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9 **IN THE UNITED STATES BANKRUPTCY COURT**
10 **FOR THE DISTRICT OF ARIZONA**
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13 In re:

14 GTI CAPITAL HOLDINGS, LLC, an
15 Arizona limited liability company dba
16 ROCKLAND MATERIALS,

17 Debtor.

In Proceedings Under Chapter 11

Case Nos. 2-03-bk-07923-SSC through
2-03-bk-07924-SSC

(Jointly Administered)

MEMORANDUM DECISION
REGARDING SURCHARGE TRIAL
(Opinion to Post)

18 In re:

19 G.H. GOODMAN INVESTMENT
20 COMPANIES, LLC, an Arizona limited
21 liability company,

22 Debtor.

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24 **I. PRELIMINARY STATEMENT.**
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27 This matter comes before the Court pursuant to the initial and supplemental motion
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1 to surcharge collateral filed by: (i) GTI Capital Holdings, LLC and G.H. Goodman Investment
2 Companies, LLC, the above-referenced Chapter 11 debtors (the “Debtors”), and (ii) Edward M.
3 McDonough, the examiner in the above-referenced Chapter 11 proceedings (the “Examiner”).
4 (“Surcharge Motion”/ “Supplemental Surcharge Motion”, collectively “Surcharge Motions” or
5 “Motions”).) [Dockets Nos. 829, 869] Pursuant to these Motions, the Debtors and the Examiner
6 jointly seek to surcharge collateral claimed by Comerica Bank (“Comerica”) for certain
7 administrative expenses totaling approximately \$2, 700,000. Beginning on December 6, 2004 and
8 concluding on June 29, 2005, the Court conducted a several-day trial on the merits of the Motions
9 and Comerica’s objection (“Objection”) thereto.¹ Thereafter, the matter was deemed submitted.
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12 In this Memorandum Decision, the Court has set forth its findings of fact and conclusions
13 of law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure.² The issues addressed herein constitute
14 a core proceeding over which this Court has jurisdiction. 28 U.S.C. §§ 1334(b), 157(b) (West 2005).
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18 **II. ISSUES.**

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21 Movants and Comerica have presented six issues to be decided by the Court:

22 A. Whether the Examiner has standing to prosecute the Surcharge Motions;
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25 ¹ The Trial was conducted on December 6 and 8, 2004; March 23, April 5, and June 29, 2005.

26 ² See Fed. R. Civ. P. 52, as made applicable by the Federal Rules of Bankruptcy Procedure 7052 and
27 9014. Any and all findings of fact shall constitute findings of fact even if they are stated as conclusions of
28 law, and any and all conclusions of law shall constitute conclusions of law even if they are stated as
findings of fact.

- 1 B. Whether certain professional fees may be surcharged under the cause/consent
2 standard (the “subjective test”) of Bankruptcy Code § 506 (c);
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4 C. Whether certain professional fees may be surcharged under the objective test
5 of §506(c);
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7 D. Whether certain personal property lease claims may be surcharged under the
8 subjective or objective test;
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10 E. Whether the bankruptcy estates may be reimbursed for certain administrative
11 expense claims that have already been paid; and
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13 F. Whether equity and fairness dictate a different result.
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16 **III. FINDINGS OF FACT.**
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19 **A. General Background.**

20 Pursuant to the Surcharge Motions, Movants seek to surcharge collateral claimed by
21 Comerica for two categories of administrative expenses: (i) certain professional fees and expenses
22 of the Examiner and his professionals; and (ii) post-petition rent and taxes related to certain
23 personal property leases of the Debtors.³ Comerica objects to Movants’ attempt to surcharge its
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26 ³ Movants are not seeking to surcharge Comerica’s claimed collateral for all post-petition expenses.
27 For example, Movants have not sought to surcharge Comerica’s claimed collateral for the fees of certain
28 of the Debtors’ professionals, which exceed \$470,000, or an environmental claim held by the Maricopa
County Flood Control District (the “Flood Control District”). However, the Debtors have sought to further

1 claimed collateral in any amount. See Pretrial Statement, §I, p.2. [Docket No. 1000]⁴

2
3 The Court conducted a protracted trial on the matters presented. Testimony was
4 provided by three witnesses:⁵ (i) Mr. Edward M. McDonough, the Examiner; (ii) Ms. Diane
5 McDonald, a representative of Comerica;⁶ and (iii) Mr. Grant Goodman, the Debtors'
6 representative. At the parties request, the Court admitted into evidence a substantial number of
7 documents presented by the Movants and Comerica. Thus, the parties presented an extensive
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11 Footnote 3 (cont'd)

12 surcharge Comerica's claimed collateral for the so-called Triad administrative claim. [Docket No. 832]
13 The Examiner has not joined in the Triad surcharge motion, and the Triad motion is not addressed in this
14 Memorandum Decision.

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16 ⁴ All docket references herein are to the Court's administrative docket in the Debtors' jointly
17 administered Chapter 11 proceeding.

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19 ⁵ In referencing the record, the Court will use the following definitions: (i) trial transcripts and
20 testimony therein will be referenced with the trial date and the initials of the testifying witness (e.g.,
21 [12/6/05 (Footnote 5 continued) EMTTr., p. __] signifies the testimony of Mr. Edward M. McDonough on
22 December 6, 2005); and (ii) transcripts from hearings in the Debtors' cases other than the trial on the
23 Surcharge Motions will be referenced by the date of the hearing and "HTr." to indicate it is a hearing
24 transcript (e.g., [4/4/04 HTr., p. __]).

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26 ⁶ Ms. McDonald is a senior vice president of Comerica and the assistant group manager of
27 Comerica's special assets group. [3/23/05 DMTr., pp.169-70] Ms. McDonald has more than thirty years
28 of experience in the banking business, more than twenty-five years of experience in dealing with special
assets, and has been involved in approximately one hundred fifty Chapter 11 proceedings on behalf of the
Bank. [3/23/05 DMTr., p.170] As noted below, however, Ms. McDonald had very little knowledge of the
Debtors' cases and surprisingly little of the Bank's institutional knowledge regarding information relevant
to the Debtors' Chapter 11 proceedings. One of the reasons for this lack of knowledge was her belief that
any issues in these Chapter 11 proceedings would be promptly resolved. Another more troubling reason
was the lack of information provided to her by her inside and, perhaps, outside counsel. For instance, at
the time of trial, she was still unclear as to what assets were subject to an alleged security interest of
Comerica. She did not realize that Comerica never held a lien on certain real property known as the "Deer
Valley" property. Finally, it appears to this Court that Comerica did not have the appropriate number of
personnel to staff this credit. It may be that Ms. McDonald's lack of knowledge was due to a lack of time
on her part to review and act upon all of the information provided to her.

1 record in support of their respective positions in this litigation.

2 To begin its analysis, the Court will provide a discussion of its factual findings in
3 this litigation. Whether Comerica caused or consented to the expenses at issue in this litigation is
4 a question of fact. See In re Compton Impressions, Ltd., 217 F.3d 1256, 1262 (9th Cir. 2000). For
5 this reason in particular, a thorough discussion of the facts is appropriate in the instant case.
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9 **B. Facts Pertaining To The Examiner's Standing And Right To Be Heard In**
10 **Connection With The Surcharge Motions.**

11 Comerica contends the Surcharge Motions are not true joint motions.⁷ Rather,
12 Comerica contends the Motions were a sham wherein Debtors' counsel "simply loaned its name
13 to the [Surcharge Motions] in order to try to create a semblance of standing . . ." [Ex. 831, p.2]
14 Comerica's contentions are not supported by the evidence presented at trial. For the reasons set
15 forth below, the Court finds the Surcharge Motions were (and are) true joint motions which were
16 properly authorized and filed by the Debtors and the Examiner.
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19 On August 11, 2004, Movants filed their initial Motion to Surcharge Comerica's
20 claimed collateral. [Ex. 80] On September 1, 2004, Movants filed their Supplemental Surcharge
21 Motion with the Court. [Ex 81]⁸ The Examiner authorized his counsel to file both of these documents
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24 ⁷ Comerica contended the Surcharge Motions were not filed with proper (or any) authorization by
25 an appropriate representative of the Debtors. [Id., p.4 & n.3] Ms. McDonald testified at trial that Comerica
26 was not aware of any facts which supported either of these contentions. [4/4/05 DMTTr., pp.111-12]

27 ⁸ Unlike the various other pleadings with respect to which the Court merely took judicial notice
28 (when appropriate) under Rule 201 of the Federal Rules of Evidence, these Motions were admitted into
evidence, because Debtors' counsel executed the Motions, reflecting that after due diligence under
Bankruptcy Rule 9011, the Debtors and their counsel believed, in good faith, that there were sufficient

1 with the Court. [12/6/04 EMTTr., p.170]

2 Mr. Goodman is the designated representative of the Debtors' estates. While
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4 Comerica subjected Mr. Goodman to extensive cross-examination regarding a wide range of issues,
5 the Court finds that Mr. Goodman's testimony, viewed in its entirety, supports the finding that the
6 Debtors properly joined in the filing of the Surcharge Motions. [4/5/05 GGTr., pp.7-8] Debtors'
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8 counsel was given proper authority by Mr. Goodman to join in the Surcharge Motions before they
9 were filed with the Court. [Id.] Mr. Goodman, as the Debtors' representative, also believed that
10 the Surcharge Motions and the relief requested therein were in the best interests of the creditors in
11 the Debtors' Chapter 11 cases. [Id.]

13 With respect to the Examiner's joinder in the Surcharge Motions, the Court finds that
14 the Examiner's joinder was simply a direct result of what had been agreed to by the parties
15 (including Comerica) at the April 15, 2004 hearing. The Examiner joined in the filing of the
16 Surcharge Motions after the Examiner and Comerica were unable to agree to the final terms of a
17
18 definitive settlement agreement. [12/6/04 EMTTr., p. 171]

20 The Court had initially directed the Examiner to file his position on the surcharge
21 issue; that was one of the Examiner's ongoing duties and responsibilities. The Examiner filed a
22 preliminary statement of position on the matter, but believed that further time was necessary to
23 complete his analysis. [Docket No. 699] Thereafter the Examiner turned his attention to one of his
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26 Footnote 8 (cont'd)

27 facts and appropriate law to support the Debtors' claims and to rebut Comerica's allegations that the filing
28 of the Motions by the Debtors was a "sham".

1 other duties and responsibilities, resolving the claims of the administrative expense claimants so
2 that the Bank and all administrative claimants might receive a prompt payment of even a pro rata
3 share of a respective claim, but soon encountered problems with the Bank as to his separate
4 settlement with it. [12/6/04 EMTTr., p. 171] Thus, the Examiner believed it was part of his
5 continuing duties to assist in the prosecution of the Surcharge Motions. Id. The Court finds that
6 the decision by the Examiner to participate in the Surcharge Motions was consistent with both the
7 duties of the Examiner and the agreement reached by the parties, including Comerica, at the April
8 15, 2004 hearing.

12 Thus, the Debtors are the proper movants for the Surcharge Motions. The Examiner
13 also is a proper movant given the facts of this case. The Court finds that the filing and prosecution
14 of the Surcharge Motions were (and are) in the best interests of the Debtors' estates, and in the best
15 interest of the Debtors' creditors in these Chapter 11 proceedings.

19 **C. The Early Days Of These Chapter 11 Proceedings.**

20 The Debtors filed their Chapter 11 petitions on May 8, 2003. Comerica is the
21 Debtors' primary secured creditor. At the onset of these proceedings, Comerica claimed it was
22 owed \$17,300,000, secured by a valid and perfected lien in substantially all of the Debtors' assets.
23 [Docket No. 10, p.2, lns.17-20]⁹ Comerica was (and is) substantially undersecured in the Debtors'

26 ⁹ Comerica's initial claim regarding the extent and the perfection of its liens was not correct. The
27 Bank had no lien rights in the property generally referred to in these cases as the Deer Valley property,
28 which was assigned a value of \$950,000. Moreover, there are two adversary proceedings in these Chapter
11 cases wherein the estates seek to avoid the Bank's lien in all of the Debtors' personal property. The

1 cases. The Debtors' loans were among the worst of Comerica's poorly performing loans.¹⁰ As
2 discussed below, Comerica ultimately charged off \$9,000,000 on its loans to the Debtors.
3

4 Approximately six weeks into these cases, Comerica filed a motion to appoint an
5 examiner with pervasively broad powers (the "Examiner Motion"). [Docket No. 73] Comerica did
6 not seek the remedy of a trustee – only an examiner with expanded powers. [Id.] On July 3, 2003,
7 the Court entered an order appointing Mr. McDonough as the Examiner with certain expanded
8 powers. [Docket No. 113] In open court, the Court stated the scope of the Examiner's duties
9 which were incorporated into the order appointing the Examiner. [Id.; 7/2/03 HTr.]
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12 While the Examiner was not initially given the pervasively broad powers sought by
13 Comerica in its Examiner Motion, the Court empowered the Examiner to perform a wide range of
14 duties at the request of Comerica. [Id.] While this topic is discussed more fully below, because
15 Comerica asked the Court to empower the Examiner to perform these duties, the Bank consented
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18 Footnote 9 (cont'd)

19 Debtors filed one of these adversary proceedings (Adversary No. 2:03-ap-00583-SSC) based on (among
20 other things) the Bank's alleged delay in filing its UCC-1 financing statement (The parties have generally
21 referred to this adversary proceeding as the "DePrizio litigation.") The Examiner filed the other adversary
22 proceeding (Adversary No. 2:04-ap-00676-SSC) at the direction of the Court based on Comerica's failure
23 to notate its name on the certificates of title of certain rolling stock. (The parties have generally referred
24 to this adversary proceeding as the "rolling stock litigation.") In the rolling stock litigation, the Court has
25 already entered judgment against Comerica in the amount of \$1,010,851, although the judgment is on
26 appeal. In total, the value of the personal property collateral in dispute in these adversary proceedings is
approximately \$2.3 million. [Docket Nos. 781, 691, 699] These adversary proceedings also attack
Comerica's lien in cash and accounts receivable. Thus, Comerica clearly was not correct in stating, at the
onset of these cases, that it had a valid and perfected lien in substantially all of the Debtors' assets.

27 ¹⁰ During the pendency of the Debtors' cases, there were approximately 85 loans under review by
28 Comerica's special assets group. [3/23/05 DMTTr., p.187] Of these loans, the Debtors' loans were among
the worst, if not the worst, within the Bank's group of troubled loans. [Id., pp.187-88]

1 to or caused the Examiner and his professionals to perform these initial duties.¹¹

2
3 Comerica actively sought to have Mr. McDonough appointed to serve as the
4 Examiner. Bank counsel¹² personally contacted Mr. McDonough prior to the Debtors' bankruptcy
5 filings, provided him with an overview of the situation, and asked him to run a conflicts check.
6 [12/6/04 EMTTr., pp.38-39] Mr. McDonough was selected by the Office of the United States
7 Trustee to serve as the Examiner upon the recommendation of Bank counsel.¹³ [12/6/04 EMTTr.,
8 p.40]
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11 The Examiner assumed his responsibilities in the Debtors' cases when these estates
12 were in "crisis mode." In the Examiner Motion, Comerica alleged gross mismanagement and/or
13 fraud in these cases (e.g., lack of proper cash controls, insider self-dealing, defalcations, improper
14 post-petition transfers, loss of key employees, and massive operating losses). [Docket No. 73]
15 These allegations required immediate action by the Examiner and his counsel.
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17 The Debtors had a substantial number of personal property leases, and without the
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20 ¹¹ The nature of the Examiner's powers were pervasive and complicated, requiring that he retain a
21 consulting firm, FTI Consulting, Inc. ("FTI"), and legal counsel, Bryan Cave LLP ("Bryan Cave").
22 Shortly after his appointment, the Examiner retained these professionals with the full knowledge of, and
without any objection from, Comerica. [Docket Nos. 118, 120, 157, 163]

23 ¹² Throughout this Memorandum Decision, the Court will use the term "Bank counsel" to refer to
24 outside counsel for Comerica. In the instances wherein the Bank lawyer involved was an in-house lawyer,
25 the Court will so indicate.

26 ¹³ It is easy to understand why Comerica's counsel recommended Mr. McDonough as Examiner and
27 why he was selected to serve by the Office of the United States Trustee. Mr. McDonough has extensive
28 expertise in serving as a fiduciary and in other professional capacities in distressed business situations. [Ex.
1; 12/06/04 EMTTr., p.36] He is a well-respected, highly qualified insolvency professional. In this Court's
view, Mr. McDonough did an excellent job during the entire course of this appointment.

1 continued use of at least some of this leased property, the Debtors could not have remained
2 operational. Comerica refused to consent to any payments being made to the personal property
3 lessors from funds claimed as its cash collateral until the Examiner had analyzed which leases were
4 essential to the Debtors' operations. Comerica claimed a lien in all of the Debtors' cash. [Docket
5 No. 10, p.2] Thus, the Examiner immediately focused on analyzing these personal property leases
6 as requested by the Bank and as directed by the Court. [7/11/03 HTr., pp.7-8, 23-26; 7/24/03 HTr.,
7 pp.5-10] The Examiner essentially undertook a cash management analysis for the Bank to
8 determine what funds were available to pay those personal property leases that were essential to
9 the operations.
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13 On July 22, 2003, the Examiner filed a report which focused on personal property
14 leases. As a direct result of this report and related analysis, a number of items of personal property
15 were surrendered, and the underlying leases were rejected by the Debtors. [Ex. 43] The Debtors'
16 leases of personal property were substantially pared down through subsequent supplemental reports
17 submitted by the Examiner recommending lease rejections during August and September 2003.
18 [Ex. 45-46] Thus, the Examiner completed, in relatively short order, the requisite work to
19 accomplish one of Comerica's goals.¹⁴
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23 During the early stages of his appointment, the Examiner also focused on controlling
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26 ¹⁴ The Examiner and the Debtors worked together to pare down the leases. As the Examiner
27 recommended surrender and rejection, the Debtors filed the appropriate pleadings to obtain the rejection
28 of these leases since the Examiner did not have the power to assume or reject leases at this stage of the
Debtors' cases. Thus, the Court entered rejection orders over a period of several weeks. This paring down
process continued essentially throughout these cases. [Docket Nos. 166, 167, 259, 317, 321, 590, 591, 606]

1 cash and cash collateral. [12/6/04 EMTTr., pp.52, 53-54] During this process, the Examiner
2 provided Comerica with an extensive amount of financial information regarding cash expenditures
3 and other matters related to cash collateral. [Exhibit 69; 12/6/04 EMTTr., pp.53-54] What is
4 unusual is that the Examiner undertook the tasks of an independent thorough review that the Court
5 would normally expect to be undertaken by Comerica's business people or by professionals retained
6 by the Bank.
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9 The Court approved various cash collateral budgets in these Chapter 11 proceedings,
10 which were incorporated in the Orders authorizing the use of Comerica's cash collateral. [Exhibit
11 70; 12/6/04 EMTTr., p.56] The Examiner previewed all of the budgets with Bank counsel.
12 Comerica approved these budgets through communications between the Examiner and Bank
13 counsel. [12/6/04 EMTTr., p.58] Through this process, Comerica consented to personal property
14 lease payments totaling approximately \$455,000 for the months of August 2003 through January
15 2004. [12/6/04 EMTTr., pp.58-60]
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19 On August 8, 2003, barely more than a month after his appointment, the Examiner
20 filed a report that addressed essentially all of the matters within the scope of the Examiner's duties
21 other than the separately addressed personal property lease issues (the "Initial Report"). [Exhibit
22 44; 12/6/04 EMTTr., pp.63-64] Thus, another major goal of Comerica was accomplished by the
23 Examiner in short order.¹⁵
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26 ¹⁵ Bank counsel received an advance copy of the Initial Report (as did Debtors' counsel). Comerica
27 did not voice any complaints about the Initial Report or the amount of time devoted to the Initial Report.
28 [12/6/04 EMTTr., pp.41, 65] Comerica's representative at the surcharge trial, Ms. McDonald, was not even
aware that the Examiner had prepared the Initial Report, which reflects to what extent the Examiner was

1 The Initial Report was lengthy, detailed and a significant undertaking especially in
2 light of the time constraints placed on the Examiner. The Initial Report confirmed many of the
3 concerns expressed by Comerica. The Initial Report directly and substantially benefitted Comerica
4 and the Debtors' estates.
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7 **D. Comerica's Decision To Seek The Further Expansion Of The Examiner's**
8 **Powers To Consummate A Sale Of Its Claimed Collateral.**

9 On August 19, 2003, Comerica filed an emergency motion to further expand the
10 powers of the Examiner to, among other things, "facilitate and accomplish an auction sale of
11 substantially all of the Debtors' operating assets together with the Debtors' executory contracts
12 and unexpired leases." (the "Expansion Motion"). [Docket No. 199] Prior to the filing of the
13 Expansion Motion, Bank counsel discussed the concept of the further expansion of powers with
14 the Examiner. [12/6/04 EMTTr., pp.67-68] The Expansion Motion heavily relied on the
15 findings of the Examiner set forth in the Initial Report. [Docket No. 199, pp.3-8]
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19 While Comerica included a request for the appointment of a trustee as an alternative
20 remedy in its Expansion Motion, the Bank only wanted this remedy if the Court decided it was not
21 appropriate to expand the Examiner's powers. [Id.] Comerica preferred the expansion of the
22 Examiner's powers over the appointment of a trustee because the Bank knew a trustee would have
23 to start from "square one" and would lack knowledge regarding the key issues in the Debtors'
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27 Footnote 15 (cont'd)
28 assisting Bank counsel and Comerica, since they apparently did not have the ability to analyze such issues
 on their own. [4/4/05 DMTTr., p.63]

1 cases. [4/4/05 DMTTr., p.68] Indeed, Comerica believed that the appointment of a trustee, rather
2 than the expansion of the Examiner's powers, would not have benefitted Comerica. [4/4/05
3 DMTTr., p.69]
4

5 The Debtors adamantly opposed the expansion of the Examiner's powers and
6 objected to the Expansion Motion [Ex. 215], and the Court was required to conduct an evidentiary
7 hearing on the Motion. In support of its position, Comerica called the Examiner to testify as a
8 witness. [10/15/03 H.Tr., pp.4-90] On October 20, 2003, the Court issued its memorandum
9 decision on the Expansion Motion and, in large part, granted the relief requested by Comerica.
10 [Docket No. 326] The Court then entered an order expanding the Examiner's powers to include
11 the power to sell the Debtors' assets and the right to assume and assign the Debtors' executory
12 contracts. [Docket No. 356]
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16 At this trial, Comerica attempts to argue that it and, once he was appointed, the
17 Examiner believed that Comerica was oversecured; hence, there was no need through December
18 2003 and beyond to discuss a carve out for the payment of the fees and costs of the Examiner and
19 his professionals from Comerica's alleged collateral. However, on August 8, 2003, a little over a
20 month after the Examiner was appointed, the Examiner filed his Initial Report with the Court.
21 [Exhibit 44] This Report showed that the Debtors' cash receipts and expenditures were not
22 reliable and had been overstated. Since the net income being generated by the Debtors was not
23 reliable, a key component in valuing any operating business, Comerica's reliance on its prepetition
24 valuation of the Debtors' assets was no longer supported by the facts of this case. Indeed by
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1 October 20, 2003, Comerica was pressing for a sale of the Debtors' assets at the evidentiary hearing
2 on the Expansion Motion, because Comerica knew, or it should have known, that it was
3 undersecured. Any other evidence presented by Comerica, at this trial, on the point is simply not
4 credible.¹⁶

5
6 The Examiner became convinced, in September to October 2003, that he would be
7 lucky to sell the Debtors' assets above the \$12,000,000 to \$14,000,000 range. [12/8/04 EMTTr.,
8 p. 147] Since the approximate amount of Comerica's debt was at least \$17,000,000 at the time,
9 the Court concludes that Comerica was undersecured as early as October 2003.
10
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12 Upon the further expansion of his powers, the Examiner immediately commenced
13 marketing the Debtors' assets. In this process, the Examiner utilized the services of FTI and Bryan
14 Cave, and he also retained an environmental consulting firm, Brown and Caldwell. [12/6/04
15 EMTTr., p.168]. The Examiner and FTI handled the overall marketing, solicitation and due
16 diligence aspects of the sale process. [12/6/04 EMTTr., pp.68-69] Bryan Cave handled all legal
17 aspects of the sale process, including the preparation of the purchase agreements and the related
18 sale motions. [12/6/04 EMTTr., p.69] Brown and Caldwell assisted the Examiner by handling
19 geological and technical issues relating to certain real property sites owned by the Debtors.
20 [12/6/04 EMTTr., p.69]
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24 Comerica's internal file documents establish that the Bank wanted to have its
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27 ¹⁶ During the Trial, Comerica relied on the Debtors' valuation of the assets as of the commencement
28 of the Chapter 11 proceedings. However, in its Motion for Relief from Stay and its Expansion Motion,
Comerica questioned the accuracy of the Debtors' valuations.

1 collateral sold by the end of 2003. [Ex. 95]¹⁷ The Examiner and his professionals moved quickly
2 to market and solicit bids for the Debtor's assets. Through this process, the Examiner selected
3 Arizona Materials as the lead bidder. [12/6/04 EMTTr., p.72]
4

5 On December 31, 2003, Arizona Materials and the Examiner executed an asset
6 purchase agreement pursuant to which Arizona Materials agreed to acquire substantially all of the
7 Debtors' assets for an all-cash purchase price of \$7,800,000, subject to higher and better offers.
8 [12/6/04 EMTTr., p.80] When this agreement was executed, the Debtors were operating as a going
9 concern. [12/6/04 EMTTr., p.80]
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12 Comerica was involved in, and kept apprised of, the marketing and sale process
13 through Bank counsel. [12/6/04 EMTTr., pp.74, 77] In fact, the Examiner learned about Arizona
14 Materials' interest in the Debtors' assets through Bank counsel. [12/6/04 EMTTr., pp.72-73] The
15 Examiner previewed bids received during the sale process with Bank counsel. [12/6/04 EMTTr.,
16 p.75; Ex.4] Bank counsel also received drafts of the asset purchase agreement as it was being
17 negotiated by counsel for the Examiner and Arizona Materials. [12/6/04 EMTTr., pp.79-80]
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20 On December 31, 2003, the Examiner filed a motion to sell the Debtors' assets to
21 Arizona Materials, and an accompanying motion to establish sale and bidding procedures with the
22 Court. [Docket Nos. 473, 474] However, the Court did not approve either motion. Because of the
23 concerns expressed by various interested parties (other than Comerica) and the independent
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26 ¹⁷ Exhibit 95 is a quarterly report prepared by the Bank's special assets group regarding the Debtors'
27 loans. The report measures the Bank's exposure as of August 5, 2003. Thus, this report was prepared
28 before the Bank filed its Expansion Motion. The report plainly states the Bank's plan of action was to
"attempt to liquidate all collateral before year end." [Id., p.2]

1 concerns of the Court, the Examiner was sent back to the negotiating table with Arizona Materials
2 and other interested parties. [1/8/04 HTr., pp.79-82, 87]
3

4 The Examiner conducted these negotiations on an expedited basis. Arizona Materials
5 and the Examiner ultimately executed an amended asset purchase agreement on January 23, 2004.
6 [12/6/04 EMTTr., pp.81-82] Pursuant to this amended agreement, Arizona Materials agreed to
7 acquire substantially all of the Debtors' assets for an all-cash price of \$8,000,000. [12/6/04
8 EMTTr., p.82] On January 23,2004, the Examiner filed an amended sale motion and an amended
9 motion to set sale and bidding procedures. [Docket Nos. 527-28; Ex. 9] ¹⁸ On that very day, the
10 Debtors also ceased business operations. [12/6/04 EMTTr., p.82] However, the Examiner had negotiated
11 and documented the agreement with Arizona Materials in such a manner that the purchaser had no ability
12 to withdraw from the transaction due to the cessation of the Debtors' business without losing its deposit.
13 [Ex. 9]
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17 On February 19, 2004, the Court conducted a final hearing on the Arizona Materials
18 sales transaction. Because no parties appeared at the hearing to overbid Arizona Materials, the
19 transaction was approved by the Court. [Docket No. 594] The Arizona Materials transaction
20 closed on February 20, 2004, and it generated \$8,000,000 in cash proceeds. [12/6/04 EMTTr.,
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23
24 ¹⁸ As reflected by the docket of this Court, the Debtors' cases were in a highly contentious state
25 around this period of time. The Debtors' estates also were running dangerously low on cash. The Debtors
26 had proposed a Chapter 11 plan that was met with stiff resistance by Comerica and various other parties.
27 The very day the Examiner filed his amended motions, the Debtors abandoned their plan. [Docket No. 525]
28 Comerica had a stay relief motion pending at the time. [Docket No. 255] Four days after the Examiner
filed his amended motions, the Debtors withdrew their opposition to the stay relief motion. [Docket No.
539] As noted below, however, Comerica chose not to move forward and foreclose on its claimed
collateral. Instead, Comerica chose to allow a sale to be completed before this Court.

1 pp.96-97]

2 After the closing of the sale, the Debtors had no remaining tangible assets, and the
3 only remaining intangible assets were litigation claims, certain accounts receivable, and cash.
4 [12/6/04 EMTTr., p.97] Since February 2004, the Debtors' cases have focused on how these sale
5 proceeds should be distributed among competing creditors. Those competing creditors are
6 Comerica, since it asserted a lien on almost all of the sale proceeds, and the various administrative
7 expense creditors.¹⁹

8 In the context of the Examiner's power of sale and the overall sale process, there are
9 other factual areas that warrant discussion. First, the Court believes that the circumstances
10 surrounding the involvement of Brown and Caldwell warrant specific discussion since this Firm's
11 work was limited to assisting the Examiner in the sale process.

12 Comerica refuses to consent to having any of its claimed collateral surcharged to pay
13 Brown and Caldwell's professional fees, even though this Firm rendered services in connection
14 with, and only in connection with, the marketing and sale of the Bank's real property collateral.
15 Thus, Brown and Caldwell has received only a fraction of its claim even though its services were
16 completed in early 2004.²⁰

17 ¹⁹ It is very unlikely that general unsecured creditors will receive a distribution in the Debtors' cases.
18 General unsecured creditors have been inactive throughout these proceedings, and the Office of the United
19 States Trustee was unable to appoint an official unsecured creditors' committee in the Debtors' cases.
20 [Docket No. 44]

21 ²⁰ Brown and Caldwell was owed the sum of \$25,850.35 for its fees, and the sum of \$1,164.47 for
22 its costs. [Docket No. 633] On October 14, 2004, the Court entered an order allowing the proceeds
23 allocated to the value of certain free-and-clear property (the Deer Valley property) to be distributed, on a

1 Brown and Caldwell's efforts were critical to the sale and marketing process with
2 respect to the Bank's real property collateral – the 43rd Avenue property and the Buckeye property.
3 [12/6/04 EMTTr., pp.92-96] Brown and Caldwell provided technical assistance to the Examiner
4 on environmental remediation, the Flood Control District claim,²¹ and other issues involving these
5 properties, all of which were critical to the sale process. [12/6/04 EMTTr., pp.91-92]
6
7

8 Comerica's refusal to allow Brown and Caldwell to be paid from the proceeds of its
9 claimed collateral is highly unfortunate. This Firm provided services which directly and
10 substantially benefitted Comerica and only Comerica. Through Bank counsel, Comerica was
11 advised in advance of the Examiner's intention to hire Brown and Caldwell. [12/6/04 EMTTr.,
12 p.93] Bank counsel received a budget from the Examiner specifically because the Examiner
13 wanted to be able to tell the Brown and Caldwell representatives that its retention and payment had
14 been discussed with, and was supported by, the Bank. [12/6/04 EMTTr., p.96] Comerica, in fact,
15 supported the retention of Brown and Caldwell. [12/6/04 EMTTr., p.96] Due, in part, to the
16 efforts of Brown and Caldwell, Comerica also has received in excess of \$4,000,000 in distributions
17 representing the value of the real property sold.
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22 Thus, the Court finds that Comerica caused the Brown and Caldwell fees to be
23 incurred by the Debtors' estates by filing the Expansion Motion so that its real estate collateral
24

25 Footnote 20 (cont'd)
26 *pro rata* basis, to administrative expense creditors, including Brown and Caldwell. [Docket No. 893]
27 Brown and Caldwell's share of this interim distribution was \$8,008.35. Thus, the Firm has an unpaid
28 balance of \$19,006.47, which the Court will now solely allocate to its fees.

²¹See, infra, note 3.

1 could be sold through this Court. Brown and Caldwell's services meet each and every one of the
2 requirements of § 506(c) of the Bankruptcy Code, including (without limitation) providing a direct,
3 substantial, and quantifiable benefit that vastly exceeds the fees charged by this Firm.
4

5 Second, concerning other issues related to the sale process that should be reviewed
6 by the Court, Comerica claimed it had a lien on substantially all of the Debtors' assets at the onset
7 of these Chapter 11 proceedings, Comerica admitted, over time, that it did not have a lien on one
8 of the parcels of real property sold to Arizona Materials which was worth \$950,000 – the Deer
9 Valley property. [Docket Nos. 781, 691, 699] Comerica challenged the Movants' attempt to
10 surcharge the fees of the Examiner and his professionals in connection with the marketing and sale
11 process of the Deer Valley property against the collateral being held by Comerica. Comerica
12 argued that if its collateral were to be surcharged, there should be some type of allocation between
13 the fees and costs expended to sell the collateral and the fees and costs to sell the unencumbered
14 property, with the collateral and the unencumbered property to be appropriately charged based upon
15 the services rendered.
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20 What Comerica failed to do, however, was present evidence as to why it would be
21 appropriate to allocate certain sale expenses only to the Deer Valley property. In contrast, the
22 Examiner testified that a de minimis amount of work went into the selling and marketing of the
23 Deer Valley property. [12/6/04 DMTTr., p.88] The Deer Valley property was easy to sell because
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1 there were no complex issues, such as the permissible usage of the properties or how to resolve the
2 claims asserted by the Flood Control District.²² [12/6/04 EMTTr., p.88]
3

4 Comerica's allocation argument also is contrary to the goal it wanted to accomplish
5 in the Debtors' cases. Comerica wanted all of the Debtors' assets to be sold as one package.
6 [4/4/05 DMTTr., p.69] Comerica wanted the Debtors' assets sold as a going concern, because the
7 Bank knew that a liquidation of these assets, as opposed to a going concern sale, would yield less
8 for the Bank. [3/23/05 DMTTr., p.207] Comerica got what it wanted. The Debtors' assets were
9 sold as a package. The Arizona Materials transaction was a going concern sale. [12/6/04 EMTTr.,
10 p.91] Thus, the Court finds that having the Deer Valley property included in the package of assets
11 sold to Arizona Materials did not materially contribute to the costs of marketing and selling of the
12 collateral claimed by Comerica. There is no need to proceed with an allocation as to the various
13 assets.
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18 Finally, the Court must consider, Comerica's decision to use the bankruptcy process
19 to meet its business goals, rather than pursuing its non-bankruptcy remedies. Comerica's own
20 internal documents support the finding, and the Court hereby finds, that Comerica decided early
21 in these bankruptcy proceedings that its best course of action was to seek the appointment of an
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26 ²² For instance, the Court finds that Brown and Caldwell did not render services in connection with
27 the Deer Valley property. As noted above, Brown and Caldwell focused on the Buckeye and the 43rd
28 Avenue property which, unlike the Deer Valley property, served as the Bank's collateral. [12/06/04
EMTTr., p.96]

1 examiner to force the sale of its collateral through this Court.²³ [Ex. 95-98, 103] As noted above,
2
3 Comerica had a business goal of liquidating its collateral by the end of 2003. Comerica obviously
4 had the right to pursue stay relief so it could exercise whatever non-bankruptcy rights it had with
5 respect to its claimed collateral by year end. The Bank never seriously pursued that course of
6 action.
7

8 Comerica filed a stay relief motion on September 12, 2003. [Ex. 255] By that time,
9 however, Comerica had already filed the Expansion Motion so that the Examiner would be given
10 the power of sale over the Debtors' assets. Thus, Comerica suspended its pursuit of stay relief and
11 decided to support the Examiner's efforts to sell the Debtors' assets through an auction process
12 before this Court. [4/4/05 DMTTr., p.75; Docket Nos. 357, 531]
13
14

15 In this regard, the Court finds Comerica's statement of position with respect to the
16 Examiner's sale motion to be significant. In this pleading, Comerica specifically agreed to forebear
17 from exercising its foreclosure rights with respect to the Debtors' assets until February 17, 2004.
18 [Docket No. 531, p.11] In this same pleading, Comerica admitted to having full knowledge of
19 the dire situation confronting the Debtors' estates, stating: "Debtors cannot generate sufficient cash
20 to pay accrued and accruing professional fees, post-petition lease payments, and other
21 administrative claims." [Id., p.7, ¶20] As noted below, however, Comerica believed until at least
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26 ²³ At trial, the Examiner admitted into evidence a number of internal memoranda which are quarterly
27 reports regarding the Debtors' loans prepared by the special assets group of Comerica. [Ex. 61, 95-98, 103]
28 The "current developments" and "prior action plan" sections of these memoranda show that obtaining an
examiner to liquidate the Debtors' estates was Comerica's basic game plan in these proceedings. [Id.]
[4/4/05 DMTTr., p.57]

1 the end of April 2004, that it had a lien on all of the Debtors' assets sold to Arizona Materials.
2 Thus, Comerica asked the Court to appoint an examiner and repeatedly sought the expansion of his
3 powers with full knowledge that these estates did not have the resources to pay the accrued and
4 accruing professionals fees and lease payments. Comerica now believes these same expenses are
5 not entitled to be paid from any of the sale proceeds which the Bank claims as its collateral. The
6 Court disagrees . Comerica caused these expenses to be incurred and must now be responsible for
7 them.
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12 **E. The Post-Sale Expansion Of The Examiner's Powers To Lead The**
13 **Administrative Claim Settlement Process And To Address The Issue Of**
14 **Surcharge.**

15 After the Arizona Materials transaction closed, the Examiner, Comerica and the other
16 major constituencies in these cases began working together to resolve their remaining issues, which
17 largely centered around dividing up the limited net sale proceeds in accordance with the priority
18 scheme of the Bankruptcy Code. After the closing, the Examiner discussed the status of and the
19 remaining issues in the Debtors' cases with counsel for the Bank and the Debtors and determined
20 that the administrative expense claims needed to be resolved. [12/6/04 EMTTr., p.97; 2/24/04
21 HTr., pp.18-19]
22
23

24 With the consent of Comerica through Bank counsel, the Examiner directed his
25 counsel to prepare and file a bar date motion for general administrative claims. On February 18,
26 2004, a bar date order was entered setting a deadline of March 26, 2004. [12/6/04 EMTTr.,
27
28

1 pp.98-99; Exhibit 10; Docket No. 593] On February 24, 2004, the Court held a hearing on the
2 motion of a personal property lessor to compel payment of its administrative claim. [2/24/04 HTr.]
3
4 During that hearing, the Court directed the Examiner to prepare and file a summary of all
5 administrative expense claims asserted in the Debtors' cases, and provide all appropriate parties
6 with notice of a status hearing to be held on April 15, 2004 (the "4/15/04 hearing"). [Id.]
7

8 As directed by the Court, the Examiner filed a report addressing the status of all
9 administrative expenses and other related matters shortly before the 4/15/04 hearing. [Ex. 49]
10 The Examiner's report also included his recommendations regarding a process for resolving these
11 claims and the other key issues remaining in the Debtors' cases. [Ex. 49, p.10; 12/06/04 EMTTr.,
12 p.103]
13

14 The Examiner's report was shared with Bank counsel before it was filed with the
15 Court. [12/6/04 EMTTr., pp.103-04] Prior to the 4/15/04 hearing, the Examiner had discussions
16 with counsel for the Bank and the Debtors regarding how to streamline the process of claims
17 administration, so that a pro rata distribution could be made to creditors. [12/6/04 EMTTr.,
18 pp.104-05]
19

20 Counsel for Comerica, the Examiner, Examiner's counsel, Debtors' counsel, Mr.
21 Goodman, and most of the key administrative expense creditors in these Chapter 11 cases attended
22 the 4/15/04 hearing. On the record, the parties agreed to adopt a protocol to resolve the major
23 remaining issues in these cases. [4/15/04 HTr.] The protocol was "the joint recommendation of
24 Comerica and the Examiner . . . [to] draw [the case] to a close." [Id., p.7]
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1 The Joint Recommendation expanded the Examiner’s powers so he could take the lead
2 in negotiating with all of the administrative expense creditors and use “shuttle diplomacy” between
3 the various administrative expense creditors and Comerica to negotiate reductions in these claims.
4 [Id., p.7] The protocol also established reserves for the various administrative expense claims,
5 pending their resolution by settlement or Court order, and allowed for an interim distribution of
6 proceeds to Comerica. [Id., pp.15-19]
7

8
9 At the 4/15/04 hearing, the topic of surcharge was, for the first time, specifically
10 addressed on the record. In fact, Bank counsel raised the issue. Examiner’s counsel acknowledged
11 the surcharge issue was the “elephant in the room” which needed to be addressed head-on. Thus,
12 the Examiner, with the consent of Comerica and the other parties, agreed to file a position paper
13 on surcharge and other related issues shortly after the 4/15/04 hearing. [Id., p.19]²⁴
14

15
16 At the 4/15/04 hearing, with the agreement of the parties, the Court continued the
17 hearing to May 27, 2004 (the “5/27/04 hearing”) to allow the Examiner to present the settlements
18 agreed upon with the administrative expense creditors in the interim. At the 5/27/04 hearing, the
19 Court would resolve those issues which only required oral argument, and those matters which
20 required an evidentiary hearing would be addressed from a case-management perspective. [Id.,
21 pp.24-27] At the conclusion of the 4/15/04 hearing, the Court approved the agreement of the
22 parties, noting “[i]t looks like we’ve got a game plan.” [Id., p.33]
23
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25

26 ²⁴ The other key issue at the time was the allocation of value among the various personal property
27 and real property assets sold to Arizona Materials. The Court ultimately entered an order allocating the
28 value of the various components of the property sold to Arizona Materials in reliance on various reports
submitted by the Examiner. [Docket Nos. 781, 691, 699]

1 The Court must now sort out the repercussions of such an agreement on the record.
2
3 Certainly Comerica expressly consented to the expansion of the Examiner's powers to present a
4 position paper on the surcharge issue and to engage in "shuttle diplomacy" on Comerica's behalf
5 to resolve the administrative expense claims against the estates. Comerica also knew that given the
6 amount of its secured claim and the asserted administrative expense claims and the limited proceeds
7 available from the sale of the Debtors' assets, the Debtors' estates were almost certainly
8 administratively insolvent. Given this administrative insolvency and given Comerica's consent on
9 the record at the 4/15/04 hearing that the Examiner and his professionals should proceed with at
10 least an initial surcharge analysis, Comerica consented to having the initial costs of the Examiner
11 and Bryan Cave surcharged against its alleged collateral. If Comerica did not desire such a result,
12 it should have qualified its consent on the record at the 4/15/04 hearing. By agreeing to the
13 expansion of the Examiner's powers in an administratively insolvent estate, Comerica consented
14 that its alleged collateral be surcharged to complete the preliminary analysis required.
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19 However, the Court is unable to conclude on this record that the extensive litigation
20 on the surcharge issue which necessarily followed is the sole responsibility of Comerica and that
21 only Comerica's alleged collateral should be surcharged for those costs. In essence, the Examiner's
22 argument is too broad. The fact that the Examiner and his professionals may have legitimate
23 administrative expense claims against these estates does not mean that Comerica consented to have
24 its alleged collateral surcharged for over a year's worth of contentious litigation. However, the
25 Court concludes, based upon the evidence presented at this trial, that at least the Examiner and his
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1 professionals are entitled to the fees and expenses that they have sought to file the position paper
2 on surcharge, providing a preliminary analysis of the issue. Such a surcharge is warranted based
3 upon Comerica's consent at the 4/15/04 hearing.
4

5 Four days after the 4/15/04 hearing, the Examiner filed his memorandum regarding
6 surcharge and other related matters. [Exhibit 92] In this memorandum, the Examiner did not
7 quantify the dollar amount that should be surcharged against Comerica because of the short
8 timelines involved and because, at that point in time, the parties were working toward a consensual
9 resolution of the appropriate amount of claims that would be paid from the Bank's claimed
10 collateral. [12/6/04 EMTTr., pp.106-07] Thus, the Examiner did not believe it was in the best
11 interests of the Debtors' estates for him to spend time and incur estate expense quantifying the
12 dollar amount of the surcharge. [12/6/04 EMTTr., pp.106-07] The Court agrees with the
13 Examiner's assessment.²⁵
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17 After the 4/15/04 hearing, the Examiner and his counsel devoted a substantial amount
18 of time and effort to shuttle diplomacy and the settlement process. The Examiner and his counsel
19 analyzed the administrative expense claims and began active negotiations with the various
20 claimants. [12/6/04 EMTTr., pp.110-11] These negotiations and the related settlement process
21 were primarily conducted from mid-April through June 2004. [12/6/04 EMTTr., pp.111-12]
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27 ²⁵ In his memorandum, the Examiner stated: "[T]here is no doubt that Comerica should be
28 surcharged for some of the administrative claims in the Debtors' cases. The extent of the surcharge is
unclear at this time." [Ex. 92, p.2]

1 As discussed more fully below, Comerica and its business representatives had
2 basically no involvement in this process or, frankly, any other material aspect of these cases prior
3 to July 2004. During the settlement process, however, the Examiner and his counsel kept the Bank
4 apprised of what was transpiring. [12/6/04 EMTTr., p.112]²⁶ At no point in time during the
5 settlement process was the Examiner informed that the negotiated settlements were unacceptable
6 to the Bank. [12/6/04 EMTTr., p.112]
7

8
9 On June 25, 2004, the Court conducted a status hearing on the progress of the
10 settlement process. By that time, the Examiner had already filed and provided notice of a number
11 of administrative expense claim settlements, along with various memoranda in support of these
12 settlements. [Docket Nos. 744, 747, 749-51, 762, 763, 767] The Court was informed at the status
13 hearing that the administrative expense claims were largely resolved and the framework of an
14 agreement between the Examiner, Comerica, and the settling claimants was close to being finalized.
15 Thus, the Court continued the hearing to July 7, 2004. [6/25/04 HTr.]
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19 On July 1, 2004, the Examiner and Comerica executed a term sheet (the “Term
20 Sheet”), which was intended to establish the framework of an agreement between the Examiner and
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25 ²⁶ At trial, the Examiner introduced a number of written communications between the Examiner’s
26 counsel and Bank counsel. [Exs. 12, 13, 14, 15, 17, 18, 19, 21] These documents were offered into
27 evidence for the limited purpose of showing that Bank counsel received communications apprising him of
28 the status of the Examiner’s negotiations with administrative claimants. Even though most of these
documents were written communications between Bank counsel and counsel for the Examiner, Comerica
objected to having these documents admitted into evidence for this limited purpose. The Court overruled
Comerica’s objections. [12/8/04 TTr., pp.6, 9]

1 Comerica with respect to the various settlements and how they would be paid. [Exs. 23-24;²⁷
2 12/06/04 EMTTr., pp.124-25] On that same day, the Examiner filed a motion to approve the Term
3 Sheet. [Ex. 24; Docket No. 796]
4

5 It is important to remember that at the time of the preparation of the Term Sheet, the
6 Examiner and Comerica knew that there were limited funds to pay the remaining claimants.
7 Indeed, the Term Sheet was structured such that Comerica waived claims to a portion of its alleged
8 collateral to create funding to pay the administrative expense claimants. Comerica was consenting
9 to its collateral being surcharged to resolve all remaining issues in the case. When Comerica
10 refused to proceed with the settlement for improper reasons, in this Court's opinion, the Examiner
11 was left in an untenable position.
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13
14

15 In analyzing what caused the settlement between the Examiner and Comerica to be
16 vitiated, the Court will provide more background information. On July 7, 2004, the Court
17 conducted an initial hearing regarding approval of the Term Sheet (the "7/7/04 hearing"). Debtors'
18 counsel expressed concerns about approving a term sheet as opposed to a definitive settlement
19 agreement. As a result, the Court denied approval of the Term Sheet and instructed the parties to
20 prepare and file a definitive settlement agreement that more fully set forth the details of the
21 settlement between the Examiner and Comerica. [12/6/04 EMTTr., p.134; 7/7/04 HTr., pp.6-9]
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25 ²⁷ Exhibits 23 and 24 were both admitted into evidence at trial. [12/6/04 TTr., p.124; 12/8/04 TTr.,
26 p.152] Exhibit 23 is the Term Sheet without the exhibits, but that document has the execution pages signed
27 by the parties. Exhibit 24 is the Term Sheet with Exhibits A and B, plus the motion to approve the Term
28 Sheet. Hereinafter, the Court will cite only to Exhibit 24, because that document includes the Term Sheet
and Exhibits A and B thereto.

1 As discussed in the next section, the settlement process failed later in July 2004, when
2 the Examiner and Comerica were unable to enter into a definitive settlement agreement. However,
3 Exhibit A of the Term Sheet sets forth seventeen parties who had settled their administrative
4 expense claims with the Examiner and Comerica pursuant to the Term Sheet. Exhibit B of the
5 Term Sheet is a list of five administrative expense claimants who had not settled their claims as of
6 July 1, 2004.
7

8
9 Of the Exhibit B claims, the only personal property lessors listed thereon were
10 Oshkosh/McNeilus Financial Services Partnership (“Oshkosh”) and Zions’ Credit Corporation
11 (“Zions”). As of July 1, 2004, the Examiner had not agreed to the terms of a settlement with these
12 parties. Thus, the Term Sheet established cash reserves in the full amount of the administrative
13 claims asserted by these parties.²⁸ [Ex. 24 & Exhibit B thereto] The Examiner ultimately was
14 successful in negotiating and documenting written settlement agreements with every personal
15 property lessor listed on Exhibits A and B of the Term Sheet. [Docket No. 936]
16
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19 While Comerica initially objected to these settlements [Docket Nos. 802, 806] and the
20 Court had to set an evidentiary hearing on this objection, Comerica ultimately consented to the
21 entry of an order approving the settled administrative claims as priority claims under § 507(a)(1)
22

23
24 ²⁸ The Examiner had listed a party on Exhibit B if he intended to seek the disallowance of the
25 administrative expense claim, except that the Examiner would not have any role in seeking the disallowance
26 of the Debtors’ professional fees. Comerica was aware of and consented to this procedure. (These
27 professional fees had previously been approved on an interim basis by the Court over the objection of
28 Comerica. [Docket Nos. 293, 458, 792, and 795]) The Term Sheet also contained reserve language for
unresolved claims: “Cash in the possession of the Examiner in the amount of the Disputed Claims [listed
on Exhibit B] will be set aside in a reserve account . . . pending the outcome of the litigation over the
Disputed Claims.” [Ex. 24, p.2.]

1 in the amounts as agreed upon with the Examiner (the “Allowance Order”). [Docket No. 951] The
2 Court entered the Allowance Order shortly after a hearing in which it noted the “Herculean effort”
3 by the Examiner in resolving the various administrative expense claims in the Debtors’ cases.
4 [8/25/04 HTr., p.42]
5

6
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8 **F. The Failure Of The Examiner And Comerica To Enter Into A Definitive**
9 **Settlement Agreement.**

10 As noted above, the Examiner and Comerica were unsuccessful in negotiating a
11 separate settlement between them. [12/6/04 EMTTr., pp.134-35] Comerica filed a formal
12 objection to all of the settlements entered into between the Examiner and the various administrative
13 claimants at the end of July 2004. [Docket Nos. 802, 806] In this objection, Comerica heavily
14 criticized the results achieved by the Examiner in the settlement process, even though the Bank
15 voiced no complaints or objections to the settlements during the entire process which began in
16 April 2004 and the settlements were ultimately approved. The Examiner and Comerica have traded
17 allegations regarding why they failed to enter into a definitive settlement agreement. Basically, the
18 parties each claim the other party refused to abide by their respective obligations under the Term
19 Sheet.
20
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23 The Examiner claims Comerica refused to enter into a definitive agreement because
24 the Bank decided not to abide by the “prompt payment” provision of the Term Sheet and, instead,
25 demanded that the Examiner support a payment to the administrative expense claimants who would
26 initially receive ninety percent (90%) of their allowed settled claims and would only receive the
27
28

1 remaining ten percent (10%) if the Debtors' estates were successful in the so-called Registry Funds
2 dispute.²⁹ Because the Examiner had already negotiated discounts with various administrative
3 expense claimants and all of the settlements included a commitment for prompt payment in full as
4 set forth in the Term Sheet, the Examiner believed that Comerica was renegotiating their Term
5 Sheet agreement. [12/6/04 EMTTr., p.135; Docket No. 813]
6

7
8 Comerica now claims that the settlement process failed because the Examiner
9 "overspent" what was agreed upon by the parties by entering into settlements with Oshkosh and
10 Zions after the Term Sheet was executed on July 1, 2004. Comerica further claims that "the
11 Debtors and the Examiner (or their professionals) [were] responsible for pushing these cases into
12 a 'free fall' mode." [Docket No. 831, p.4 n.3]
13
14

15 Comerica and the Examiner devoted a substantial amount of time and energy trying
16 to reach the terms of a definitive settlement agreement. Numerous draft documents were circulated
17 between the parties, and the parties exchanged a number of email communications regarding the
18 "deal points" that needed to be resolved. [Exs. 26, 27, 29, 31; 12/6/04 EMTTr., pp.134-41]
19

20 Exhibit 29 is an email exchange dated July 15, 2004, and it is a critical document
21 because it reflects why the settlement process failed. Bank counsel confirmed therein that
22 Comerica was "tapped out" and was no longer willing to consent to the prompt payment in full to
23
24

25
26 ²⁹ The Registry Funds dispute is specifically addressed in the Term Sheet. The Court previously
27 entered an order requiring Mr. Goodman to deposit \$250,000 into the registry of the Court (the "Registry
28 Funds"). [Docket No. 562] Under the Term Sheet, the Examiner and Comerica were jointly to seek an
order pursuant to which the Debtors' estates would be entitled to retain the Registry Funds. [Ex. 24, p.1]

1 all creditors listed on Exhibit A of the Term Sheet. Instead, Comerica wanted the administrative
2 expense claimants to accept an up-front ninety percent (90%) recovery on their settled
3 administrative expense claims, and the balance would be paid if the Debtors' estates were
4 successful in litigation regarding the Registry Funds. [Ex. 29]

6 Comerica knew at the time the Term Sheet was executed, however, that the
7 administrative expense claims set forth on Exhibit A had to be promptly paid from estate funds.
8 Ms. McDonald specifically testified that Comerica knew from the onset that the sum of \$2,420,000
9 was going to be paid out promptly to the claimants on Exhibit A. [4/4/05 DMTTr., p.98]
10

12 With respect to Comerica's allegation that the settlement with the Examiner failed
13 because the Examiner "overspent," the Examiner reached settlements with Oshkosh and Zions -
14 the only two holdouts - while the Examiner and Comerica were negotiating the definitive
15 settlement agreement. [4/4/05 DMTTr., pp.101-02] Comerica's position was that the Examiner
16 exceeded his authority by settling with Oshkosh and Zions, which resulted in said creditors being
17 moved from the contested claims on Exhibit B to those which had been resolved on Exhibit A of
18 the Term Sheet, while the parties were negotiating the definitive agreement. [4/4/05 DMTTr.,
19 p.99]³⁰
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23 Comerica offered no evidence at trial that the Examiner lacked authority to settle these
24 holdout claims or that there was any kind of limitation on the Examiner's ability to settle these
25

26 ³⁰ Exhibit B to the Term Sheet sets forth each of the administrative creditors that were not resolved
27 as of July 1, 2004. The Debtors' professionals and an affiliate of the Debtors, Triad Captive Insurance
28 Company, were on the list. The only other administrative creditors on Exhibit B were Oshkosh and Zions.
[Ex. 24; 12/6/04 EMTTr., p.133]

1 claims. To the contrary, Comerica knew the Examiner was having ongoing discussions with the
2 creditors listed on Exhibit B in an effort to settle their claims. [4/4/05 DMTTr., pp.99-101]
3
4 Comerica also knew that the Examiner was having ongoing negotiations with Oshkosh and Zions
5 to resolve their claims. [12/6/04 EMTTr., p.133]
6

7 In fact, Comerica knew as early as June 21, 2004, that the Examiner was close to
8 resolving the Oshkosh and Zions claims. In a letter dated June 21, 2004 from Examiner's counsel
9 to Bank counsel, Comerica was advised (among other things) that the Examiner was close to
10 settling the Oshkosh and Zions claims for dollar amounts less than the amount of the reserves
11 established for these creditors under the Term Sheet. [Ex.22; 4/4/05 DMTTr., pp.102-03]³¹
12

13 At no time after June 21, 2004, did Comerica tell the Examiner that a settlement with
14 Zions or Oshkosh would be unacceptable to the Bank or that the Examiner should not settle with
15 these creditors. [12/6/04 EMTTr., p.133; 4/4/05 DMTTr., pp.107-08] Comerica never told the
16 Examiner that, if he settled these claims, it would constitute a breach under the Term Sheet because
17 it would be "overspending." [4/4/05 DMTTr., pp.107-08] Bank counsel also attended the 7/7/04
18 hearing at which time the Court was informed that a settlement had been reached with Oshkosh and
19 Zions, and Bank counsel expressed no concern or objection on the record at that time or any time
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26 ³¹ As of June 2004, the Term Sheet had not yet been executed by the parties. In the June 21, 2004
27 letter, however, Examiner's counsel provided a draft of Exhibits B of the Term Sheet, and the reserves set
28 forth as to Oshkosh and Zions are the same amounts that are included on the final version of the Term
Sheet. [Ex. 24]

1 thereafter until the settlement between the Examiner and Comerica could not be consummated in
2 mid-July 2004. [7/7/04 HTr., pp.4-5]
3

4 Comerica's own internal documents also are helpful to this Court's understanding of
5 the Bank's position with respect to the Term Sheet and the failure of the parties to finalize a
6 definitive settlement agreement. [Exs. 61, 95-98, 103, 106] The May 14, 2004 Memorandum was
7 prepared after the 4/15/04 hearing. In this Memorandum, the Bank admitted knowing that the
8 Debtors' estates had at least \$2,000,000 in post-petition expenses which would "dilute" Comerica's
9 recovery. Comerica confirmed therein that "the Examiner is currently negotiating discounts with
10 the other claimants and we should know the outcome of the distribution of sale proceeds within the
11 next 30 days." [Ex. 98]
12
13
14

15 Thus, Comerica knew in May 2004 that its recovery from the remaining sale proceeds
16 would be diluted by an amount that could exceed \$2,000,000 million, and the Bank was awaiting
17 the outcome of the settlement process being handled by the Examiner to find out the amount of its
18 final distribution of the sale proceeds. This Memorandum and Comerica's internal documents as
19 a whole belie Comerica's assertions that: (i) the Bank had established, let alone communicated to
20 the Examiner, any kind of monetary threshold the Examiner could not exceed without
21 "overspending;" or (ii) the Examiner needed the consent of Comerica to settle with Oshkosh,
22 Zions, or any other creditor. [Exs. 61, 95-98, 103, 106]
23
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26 This last point is significant in light of Comerica's contention that "[t]he Examiner
27 and each of the administrative claimants in these cases knew all along that payment of the 'settled'
28

1 claims was contingent upon the agreement to have its collateral invaded.” [Docket No. 831, p.4
2 n.3] Comerica provided no evidence in support of this contention. Ms. McDonald testified that
3 she knew of no facts in support of this contention. [4/4/05 DMTTr., p.112]³² To the contrary,
4 Comerica knew it did not have “veto power” on the amount of the settled claims reached between
5 the Examiner and the various administrative claimants. [4/4/05 DMTTr., p.101] Comerica also
6 knew that the administrative expense claimants who did not settle their claims would have a full
7 reserve established for their asserted claims. [4/4/05 DMTTr., p.101]
8
9

10
11 Thus, the Court finds that the Examiner did not breach the Term Sheet, or any other
12 kind of agreement with the Bank, by settling with Oshkosh or Zions. Comerica failed to provide
13 any credible evidence that the Examiner “overspent” by settling with Oshkosh or Zions or for any
14 other reason. The Oshkosh and Zions claims were settled at amounts the Examiner considered
15 “rock bottom” prices. These claims also were settled in amounts which were below the reserves
16 set forth in the Term Sheet. [Ex. 22, p.6; Docket Nos. 893, 936]
17
18

19 The evidence at trial establishes, and the Court so finds, that Comerica breached the
20 letter and spirit of the Term Sheet when the Bank demanded that all administrative expense
21 creditors take less than prompt payment in full on their settled claims and absorb the economic risk
22 associated with the outcome of the Registry Funds dispute. Comerica’s actions in this regard were
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24
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26
27 ³² Comerica also submitted no credible evidence in support of its contention that the Debtors and
28 the Examiner were responsible for pushing these cases into “free fall” mode. Ms. McDonald specifically
testified that she was aware of no facts which supported this contention. [4/4/05 DMTTr., pp. 112-13]

1 taken in bad faith and resulted in the failure of the Examiner and Comerica to enter into a definitive
2 settlement agreement.
3

4
5 **G. The Benefit To Comerica From the Efforts Of The Examiner And His**
6 **Professionals.**

7 As discussed below, a key requirement under the “objective test” of Bankruptcy Code
8 § 506(c) is whether the Bank benefitted from the expenses incurred by the Examiner and his
9 professionals in the Debtors’ cases. In written discovery, Comerica denied receiving any direct or
10 substantial benefit from the efforts of the Examiner and his professionals in the Debtors’
11 bankruptcy cases. [Ex. 55, Request for Admission 1]
12
13

14 Comerica’s denial is clearly refuted by the evidence before the Court, especially the
15 testimony of Ms. McDonald and the Examiner. Comerica obtained a direct, substantial and
16 quantifiable benefit from the efforts of the Examiner and his professionals. Ms. McDonald and the
17 Examiner testified at length regarding the areas of work performed by Examiner and his
18 professionals that provided Comerica with this benefit. [12/06/04 EMTTr. pp.150-53; 4/4/05
19 DMTTr., pp.75-80]
20
21

22 **1. The Initial Report.**
23

24 First, Comerica received a direct, substantial and quantifiable benefit from all of the
25 work by the Examiner and his counsel in connection with the preparation of the Initial Report and
26 the stabilization of the Debtors’ business shortly after the Examiner was appointed. Comerica
27 specifically requested that the Court appoint an independent third party to perform all of these
28

1 tasks. Comerica would not have asked these tasks to be performed if it were not beneficial to the
2 Bank. Moreover, the evidence reflects that Comerica did not have the staff available to analyze
3 such detailed accounting data on an expedited basis. Because the Comerica business plan focused
4 on a sale of all of the Debtor's assets in a going concern basis by the end of 2003, Comerica was
5 relying on, and asked the Examiner to undertake the "laboring oar" in monitoring the Debtor's
6 business operation.
7

9 **2. Cash Management.**

10 In particular, Comerica also received a direct, substantial, and quantifiable benefit
11 from the work of the Examiner and his professionals in controlling cash and eliminating the
12 possibility of insider defalcations, negotiating and documenting cash collateral budgets, and paring
13 down the personal property leases. [3/23/05 DMTTr., pp.70-72, 74, 221] As noted by Comerica
14 in its Examiner Motion, the Debtors were rapidly moving in the direction of a Chapter 7 liquidation
15 when Comerica sought the appointment of an examiner. Without the efforts of the Examiner and
16 his professionals, it is extraordinarily unlikely that the Debtors would have survived long enough
17 for there to be a going concern sale. Comerica also received a direct benefit through the cash
18 savings caused by the Examiner's involvement in all of these matters. Indeed, there were a number
19 of hearings before this Court on the Debtors' mining operations. The Debtors' financial officers
20 reported the amount of material mined, the ongoing process of the collection of accounts
21 receivable, and the weekly cash requirements. The Examiner independently reviewed this data for
22 Comerica which was extremely time intensive.
23
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28

1 **3. Sale and Marketing.**

2 With respect to the sale and marketing work performed by the Examiner and his
3
4 professionals, the Examiner testified at length regarding the direct, substantial and quantifiable
5 benefit received by Comerica from this process. Comerica benefitted from a quick sale of its
6 collateral, which was accomplished in a matter of months. [12/6/04 EMTTr., p.153] Comerica also
7
8 benefitted from this work because it received the added value of a going concern sale of its
9 collateral; the Bank was well aware that it would receive a reduced recovery in a liquidation.
10
11 [3/23/05 DMTTr., pp.221-23; 4/4/05 DMTTr., p.71]

12 Comerica further benefitted because it avoided incurring a substantial amount of
13 expense when the Examiner accomplished the sale through this Court. Comerica avoided the
14 additional costs of stay relief litigation. [12/6/04 EMTTr., p.154; 4/4/05 DMTTr., p.82] Comerica
15
16 also avoided the costs associated with foreclosing, taking ownership of the various properties, and
17 having to incur the other expenses associated with a foreclosure sale. [12/6/04 EMTTr., pp.153-54]
18

19 The Examiner testified about the direct costs saved by Comerica through the use of
20 a bankruptcy sale.³³ Comerica saved as much as ten percent (10%) in commissions on the sale of
21 its real property collateral, which was a savings of approximately \$468,000. [12/6/04 EMTTr.,
22
23
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25

26 ³³ The Examiner has been involved in a number of real and personal property transactions during
27 his career. The Examiner is licensed to sell real estate in the State of Arizona, and he has experience selling
28 real estate as a Chapter 7 trustee. He has participated in numerous commercial sale transactions, including
personal property liquidations. [12/6/04 EMTTr., pp.153, 155]

1 p.154; Exs. 781, 691, 699]³⁴ These savings were confirmed by Ms. McDonald. [4/4/05 DMTTr.,
2 pp.79-80]
3

4 Comerica also avoided the direct costs associated with having to liquidate its personal
5 property collateral in a non-bankruptcy disposition. [12/6/04 EMTTr., pp.155-56] Comerica saved
6 as much as ten percent (10%) of the value of the personal property, or the sum of approximately
7 \$236,000, by avoiding a commission through the use of a bankruptcy sale.³⁵ [Id.; Exs. 781, 691,
8 699] Comerica avoided the costs of marketing and transferring title of these assets to a third party.
9 [12/06/04 EMTTr., p.156], which was confirmed by Ms. McDonald. [4/4/05 DMTTr., pp. 9, 81]
10

11 Comerica also avoided the costs associated with storing this personal property, which costs were
12 substantial given the amount of personal property transferred to Arizona Materials as a part of the
13 sale transaction. [Ex. 9 & Schedule 1.22]³⁶
14
15

16 Comerica avoided other expenses by using the Examiner and this Court to sell its
17 claimed collateral. Comerica avoided the substantial legal costs associated with documenting the
18 sale transaction(s). [12/6/04 EMTTr., pp.154-55] Comerica also avoided the expenses associated
19 with securing the property pending a sale thereof. [12/6/04 EMTTr., p.154]
20
21

22 ³⁴ This number is simply ten percent (10%) of the approximately \$4.6 million in cash attributable
23 to the value of the real estate subject to Comerica's lien (i.e., the Debtors' real property other than the Deer
24 Valley property).

25 ³⁵ This number is simply ten percent (10%) of the approximately \$2.3 million in cash attributable
26 to the value of the personal property sold to Arizona Materials.

27 ³⁶ Ex 9 is the Arizona Materials asset purchase agreement and Schedule 1.22 thereto is a list of all
28 of the personal property sold to Arizona Materials. The Examiner sold a substantial amount of personal
property to Arizona Materials, and the approximate value of this property was \$2.3 million. See, supra,
note 9.

1
2
3 **4. Collection of Accounts Receivable.**

4 Comerica received a direct, substantial, and quantifiable benefit from the work
5 performed by the Examiner and his professionals in collecting the Debtors' accounts receivable
6 which were claimed as Bank collateral.³⁷ Through the efforts of the Examiner and his legal
7 counsel, approximately \$1,000,000 was collected on the Debtors' accounts receivable. [4/4/05
8 DMTTr., pp.60, 122]
9

10
11 **5. Settlement of Administrative Expenses.**

12 Finally, Comerica received a direct, substantial, and quantifiable benefit through the
13 settlement process and the related efforts of the Examiner and his professionals. The Term Sheet
14 itself is evidence of the benefit the Bank received through this process. [12/6/04 EMTTr., p.152]
15 While Comerica apparently could not resist attempting to renegotiate the arrangement set forth
16 therein, Comerica knew the Term Sheet was beneficial to the Bank. [4/4/05 DMTTr., pp.95, 97],
17 since Ms. McDonald would not have executed the Term Sheet unless it provided a benefit to, and
18 was in the best interests of, the Bank.
19
20

21 At trial, the Examiner also admitted into evidence the internal Bank document which
22 gave Ms. McDonald the authority to sign the Term Sheet. [Ex. 106; 4/4/05 DMTTr., pp.138-41]
23
24

25
26 ³⁷ Comerica expressly consented to be surcharged for all related expenses when it entered into the
27 Consent Order Expanding Examiner's Powers, dated June 9, 2004. [Docket No. 764; 7/7/04 HTr.] It is
28 significant to note that, by this stage of the Debtors' cases, Comerica knew it would not be paid in full and
was fully aware of the significant administrative expense claims asserted in these Chapter 11 cases. Yet,
Comerica had no problem enlisting the Examiner and his professionals to perform more duties.

Specifically, Exhibit 106 is the Dispute Litigation Settlement Authorization dated June 30, 2004 (the “Settlement Authorization”), which provided the Bank’s internal analysis of why the settlement with the Examiner embodied in the Term Sheet should be approved by the Bank and which authorized Ms. McDonald to execute the Term Sheet. [Id.]

The Settlement Authorization provides additional evidence of the direct, substantial, and quantifiable benefit the Bank received from the settlement process and the agreement set forth in the Term Sheet. The Settlement Authorization explains why the settlement with the Examiner was beneficial to the Bank, and this authorization was approved by senior management within Comerica and its parent company, Comerica, Inc. [Ex. 106; 4/4/05 DMTTr., pp.143-44]³⁸ The Settlement Authorization describes the dispute being settled as the “challenge to the perfection and priority of Bank’s security interest.” [Ex. 106] Thus, Comerica viewed the main purpose of the Term Sheet to be a way to settle the rolling stock litigation, the DePrizio litigation, and a state court lawsuit in which the Bank was a defendant. [Id.]

³⁸ In a hearing conducted by the Court on August 19, 2004 (the “8/19/04 hearing”), the Court was told by Bank counsel, in the context of a motion to compel discovery by the Examiner [Docket No. 846], that such a document did not exist and that no Bank representative other than Ms. McDonald and an in-house lawyer were involved in the decision-making process relative to the settlements. [8/19/04 HTr., pp.64-69] Comerica produced the Settlement Authorization to Mr. Goodman and claimed the production was inadvertent, but after a flurry of pleadings and hearings, the Court entered an order ruling that any claim of privilege with respect to this document had been waived and the Settlement Authorization was admitted into evidence. [Docket No. 1091] What is troubling to the Court is that the Settlement Authorization plainly contradicts the statements made by Bank counsel during the 8/19/04 hearing. The Settlement Authorization obviously is the document pursuant to which the Bank approved a settlement between the Examiner and Comerica. The document contains the business justification and analysis in support of the settlement set forth in the Term Sheet. The Settlement Authorization also plainly shows that individuals other than Ms. McDonald and an in-house lawyer of Comerica were involved in this settlement analysis.

1 In the Settlement Authorization, Comerica admitted that “there [was] no likelihood
2 of our being able to defeat [the rolling stock litigation].” [Id.] With respect to the DePrizio
3 litigation, the Bank believed it would “ultimately prevail on this claim, but it would require long
4 and expensive litigation.” [Id. (emphasis added)]³⁹ Comerica also noted it would receive the
5 benefit of the estate releasing the Bank from litigation pending in state court. [Id.]
6
7

8 In the Settlement Authorization, Comerica confirmed it was in a position to settle all
9 three of these matters for \$1.1 million which was “\$100,000 more than the amount we expect to
10 lose on the rolling stock litigation.” [Id.] Of course, this Court has entered judgment against
11 Comerica in the rolling stock litigation in the amount of \$1,010,851, although Comerica has
12 appealed this judgment despite acknowledging in writing in the Settlement Authorization that it
13 knew it would lose this litigation. Thus, in return for resolving all of this pending litigation
14 involving the Debtors’ estates through the settlement embodied in the Term Sheet, Comerica was
15 only paying the equivalent of what it intended to lose as a result of an adverse judgment in the
16 rolling stock litigation.
17
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19

20 For all of the foregoing reasons, the Court finds that Comerica received a direct,
21 substantial, and quantifiable benefit from a majority of efforts of the Examiner and his
22 professionals. The dollar amount of the surcharge is set forth in the Court’s conclusions of law as
23
24

25
26 ³⁹ The Deprizio litigation has been affected by the recent changes to the Bankruptcy Code enacted
27 in the Bankruptcy Abuse, Prevention, and Consumer Protection Act of 2005. As a result, Comerica has
28 filed a Motion to Dismiss the claim. However, the Debtor also asserts an independent claim for a
fraudulent conveyance concerning the delay, by Comerica’s predecessor in interest, in the filing of a
financing statement as to the Debtor’s personal property assets.

1 it is more appropriate to address the dollar amount in light of the legal principles applicable to this
2 litigation
3

4
5 **H. Comerica's Support And General Acquiescence Regarding The Efforts Of The**
6 **Examiner And His Professionals Until A Dispute Arose Concerning The Settlement**
7 **Process.**

8 Black's Law Dictionary defines "express consent" as "consent that is clearly and
9 unmistakably stated," and "implied consent" as "consent inferred from one's conduct rather than
10 from one's direct expression." Black's Law Dictionary 323 (8th ed. 2004). As noted below,
11 implied consent is not lightly inferred especially in the context of surcharge litigation. In deciding
12 the extent to which Comerica consented to the surcharge of its claimed collateral, the Court must
13 consider the communications between Comerica's representatives and the Examiner.
14

15 As noted previously, the Examiner was appointed at the request of Comerica. The
16 Examiner's duties were expanded at the request of Comerica. Moreover, Comerica entered into
17 an agreement on the record with the Examiner to proceed with a protocol to quantify and resolve
18 the administrative expense claims which would be paid from the limited funds available. Comerica
19 also made the business decision to allow the Examiner to perform analytical business functions that
20 would normally be performed by the in-house lawyers or accountants at a financial institution. The
21 Examiner diligently and professionally performed the services that were requested of him.
22
23

24 Although the Debtors' loans received the attention of Comerica's senior management,
25 few business representatives had any direct involvement with the loans. The Examiner's efforts
26 to confer with a business representative were rebuffed. [12/6/04 EMTTr., pp.46-48] The Examiner
27
28

1 made an effort to keep the Bank fully informed of what he was doing during his appointment by
2 providing information through Bank counsel. [12/6/04 EMTTr., pp 51-52] On many occasions,
3 the Examiner communicated with Bank counsel to provide the Bank with information or to seek
4 consent on matters involving cash management. [12/6/04 EMTTr., pp.38-50] The Examiner and
5 Bank counsel exchanged a number of written communications during the Examiner's appointment,
6 providing the Bank with budgetary and related information. [12/6/04 EMTTr., pp.50-51] Despite
7 the fact that the Debtors' loans were considered to be "distressed" or nonperforming, Comerica
8 never had a Bank representative appear before the Court until this trial commenced on the
9 Surcharge Motions. [3/23/05 DMTTr., pp.188-89]

13 During the time period from the appointment of the Examiner until July 2004,
14 Comerica supported the work being performed by the Examiner and his professionals. In fact, Ms.
15 McDonald confirmed that Comerica had no complaints about the work being performed by the
16 Examiner and his professionals, nor did the Bank have any complaints about the fees of the
17 Examiner and his professionals until July 2004, when the parties could not resolve their
18 disagreement as to whether Comerica had modified the terms and conditions of their settlement.
19 [4/4/05 DMTTr, pp.65-66] Only after this work was performed and the settlement between
20 Comerica and the Examiner could not be placed in a final written format did Comerica notify the
21 Examiner and his counsel that the professional fees and costs would not be paid from any of
22 Comerica's collateral.

1 Comerica argues that there is no carve out for the Examiner's fees and costs or any
2 of his professionals in the numerous cash collateral orders entered in these proceedings. If
3
4 Comerica had simply acquiesced to the cash collateral proposals advocated by the Debtors in this
5 proceeding, the Court might agree that a failure to carve out professional fees and expenses would
6 be the end of the factual inquiry. However, through Bank counsel, Comerica interjected itself into
7 these proceedings early on with the request to appoint an examiner. Comerica aggressively sought
8 the appointment of the Examiner because it believed that the Debtors were engaged in fraudulent
9 activities or a misappropriation of the Bank's collateral. The Bank wanted the Examiner to take
10 control of the cash and preclude any further loss of Comerica's collateral. Comerica then pressed
11 for the expansion of the Examiner's powers to sell the Debtors' assets because it was consistent
12 with Comerica's business plan for the end of 2003. Comerica later consented to the Examiner
13 being the critical party to resolve the administrative expenses in this case, because Comerica knew,
14 after the sale of assets, that there were limited funds to pay the administrative expense claimants
15 and the Bank. It was only when Comerica determined, from a business standpoint, not to proceed
16 with the settlement that the Examiner and the Bank had entered to did Comerica interpose its
17 objection to the Examiner's fee applications or those of his professionals.⁴⁰

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23 The Court concludes, based upon this record, that Comerica consented to have its
24 collateral surcharged to pay a majority of the fees incurred by the Examiner and his professionals
25

26
27 ⁴⁰ Comerica's internal memoranda also support the Court's finding that Comerica supported and was
28 satisfied with the performance of the Examiner and his professionals and only challenged their professional
fees after the settlement could not be placed in a final form in July 2004. [Exs. 61, pp.95-98, 103]

1 in this case.⁴¹ However, as noted hereinafter, the expenses of the Examiner and Bryan Cave may
2 require further hearing before this Court.
3

4
5 **I. The Personal Property Leases And Related Administrative Claims.**
6

7 On August 11, 2004, Movants filed their initial Motion to Surcharge Comerica's
8 claimed collateral which addressed only the fees and expenses of the Examiner and his
9 professionals. [Ex. 80] On August 25, 2004, the Court conducted a Rule 7016 scheduling
10 conference on the initial Surcharge Motion. During this conference, counsel for an administrative
11 claimant, Bombardier Capital Inc., voiced a concern that the initial Motion only addressed the fees
12 and expenses of the Examiner's professionals and that it would be appropriate to "get it all on the
13 table" to litigate the full extent of any surcharge which should include the claims of personal
14 property lessors. [8/25/04 HTr., pp.5-7]
15

16
17 The Movants did not oppose that approach. Comerica's counsel agreed that it was
18 "fair and reasonable to have one surcharge hearing rather than multiple ones." Comerica's position
19 was that there should be "surcharge litigation once and not piecemeal." [*Id.*, pp.12, 15-16; 12/6/04
20 EMTTr., pp.159-60; Docket No. 855, p.4]⁴² The Court concluded that so long as any party that
21
22

23
24 ⁴¹ The Examiner and his professionals filed a number of fee applications during the pendency of these
25 cases. Docket Nos. 413, 416, 633, 634, 635, 809, 810. Until Comerica refused to proceed with the
26 settlement in July 2004, Comerica did not formally or informally object to any of the applications. While
27 such silence does not necessarily imply consent, given Comerica's early and extensive involvement in the
28 case, the failure to say anything was misleading and highly improper.

⁴² Even though Movants and Comerica are addressing all surcharge matters in one proceeding, there
is no bar date or other deadline precluding further surcharge requests. Movants also have reserved the right

1 wished to join in the proposed surcharge litigation did not unduly delay the proceeding, the
2 Movants could file a Supplemental Motion providing a “reasoned approach” as to why other
3 administrative claims should be brought into the surcharge litigation. [Id., 10, 23, 42] The Court
4 requested that the Movants promptly file such a supplemental motion. [Id., pp.23, 42]
5

6 On September 1, 2004, Movants filed their Supplemental Surcharge Motion. [Ex. 81]
7
8 The Supplemental Motion added professional fees and costs for July 2004 and certain personal
9 property lease claims. With respect to the lease claims, Movants sought to surcharge the Bank’s
10 claimed collateral for post-petition rent and taxes due under nine personal property leases of the
11 Debtors in the approximate amount of \$1,500,000 (the “Total Lease Claims”). [Ex. 81 & Ex. C
12 thereto] Of the Total Lease Claims: (i) the sum of approximately \$950,000 represented the
13 post-petition rent and taxes which had accrued but remained unpaid under certain leases (the
14 “Unpaid Lease Claims”); and (ii) the sum o f approximately \$565,000 related to the post-petition
15 rent and taxes actually paid to the lessors during the pendency of the Debtors’ cases (the “Paid
16 Lease Claims”).⁴³ [Id.]
17
18
19

20 With respect to the Unpaid Lease Claims, the sum of approximately \$450,000 of these
21 claims accrued under the applicable leases in July through September 2003. [12/6/04 EMTTr.,
22
23

24 Footnote 42 (cont’d)

25 to move to further surcharge the Bank’s claimed collateral for the fees and costs of the Examiner and his
26 professionals incurred from and after July 31, 2004. [Ex. 81, p.2 n.1]

27 ⁴³ Only rent and tax components of the lessor claims were included by Movants in the supplemental
28 motion. Other elements of the lessors’ claims such as interest, late penalties, and damage claims were not
included by Movants. [12/6/04 EMTTr., p.162]

1 pp.162-64] The sum of approximately \$500,000 of the Unpaid Lease Claims accrued under the
2 applicable leases in May and June 2003. [12/6/04 EMTTr., p.165]
3

4 With respect to the Paid Lease Claims, Comerica consented to the use of its cash
5 collateral to pay said claims. However, Comerica is a defendant in two adversary proceedings in
6 which the Debtors' estates are challenging the Bank's liens in all personal property of the Debtors.
7

8 To the extent Comerica does not ultimately prevail in these adversary proceedings, the Examiner
9 believes it is appropriate for the Court to require the Bank to reimburse the estates for these
10 payments. [12/6/04 EMTTr., pp.163-64] For the reasons set forth hereinafter in the legal
11 discussion, the Court need not determine whether Comerica should reimburse the Debtors' estates
12 at this time.
13
14

15 As to the Unpaid Lease Claims in the amount of \$500,000 for the period from May
16 and June 2003 [12/6/04 EMTTr., p. 165, Ex. 81 & Ex. C] and the Unpaid Lease Claims for July
17 2003, the Court concludes that the Examiner has failed to show how these personal property leases
18 which were rejected shortly after the filing of the Debtors' petitions provided any benefit to
19 Comerica. These claims must be removed from the damage computations. At the trial before this
20 Court, the Examiner admitted that those leases which were rejected shortly after his appointment
21 provided no benefit to Comerica. [Exhibit BBB, Request for Admission #13 at 8, 12/8/05 EMTTr
22 p. 191 Lines 8-25] The Court agrees. However, the Court has extended the scope of the
23 disallowed Unpaid Lease Claims to include the month of July 2003. Since the Examiner was
24 appointed on July 3, 2003, the Court concludes that those leases which were rejected by the Debtors
25
26
27
28

1 for the months of May, June and July, 2003 provided no benefit to Comerica. The Examiner needs
2 to recalculate the Unpaid Lease Claims to ensure that the lease payments from July 2003 are now
3 excluded from his computations. The Court concludes that those leases which were rejected
4 commencing August 1, 2003, and beyond did provide Comerica with the ability to receive the
5 benefit of a going concern sale of the Debtors' assets.
6

7
8 As to the Unpaid Lease Claims for the period from August 2003 and beyond, the
9 Court finds that Comerica caused and consented to the incurrence of these Claims. The Examiner
10 devoted a substantial amount of time and effort in paring down the non-essential personal property
11 leases. Much of this work was done on an emergency basis, with the Examiner preparing his
12 Report in a relatively short period of time. Comerica received a direct, substantial and quantifiable
13 benefit from this process, since the Examiner's efforts resulted in the concomitant reduction in the
14 use of Comerica's cash collateral. [12/6/04 EMTTr., p. 151] Moreover, those leases which were
15 not rejected by August 1, 2003, were critical to the Debtors' ability to operate on a going concern
16 basis. [12/6/04 EMTTr., pp. 168-69]⁴⁴ Without these leases in place, the Debtors would have had
17 a cash shortfall by November 2003. [12/6/04 EMTTr., pp. 169-70] Comerica realized the
18 importance of the preservation of the leases, because in the Expansion Motion, providing the
19 Examiner with the power to sell the Debtors' assets on a going concern basis, Comerica requested
20 that the Examiner have the power to assume and assign the leases.
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26 ⁴⁴ A number of items of leased equipment were critical to the Debtors' mining operations. If the
27 Debtors had not had the ability to use these assets, it would have affected the Debtors' ability to operate on
28 a going concern basis, which was contrary to Comerica's business plan. It would have adversely impacted
the price obtained by the Examiner for the Debtors' assets. [12/6/04 EMTTr., pp.168-69]

1 Finally, many of these Unpaid Lease Claims were set forth on Exhibit A of the Term
2 Sheet between Comerica and the Examiner when said parties were trying to finalize the settlement
3 between them. Thus, the Court finds that Comerica expressly consented to be surcharged for
4 substantially all of the Unpaid Lease Claims upon execution of the Term Sheet.⁴⁵ Comerica also
5 questions the amount of the Unpaid Lease Claims by focusing on the affidavit of Jerry Green, acting on
6 behalf of Caterpillar. [Exhibit DDDD] Caterpillar revised its proof of claim on March 26, 2004 [Id.
7 at ¶ 9], requesting damages in the amount of \$379,337.03. The revised proof of claim had three
8 components. First, Caterpillar requested damages in the amount of \$191,458.14 constituting rent,
9 taxes, repossession expenses, and late charges for those equipment leases rejected by the Debtors.
10 Second, the Debtors retained certain equipment, for which Caterpillar incurred damages in the
11 amount of \$144,695.01. Third, Caterpillar requested installment payments on the highway truck
12 retained by the Debtors in the amount of \$43,183.88. [Exhibit DDDD]

13 However, this proof of claim was reduced to the sum of \$309,082.05 as a result of the
14 settlement agreement entered into between the Examiner and Caterpillar. [Docket Entry Nos. 749,
15 951, Notice Regarding Settlement and Order Approving Allowance of Certain Administrative
16 Claims, respectively] Subsequently, the Examiner utilized unencumbered funds from the sale of
17 the Deer Valley facility to pay Caterpillar the sum of \$91,625.11, reducing the allowed amount of
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26 ⁴⁵ Crown Bank Leasing was set forth on the Term Sheet with a claim in the amount of \$5,078.32.
27 In the Supplemental Motion, the claim was increased to the amount of \$10,156.64. The Court sees no basis
28 to increase the Crown Bank Leasing Claim as a part of this surcharge proceeding. The other Unpaid Lease
Claims must be similarly adjusted to exclude those damages which resulted from the rejection of leases in
July 2003.

1 the claim to the amount of \$217,456.94. [Docket Nos. 889 and 893, Notice Regarding Interim
2 Distribution and Order Granting Interim Distribution, respectively] Thus, the Court agrees that
3 the Examiner's Supplemental Surcharge Motion is inaccurate to the extent the Examiner has
4 requested, for instance, that the full amount of Caterpillar's proof of claim, prior to settlement, be
5 surcharged against Comerica's collateral.
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8 A careful review of Exhibit 81, the Supplemental Surcharge Motion, and Exhibit C
9 thereto, reflects that the Examiner reduced the Caterpillar claim, as settled, from the amount of
10 \$309,082.05 to the amount of \$267,496.14, which consisted only of the rent and tax components
11 of the Claim. [Exhibit C at note 1] However, the Court will further reduce the primary component
12 of the Caterpillar claim as a result of the payment from the Deer Valley proceeds. (\$267,496.14 -
13 \$91,625.11 = \$175,871.03.) The Court concludes, therefore, that the amount of \$175,871.03 may
14 be surcharged against the Comerica collateral at this time. Moreover, the Court concludes, as more
15 fully discussed hereinafter, that to the extent Caterpillar has a Paid Lease Claim, the Examiner may
16 seek reimbursement from Comerica, for the benefit of the Debtors' estates, when the matter is ripe
17 for adjudication.
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22 The Examiner should review the Unpaid Lease Claims to ensure that those Claims are
23 now consistent with this Court's Decision. If a lease was rejected in July 2003 or earlier, the
24 damages in that lease may not be surcharged against Comerica's collateral. If the Unpaid Lease
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1 Claim was reduced by a distribution from the Deer Valley property, said claim should
2 concomitantly be reduced in this matter to reflect said payment.⁴⁶
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5 **J. Comerica's Knowledge Regarding The Debtors' Administrative Insolvency**
6 **And Its Prospect For Receiving Payment In Full Through These Chapter 11**
7 **Proceedings.**

8 As discussed more fully below, a creditor who requests that an estate representative
9 perform a task with knowledge that the estate is insolvent is, all other things being equal, more
10 likely to be subject to a successful surcharge motion under § 506(c) of the Bankruptcy Code.
11 Likewise, a debtor's estate is more likely to be administratively insolvent if a lender has a lien on
12 all estate property, since the debtor will not have any unencumbered property to pay the expenses
13 of administering the estate. Thus, Comerica's knowledge regarding whether the Debtors' estates
14 had sufficient value in excess of the amount of the Bank's debt, to cover a reasonable amount of
15 the administrative expense claims, also is relevant to the administrative insolvency issue.
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19 Applying said principles to the facts of this case, the Court concludes that the Bank
20 knew early on in these proceedings that the Debtors' estates were administratively insolvent.
21 Comerica possessed this knowledge before the Examiner was even appointed by the Court. In its
22 Examiner Motion filed on June 19, 2003, shortly after these bankruptcy petitions were filed on
23 May 8, Comerica advised the Court that there were "ballooning administrative expenses" and that
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27 ⁴⁶ Since the Examiner has agreed that the Unpaid Lease Claims must be capped at the aggregate
28 amount of \$450,000, this Court's exclusion of certain leases or reduction of Claims for the payment received
from the Deer Valley property may have little practical effect.

1 the Debtors' estates were unable to "cover" half of their \$2,300,000 to \$2,500,000 monthly
2 operating expenses. Comerica told the Court that the Debtors were "quickly moving toward
3 administrative insolvency. . ." [Ex. 73, pp. 4-10] Once the Examiner was appointed, various
4 budgets were prepared for Comerica on an ongoing basis, concerning the use of Comerica's cash
5 collateral, which continued to reflect the inability of the operations to provide for the payment of
6 the ongoing administrative expenses. By August 19, 2003, Comerica was repeating many of the
7 same allegations in its Expansion Motion [Docket Entry No. 199]. Comerica again made the same
8 statements about administrative insolvency in its motion for relief from stay filed on September 12,
9 2003. [Docket Entry No. 255.]⁴⁷

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13 Of course, given the difficult situation in which Comerica now finds itself, it must
14 now try to undermine the statements that it made to the Court early on in these cases. Comerica
15 attempts to rely on the Debtors' valuation of the assets to reflect that Comerica believed, for a
16 substantial period of time, that there was sufficient equity in the assets to pay the Examiner, his
17 professionals, and the ongoing expenses of administration.⁴⁸ However, Comerica repeatedly
18 questioned the credibility of the valuation evidence presented by the Debtors in Comerica's
19 Examiner Motion and the Expansion Motion. Indeed at the October 15, 2003 hearing on the
20 Expansion Motion, Comerica did not object to, nor controvert, the testimony of the Examiner which
21 reflected that the Debtors' assets had a range in value of only \$12,000,000 to \$14,000,000.
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26 ⁴⁷ Not surprisingly, Comerica alleged in the Motion for Relief from Stay that the Debtors had no
27 equity in the Bank's claimed collateral.

28 ⁴⁸ See Ex. 55, Request for Admission # 3, 3/23/05 DMTTr., p. 195.

1 [12/8/04 EMTTr., p. 147.] At the time of the hearing on the Expansion Motion, the indebtedness
2 owing to Comerica was at least in the amount of \$17,000,000.
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4 Moreover, Comerica placed the Debtors' loans on non-accrual status more than a
5 month before the Debtors filed their bankruptcy petitions. [Ex. 63] One of the reasons to take such
6 action was the belief by the loan officer and senior management that it was probable that the loans
7 would not be paid in full. [3/23/05 DMTTr., pp. 193-94] As a part of the process of placing the
8 loans on non-accrual, the Bank also provided for a loss reserve. In order to comply with FASB
9 114, which sets forth the generally accepted accounting principle for impaired loans, Comerica
10 established a loss reserve of \$2,500,000 before the Debtors filed their Chapter 11 proceedings.
11 [4/4/05 DMTTr., p. 114; Ex. 95]⁴⁹ After the Debtors filed their Chapter 11 proceedings, Comerica
12 established a \$4,600,000 loss reserve on the Debtor's loans as of May 31, 2003, just before the
13 Bank filed the Examiner Motion. [Ex. 61]⁵⁰ Ultimately Comerica charged off \$9,000,000 of the
14 Debtors' loans on March 5, 2004. [Ex. 63; 3/23/05 DMTTr., p. 227.]
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19 For all of the foregoing reasons, the Court concludes that Comerica knew early on in
20 these Chapter 11 proceedings that the Debtors' estates would soon become insolvent. If there was
21 even a scintilla of doubt in Comerica's mind, that was erased at the hearing on the Expansion
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24 ⁴⁹ Ms. McDonald agreed that Comerica was required to comply with FASB 114. [3/23/05 DMTTr.,
25 pp. 196-98; Ex. 104]

26 ⁵⁰ Of course, Comerica wants to focus on the fact that the loss reserve was subsequently reduced,
27 reflecting that Comerica still believed that it would be paid in full. However, the point is that Comerica still
28 believed that it would sustain a loss, albeit it in a lower amount. That does not vitiate the evidence from the
Examiner that Comerica realized that the value of the Debtors' assets, as of October 2003, was insufficient
to pay its claim in full.

1 Motion on October 15, 2003, at which the Examiner made it clear that the assets had a value
2 between \$12,000,000 to 14,000,000, yet the Comerica debt was approximately \$17,000,000.
3
4 Comerica consistently asserted in its Examiner Motion, the Expansion Motion, and in its Motion
5 for Relief from Stay that it had a lien on substantially all of the Debtors' assets. Comerica knew,
6 or should have known, that its claimed collateral was going to be surcharged for the actions that
7 it initiated and insisted on.
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11 **K. The Administrative Expense Claims of the Examiner and His Professionals.**

12 The Court previously conducted hearings on the fee applications of the Examiner and
13 his professionals. The First and Second Fee Applications of the Examiner and Bryan Cave were
14 duly noticed out, no objections were filed with respect thereto, and the Applications were approved
15 by this Court at hearings conducted on January 27, 2004 and June 25, 2004.⁵¹
16

17 At closing argument for the trial on the Surcharge Motions, Comerica raised the issue
18 that the Third Fee Application of Bryan Cave, although initially approved by this Court, was
19 subsequently modified by the Court's ruling on the Motion to Disqualify Bryan Cave from
20 representing the Examiner on the Triad and the Court Registry Funds issues.⁵² [6/24/05 TTr., pp.
21 163-64] The Examiner and Bryan Cave also presented their invoices for the month of July 2004
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26 ⁵¹ See Docket Nos. 535 and 791 concerning the minute entries, and Docket Nos. 559, 797 and 799
27 for the Orders approving the Applications but withholding payment of the fees and costs.

28 ⁵² See Docket No. 809, the Bryan Cave Third Fee Application, and Docket No. 810, the Examiner's
Third Fee Application.

1 at the Surcharge Motions trial, although those invoices were not yet the subject of a fee application
2 submitted by the Examiner or the Firm to the Court.
3

4 From a factual standpoint, the Court wishes to clarify the record concerning the Third
5 Fee Applications. First, the Examiner and his firm's Third Fee Application and the Third Fee
6 Application of Bryan Cave were approved at the August 19, 2004 hearing before this Court.⁵³ The
7 Court has reviewed the transcript from the hearing that day, and the minute entry is incorrect. The
8 Fee Application of the Examiner, his firm, and Bryan Cave were scheduled for hearing on August
9 19, although the minute entry reflects that only the Application of the Examiner and his Firm, FTI
10 Consulting, was set for that day.⁵⁴ Second, no Fee Applications were taken under advisement,
11 although the minute entry from the August 19 hearing states otherwise.⁵⁵ What did occur was this
12 Court's independent analysis of Comerica's objections to the approval of both Applications, and
13 this Court's determination that the Fee Application of the Examiner and Bryan Cave should be
14 approved. Neither the Examiner nor Bryan Cave submitted a form of order approving the
15 Applications, however.
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23 ⁵³ [8/19/04 HTr. pp. 3-44]

24 ⁵⁴ Docket No. 854 , the original minute entry from the hearing on August 19, 2004.

25 ⁵⁵ In fact, the Court at the subsequent hearing on the Motion to Disqualify had stated, at one point,
26 that it believed that the Bryan Cave Third Fee Application was under advisement. Since the Court relied,
27 in part, on the 8/19/04 minute entry at the time of rendering its subsequent decision on the record on the
28 Motion to Disqualify Bryan Cave, the error was continued through these proceedings.

1 Subsequently, at the hearing on the Motion to Disqualify Bryan Cave, this Court ruled
2 that Bryan Cave should not represent the Examiner as to the Triad and Registry Funds matters, but
3 in all other respects, the Motion to Disqualify was denied. The Court placed its extensive findings
4 of fact and conclusions of law in a Disqualification Memorandum dated November 18, 2004.⁵⁶
5 Bryan Cave did delete those entries which related to the Triad and Registry Funds matters in a
6 notice that was subsequently filed with the Court.⁵⁷ Bryan Cave believed that the entries which
7 should be deleted were indicated in the Notice and totaled the sum of \$9,262,75.
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10 On November 18, 2004, the Third Application of Bryan Cave, although initially
11 approved on August 19, 2004 was denied without prejudice, with this Court's belief that Bryan
12 Cave would, at some point, request a hearing on the allowance and payment of said Application.
13 It was the Court's intention to review the entries that Bryan Cave recommended should be deleted
14 and make an independent determination to what extent the Application should be allowed, albeit
15 in a reduced amount. Unfortunately, the renewed hearing on that Third Fee Application has not
16 yet occurred. Thus, the Court agrees with Comerica in that the Court is not yet in a position to
17 approve the fees and costs of Bryan Cave in its Third Fee Application. However, such issues may
18 be resolved at a further hearing before this Court or at the final hearing on the Firm's Fee
19 Applications. As to the Third Fee Application of Bryan Cave, the fees in the amount of \$141,561
20 and costs in the amount of \$6,949.88 may not be surcharged at this time.
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27 ⁵⁶ Docket No. 988, the Memorandum Decision, and Docket No. 989 is the Order thereon.

28 ⁵⁷ Docket No. 1165.

1 For similar reasons, since the fees and expenses of the Examiner and Bryan Cave for
2 the month of July 2004 have not yet been incorporated in appropriate fee applications, those fees
3 and expenses may not be surcharged at this time. As to the Examiner and his firm, the fees for July
4 2004 are the sum of \$10,771, with costs in the amount of \$152.65. As to Bryan Cave, the fees for
5 July 2004 are the sum of \$44,431, and the costs are \$330.75.
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8 The Court has independently reviewed the First, Second, and Third Fee Applications
9 of the Examiner, his firm, and the First and Second Fee Applications of Bryan Cave and concludes
10 that overall the hourly rate requested by said parties is reasonable, that the entries were prepared
11 at the time that the services were being rendered, and that the overall compensation requested by
12 the Examiner, his firm, FTI Consulting, and Bryan Cave is reasonable. However, certain entries
13 which related solely to the estate or which were requested by the Office of the United States
14 Trustee did not have any concomitant benefit to Comerica or were not caused or consented to by
15 Comerica. Such fees, and costs related thereto, may not be surcharged against Comerica's
16 collateral. For instance, in the First Fee Application of Bryan Cave, there are certain entries
17 concerning the Deprizio litigation that relate to setting aside the lien of Comerica on certain
18 assets.⁵⁸ In the separate rolling stock litigation, the Examiner and Bryan Cave also sought to set
19 aside Comerica's alleged perfected security interest on the Debtors' equipment. Again, the Court
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27 ⁵⁸ Exhibit 71, Part A thereto, for the time period of 8/1/03 to 8/31/03 under the heading of "Other
28 Contested Matters": 8/4/03, entry of Miller, \$199.50; 8/5/03, entry of Miller, \$399; 8/13/03, entry of Miller,
\$399, all relate to the Deprizio litigation and should not be surcharged against Comerica's collateral.

1 concludes that this litigation does not benefit Comerica and was not caused or consented to by
2 Comerica.
3

4 In determining which fees and costs should be excluded, the Court has reviewed the
5 summary sheets presented by the Examiner and Bryan Cave.⁵⁹ Certainly these are useful, but there
6 may be certain entries for the Deprizio or the rolling stock litigation that are not set forth on the
7 summary sheets. The Court also concludes that the fees and costs related to the Examiner's
8 preparation of the monthly operating reports, requested by the Office of the United States Trustee
9 as a standard practice for any examiner appointed in a Chapter 11 case where the debtor still has
10 ongoing business operations and although helpful to this Court and creditors, should not be
11 surcharged against Comerica's collateral. There were certainly other reports, such as the Interim
12 Report or the reports generated by the Examiner for Comerica as to the collection of accounts
13 receivable, which were a benefit to Comerica and/or which were requested by or consented to by
14 Comerica, that should be surcharged against the Collateral. However, the monthly operating
15 reports are routine and prepared according to a specific form generated by the Office of the United
16 States Trustee. That type of general administrative report does not fit the test of an appropriate
17 surcharge.
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27 ⁵⁹ The Bryan Cave summary sheet is just behind Exhibit 71; the Examiner summary sheet is just after
28 Exhibit 71(D).

The Court has prepared a table reflecting those entries which should not be surcharged against Comerica's collateral.⁶⁰

Bryan Cave

First Application

Fee Employment/Applications

\$2,501

Fee Employment/Objections

\$115

Avoidance Action Analysis

\$20,384

Litigation/Other Contested Matters

8/03/03 Miller \$199.50

8/4/03 Miller \$399

8/5/03 Miller \$399

Plan and Disclosure Statement

\$2,327

Total

\$26,324.50

Second Application

Fee Employment/Applications

\$9,974

Fee Employment/Objections

11/21/03 Landavazo \$46

11/25/03 Landavazo \$46

Avoidance Action Analysis

\$2,899.50

Plan and Disclosure Statement

\$471

Total

\$13,436.50

Grand Total

\$39,761.00

⁶⁰ For ease of reference, the Examiner and Bryan utilized task based billing. Such itemized billing allows this Court to review and approve entire categories of fees without having to list every approved entry from a voluminous fee application. Therefore, if an entire category is excluded from the First or Second Fee Application of Bryan Cave, all entries from the attorneys or paralegals under that category may not be surcharged against Comerica's alleged collateral. As to some categories, such as "Other Litigation/Contested Matters" or "Fee Applications," if the Court has listed specific entries, only those entries are excluded; all other entries directly benefitted Comerica or were caused or consented to by Comerica.

The Examiner and his Firm, FTI Consulting

First Application

Second Application

Third Application

Document Review

Asset Review

Document Review

7/9/03 McDonough

12/22/03 McDonough

3/16/04 McDonough

Complaint/avoid transfer \$158

rolling stock \$276.50

Adv.Pro.Transcript

7/26/04 McDonough

1/7/04 Cosman

Review \$118.50

Review MSJ \$276.50

rolling stock \$337.50

7/27/04 McDonough

1/13/04 Cosman

Financial Analysis

Review MSJ Declaration \$156

rolling stock \$67.50

3/2/04 Cosman

1/14/04 Cosman

UCC titles \$247.50

update rolling stock \$157.50

3/3/04 Cosman

2/26/04 McDonough

UCC titles \$247.50

vehicle lien analysis \$474.00

3/5/04 Cosman

Review titles \$135.00

3/5/04 McDonough

Review titles \$79

Monthly Oper.Reports

\$18,085

Total

\$590.50

Total

\$1,313.00

Total

\$18,912.50

Grand Total

\$20,816.00

The evidence presented at trial reflects that other than the cost of the bond premium,
or the renewal thereof and the fiduciary policy requested by the Examiner, the Examiner and his

1 professionals have not sought to surcharge Comerica's alleged collateral for their expenses.⁶¹
2
3 Given such a limitation, the Court need not allocate which expenses should be so surcharged other
4 than as set forth in the Decision.

5 Comerica has also challenged the cost of the Examiner's bond premium, in the amount
6 of \$80,000, and the attendant fiduciary expense in the amount of \$4,200, which were set forth in
7 the Examiner's Third Fee Application. The Court has independently reviewed this cost item. The
8 Court concludes that given the funds that the Examiner still is required to hold and given the
9 prudent practice of the Court and the United States Trustee's Office that any professional that holds
10 estate funds should be appropriately bonded until the funds are paid out to creditors or other
11 appropriate arrangements are made, the Court finds it disingenuous that Comerica, the party who
12 requested the appointment of an Examiner and then requested an expansion of his powers including
13 the sale of the Debtors' assets, now complains that it should be required to pay for the bond from
14 its collateral. It is this Court's opinion that the actions of Comerica directly caused the Examiner to
15 be appointed, and those costs, such as the requirement for a bond, or the attendant fiduciary
16 expense, should be borne by the party requesting such relief. Moreover, under Comerica's analysis
17 of what constitutes its collateral and the resulting protracted litigation between Comerica and the
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24 ⁶¹ For instance, the Examiner's testimony at trial only sought reimbursement for the bond premium
25 (\$80,000) and the fiduciary policy (\$4,200) and not for any other expenses. The Surcharge Motions and the
26 summary sheets for Exhibit 71 reflect no costs for the Examiner, his firm, or Bryan Cave other than as noted
27 concerning the bond premium and its renewal. This may have been inadvertent, but the Court has
28 insufficient information to determine what research, photocopying, federal express, or other expenses relate
to the fees which are specifically being excluded for surcharge purposes. The Examiner and Bran Cave need
to address the issue of expenses, other than the bond premium and its renewal, at a later date.

1 Examiner and the Debtors, the Examiner has been required to hold said funds for a substantial
2 period of time. It is improper for Comerica to complain about such costs that it caused and
3 continues to cause. The bond amount of \$80,000 and the attendant fiduciary expense in the
4 amount of \$4,200 shall be surcharged against Comerica's claimed collateral.⁶²
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8 **IV. CONCLUSIONS OF LAW.**

9 **A. Whether the Examiner Has Standing to Prosecute the Surcharge Motions.**

10 Before addressing the substantive issues, the Court must consider the Examiner's right
11 to be heard in connection with the Surcharge Motions. Comerica characterizes this issue as a lack
12 of standing.⁶³ However, given the facts of this case, the Court concludes that Comerica is
13 employing a legal strategy to silence the Examiner, so that the Debtors and the professionals will
14 not have the benefit of the Examiner's insight and familiarity with these cases. Once Comerica
15 requested that the Examiner's powers be greatly expanded, Comerica ensured that it would be the
16 Examiner that would actually be involved in virtually all of the factual matters addressed in the
17 litigation. Through Comerica's efforts, the Examiner became empowered with almost all of the
18 powers of a trustee. 11 U.S.C. §§ 1104(d), 1106(b). The Examiner became one of the real parties
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25 ⁶² It may not be gainsaid that the first party to complain vociferously if there were any loss of funds
26 by the Examiner would be Comerica.

27 ⁶³ The Court notes the irony in Comerica's current attempts to silence the Examiner given its
28 aggressive efforts to expand the powers of the Examiner so that he could be heard in essentially all matters
in these Chapter 11 proceedings.

1 in interest to be heard on the Surcharge Motions. Moreover, the Debtors will be seriously
2 hampered in their prosecution of the Surcharge Motions without the joinder of the Examiner.
3

4 Even if the Court is incorrect in Comerica's use of a legal strategy to vitiate the
5 Examiner's standing, the Court concludes that the Examiner has standing for several other reasons.
6 First, a debtor in possession has standing to seek surcharge of a secured creditor's collateral. In re
7 Debbie Reynolds Hotel & Casino, Inc., 255 F.3d 1061, 1066 (9th Cir. 2001) (citing Hartford
8 Underwriters, 120 S. Ct. 1942, 1947 & n.3 (2000)); In re Compton Impressions, Ltd., 217 F.3d
9 1256, 1260 (9th Cir. 2000). Because the Debtors are proper movants on the Surcharge Motions,
10 the Examiner's technical standing under § 506(c) is largely irrelevant. "The general rule applicable
11 to federal court suits with multiple plaintiffs is that once the court determines that one of the
12 plaintiffs has standing, it need not decide the standing of the others." Leonard v. Clark, 12 F.3d
13 885, 888 (9th Cir. 1994) (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 682, 97 S. Ct. 2010,
14 2014 (1977)); Buono v. Norton, 371 F.3d 543, 548 n.3 (9th Cir. 2004). The Debtors' standing to
15 surcharge Comerica "end[s] the inquiry." Leonard, 12 F.3d at 888. The Debtors have standing,
16 and that is all that is required for the Court to consider the Surcharge Motions.
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22 Second, whether it is viewed as independent standing or the right to be heard, the
23 Court also concludes that the Examiner has a right to participate fully and be heard in connection
24 with the Surcharge Motions under the unique circumstances presented in these cases. As noted
25 above, Comerica agreed, during the 4/15/04 hearing, that the Examiner had a right to be heard
26 regarding the extent to which Comerica's collateral should be surcharged under § 506(c) of the
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1 Bankruptcy Code. Because of what transpired at the 4/15/04 hearing, the Court and all parties who
2 appeared (including Comerica) knew that the settlement process might ultimately result in an
3 evidentiary hearing on disputed issues. Comerica simply is not entitled to breach this agreement
4 by asserting a lack of standing argument under § 506(c). Even if the Examiner does not have
5 independent standing, Comerica agreed to allow the Examiner to be heard on surcharge issues.⁶⁴
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8 Third, the Examiner is a party in interest on the surcharge issue. § 1109(b) states that
9 a “party in interest, including [certain entities] may raise and may appear and be heard on any issue
10 in a case under this chapter.” 11 U.S.C. § 1109(b). This language places no limit on who may be
11 a party in interest. In re Torrez, 132 B.R. 924, 934 (E.D. Cal. 1991) (citation omitted); 7 Collier
12 on Bankruptcy ¶ 1109.02, at 1109-9 (15th ed. 2004). The party in interest status must be “elastic
13 and flexible” in order to “insure that all interests that may be significantly impacted by a Chapter
14 11 case have an adequate opportunity for fair representation.” Torrez, 132 B.R. at 934. Thus,
15 Comerica’s assertion that the word “examiner” is not specifically mentioned in §1109(b) is not
16 dispositive of the issue before the Court. Once the examiner has been given expansive powers
17 under §§1104(d) and 1106(b), many courts have expanded the power of the Examiner to be heard
18 as a party in interest. In re Carnegie Intern. Corp., 51 B.R. 252 (Bankr.Ind. 1984); Williamson v.
19 Roppollo, 114 B.R. 127, 129 (W.D. La. 1990) (examiner given the power to sue to recover
20 preferences or fraudulent conveyances); In re Franklin-Lee Homes, Inc., 102 B.R. 477, 481
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26 ⁶⁴ The Local Rules in this District explicitly provide that this kind of agreement is binding without
27 the necessity of any writing since it was placed on the record in a hearing before this Court. See Local Rule
28 of Bankruptcy Procedure 9071-1. The agreement of counsel on the record may subsequently bind them and
the parties they represent. See also In re Haynes 97 B.R. 1007, 1011 (9th Cir. BAP 1989).

1 (E.D.N.C 1989) (expanding the “duty of the examiner to include the narrow duty to institute
2 adversary proceedings”).
3

4 After considering all of the arguments and evidence presented, the Court concludes
5 that the Examiner and his counsel were in a unique position to address the issues before the Court
6 in this surcharge litigation. Thus, the Examiner has a right to be heard and to participate actively
7 in the surcharge litigation. The participation of the Examiner and his professionals is in the best
8 interests of the Debtors’ estates. See, e.g., In re Carnegie Int’l Corp., 51 B.R. 252, 256 (Bankr. S.D.
9 Ind. 1984) (“Plainly, authorizing the examiner, who is thoroughly familiar with these causes of
10 action, to bring suit will minimize expenses and maximize benefits to the estate.”) In this regard,
11 the Court notes that the Bankruptcy Appellate Panel of the Ninth Circuit has viewed favorably the
12 ability of parties with similar interests to address matters on behalf of a debtor’s estate. See In re
13 Spaulding Composites Co., 207 B.R. 899, 904 (BAP 9th Cir. 1997). In such cases, “[a]llowing the
14 DIP to coordinate litigation responsibilities . . . can be an effective method for the DIP to manage
15 the estate and fulfill its duties.” Id. In connection with the Surcharge Motions, the Examiner and
16 the Debtors came to have a “close identity of interests.” Id. Thus, the Examiner’s participation in
17 prosecuting the Surcharge Motions on behalf of the Debtors’ estates was entirely appropriate and
18 in the best interests of the Debtors’ estates.
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24 Finally, Comerica argues that the Examiner’s status as joint movant on the Surcharge
25 Motions violates the rule of law enunciated by the United States Supreme Court in the decision of
26 Hartford Underwriters Insurance Co. v. Union Planters Bank, 530 U.S. 1, 120 S. Ct. 1942 (2000).
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1 In reality, the Hartford decision is fully distinguishable. In the Hartford decision,, the debtor had
2 obtained workers' compensation insurance from Hartford Underwriters Insurance Co. ("Hartford")
3 during its Chapter 11 proceeding. Throughout its efforts to reorganize, the debtor failed to pay the
4 insurance premiums. When the reorganization failed, the bankruptcy court converted the case to
5 a Chapter 7 liquidation proceeding and appointed a trustee.
6

7
8 Without consulting the trustee, Hartford unilaterally attempted to surcharge the
9 collateral of one of the debtor's secured creditors for payment of the insurance premiums. The
10 Supreme Court rejected Hartford's assertion that it had an independent right to use § 506(c). Id.,
11 530 U.S. at 14, 120 S. Ct. at 1951. The Supreme Court expressed particular concern over
12 Hartford's unilateral action, noting that, if Hartford were allowed to bring an independent surcharge
13 claim, any administrative claimant could usurp the trustee's role as the representative of the estate.
14 Id., 530 U.S. at 8-9, 120 S. Ct. at 1948.⁶⁵
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16
17 Unlike the administrative claimant in Hartford, the Examiner in these proceedings
18 does not seek surcharge as an independent right. He has joined the Debtors – parties that
19 undeniably have standing – in moving to surcharge Comerica's collateral. Thus, there is no risk
20 of usurpation in the instant case.
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24 ⁶⁵ Comerica notes that the Examiner has an administrative expense claim in the Debtors' cases and
25 argues that Hartford bars the Examiner from having standing for this reason. Of course, Hartford does not
26 deal with this kind of situation in which an examiner with expanded powers and an administrative expense
27 claim joins in a surcharge motion, so this situation is distinguishable. Comerica's argument also is illogical
28 because virtually every trustee in bankruptcy is an administrative expense creditor, yet Comerica would not
usurp the ability of the trustee, as an administrative expense creditor, to pursue a surcharge claim. Why
should the status of the examiner require a different result? Thus, the Court specifically rejects this
argument.

1 Additionally, since the case had converted to a Chapter 7, the Hartford Court
2 concluded that the trustee's "unique role" in such liquidation proceedings made "it entirely
3 plausible that Congress would provide a power to him and not to others." Id., 530 U.S. at 7, 120
4 S. Ct. at 1947. The Supreme Court, therefore, saw no reason to look beyond § 506(c) to determine
5 standing.
6

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8 In Chapter 11 proceedings where an examiner has been appointed, however, the
9 situation is more complex, particularly when the Court has given the examiner expanded powers.
10 In such a case, the examiner fulfills some of the duties of a trustee, while the debtor in possession
11 fulfills others. See 11 U.S.C. § 1106(b). §1104(c)(West 2005) is the starting point in determining
12 the duties of an Examiner, which provides:
13

14
15 If the court does not order the appointment of a trustee under this section, then at any
16 time before the confirmation of a plan, on request of a party in interest or the United
17 States trustee, and after notice and a hearing, the court shall order the appointment
18 of an examiner to conduct such an investigation of the debtor as is appropriate,
19 including an investigation of any allegations of fraud, dishonesty, incompetence,
20 misconduct, mismanagement, or irregularity in the management of the affairs of the
21 debtor of or by current or former management of the debtor, if--

22 (1) such appointment is in the interests of creditors, any equity security holders, and
23 other interests of the estate; or

24 (2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods,
25 services, or taxes, or owing to an insider, exceed \$5,000,000.
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1 However, §1106(b) expands the powers of an examiner under §1104(d),⁶⁶ to include the duties of
2 a trustee under §1106, Subsections (a)(3) and (4).⁶⁷ The Court may further expand the powers of
3 an examiner to undertake “any other duties of the trustee that the court orders the debtor in
4 possession not to perform.” 11 U.S.C. §1106(b). For instance, the Court may conclude that since
5 the trustee has the right to sell the estate’s assets under §363(b)(1)⁶⁸ or to provide adequate
6 protection under §361(1),⁶⁹ the examiner in a case should undertake those duties. However,
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10 ⁶⁶ §1104(d) (West 2005) states, as the starting point:

11 If the court orders the appointment of a trustee or an examiner, if a trustee or an examiner
12 dies or resigns during the case or is removed under section 324 of this title, or if a trustee
13 fails to qualify under section 322 of this title, then the United States trustee, after
14 consultation with parties in interest, shall appoint, subject to the court's approval, one
disinterested person other than the United States trustee to serve as trustee or examiner, as
the case may be, in the case.

15 ⁶⁷ §1106(a)(3) (West 2005) provides:

16 A trustee shall -- except to the extent that the court orders otherwise, investigate the acts,
17 conduct, assets, liabilities, and financial condition of the debtor, the operation of the
debtor's business and the desirability of the continuance of such business, and any other
matter relevant to the case or to the formulation of a plan;

18 §1106(a)(4) (West 2005) states:

19 A trustee shall --(4) as soon as practicable--

20 (A) file a statement of any investigation conducted under paragraph (3) of this subsection,
including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct,
21 mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause
of action available to the estate; and

22 (B) transmit a copy or a summary of any such statement to any creditors' committee or
equity security holders' committee, to any indenture trustee, and to such other entity as the
23 court designates.

24 ⁶⁸ §363(b)(1) (West 2005) states:

25 The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary
26 course of business, property of the estate.

27 ⁶⁹ §361(1) (West 2005) provides in relevant part:

28 When adequate protection is required ... such adequate protection may be provided by --
requiring the trustee to make a cash payment or periodic cash payments to such entity, to

1 §1106(b) has an exception. The language, “except to the extent that the court orders otherwise,”
2 allows the court discretion in permitting the examiner and the debtor in possession to act or be
3 heard jointly on a matter.⁷⁰ In light of this sharing of responsibilities, it is entirely plausible that
4 Congress intended to allow joint efforts, such as a joint surcharge motion, by an examiner and a
5 debtor in possession.
6

7
8 Having rejected Comerica’s standing challenge, the Court will now proceed to analyze
9 the remaining substantive legal issues in this matter.
10

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13 **B. Whether Certain Professional Fees and Expenses May Be Surcharged Under the**
14 **Cause/Consent Standard (the “Subjective Test”) of Bankruptcy Code §506(c).**

15 The Ninth Circuit Court of Appeals and various other courts have set forth the
16 standards to be applied when a party seeks to surcharge the collateral of a lender. An overview of
17 these general principles is important to understanding how the Court resolves the issues herein.
18

19 In the decision of In re Cascade Hydraulics & Utility Service, Inc., 815 F.2d 546 (9th Cir.
20 1987), the Ninth Circuit sets forth certain key principles which control this Court’s analysis under § 506(c).
21

22 In Cascade Hydraulics, the Ninth Circuit stated:
23

24 Footnote 69 (cont’d)

25 the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of
26 this title, or any grant of a lien under section 364 of this title results in a decrease in the value
of such entity's interest in such property.

27 ⁷⁰ The language may also allow the Court to prohibit the examiner and the debtor in possession from
28 undertaking a particular task. For instance, the Court may wish to prohibit the examiner and the debtor from
proceeding with certain litigation.

1 Generally, a debtor's bankruptcy assets are subject to all liens and encumbrances existing
2 when the petition is filed. 3 Collier on Bankruptcy ¶507.02(2) (15th ed. 1979). These
3 encumbrances are usually satisfied before disbursement to unsecured creditors. See generally,
4 3 Collier on Bankruptcy ¶ 507.02(2). Administrative expenses or the general costs of
5 reorganization may not generally be charged against secured collateral. First Western Savings
6 & Loan Association v. Anderson, 252 F.2d 544, 547 (9th Cir. 1958). We allow payment of
7 administrative expenses from the proceeds of secured collateral when incurred primarily for
8 the benefit of the secured creditor or when the secured creditor caused or consented to the
9 expense. Id.; In the Matter of Trim-X, Inc., 695 F.2d 296, 301 (7th Cir. 1982).

10 Id. at 547.

11 Two key legal principles have emerged from Cascade Hydraulics. First, the surcharge
12 of a secured creditor's collateral under § 506(c) is the exception rather than the rule, since
13 administrative expense costs may not generally be charged against the collateral of a lender.
14 Second, there are two exceptions to the general rule which are commonly referred to as the
15 objective and the subjective tests under § 506(c). A party moving to surcharge a lender's collateral
16 under § 506(c) may meet its burden by proving: (i) the specific criteria listed in § 506(c) have been
17 satisfied (i.e., the objective test); or (ii) the secured creditor "caused or consented to" the expenses
18 (i.e., the subjective test). Id.; In re Compton Impressions, Ltd., 217 F.3d 1256, 1260 (9th Cir.
19 2000).

20 The Ninth Circuit has recognized the existence of the objective and subjective test
21 since at least 1958. In the decision of First Western Savings & Loan Association v. Anderson, 252
22 F.2d 544, 547 (9th Cir. 1958), the Ninth Circuit held that, under the appropriate circumstances, a
23 lender's collateral could be surcharged "with any allowances which were fairly attributable to
24 activities benefitting a secured creditor, or to which he expressly or impliedly consented, or which
25 he caused." The Ninth Circuit specifically noted the trial court's need to balance the interests of
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1 the parties involved. “In every case where free assets are insufficient, the court should balance the
2 misfortune of having some allowances go unpaid against the possible inequity of charging them
3 all against mortgaged property.” Id. at 548.⁷¹

4
5 The Ninth Circuit has long recognized that when a reorganization is unsuccessful and
6 a case is administratively insolvent, the trial judge has the authority to decide the extent to which
7 a lender’s collateral may be charged. Silverstate Savings & Loan Ass’n v. Young, 252 F.2d 236,
8 238-39 (9th Cir. 1958) (“[W]here the free assets involved in an unsuccessful reorganization
9 proceeding are insufficient to cover allowances (to trustee and his attorney) the extent to which
10 mortgaged property should be charged therewith rests within the sound discretion of the trial
11 judge.” (citing First W. Savings & Loan Ass’n v. Anderson, 252 F.2d 544 (9th Cir. 1958))).
12
13 Accord In re Sonoma V, 24 B.R. 600, 604 (9th Cir. BAP 1982).

14
15
16 The Court will apply the subjective test to the fees and the expenses of the Examiner
17 and his professionals in this section. The Court will apply the objective test to these same fees and
18 expenses in Section IV(C) below.

19
20 Turning to the subjective test, § 506(c) was “designed to prevent a windfall to the
21 secured creditor at the expense of the claimant.” In re Visual Indus., Inc., 57 F.3d 321, 325 (3d Cir.
22 1995) (citation omitted). When Congress enacted § 506(c), it codified the equitable doctrine of
23 surcharge. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 357 (1977) (§ 506(c) “codifies current
24 law”); S. Rep. No. 989, 95th Cong., 2d Sess. 68 (1978) (same).

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28 ⁷¹ In the instant case, of course, Movants are not seeking to charge all of the Debtors’ administrative
claims against the Bank’s collateral. See supra note 3.

1 The pre-Code practice included the subjective test. See, e.g., W. Savings & Loan
2 Ass'n v. Anderson, 252 F.2d 544 (9th Cir. 1958). The courts developed the subjective test to
3 preclude a secured creditor from calling "upon a professional to perform services on its behalf, and
4 then [denying] payment to the professional because hindsight prove[d] that the services did not
5 provide the anticipated benefit." In re Nutri/System, Inc., 169 B.R. 854, 872 (Bankr. E.D. Pa.
6 1994) (citations omitted); see also In re Louisville Storage Co., 21 F. Supp. 897, 899 (W.D. Ky.
7 1936), aff'd, 93 F.2d 1008 (6th Cir. 1938). Comerica requested the Examiner and his professionals
8 provide a wide range of services. After all the services were performed, Comerica decided to
9 withhold consent to bar payment of any of these professional fees from its collateral and from
10 property that has not yet been determined to be its collateral.
11

12 The subjective test requires proof of causation, express consent, or implied consent.
13
14 As noted by the Ninth Circuit in Cascade Hydraulics, "[m]ere cooperation with the debtor does not
15 make the secured creditor liable for all expenses of administration." 815 F.2d at 548. Furthermore,
16 a lender's consent to certain expenditures "is not a blanket consent to be charged with additional
17 expenses." Id. at 549. In Cascade Hydraulics, the creditor provided limited consent, and the Ninth
18 Circuit noted that this limited consent did not constitute "implied consent to be charged with
19 [debtor's] cost of doing business." Id. The Ninth Circuit further stated that § 506(c) "is not
20 intended as a substitute for recovery of administrative expenses normally the responsibilities of the
21 debtors' estates." Cascade Hydraulics, 815 F.2d at 548. As noted above, however, the Debtors'
22 cases are not a normal situation, and the professional fees of the Examiner, his firm, Bryan Cave
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1 and Brown and Caldwell, are not a “cost of doing business” for the Debtors. These professionals
2 did the vast majority of their work at the request of Comerica.
3

4 The Ninth Circuit has found that “[i]mplied consent is generally limited to instances
5 in which the creditor caused the additional expense.” Cascade Hydraulics, 815 F.2d at 549. This
6 general rule has been noted by other circuit courts as well. In re Flagstaff Foodservice Corp., 762
7 F.2d 10, 12 (2d Cir. 1985); In re Trim-X, Inc., 695 F.2d 296 (7th Cir. 1982).⁷²
8

9 In this case, Comerica aggressively sought relief from this Court, including the filing
10 of the Examiner Motion and the Expansion Motion and the resolution of administrative expense
11 claims to allow a prompt distribution to Comerica. Comerica caused a majority of the Examiner’s
12 and his professionals’ fees and expenses to be incurred. Many courts have inferred consent under
13 similar circumstances, especially when there are no longer any unencumbered assets. See In re
14 Hotel Assocs., Inc., 6 B.R. 108, 111 (Bankr. E.D. Pa. 1980); In re Torchia, 188 F. 207, 208 (3d Cir.
15 1911); In re Edinboro Dev. Inc., 422 F. Supp. 1049, 1052-53 (W.D.Pa. 1976); 4 Collier on
16 Bankruptcy ¶506.05[7], at 506-136 – 37.
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20 While many decisions have addressed this topic of implied consent, the decision of
21 In re Hotel Associates, Inc., 6 B.R. 108 (Bankr. E.D. Pa. 1980), provides instructive guidance.
22

23 While no published decision has ever addressed a situation involving an examiner with expanded
24

25 ⁷² The Flagstaff Foodservice case is a seminal decision on the issue of surcharge in which the Second
26 Circuit Court of Appeals reversed the rulings by the lower courts authorizing the debtor to pay certain
27 payroll taxes from the collateral of the secured creditor. One of the reasons that the Second Circuit reversed
28 the lower courts was the concern that the lower courts’ rulings might have the effect of discouraging secured
creditors from supporting a debtor’s efforts to reorganize if they were subject to being surcharged by merely
cooperating with a debtor attempting reorganization.

1 powers in the context of surcharge litigation, the Hotel Associates Decision addresses surcharge
2 in the context of a trustee. Shortly after the Court appointed the trustee, he moved for an order
3 directing that all expenses and costs of administration incurred by the trustee or his agents be
4 reimbursed by the lender to accomplish the tasks set forth in the order of appointment. The lender
5 opposed the motion. It argued that by filing a motion to appoint a trustee, the lender did not
6 guarantee the payment of the trustee's fees and expenses. However, the lender had made it clear
7 that it wanted the trustee to propose a plan as an exit strategy for the Chapter 11 proceedings. Id.
8 at 111. The Court found it significant that although the debtor's assets were heavily encumbered,
9 the lender sought the appointment of a trustee rather than stay relief. Thus, the lender "not only
10 implicitly consented to the trustee's costs and expenses, but insured ... that those costs and expenses
11 would be incurred." Id. at 114. Once the lender determined to have the trustee propose a plan to
12 assist the lender in its business strategy, the lender undertook a "risk of loss" if the strategy were
13 not successful. Id. The Hotel Associates court analyzed the situation as follows:

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19 The [secured creditor] not only has consented to the payment of the trustee's costs, but the
20 [secured creditor's] own motion, bringing about the appointment of trustee, has caused the
21 expenses that the trustee is bound to incur. A secured creditor which causes administrative
expenses, can and should be charged with such costs.

22 Hotel Assocs., 6 B.R. at 111-12 (citing In re Louisville Storage Co., 21 F.Supp. 897, aff'd 93 F.2d 1008
23 (6th Cir. 1938)).

24
25 This same analysis applies in the instant case. Comerica knew, or should have known,
26 that the Debtors' estates did not have sufficient assets to cover all of the administrative expenses,
27 yet Comerica requested that this Court appoint an examiner with pervasively broad powers that
28

1 were expanded. Comerica sought these orders to protect its own economic interests, rather than
2 to protect the interests of other creditors in the Debtors' cases.
3

4 While Comerica did not support an exit strategy involving a Chapter 11 plan,
5 Comerica aggressively supported a going concern sale of the Debtors' assets, with the Examiner
6 in charge of executing the Bank's strategy. Thus, the Court concludes that Comerica ran the risk
7 of loss associated with a sale that did not yield sufficient funds to meet the business goals of the
8 Bank.
9

10
11 Only when it became apparent to Comerica that the it did not have a lien on all of the
12 Debtors' assets, and the Bank was required to charge off \$9,000,000 of the Debtors' loans, did
13 Comerica decide to withhold its consent to the settlement between the Examiner and Comerica and
14 to renegotiate the terms and conditions as to the payment of administrative expense claimants. By
15 this time, however, Comerica had sought the expansion of the Examiner's powers and ensured that
16 the related expenses would be incurred by the Debtors' estates. Comerica may not now claim
17 non-consent to avoid paying for the work that it caused to be performed.
18
19

20 At trial, Movants established that Comerica was deeply involved in the efforts of the
21 Examiner. Primarily through its Bank counsel, since Comerica inexplicably decided to take a
22 "hands off" approach to the Debtors' cases, Comerica was kept fully apprised of essentially all of
23 the decisions and developments by the Examiner and his professionals. In many instances,
24 Comerica's Bank counsel provided direct input into the decision-making process of the Examiner.
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1 Until settlement negotiations broke down in July 2004, Comerica never complained, objected to
2 or opposed any action taken by the Examiner or his professionals.
3

4 Comerica actually contends that it neither caused nor consented to any of the work
5 performed by the Examiner and his professionals. This same argument was rejected in the decision
6 of In re Bob Grissett Golf Shoppes, Inc., 50 B.R. 598 (Bankr. E.D. Va. 1985). In the Grissett
7 Decision, the creditor had secured two notes with a blanket lien on all of the debtor's collateral.
8 Shortly after the debtor filed a petition, the secured creditor moved for the appointment of a trustee,
9 rather than relief from the automatic stay. The Grissett Court began its analysis by noting a
10 distinction between "acts which evidence consent to bear the costs of reorganization proceedings
11 and acts which merely evidence a willingness that such proceedings be conducted if others want
12 them and if others bear the cost." Id. at 604 (citation omitted). The Grissett court found that when
13 a secured creditor moved for the appointment of a trustee, rather than relief from the automatic stay,
14 and there were few or no unencumbered assets available to fund administrative expenses, the
15 secured creditor should have known that surcharge was appropriate. In such a situation, the secured
16 creditor impliedly consented to the surcharge of its collateral. Id. at 604, 609-10.
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22 Comerica's acts in these Chapter 11 cases similarly reveal its consent to bear the costs
23 associated with the efforts of the Examiner and his professionals. Comerica and its counsel knew
24 the Debtors' estates had few, if any, assets that were not subject to a lien claimed by Comerica.
25 Rather than obtain stay relief and foreclose, Comerica pressed for the appointment of an examiner
26 and pushed for a sale process before this Court. Having set that process in motion, Comerica
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1 cannot walk away from the burden of paying for the efforts of the Examiner and his professionals.

2 See Grissett, 50 B.R. at 609.

3
4 Comerica chose to pursue a path of having the Examiner manage a process that began
5 with an extensive investigation regarding a wide range of alleged “bad acts” by the Debtors’
6 representatives. From the onset, the Examiner, at the request of Comerica, took control of the cash
7 and cash budgeting process, and also substantially pared down the personal property leases which
8 were a significant monetary burden to the Debtors’ estates. Comerica then sought and obtained
9 additional expanded powers of the Examiner so that the Debtors’ assets could be sold as a going
10 concern through an auction sale. Comerica then agreed to have the Examiner take the lead on
11 negotiating the administrative expense claim settlements and the issue of surcharge. As a direct
12 result of this path chosen by Comerica, the Debtors’ estates incurred the expenses at issue in this
13 litigation. There is no doubt that a majority of the professional fees and expenses at issue in this
14 litigation were caused by Comerica through implied and often actual consent.
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19 Thus, the Court concludes that Comerica consented to and/or caused substantially all
20 of the professional fees incurred by the Examiner and his professionals. The Court has set forth,
21 in specific findings of fact, those fees and expenses which may be surcharged against Comerica’s
22 collateral, and those which do not meet the subjective test. The Movants have met their burden of
23 proof that the vast majority of the fees and expenses of the Examiner and his professionals may be
24 surcharged against Comerica’s collateral.
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1 C. **Whether Certain Professional Fees and Expenses May Be Surcharged Under the**
2 **Objective Test of § 506(c).**

3
4 A party seeking to surcharge a creditors' collateral under the objective test has an
5 "uphill battle" because of the language of § 506(c) and controlling case law. § 506(c) states that
6 the trustee may only recover "the reasonable, necessary costs and expenses of preserving or
7 disposing, of [the lender's collateral]." 11 U.S.C. § 506(c). Thus, Movants have a relatively
8 narrow window through which these fees and expenses must fit to be eligible for surcharge under
9 the objective test.
10

11
12 In the decision of In re Debbie Reynolds Hotel & Casino, 255 F.3d 1061 (9th Cir.
13 2001), the Ninth Circuit made it clear that the objective test is not easily satisfied. The Ninth
14 Circuit has provided the following rule of law to be applied herein:
15

16 [T]he parties seeking the surcharge must prove that the expenses were reasonable,
17 necessary, and provided a quantifiable benefit to the secured creditor. In re Cascade
18 Hydraulics & Utility Service, Inc., 815 F.2d 546, 548 (9th Cir. 1987). This is not an easy
19 standard to meet. It is the party seeking the surcharge that has the burden of showing a
20 "concrete" and "quantifiable" benefit. The § 506 recovery is limited to the amount of the
21 benefit actually proven. In re Compton Impressions, 217 F.3d at 1261. . . . Furthermore,
22 because the amount of a surcharge is limited to the amount of the benefit and must be
23 proven with specificity, the deserving party is easily ascertainable.

24 Debbie Reynolds, 255 F.3d at 1068.

25 There is no doubt that Comerica obtained a substantial, direct, and quantifiable benefit
26 from the efforts of the Examiner and his professionals. The Court begins its analysis under the
27 objective test, however, by focusing on the reasonableness requirement of § 506(c).
28

1 Comerica did not submit any credible evidence in support of an argument that the
2 professional fees at issue were unreasonable. In contrast, the Examiner and his professionals
3 provided detailed billings and extensive analysis explaining what work was performed in the
4 Debtors' cases and how much time was devoted to these tasks. [Ex. 71] From the perspective of
5 the Court, the Examiner and his professionals provided excellent services, and the amount of time
6 spent and rates utilized were (and are) reasonable. Thus, the Court concludes that Movants have
7 met their burden of proof with respect to the reasonableness requirement of § 506(c).
8
9

10
11 The Court next addresses the necessity requirement of § 506(c). Again, Comerica did
12 not come forward with any credible evidence that these expenses were unnecessary. Comerica
13 relied on an argument that Movants could not, and did not, show that all of these professional fees
14 were necessary to preserve or dispose of the lender's claimed collateral. As with the Court's
15 analysis under the subjective standard, the Court has identified which services by the Examiner's
16 professionals were not necessary to preserve or dispose of Comerica's claimed collateral. The
17 Court concludes that Movants met their burden of proof on the necessity requirement except for
18 certain areas of work identified in this Decision.
19
20

21 With respect to the Examiner's legal counsel, Bryan Cave, the Court has identified
22 \$39,761.00 from the First and Second Fee Applications which were unnecessary under § 506(c).
23 The Court must also exclude the sum of \$141,561.00 in fees and costs requested by the Examiner's
24 counsel in the Third Fee Application [Exhibit 71, Docket No. 810] The Examiner may not use
25 § 506(c) to have the attorneys' fees and costs of his professional paid, thereby circumventing the
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28

1 approval process under § 330 of the Bankruptcy Code. In re Famous Restaurants, Inc., 205 B.R.
2 922 (Bankr.D.Ariz. 1996). The Court will have to reconsider the fees and costs in the Third
3 Application of Bryan Cave at a further hearing before this Court.⁷³ As noted previously, the Court
4 is unable to consider, at this time, the costs requested by Bryan Cave as to the First, Second, Third
5 Fee Applications and the July 2004 invoices.
6

7
8 With respect to the Examiner's time entries and those of his consulting firm, FTI, in
9 the First, Second and Third Fee Applications, the Court concludes that a total of \$20,816 were
10 unnecessary under § 506(c). The Court must also exclude any costs requested by the Examiner,
11 at this time, other than the costs associated with the bond premium, its renewal, and the attendant
12 fiduciary policy. The Court further concludes that all other professional fees incurred by the
13 Examiner and his professionals, including those of Brown and Caldwell, were necessary within the
14 meaning of § 506(c).
15
16

17 Finally, the Court addresses the benefit requirement of § 506(c). Rather than provide
18 a fact witness who had actual knowledge of the extent of the benefit received by the Bank (or the
19 lack thereof), Comerica decided to produce a Bank representative (Ms. McDonald) who knew little
20 to nothing about what transpired in these cases and knew virtually nothing about Comerica's
21 institutional experience on key areas related to the benefits that Comerica might have obtained from
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27 ⁷³ Pursuant to Docket No. 1165, the Bryan Cave believes that only the sum of \$9,262.75 should be
28 excluded. Those fees related to the Triad/Registry Funds contested matters. Bryan Cave believes that the
balance of the fees were necessary to preserve or protect Comerica's collateral.

1 the efforts of the Examiner and his professionals.⁷⁴ Comerica argued that Movants simply could
2 not, and did not, prove the Bank benefitted within the meaning of § 506(c).
3

4 However, the Court has set forth above, in its factual findings, the extent of the benefit
5 provided by the Examiner's professionals to Comerica. The Court concludes that Comerica
6 received a direct, substantial, concrete and quantifiable benefit from the efforts of the Examiner and
7 his professionals. Focusing on which fees and expenses performed by the Examiner and his
8 professionals did not meet the benefit requirement of § 506(c), the Court has set forth in this
9 Decision the detailed factual findings as to those fees and expenses which should not be
10 surcharged. The same work the Court has found to be unnecessary also did not provide a benefit
11 within the meaning of § 506(c). The Court concludes that all other professional fees requested by
12 the Movants meet the benefit requirement of § 506(c).
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16 Finally, the Ninth Circuit in the decision of In re Cascade Hydraulics & Utility
17 Service, Inc., 815 F.2d 546, 547 (9th Cir. 1987), stated that the objective test required proof that
18 the administrative expense claims at issue were "incurred primarily for the benefit of the secured
19 creditor . . ." Comerica has emphasized throughout the trial that the efforts of the Examiner and
20 his professionals "benefitted everybody" in these Chapter 11 proceedings. [3/23/05 DMTTr., pp.
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24 ⁷⁴ Comerica ignored this Court's instruction to provide an analysis of the benefit it obtained from
25 the efforts of the Examiner and his professionals. [10/04/04 HTr., pp.58-60] (The Examiner provided this
26 analysis in Exhibit 71.) Comerica also failed to respond properly to an interrogatory by the Examiner
27 requesting the quantification of any benefit provided to Comerica from the services of the Examiner and
28 his professionals. [Ex. 55, Interrogatory No. 14] In so doing, Comerica engaged in inappropriate
obfuscation which did not ultimately work to its advantage in this litigation or assist the Court in rendering
this Decision.

221-24] The Court disagrees with Comerica. Comerica sought the Examiner, requested expansion of his powers, aggressively pursued a sale of the Debtor's assets consistent with Comerica's business plan, and consented to the Examiner engaging in shuttle diplomacy to resolve the administrative expenses of this estate. The Examiner's preparation of the Initial Report, paring down of personal property leases to allow only those essential to the Debtors' operations to be packaged at the urging of Comerica with other assets to provide a going concern sale of the estate's assets, collection of account receivables, sale of overencumbered assets (such as the 43rd Avenue and Buckeye properties), and the shuttle diplomacy to settle the administrative expense claims on Comerica's behalf to provide a prompt distribution to Comerica benefitted primarily Comerica. Once Comerica requested that the Examiner undertake specific duties, which this Court concludes protected its collateral or assets upon which it asserted a lien, and continued to press aggressively for more expansive powers for the Examiner, when Comerica knew that the estate was administratively insolvent, Comerica crossed the line. Those actions undertaken by the Examiner were primarily for the benefit of Comerica.

Comerica was the primary beneficiary, and in many respects, the sole beneficiary, of the efforts of the Examiner and his professionals. In a case where general unsecured creditors will almost certainly never receive a distribution and administrative expense claimants are faced with an uphill battle to receive more than a fraction of the amount of their claims, Comerica's argument that the efforts of the Examiner and his professionals benefitted everyone, and not primarily the Bank, is sophistry.

1 In summary, the Court concludes that Movants have met their burden of proof under
2 the objective test with respect to the vast majority of the professional fees addressed in the
3 Surcharge Motions.
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6 **D. Whether Certain Personal Property Leases May Be Surcharged Under the**
7 **Subjective or Objective Test.**
8

9 Although the Movants also seek entry of an order surcharging Comerica's claimed
10 collateral for the Total Lease Claim, the Court has already determined that certain Unpaid Lease
11 Claims for the period from May through July 2003 should not be surcharged against Comerica's
12 claimed collateral, since insufficient facts have been shown to support such claims. However, the
13 Court will consider whether the balance of Unpaid Lease Claims should be surcharged against
14 Comerica's alleged collateral under either the subjective or objective test.
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17 In the decision of In re Nutri/System, Inc., 169 B.R. 854 (Bankr. E.D. Pa. 1994), the
18 Bankruptcy Court for the Eastern District of Pennsylvania extensively discussed these tests in the
19 lease context. Id. at 871-76. The Nutri/System Court did not apply the objective test to the facts
20 because the movants had "abandoned their § 506(c) surcharge claim . . . even though they [might]
21 have been entitled to some relief under that theory." Id. at 873. With respect to the subjective test,
22 the Nutri/System Court noted that the lender had possession of its collateral during much of the
23 relevant time period, and it was clear the lender did not give consent to a surcharge. The
24 Nutri/System Court found that the lender "expressly declined to approve the use of its cash
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1 collateral for the payment of administrative rent . . . and the [bank] sought relief from the stay at
2 a fairly early stage in the case to foreclose on its collateral.” Id. at 876.
3

4 In the instant case, the facts are far different. As noted above, Comerica specifically
5 consented to the use of the sum of \$455,000 in its claimed cash collateral to pay administrative
6 expenses. [Ex. 70; 12/6/04 EMTTr., pp.58-60] Comerica asked this Court to appoint an examiner
7 with expanded powers to manage the Debtors’ businesses and sell the Debtors’ assets (including
8 leases) as a going concern. The Examiner had the power to assume and assign these leases at the
9 request of Comerica. Even though the Debtors withdrew their opposition to Comerica’s stay relief
10 motion, the Bank deliberately decided not to pursue foreclosure so that a going concern sale of the
11 Debtors’ assets could be conducted by this Court and closed by the Examiner. A going concern
12 sale would not have been possible without these leases in place in a “pared down” state. Comerica
13 never attempted to take possession or control of its property which remained under the custody and
14 control of Movants until the closing of the sale transaction approved by this Court.
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19 Thus, the Nutri/System Decision supports the position of Movants under the subjective
20 test. Having obtained the benefit of its going concern sale, Comerica’s argument that it did not
21 consent to, or cause, any of these expenses simply is not supported by the record. The Court
22 concludes that Comerica indeed caused the estates to incur the Unpaid Lease Claims by consenting
23 to the lease payments, choosing the remedy of an examiner with expanded powers, and pursuing
24 a going concern sale of the Debtors’ property through the Examiner.
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1 Based upon this record, the Court concludes that Comerica should be surcharged for
2 that portion of the Unpaid Lease Claims relating to those leases rejected by the Debtors for the
3 period from August 1, 2003 through the closing on the sale transaction.⁷⁵ The Court concludes it
4 would be inequitable to surcharge Comerica's claimed collateral for the May, June, and July 2003
5 lease expenses of those leases which were rejected by July 31, 2003, because the record does not
6 support Comerica having caused or consented to those leases which were rejected within the first
7 90 days after the Debtors' cases were filed. Under such circumstances, the Court is unable to
8 surcharge such expenses against Comerica's collateral.
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12 In applying the objective test under § 506(c), the Court arrives at the same conclusion.
13 Such Unpaid Leases Claims for those leases which were rejected on August 1, 2003 up to the
14 closing of the sale transaction were (and are) reasonable and necessary within the meaning of that
15 provision. Comerica offered no credible argument or evidence to the contrary. At the insistence
16 of Comerica, the Examiner promptly pared down the personal property leases. The Unpaid Lease
17 Claims only include the components of unpaid rent and tax under the applicable personal property
18 leases. The Court also concludes that Comerica would not have obtained the going concern sale
19 it needed to maximize its recovery but for these leases being preserved by the Examiner for
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25 ⁷⁵ As stated in the factual discussion, the Court shall not surcharge any Unpaid Lease Claims relating
26 to a lease which was rejected in the months of May, June, and July 2003. The Examiner, thus, will need
27 to recompute the exact amount of the Unpaid Lease Claims as a result of this Decision. The Court does
28 not recall any personal property lease assumed by Arizona Materials at the closing of the sale transaction.
However, Arizona Materials would have cured any defaults under said leases at the time of assumption;
hence, the lessors of the assumed leases would not have an Unpaid Lease Claim.

1 purchase by Arizona Materials. Thus, the Unpaid Lease Claims are reasonable and necessary
2 within the meaning of § 506(c).
3

4 The Court also concludes that Comerica received a direct, substantial, and quantifiable
5 benefit from having the aforesaid personal property leases in place for assumption and assignment
6 to potential purchasers such as Arizona Materials. While it is somewhat difficult to place a precise
7 dollar amount on the benefit received by Comerica, there is no doubt that the Examiner
8 renegotiated the sale price with Arizona Materials between the execution of the first agreement and
9 the second agreement and, in so doing, increased the consideration to be received by \$200,000 in
10 cash. The Examiner also testified that Comerica received the benefit of a going concern sale, as
11 opposed to a sale of dirt and non-operating assets. Comerica would not have received this benefit
12 without having the leases in place in a “pared down” state.
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16 Thus, the Court concludes that, under the objective test, Comerica should be
17 surcharged for the rent and taxes related to those leases which were rejected during the time period
18 from August 1, 2003 to the closing of the sale transaction with Arizona Materials. Under Ninth
19 Circuit authority, the Court must find a sufficient nexus between the expense at issue and the
20 benefit conferred to the surcharged creditor. In re Compton Impressions, Ltd., 217 F.3d 1256, 1262
21 (9th Cir. 2000). In this matter, Comerica requested that the Examiner’s powers be expanded to
22 include the power of sale of the Debtors’ assets. Specifically the Expansion Motion and the Bank’s
23 internal memoranda contemplated a going concern sale of assets. Such a sale required that the
24 leases, in a pared down state, be assumed and assigned, or available for assumption and assignment,
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1 to maximize the value that Comerica would receive for the sale of its claimed collateral. There is
2 a direct correlation between the expense and benefit conferred. The Court concludes that sufficient
3 specificity exists here to support the surcharge of the Unpaid Lease Claims under the objective
4 test.⁷⁶
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8 **E. Whether the Bankruptcy Estates May Be Reimbursed for Certain**
9 **Administrative Expense Claims Already Paid.**

10 During the trial, Comerica filed its Motion for Partial Judgment Denying Surcharge
11 of Paid Rent Claim, dated February 15, 2005. [Docket No. 1032] In this Motion and during the
12 course of the trial, Comerica argued that Movants were attempting to surcharge the Bank's claimed
13 collateral for the Paid Lease Claims which would "result in a double payment to the lessors." As
14 stated in the factual discussion, these Claims were paid, with the consent of Comerica, pursuant to
15 the numerous Cash Collateral Orders entered in this case. The Examiner's legitimate concern was
16 that he might be successful in setting aside Comerica's lien on the very collateral that was being
17 used to pay the Paid Lease Claimants. Since Comerica had repeatedly requested that all issues
18 related to surcharge be addressed at one hearing, the Court understands why the Examiner
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23 ⁷⁶ To be clear and notwithstanding any other language set forth in this Memorandum Decision, the
24 surcharged amount of the Unpaid Lease Claims shall refer to those leases which were rejected between
25 August 1, 2003 and the closing of the sale transaction with Arizona Materials and shall be the actual
26 amount of claims accrued under the applicable leases for base rent and taxes, provided that the aggregate
27 amount to be paid in said Unpaid Lease Claims shall not exceed the amount of \$450,000. The Crown
28 Leasing Claim in the amount of \$10,156.64 must also be reduced to \$5,078.32 In the event these claims
exceed \$450,000 for such time period, then the \$450,000 surcharged amount shall be prorated among such
lessors based on their respective base rent and tax claims. The Examiner shall be, and hereby is, authorized
to determine the appropriate amount that shall be received by each such lessor.

1 presented the Paid Lease Claims issue at this trial. However, this Court has not yet entered a final
2 judgment in the Deprizio litigation. Until it does, it is premature for this Court to permit
3 reimbursement to the bankruptcy estate. The Movants' issues are simply not ripe for adjudication.
4

5 However, the Court wishes to clarify one point raised by Comerica. Comerica
6 contends, that the Movants' reimbursement mechanism is proscribed by the Ninth Circuit Court
7 of Appeals in the decision of In re Debbie Reynolds Hotel & Casino, 255 F.3d 1061 (9th Cir.
8 2001). A careful review of that decision shows that Comerica is incorrect.
9

10 In the Debbie Reynolds Decision, the Ninth Circuit addressed a super-priority
11 creditor's objection to a settlement reached between the Chapter 11 debtor and a secured creditor.
12 After liquidation of the estate's property, the secured creditor consented, in a formal settlement
13 agreement, to a \$50,000 surcharge of its collateral to pay debtor's counsel. In exchange, the debtor
14 agreed there would be no further challenges to the collection of the creditor's secured debt and no
15 additional right to surcharge. The super-priority creditor objected to the settlement, arguing that
16 its rights under § 507 had priority over the administrative expense claims of the debtor's counsel
17 under § 503, and hence, it should receive priority over the debtor's counsel for payment of the
18 \$50,000.
19

20 Thus, the Ninth Circuit focused on a priority dispute between those parties and
21 addressed the issue of "whether a surcharge under 11 U.S.C. § 506(c) falls within the priority
22 schedule of § 507." Id. at 1067. The Court ultimately held that the \$50,000 surcharge at issue was
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1 not subject to § 507's priority scheme. Rather, "the proceeds of a § 506(c) surcharge pass directly
2 to the claimant with no gain to the estate." Id. (citation omitted).

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4 Comerica seizes on this sentence from the Debbie Reynolds Decision to argue that any
5 surcharge of its claimed collateral to pay the Paid Lease Claims "must be paid directly to the
6 personal property lessors," that said payments have already been made, and that such a surcharge
7 "would result in a double payment to the lessors." Even though the Ninth Circuit found under the
8 particular facts in the Debbie Reynolds Decision that the surcharge proceeds should pass directly
9 to the claimant, the Court specifically recognized that a direct distribution was not mandated.
10 Using an example that applies in the instant case, the Ninth Circuit specifically discussed the
11 concept of reimbursement of a previously paid expense:
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15 Had the trustee paid its counsel's legal fees prior to seeking a surcharge, the effect would be
16 the same as if the proceeds from the surcharge were distributed directly to Debtor's counsel.
17 Once the trustee has incurred expenses, it may be reimbursed out of the secured collateral .

18 ...

19 Id. at 1067-68 (emphasis added).

20 Thus, this Court concludes that what the Examiner is seeking is reimbursement for the
21 funds that he may have paid from assets that this Court may determine to be unencumbered if
22 Comerica does not succeed in the Deprizio or other lien litigation. An example illustrates this
23 point. Let us assume that the sum of \$8,000,000 has been received from the sale of various assets,
24 of which, the sum of \$6,000,000 represents the alleged collateral of a secured creditor, and the sum
25 of \$2,000,000 represents unencumbered assets. An examiner proceeds to utilize the \$2,000,000
26 in unencumbered funds to pay \$4,000,000 in administrative expense claims. The examiner believes
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1 that he must use the remaining \$6,000,000 in sale proceeds to pay the secured creditor.
2 Subsequently the examiner succeeds in setting aside the secured creditor's lien in certain assets.
3
4 It is determined that \$2,000,000 out of the \$6,000,000 being held by the examiner is no longer
5 subject to the security interest of the creditor. Now the examiner has the amount of \$4,000,000 in
6 remaining sale proceeds to pay the secured creditor, and the amount of \$2,000,000 in newly
7 unencumbered funds. The examiner may now use the remaining funds to pay the balance of the
8 administrative expense claims. If the examiner had paid the full \$6,000,000 to the secured creditor
9 and then the security interest was set aside, the result would not change. There would be the
10 amount of \$2,000,000 in unencumbered funds available to the estate. In such event, the examiner
11 would seek a turnover of said funds from the secured creditor, because the latter party had received
12 an improper distribution for which the secured creditor would reimburse the estate.
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16 From this example, it is clear that the Examiner in the case believes that he made an
17 improper distribution to Comerica or that he is holding funds which are no longer subject to
18 Comerica's lien. If he is correct (and only time will tell), he may seek reimbursement from
19 Comerica or distribute the remaining funds. Such a request is not contrary to the Debbie Reynolds
20 Decision. The Court concludes that if the Movants are successful in the Deprizio or other lien
21 litigation, the Examiner may seek a turnover of the funds improperly distributed to Comerica, or
22 he may request that any funds that he is holding for Comerica be redistributed as unencumbered
23 funds of this estate according to the Bankruptcy Code priority scheme.
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1 For the reasons stated above, with respect to the amount of the Paid Lease Claims that
2 Comerica should reimburse the Debtors' estates under a surcharge theory, the Court will not decide
3 the issue at this time. Rather, the Court will wait until the lien litigation is at a stage where the
4 reimbursement issue is a justiciable controversy. While Comerica did not raise this ripeness
5 argument as an issue to be decided by the Court on the Pretrial Statement, the Court believes it is
6 premature to address this issue given the status of this pending litigation. The Court's decision to
7 postpone resolution of the amount of the surcharge reimbursement, however, should not, and does
8 not, affect the finality of the other matters addressed in this Memorandum Decision.
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13 **F. Whether Equity And Fairness Dictate a Different Result.**
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15 Comerica has, on several occasions, made an equitable argument, denominated a
16 "sharing of the pain," to focus on its claim that Comerica will not receive payment in full through
17 the Debtors' cases, while the expenses addressed in the Surcharge Motions will be paid in full if
18 the Court grants the Surcharge Motions. Comerica's equitable argument is misplaced.
19

20 As a matter of law, secured creditors obviously are entitled to the value of the
21 collateral in which they have valid, perfected, and unavoidable liens. At this stage of the Debtors'
22 cases, it is obvious that Comerica will not receive payment in full. However, Comerica has already
23 received interim payments reflecting the value of the property in which it has undisputed liens. The
24 remaining estate cash represents: (i) proceeds of free and clear property (i.e., the Deer Valley
25 property) from which Comerica is not entitled to a distribution unless and until creditors with
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1 unsecured claims receive a distribution;⁷⁷ and (ii) personal property proceeds which are the subject
2 of the personal property lien litigation. Thus, Comerica has received all of the property (value) to
3 which it is entitled at this stage of the Debtors' cases. Comerica must await the outcome of the lien
4 litigation before the Court may determine whether Comerica has a legal right to any of the proceeds
5 of the personal property.
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8 Comerica's position is easily contrasted from the position of the administrative
9 expense creditors from the standpoint of fairness. The Court is not confronted with a situation in
10 which a party is seeking to surcharge a lender's collateral for all of the general post-petition
11 operating expenses of a debtor's estate. To the contrary, Movants analyzed all of the administrative
12 expenses that existed as of July 31, 2004, and decided which of those expenses should be
13 surcharged against Comerica's claimed collateral. Notably absent from this list are any of the
14 professional fees of the Debtors' professionals, which constitute a substantial administrative
15 expense claim against these estates, and any lessor claims not based upon rent or taxes due under
16 the related personal property leases.
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20 The Movants have presented to the Court two categories of administrative expenses.
21 First, Movants seek the surcharge of the fees and costs of the Examiner and his professionals
22 incurred through the end of July 2004. The Court has reduced their fees and costs in this Decision.
23 The Movants requested payment of these expenses in the Surcharge Motions because Comerica
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27 ⁷⁷ As noted previously, this is an administratively insolvent estate. Since not even the administrative
28 expense claims will be paid in full, there will be no distribution to general unsecured creditors. Any
deficiency claim that Comerica has is a general unsecured claim.

1 deliberately sought an Examiner with increasingly expanded powers until it had achieved its goal
2 of liquidating the Debtors' assets. Comerica thereby avoided substantial expense and delay, but
3 the Debtors' estates incurred the expense of these professionals with Comerica's knowledge that
4 the Debtors' estates were almost certainly administratively insolvent. Thus, Comerica is not
5 confronted with an attempt to surcharge its collateral for every general post-petition operating
6 expenses. The Debtors' estate are simply attempting to have the professional fees and expenses
7 paid from the claimed collateral of the Bank because it wanted the services performed and the costs
8 incurred for its benefit.
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12 Second, Movants seek to surcharge the Bank's claimed collateral for the post-petition
13 rent and tax obligations incurred by the Debtor's estates prior to the closing of the Arizona
14 Materials transaction. The Movants rightly contend that Comerica wanted the Debtors' estates to
15 remain operational in a "pared down" state, so that Comerica could obtain the benefit of a going
16 concern sale with a reduction in the use of its claimed cash collateral. Without the use of the
17 property subject to personal property leases, the Debtors would not have been able to continue as
18 a going concern. Comerica should be responsible for these costs as well, since it wanted and
19 received a going concern sale of its claimed collateral.
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23 Thus, Comerica's "share the pain" argument is misplaced as it relates to all of these
24 administrative expense claims. But for Comerica's goal of keeping these cases operational and
25 providing ever-increasing duties to the Examiner and his professionals, these post-petition expenses
26 would have not been incurred by the Debtor's estates. Moreover, the Court notes that many of
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1 these lease Unpaid Lease Claimants took material discounts in their settlements with the Examiner.
2 Thus, Comerica's argument that Movants are pushing for full payment on these Claims while the
3 Bank does not get paid in full sorely misses the mark — many of these Claimants will not be paid
4 in full on their asserted administrative expense claims.
5

6 7 8 **V. CONCLUSION.**

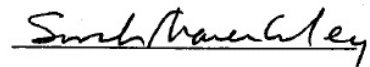
9 Based upon the foregoing, the Court concludes that Comerica's claimed collateral
10 shall be surcharged in the amount not to exceed \$1,399,458.47 (the "Surcharged Amount"). The
11 Surcharged Amount is computed as follows. First, as to Brown and Caldwell, the Court shall
12 surcharge the amount of \$19,006.47⁷⁸ against the alleged collateral of Comerica. Next, in the
13 Examiner's First, Second, and Third Fee Applications, the Examiner requested fees in the amount
14 of \$588,868.50,⁷⁹ which the Court reduced in its analysis by the sum of \$20,816. The Court has
15 specifically allowed the sum of \$80,000 for the Examiner's bond premium or premiums and the
16 attendant expense of \$4,200. Thus, the Examiner is entitled to surcharge the aggregate amount of
17 \$ 652,252.50 for his fees and costs (\$588,868.50 plus \$84,200 minus \$20,816) against the alleged
18 collateral of Comerica. Bryan Cave requested the sum of \$96,339.25 in fees in its First Fee
19 Application, the sum of \$221,621.25 in fees in its Second Fee Application, for the aggregate
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25 ⁷⁸See note 20 and the text surrounding same.
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27 ⁷⁹The fees in the First Fee Application were \$393,985.50; the Second, \$105,776.50; and the Third,
28 \$89,106.50. As noted, the Court is not approving the costs or expenses set forth in these Fee Applications
relative to the Surcharge Motions other than those expenses related to the bond premium.

1 amount of \$317,960.50. As noted in this Decision, the Court is not considering, at this time for
2 surcharge purposes, any expenses that Bryan Cave may have included in said Applications. The
3 fee amount was reduced by \$39,761.00 to permit the sum of \$278,199.50 to be surcharged against
4 Comerica's alleged collateral. Bryan Cave's Third Fee Application is subject to further hearing
5 before this Court. The July 2004 invoices for the Examiner, his firm, and Bryan Cave are also
6 subject to appropriate fee applications and further hearing before this Court. The Examiner may
7 also surcharge the amount of the Unpaid Lease Claims, not to exceed the amount of \$450,000.00
8 against the alleged collateral of Comerica. The Surcharge Motions are granted in part, and denied,
9 in part. The Court will execute a separate order incorporating this Memorandum Decision.
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16 DATED this 21st day of November, 2005.

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19 Honorable Sarah Sharer Curley
20 U. S. Bankruptcy Judge
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23 BNC to Notice
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