

DEC 08 2017

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	HI-16-1181-BTaL
6	1910 PARTNERS,)	Bk. No.	15-00009
7	Debtor.)	Adv. No.	15-90006
8	_____)		
9	1910 PARTNERS,)		
10	Appellant,)		
11	v.)	MEMORANDUM¹	
12	ASSOCIATION OF APARTMENT)		
13	OWNERS OF CANTERBURY PLACE,)		
14	Appellee.)		
	_____)		

Argued and Submitted on October 26, 2017,
at Honolulu, Hawaii

Filed - December 8, 2017

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

Honorable Lloyd King, Bankruptcy Judge, Presiding

Appearances: Chuck C. Choi of Choi & Ito argued for appellant,
1910 Partners; Jerrold K. Guben of O'Connor,
Playdon & Guben LLP argued for appellee,
Association of Apartment Owners of Canterbury
Place.

Before: BRAND, TAYLOR and LAFFERTY, Bankruptcy Judges.

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 8024-1.

1 Chapter 11² debtor 1910 Partners appeals a judgment awarding
2 the Association of Apartment Owners of Canterbury Place ("AOAO")
3 its postpetition attorneys' fees and costs of \$567,936.25. The
4 fees and costs were awarded as a secured claim under § 506(b) and
5 as an administrative expense priority claim under § 503(b)(4), to
6 be paid in full, in cash, on the effective date of 1910 Partners'
7 confirmed plan pursuant to § 1129(a)(9)(A). Because the
8 bankruptcy court applied an incorrect standard of law and failed
9 to provide sufficient due process, we VACATE the award of post-
10 petition attorneys' fees and costs and REMAND.

11 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

12 **A. Events prior to the instant bankruptcy case and related**
13 **adversary proceeding**

14 AOAO is an association of owners of residences in Canterbury
15 Place, a mixed use condominium project in Honolulu ("Building").
16 1910 Partners is a limited partnership which owns the five ground
17 floor commercial units in the Building and 96 parking stalls
18 located on the second and third floors of the Building's parking
19 garage. Mr. Bruce C. Stark is the president of 1910 Partners.

20 The conflict between 1910 Partners and AOAO dates back to the
21 1990s. The parties' primary dispute lies in the allocation of
22 common expenses, utilities and reserves for the Building and how
23 much 1910 Partners should have to pay towards those items.

24 In 2009, AOAO filed five complaints against 1910 Partners in
25 state court; it sought to collect on 1910 Partners' alleged

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

1 delinquencies by foreclosing its statutory liens against the five
2 commercial units. 1910 Partners filed its first chapter 11
3 bankruptcy case before the state court could decide the merits of
4 the complaints. 1910 Partners removed the complaints to the
5 bankruptcy court and filed counterclaims against AOA.

6 During the course of 1910 Partners' first bankruptcy case,
7 the parties entered into a settlement agreement. Among other
8 things, the settlement agreement provided that 1910 Partners would
9 pay AOA approximately \$285,000 in full satisfaction of all
10 alleged prepetition maintenance fees, costs and utilities accrued
11 and contractual attorneys' fees. The settlement amount was to be
12 paid in monthly installments over four years. The parties also
13 agreed to install a submetering system to prevent future disputes
14 over the allocation of common expenses for the Building.

15 Unfortunately, the parties continued to have disputes and,
16 when mediation failed, AOA filed another action against 1910
17 Partners. 1910 Partners responded with several counterclaims.

18 **B. The instant bankruptcy case and related adversary proceeding**

19 On January 5, 2015, 1910 Partners filed its second chapter 11
20 bankruptcy case. Shortly thereafter, AOA removed the 2014 state
21 court action to the bankruptcy court. During the course of the
22 main case and adversary proceeding, AOA was represented by the
23 law firms of O'Connor Playdon & Guben ("OPG") and Revere &
24 Associates ("Revere").

25 AOA filed an amended proof of claim, asserting a secured
26 claim for \$1,308,500 ("Claim"). The Claim included prepetition
27 unpaid AOA maintenance fees, unpaid utility expenses, and unpaid
28 utility adjustment charges as provided by the 2012 settlement

1 agreement, as well as AOA's prepetition attorneys' fees of
2 approximately \$155,000. The Claim did not include any request for
3 payment of postpetition attorneys' fees or costs.

4 1910 Partners filed its initial chapter 11 plan of
5 reorganization in June 2015. In its objection, AOA contended it
6 was owed postpetition attorneys' fees as an oversecured creditor
7 under § 506(b), accruing from the petition date through July 15,
8 2015. Thereafter, 1910 Partners filed an amended chapter 11 plan
9 of reorganization, which the bankruptcy court confirmed over
10 AOA's objection ("Plan").³ The Plan paid the Claim in
11 installments of \$18,000 per month plus interest.

12 The confirmation order was entered on March 4, 2016.
13 According to the order, entered the same day as the adversary
14 judgment in favor of AOA discussed below, administrative expense
15 claims were to be filed and served on 1910 Partners no later than
16 60 days after the effective date of March 21, 2016, unless the bar
17 date was extended by mutual agreement of 1910 Partners and the
18 holder of the claim.

19 **1. The trial, judgment and events up to the appeal date**

20 The sole purpose of the adversary proceeding between AOA and
21 1910 Partners was to adjudicate the amount of the Claim.

22 The first time AOA indicated its intent to request
23 postpetition attorneys' fees and costs incurred as part of the
24 Claim was in its pretrial list of exhibits. AOA presented two
25 exhibits, each consisting of only a single page summary of the
26 fees and costs incurred by OPG and Revere respectfully. AOA also

27 ³ AOA's concurrent motion to appoint a chapter 11 trustee
28 was denied after a two-day hearing.

1 contended at the end of its 50-page brief that it was entitled to
2 postpetition attorneys' fees and costs as an oversecured creditor
3 in the amount of \$106,426 through December 31, 2015. AAO
4 acknowledged that its attorneys' fees and costs through trial
5 would be calculated at the conclusion of the trial. AAO's brief
6 did not mention any substantial contribution claim.

7 Trial on the Claim was held over four days. Counsel for AAO
8 stated at the end of his summation that AAO's postpetition
9 attorneys' fees were "almost a half a million dollars . . . and
10 accruing, because of Mr. Stark's obstinacy." He further argued,
11 for the first time, that the court needed "to send a message" to
12 Mr. Stark for his obstinacy and treat AAO's postpetition fees and
13 costs as an administrative claim under § 1129(a)(9)(A) that would
14 be paid in full, in cash, on the effective date.

15 Counsel for 1910 Partners objected, arguing that it was not
16 appropriate to address AAO's postpetition attorneys' fees and
17 costs and their reasonableness in the context of deciding the
18 Claim; some additional type of motion had to be filed and served.
19 Counsel also objected to AAO's oral request that its fees and
20 costs be paid as an administrative expense, arguing that AAO
21 could not have both a secured claim and an administrative claim,
22 and that this issue should have been raised in the main case, not
23 the adversary proceeding, and properly noticed with a hearing.

24 After trial, the bankruptcy court ordered the parties to
25 submit competing findings of fact and conclusions of law. In its
26 proposed findings and conclusions, AAO proposed the following
27 with respect to its postpetition attorneys' fees and costs:

28 • AAO incurred postpetition attorneys' fees and costs totaling

1 \$567,936.25;

- 2 • as an oversecured creditor AOA was entitled to **all**
3 postpetition attorneys' fees and costs under § 506(b), which
4 were "reasonable"; and
- 5 • because AOA had made a "substantial contribution" to the
6 estate it was entitled to have its attorneys' fees and costs
7 be accorded administrative expense priority status under
8 § 503(b)(4) and be paid in cash, in full, on the Effective
9 Date of the Plan as per § 1129(a)(9)(A).⁴

10 In addition to its proposed findings and conclusions, AOA
11 submitted an ex parte motion to submit its attorneys' time sheets
12 under seal and to hand deliver the time sheets to 1910 Partners
13 upon entry of an order granting the motion to seal. AOA
14 maintained that the time sheets contained confidential attorney-
15 client information and attorney work product. Alternatively, AOA
16 offered to file redacted versions of the time sheets with
17 unredacted versions to be viewed in camera.

18 1910 Partners submitted proposed findings, including one
19 stating that the bankruptcy court was unwilling to rule on AOA's
20 postpetition attorneys' fees and costs under § 506(b) until AOA
21 filed a properly noticed motion with supporting documentation, so
22 that the court and interested parties could ascertain the
23 "reasonableness" of AOA's fee request. 1910 Partners also
24 submitted a proposed finding that none of AOA's attorneys' fees
25 were entitled to administrative expense priority. 1910 Partners

26 ⁴ AOA maintained that it made a "substantial contribution"
27 in the main case by: (1) being the only active creditor in the
28 case; (2) raising the issue of recovering \$300,000 in insider
29 preference payments, which was not dealt with in the first plan;
30 (3) ensuring the enforcement of the "absolute priority" rule;
31 (4) moving to appoint a chapter 11 trustee, which motion was
32 denied but uncovered 1910 Partners' failure to maintain its units
33 and parking area; and (5) its objections raised to the initial
34 plan, which led to a reduced term of the final Plan payments to
35 unsecured creditors to five years after the Effective Date.

1 maintained that, as an oversecured creditor, AOA's legal fees
2 could not be both a secured claim under § 506(b) and an unsecured
3 administrative expense priority claim.

4 The bankruptcy court entered its findings of fact and
5 conclusions of law and judgment with respect to AOA's Claim on
6 March 4, 2016 ("March 4 Judgment"). In short, the court, adopting
7 AOA's proposed findings and conclusions, found in favor of AOA
8 in all respects and ruled that its Claim would be allowed in full.

9 With respect to AOA's postpetition attorneys' fees and
10 costs, which is the only issue on appeal, the court determined
11 that: (1) AOA was entitled to an award of its fees and costs
12 under § 506(b) and that the requested \$567,936.25 was
13 "reasonable"; and (2) AOA had made a "substantial contribution"
14 to the estate and therefore all of its § 506(b) fees and costs
15 were to be treated as a § 503(b)(4) administrative expense claim
16 and be paid in full, in cash, on the Effective Date of the Plan
17 pursuant to § 1129(a)(9)(A).

18 1910 Partners filed a timely motion for reconsideration,
19 raising two arguments with respect to AOA's postpetition
20 attorneys' fees and costs. First, 1910 Partners argued that the
21 court erred by awarding AOA's fees and costs under § 506(b) as
22 part of a "claims allowance process" without providing 1910
23 Partners or unsecured creditors a fair "due process" opportunity
24 to object to their reasonableness, after a duly noticed motion and
25 hearing. Without detailed time sheets, 1910 Partners argued that
26 it was unable to ascertain not only reasonableness of AOA's
27 postpetition fees but also what fees were attributable to legal
28 services provided in the main case as distinguished from those

1 provided in the adversary proceeding.

2 Second, 1910 Partners argued that the court erred by granting
3 AOA's postpetition attorneys' fees and costs administrative
4 priority under § 503(b)(4) without detailed time sheets from OPG
5 and Revere, any notice or hearing, and by making that
6 determination in the context of the adversary proceeding on the
7 Claim as opposed to in the main case. Furthermore, 1910 Partners
8 argued that, because the fees AOA incurred in the adversary
9 proceeding were solely for its benefit, they could never be
10 awarded as an administrative expense claim; AOA's efforts there
11 did not provide a tangible benefit to the estate or the general
12 unsecured creditors.

13 AOA opposed the motion to reconsider. Much of its
14 opposition spent time making a case for why its claim for
15 postpetition attorneys' fees and costs was entitled to
16 administrative priority under § 503(b)(4). AOA maintained that
17 by raising the administrative expense claim issue at the closing
18 of trial, in its proposed findings and conclusions after trial,
19 and by "proffering to file the detailed time sheets of OPG and
20 Revere under seal," 1910 Partners received sufficient due process.
21 AOA faulted 1910 Partners for not objecting to the proposed seal
22 motion or requesting that the court direct AOA to file its time
23 sheets in open court, when it had three weeks to do so.

24 After a hearing, the bankruptcy court entered findings of
25 fact and conclusions of law and an order on June 8, 2016, denying
26 the reconsideration motion (the "June 8 Order"). Throughout the
27 findings and conclusions, drafted by counsel for AOA and adopted
28 by the court, the court referred to AOA's postpetition attorneys'

1 fees and costs of \$567,936.25 as an administrative expense
2 priority claim under § 503(b)(4) to be paid per § 1129(a)(9)(A).
3 However, in the related order, also drafted by AOA's counsel and
4 adopted by the court, AOA's postpetition attorneys' fees and
5 costs of \$567,936.25 were awarded under § 506(b), with no mention
6 of § 503(b)(4) or § 1129(a)(9)(A).

7 On May 20, 2016, after the hearing on the reconsideration
8 motion but before the bankruptcy court had entered the June 8
9 Order denying that motion, the parties filed in the main case a
10 stipulation agreeing to extend the "Professional Fee Claims Bar
11 Date" to August 31, 2016.

12 1910 Partners timely appealed the March 4 Judgment and the
13 June 8 Order.

14 **2. Post-appeal events**

15 On June 29, 2016, AOA filed in the main case a motion to
16 enforce the Plan, arguing that 1910 Partners had failed to pay its
17 administrative expense claim of \$567,936.25. After a hearing, the
18 bankruptcy court entered findings of fact and conclusions of law
19 and an order on October 13, 2016, again drafted by counsel for
20 AOA, ordering that 1910 Partners either pay the claim
21 immediately, create a reserve for the \$567,936.25, seek a stay of
22 the enforcement of the Plan, or proffer a supersedeas or appeal
23 bond for \$709,245.31.

24 Meanwhile, on August 31, 2016, AOA filed in the main case an
25 application for the allowance and award of its postpetition
26 attorneys' fees and costs under § 503(b)(4), which 1910 Partners
27 opposed. Included with the application were detailed time sheets
28 from OPG and Revere. In total, AOA sought \$607,420.57 in fees

1 and costs to be awarded administrative expense priority under
2 § 503(b)(4). The fee application was served on 1910 Partners,
3 creditors and the U.S. Trustee. Later, in its reply, AOA0 boldly
4 asserted that the court did not need detailed time sheets or any
5 documentation to allow and award its postpetition fees and costs
6 as a § 503(b)(4) administrative expense priority claim, because
7 AOA0's work and results were apparent for both the main case and
8 the adversary proceeding liquidating its Claim and sufficiently
9 supported its administrative claim.

10 On December 2, 2016, the bankruptcy court entered an order in
11 the main case awarding AOA0 its postpetition attorneys' fees and
12 costs of \$607,420.57 as an administrative expense priority claim
13 under § 503(b)(4) to be paid pursuant to § 1129(a)(9)(A) (the
14 "December 2 Fee Order"). Attached to and incorporated in the
15 December 2 Fee Order were the March 4 Judgment and June 8 Order.

16 1910 Partners did not appeal the December 2 Fee Order.

17 **II. JURISDICTION**

18 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
19 and 157(a)(2)(A), (B) & (K). AOA0 raised the issues of finality
20 and mootness with respect to the March 4 Judgment in its motion to
21 dismiss this appeal, arguing that the December 2 Fee Order was a
22 "final" order that superseded the March 4 Judgment and mooted this
23 appeal. For the reasons that follow, AOA0's motion to dismiss is
24 DENIED.

25 We conclude that the March 4 Judgment was a final order. "An
26 order is final if it constitutes a complete adjudication of the
27 issues at bar and clearly evidences the judge's intention that it
28 be final." Wiersma v. Bank of the W. (In re Wiersma), 483 F.3d

1 933, 938 (9th Cir. 2007) (citing Slimick v. Silva (In re Slimick),
2 928 F.2d 304, 307 (9th Cir. 1990)). The March 4 Judgment
3 adjudicated the claims between the parties and unequivocally
4 awarded AOA0 its postpetition attorneys' fees and costs under
5 § 506(b), § 503(b)(4) and § 1129(a)(9)(A). The court made express
6 findings about the "reasonableness" of AOA0's fees as well as
7 findings about the "substantial contribution" AOA0 had made to the
8 estate. Nothing in the March 4 Judgment indicates that a further
9 motion was necessary for AOA0 to be awarded its postpetition fees
10 and costs and, in fact, AOA0 vehemently argued that no such motion
11 had to be filed for its fees and costs to be awarded under any
12 statute.⁵

13 We reject AOA0's argument that the parties and the court
14 contemplated further proceedings on AOA0's postpetition attorneys'
15 fees and costs after the March 4 Judgment based on the stipulation
16 to extend the Professional Fee Claims Bar Date. Section 2.3.2 of
17 the Plan governs claims for professionals who have rendered
18 services to the estate, such as debtor's counsel or counsel for a
19 creditor's committee. AOA0 was not claiming "professional fees"
20 here; it was asserting an administrative expense claim for its
21 fees, the bar dates for which is governed by Section 2.3.1 of the
22 Plan and confirmation order. The parties' stipulation, therefore,
23 had no effect on the bar date for AOA0's administrative expense
24 claim. Any such claim had to be filed and served no later than

25
26 ⁵ Arguably, AOA0 must have thought the March 4 Judgment
27 finally adjudicated its postpetition fee claim given that it filed
28 the motion to enforce the Plan, wherein it complained about not
being paid its \$567,936.25 administrative claim, **before** it filed
its fee application.

1 60 days after the Effective Date, which would have been May 20,
2 2016. Thus, AOA's fee application filed on August 31, 2016, if
3 even considered a proper administrative expense claim, was
4 untimely.

5 We also conclude that the appeal of the March 4 Judgment is
6 not moot. We lack jurisdiction over moot appeals. I.R.S. v.
7 Pattullo (In re Pattullo), 271 F.3d 898, 901 (9th Cir. 2001). A
8 case is moot where an event occurs while a case is pending appeal
9 that makes it impossible for the court to grant any effective
10 relief to the prevailing party. Id. While AOA argues that the
11 December 2 Fee Order has mooted the appeal because proper
12 procedures have since been followed and its postpetition
13 attorneys' fees and costs have again been awarded under the same
14 statutes, AOA fails to recognize that the bankruptcy court lacked
15 jurisdiction to enter the December 2 Fee Order.

16 Once a notice of appeal for a final, appealable order is
17 filed, the trial court is divested of jurisdiction over aspects of
18 the case involved in the appeal. Griggs v. Provident Consumer
19 Disc. Co., 459 U.S. 56, 58 (1982); Hill & Sanford, LLP v. Mirzai
20 (In re Mirzai), 236 B.R. 8, 10 (9th Cir. BAP 1999). Although the
21 trial court may take actions that preserve the status quo during
22 the pendency of an appeal, it may not finally adjudicate
23 substantial rights directly involved in the appeal. Neary v.
24 Padilla (In re Padilla), 222 F.3d 1184, 1189 (9th Cir. 2000). The
25 trial court cannot enter an order that supplements the order on
26 appeal because such supplementation would change the status quo.
27 In re Mirzai, 236 B.R. at 10 (citing McClatchy Newspapers v. Cent.
28 Valley Typographical Union, 686 F.2d 731, 734-35 (9th Cir. 1982)).

1 The trial court also may not alter or expand upon the judgment.
2 In re Padilla, 222 F.3d at 1190.

3 Because the propriety of AOA's claim seeking recovery of
4 postpetition attorneys' fees and costs is the subject of this
5 appeal, the bankruptcy court lacked jurisdiction to consider
6 AOA's subsequent fee application or to enter the December 2 Fee
7 Order, which not only supplemented the March 4 Judgment but
8 expanded upon it by awarding AOA an additional \$40,000 in
9 postpetition fees and costs. As a result, the December 2 Fee
10 Order is void. Id. Therefore, contrary to AOA's position, the
11 subsequent events which may have "cured" the procedural
12 irregularities that occurred here have no impact on this appeal.

13 Because we are able to grant 1910 Partners effective relief
14 if we decide the appeal of the March 4 Judgment in its favor, the
15 appeal is not moot. Accordingly, we have jurisdiction under
16 28 U.S.C. § 158.

17 **III. ISSUES**

18 1. Did the bankruptcy court err by awarding AOA's
19 postpetition attorneys' fees and costs as both a § 506(b) claim
20 and as an administrative expense priority claim to be paid in
21 full, in cash, on the Effective Date of the Plan?

22 2. Did the bankruptcy court err by awarding AOA's
23 postpetition attorneys' fees and costs without requiring AOA to
24 file and serve a motion with supporting documentation before
25 determining the amount of the fees and costs allowed under either
26 § 506(b) or § 1129(a)(9)(A) and § 503(b)(4)?

27 3. Did the bankruptcy court abuse its discretion in denying the
28 motion to reconsider?

1 **IV. STANDARDS OF REVIEW**

2 The bankruptcy court's application of the rules of procedure
3 is reviewed de novo. Ruvacalba v. Munoz (In re Munoz), 287 B.R.
4 546, 550 (9th Cir. BAP 2002). Likewise, whether a party's due
5 process rights were violated is a question of law we review de
6 novo. Miller v. Cardinale (In re Deville), 280 B.R. 483, 492 (9th
7 Cir. BAP 2002).

8 We will not disturb the bankruptcy court's award of
9 attorney's fees and costs unless the court erroneously applied the
10 law or abused its discretion. Renfrow v. Draper, 232 F.3d 688,
11 693 (9th Cir. 2000); Fry v. Dinan (In re Dinan), 448 B.R. 775, 783
12 (9th Cir. BAP 2011).

13 The bankruptcy court's denial of a reconsideration motion is
14 also reviewed for an abuse of discretion. Cruz v. Stein Strauss
15 Tr. # 1361, PDQ Invs., LLC (In re Cruz), 516 B.R. 594, 601 (9th
16 Cir. BAP 2014). The bankruptcy court abuses its discretion if it
17 applies an incorrect legal standard or its factual findings are
18 clearly erroneous. TrafficSchool.com, Inc. v. Edriver Inc.,
19 653 F.3d 820, 832 (9th Cir. 2011).

20 **V. DISCUSSION**

21 **A. The bankruptcy court erred in awarding AOA0 its postpetition**
22 **attorneys' fees and costs on this record.**

23 1910 Partners contends that the bankruptcy court erred by
24 granting AOA0's fee claim administrative expense priority under
25 §§ 503(b)(4) and 1129(a)(9)(A) and, at the same time, determining
26 that AOA0 was entitled to its postpetition attorneys' fees and
27 costs as an oversecured creditor under § 506(b). 1910 Partners
28 also argues that it was denied due process when the court awarded

1 AAOO its postpetition attorneys' fees and costs without a separate
2 motion or any documentation to support it. While, conceivably, we
3 can envision a situation where an oversecured creditor could have
4 an administrative expense priority claim and a claim under
5 § 506(b), we need not address that issue, because the record does
6 not support AAOO's postpetition fee award under any of the above
7 statutes.

8 **1. AAOO was not entitled to its fee award under § 506(b).**

9 Section 506(b) permits oversecured creditors to claim
10 attorney's fees and costs:

11 To the extent that an allowed secured claim is secured by
12 property the value of which, after any recovery under
13 subsection (c) of this section, is greater than the amount
14 of such claim, there shall be allowed to the holder of
such claim, interest on such claim, and any reasonable
fees, costs, or charges provided for under the agreement
or State statute under which such claim arose.

15 § 506(b). Thus, the creditor is entitled to postpetition
16 attorney's fees and costs if: (1) the claim is an allowed secured
17 claim; (2) the creditor is oversecured; (3) the fees are
18 reasonable; and (4) the fees are provided for under the agreement.
19 Kord Enters. II v. Cal. Commercial Bank (In re Kord Enters. II),
20 139 F.3d 684, 687 (9th Cir. 1998). It is undisputed that AAOO is
21 an oversecured creditor with an allowed secured claim and could
22 recover its reasonable postpetition attorneys' fees and costs
23 based on the underlying agreements between the parties upon proof.

24 However, § 506(b) requires that such fees and costs be
25 "reasonable." Dalessio v. Pauchon (In re Dalessio), 74 B.R. 721,
26 723 (9th Cir. BAP 1987). The key determinant for "reasonableness"
27 is whether the creditor incurred expenses and fees that fall
28 within the scope of the fees provision in the parties' agreement

1 and took the kinds of actions that similarly situated creditors
2 might reasonably conclude should be taken. Id. "The bankruptcy
3 court should inquire whether, considering all relevant factors
4 including duplication, the creditor reasonably believed that the
5 services employed were necessary to protect its interests in the
6 debtor's property." Id. (citing In re Carey, 8 B.R. 1000, 1004
7 (Bankr. S.D. Cal. 1981)). "A court should not reward a creditor
8 whose overly aggressive attorney harasses and opposes the debtor
9 at every stage of the bankruptcy proceeding, nor should an
10 oversecured creditor be given a blank check to incur fees and
11 costs which will automatically be reimbursed out of its
12 collateral." Id.

13 A secured claim holder has the burden of proving the
14 reasonableness of its fee claim under § 506(b). Atwood v. Chase
15 Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 (9th Cir.
16 BAP 2003). This requires, at minimum, supporting documentation to
17 include detailed time sheets.⁶ In re Dalessio, 74 B.R. at 724.
18 Without this, the trial court has no possible way to determine
19 reasonableness. Here, AOA0 did not request its postpetition
20 attorneys' fees and costs under § 506(b) in the Claim. The first
21 time AOA0 provided any real discussion on the matter was in its
22 trial brief in the adversary proceeding. However, AOA0 failed to

23
24 ⁶ We do not address the question of what procedural device
25 is required for an oversecured creditor to recover postpetition
26 attorney's fees and costs under § 506(b). While the Ninth Circuit
27 has not decided this issue, we held in In re Atwood that a proof
28 of claim requesting such fees and costs may be sufficient.
293 B.R. at 231-232. The Local Bankruptcy Rules for the District
of Hawaii are silent on this issue. Nonetheless, regardless of
the procedure used, an award for such fees and costs uniformly has
to be supported with evidence sufficient for the bankruptcy court
to determine reasonableness.

1 state the exact amount it would be seeking, indicating that it
2 would be determined after trial.

3 The amount of postpetition fees and costs AOA0 was seeking
4 was finally revealed in its proposed findings and conclusions
5 after trial, but was not supported with any evidence. AOA0 also
6 sought to file its counsels' time sheets under seal and proposed
7 not to provide a copy of them to 1910 Partners until after the
8 court had entered an order granting the seal motion. No such
9 order was entered, and 1910 Partners did not receive a copy of the
10 time sheets, redacted or otherwise, prior to the March 4 Judgment.
11 Also absent from the record is any declaration from AOA0's counsel
12 attesting to the fees' reasonableness.

13 AOA0 faults 1910 Partners for failing to object to the motion
14 to file the time sheets under seal or to request that the court
15 compel AOA0 to provide them in open court, suggesting that 1910
16 Partners' alleged silence somehow constituted waiver. 1910
17 Partners did object to the award of AOA0's postpetition attorneys'
18 fees and costs in closing argument at trial and in its competing
19 proposed findings and conclusions. Further, as the creditor
20 seeking such fees and costs, AOA0 had the burden of proving the
21 reasonableness of its claim under § 506(b). In re Atwood,
22 293 B.R. at 233. Putting the onus on 1910 Partners to object to
23 the seal motion or to compel AOA0 to provide the time sheets was
24 not only inappropriate, it was contrary to the law.

25 It is also not evident whether the bankruptcy court received
26 and reviewed the time sheets or did any independent inquiry into
27 the nature of the requested fees and costs. Although the court
28 summarily found that the entire amount requested for fees and

1 costs was "reasonable," the March 4 Judgment was drafted, in large
2 part, by AOA. Thus, we review this finding with special
3 scrutiny. Silver v. Exec. Car Leasing Long-Term Disability,
4 466 F.3d 727, 733 (9th Cir. 2006).

5 Overall, we conclude that the bankruptcy court erred by
6 failing to require AOA to support its postpetition fee request
7 with any evidence and by failing to afford 1910 Partners a
8 procedure to review the time sheets of AOA's professionals and to
9 make objections as to the reasonableness of the requested fees and
10 costs before entering the March 4 Judgment.

11 **2. AOA's fee award was not entitled to administrative**
12 **priority.**

13 Even more troubling is the bankruptcy court's award of AOA's
14 postpetition attorneys' fees and costs as an administrative
15 expense priority claim under § 503(b)(4) to be paid pursuant to
16 § 1129(a)(9)(A). Section 503(b)(4) provides, in relevant part:

17 (b) After notice and a hearing, there shall be allowed
18 administrative expenses, other than claims allowed under
section 502(f) of this title, including -

19 (4) reasonable compensation for professional services
20 rendered by an attorney or an accountant of an entity
21 whose expense is allowable under paragraph (3) of this
22 subsection, based on the time, the nature, the extent, and
23 the value of such services, and the cost of comparable
services other than in a case under this title, and
reimbursement for actual, necessary expenses incurred by
such attorney or accountant[.]

24 § 503(b)(4). As pertinent here, § 503(b)(4) permits an
25 administrative claim for fees and expenses of an attorney who
26 represents a creditor who made a substantial contribution to the
27 chapter 11 case. See Wake v. Sedona Inst. (In re Sedona Inst.),
28 220 B.R. 74, 81 (9th Cir. BAP 1998); In re W. Asbestos Co.,

1 318 B.R. 527, 530 (Bankr. N.D. Cal. 2004).

2 A creditor seeking administrative priority for its legal fees
3 and costs bears the burden of proof to demonstrate that the
4 creditor has made a substantial contribution to the estate.
5 Andrew v. Coopersmith (In re Downtown Inv. Club III), 89 B.R. 59,
6 64 (9th Cir. BAP 1988) ("The burden of proof under Bankruptcy Code
7 § 503(b)(4) to show that a substantial contribution was made is on
8 the party seeking compensation[.]"); see also In re Catalina Spa &
9 R.V. Resort, Ltd., 97 B.R. 13, 17 (Bankr. C.D. Cal. 1989) (same).
10 The measure of any substantial contribution is the "'extent of the
11 benefit to the estate.'" Cellular 101, Inc. v. Channel Commc'ns,
12 Inc. (In re Cellular 101, Inc.), 377 F.3d 1092, 1096 (9th Cir.
13 2004) (quoting Christian Life Ctr. Litig. Defense Comm. v. Silva
14 (In re Christian Life Ctr.), 821 F.2d 1370, 1373 (9th Cir. 1987)).
15 The benefits conferred by the claimant must be direct and not
16 "incidental" or "minimal," and must outweigh the benefit received
17 by the claimant. Id. at 1098.

18 The prerequisite for a creditor's administrative priority
19 claim for legal fees and costs under § 503(b)(4) is "notice and a
20 hearing." See § 503(b)(4). Moreover, Local Bankruptcy
21 Rule 3001-2(d) requires an entity requesting payment of an
22 administrative expense in a chapter 11 case to give notice of the
23 request to the debtor in possession, the U.S. Trustee and the
24 holders of the 20 largest unsecured claims. Local Bankruptcy
25 Rule 2016-1 also mandates that, to receive compensation for
26 attorney's fees or reimbursement of expenses under § 503(b)(4),
27 the professional must submit an application with supporting
28 documentation, including detailed time records and a certification

1 by the applicant. None of these things happened here.

2 We also find error in the court's consideration of AOA's
3 proposed administrative expense claim in the context of the
4 adversary proceeding on the Claim. Any administrative expense
5 claim had to be filed by separate motion in the main case,
6 properly noticed, and granted only after a hearing or opportunity
7 for hearing. No separate motion was filed in the main case,
8 proper notice was not provided, and no hearing was noticed or
9 held. AOA's counsel simply threw in as part of his closing
10 argument in the adversary proceeding that AOA's postpetition
11 attorneys' fees and costs should be given administrative priority
12 and be paid in full, in cash, on the Effective Date of the Plan to
13 teach Mr. Stark a lesson. AOA then proceeded to award itself an
14 administrative expense priority claim for the full amount of its
15 postpetition fees and costs in its proposed findings and
16 conclusions after trial, which the court adopted.

17 In summary, given these procedural irregularities, 1910
18 Partners (and others) were denied due process with respect to the
19 granting of administrative priority status to AOA's postpetition
20 attorneys' fees and costs.

21 Further, without a proper fee application and supporting
22 documentation, it was impossible not only for the court to find
23 that AOA made a "substantial contribution" to the estate but also
24 to find that every cent AOA spent pursuing its own Claim in the
25 adversary proceeding was a direct benefit to the estate. Even
26 with supporting documentation, it would be extremely difficult for
27 AOA to prove that the benefit recovered in the adversary
28 proceeding was outweighed by the benefit received by the estate.

1 Therefore, because the court's finding of "substantial
2 contribution" was not supported by any evidence, only argument, it
3 was clearly erroneous.⁷

4 **B. The bankruptcy court abused its discretion by not granting
5 the motion to reconsider.**

6 A motion under Civil Rule 59(e) should not be granted unless
7 the court is presented with newly discovered evidence, committed
8 clear error, or if there is an intervening change of controlling
9 law. 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th
10 Cir. 1999). 1910 Partners asked the bankruptcy court to
11 reconsider its ruling in the March 4 Judgment with respect to
12 AOA's postpetition attorneys' fees and costs under either
13 § 506(b) or § 503(b)(4), arguing lack of due process and that an
14 insufficient evidentiary record existed to find "reasonableness"
15 or "substantial contribution." Because we have determined that
16 the court applied an incorrect standard of law and clearly erred
17 in these respects, it abused its discretion by not granting 1910
18 Partners' motion to reconsider.

19 **VI. CONCLUSION**

20 We VACATE the portion of the March 4 Judgment awarding AOA
21 postpetition attorneys' fees and costs of \$567,936.25 and REMAND
22 for further proceedings. On remand, the court can consider
23 whether AOA is entitled to some amount of fees or costs as an
24 oversecured creditor under § 506(b). The court may also consider,
25 after proper notice and a hearing, whether any amount of these

26
27 ⁷ As with § 506(b), AOA's administrative claim for fees and
28 costs under § 503(b)(4) was also subject to a "reasonableness"
determination, which could not be determined absent an evidentiary
record. § 503(b)(4); In re Sedona Inst., 220 B.R. at 81.

1 fees or costs are entitled to administrative expense priority, to
2 the extent that such claim is not barred by the Plan or the
3 confirmation order.

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