run a dairy farm  
26 itself. While it is true that JLE was the entity created for  
27 holding the dairy properties, the record shows that  
28 Mr. Echeverria's and Mr. Odom's business plan was to update all  
three dairies on a rotating basis so that the Accomazzo/Ambien  
Dairy and Rio Loco dairy could operate effectively. They were  
(continued...)

1 In sum, these authorities collectively show that under  
2 Arizona law a plaintiff in a trespass action is permitted to  
3 claim restitution as a measure of damages as an alternative to  
4 damages for payment of rent. Accordingly, we conclude that the  
5 bankruptcy court did not err by calculating JLE's damages using  
6 a restitutionary measure of damages, including the disgorgement  
7 of profits. Since none of the cases cited by Debtors are  
8 binding or compel a different result, it is not necessary for us  
9 to discuss them.

10 **3. The bankruptcy court erred in calculating the**  
11 **postpetition profits.**

12 Where the trespasser's conduct is conscious, his or her  
13 liability may be measured by the trespasser's benefit or profit  
14 from the trespass. Restatement of Restitution §§ 40, 51(4).  
15 In calculating Debtors' liability under this standard, the  
16 bankruptcy court first considered Debtors' use of its silage,  
17 which Erik admitted would have been valueless if Debtors were  
18 required to move from the property. The court calculated the  
19 amount of silage used by Debtors on a daily basis and  
20 multiplied that number by the number of days they used JLE's  
21 property postpetition to arrive at a total representing Debtors'  
22 benefit.

23 Next, the court considered the profits Debtors gained by  
24 being able to operate a larger dairy during the trespass period.  
25 In this regard, the bankruptcy court noted that to move onto the

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26  
27 <sup>7</sup>(...continued)  
28 unable to implement that plan due to Debtors' trespass on  
Dairy I.

1 Van Leeuwen Property, Debtors had to sell 1405 dairy cows at a  
2 May auction. The remainder of their herd was moved to the Van  
3 Leeuwen property and used in Debtors' continued dairy  
4 operations. The court found Debtors directly benefitted to the  
5 extent they profited from being able to use the 1405 cows on the  
6 Dairy I property that they could not use on the Van Leeuwen  
7 property. The court then calculated Debtors' profit based on  
8 these additional cows. After applying credits for rent paid,  
9 the bankruptcy court found in the September 30, 2016 order that  
10 JLE had a prepetition claim for \$579,072.51 and a postpetition  
11 claim entitled to administrative priority in the amount of  
12 \$1,571,916.11.

13 Debtors contend that the bankruptcy court erred in  
14 calculating JLE's postpetition claim. According to Debtors, the  
15 bankruptcy court make a "critical mistake" of double-counting.  
16 This double-counting occurred because the court took the amount  
17 of silage used in the relevant time period and added that figure  
18 to a portion of the net income derived from its profits gained  
19 from operating a larger dairy operation on JLE's property.  
20 Debtors argue that it was error to include both items in the  
21 measure of restitution. Debtors also contend that the court's  
22 analysis of the amount of silage utilized by Debtors during  
23 their occupancy is not a proper method to calculate "profits"  
24 since it is an expense item. We agree.

25 The proper measure of recovery in this case must be the  
26 benefits, or net profits, received by Debtors from the wrongful  
27 use of JLE's property. Net profit is the business's gross  
28 revenues less any operating expenses. An operating expense



1 would include the silage that was bought by Debtors to feed  
2 their cows, including the extra cows that Debtors kept on the  
3 property by virtue of their wrongful trespass. Debtors did not  
4 generate a direct profit, or benefit, by use of the silage after  
5 their trespass. Instead, they simply avoided a loss of  
6 something that they had already paid for. Nonetheless, their  
7 purchase of the silage was a legitimate operating expense  
8 because it was fed to the cows which generated the profits that  
9 accrued to Debtors as a direct result of their wrongful  
10 trespass. Accordingly, the bankruptcy court erred by  
11 considering the silage as a separate component of damages which  
12 resulted in overstating and double counting the wrongfully  
13 obtained profits. Therefore, we vacate the bankruptcy court's  
14 postpetition damage award and remand for a calculation of  
15 damages consistent with this memorandum.

## 16 **VI. CONCLUSION**

17 For the reasons stated, we AFFIRM the bankruptcy court's  
18 findings regarding Debtors' conscious trespass in the pre and  
19 postpetition periods. We VACATE the bankruptcy court's  
20 postpetition damage award and REMAND for a calculation of  
21 damages consistent with this memorandum.  
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