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

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

5	In re:	)	BAP No. AZ-09-1412-KiJuMk
		)	
6	MORTGAGES LTD.,	)	Bk. No. 08-07465-RJH
		)	
7	Debtor.	)	
		)	
8	_____	)	
		)	
9	KEVIN T. O'HALLORAN, Trustee	)	
	of the ML Liquidating Trust,	)	
10	Appellant,	)	
		)	
11	v.	)	<b>MEMORANDUM<sup>1</sup></b>
		)	
12	GRANT LYON, Chapter 11	)	
	Trustee for Radical Bunny,	)	
13	LLC,	)	
		)	
14	Appellee.	)	
		)	
15	_____	)	

Argued and Submitted on June 18, 2010  
at Phoenix, Arizona

Filed - August 4, 2010

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

Honorable Randolph J. Haines, Bankruptcy Judge, Presiding

\_\_\_\_\_  
Before: KIRSCHER, JURY, and MARKELL, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Appellant, Kevin T. O'Halloran, trustee of the Liquidating  
2 Trust of chapter 11 debtor Mortgages Ltd. ("Trustee"), appeals an  
3 order from the bankruptcy court granting Appellee-creditor,  
4 Radical Bunny, LLC ("Radical Bunny"), a substantial contribution  
5 claim under 11 U.S.C. §§ 503(b)(3)(D) and (503)(b)(4).<sup>2</sup> Because  
6 the bankruptcy court erred in its interpretation and application  
7 of controlling law, and made insufficient findings of fact, we  
8 REVERSE and REMAND for further proceedings.

9 **I. BACKGROUND**

10 **A. Factual Background.**

11 Debtor, Mortgages Ltd. ("ML"), was a private lender that  
12 made loans secured by Arizona real estate. Radical Bunny was  
13 formed to make loans to ML using funds from various individuals  
14 seeking a favorable rate of return. In addition to using funds  
15 lent by Radical Bunny, ML used money raised from approximately  
16 2,700 investors ("Investors").

17 ML began experiencing financial difficulty. On June 2,  
18 2008, Scott Coles, the sole shareholder, chairman, and CEO of ML  
19 since 1992, committed suicide. Just days later on June 20, 2008,  
20 an involuntary chapter 7 petition was filed against ML by two of  
21 its borrowers and a contractor. The case was converted to a  
22 voluntary chapter 11 on June 24, 2008.

23 As of the petition date, ML owed Radical Bunny approximately  
24 \$200 million in outstanding loans advanced by Radical Bunny,  
25 which was evidenced by 99 separate promissory notes and other

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

1 documents. More than 900 loan participants had provided funds to  
2 Radical Bunny that were loaned to ML. Until the involuntary  
3 filing, Radical Bunny had been receiving from ML more than  
4 \$2 million a month in non-default interest payments. Radical  
5 Bunny retained DeConcini, McDonald, Yetwin & Lacy, P.C. ("DMYL")  
6 just prior to the involuntary to represent it against ML's  
7 defaults under the promissory notes, and DMYL continued to  
8 represent Radical Bunny as a creditor in ML's bankruptcy case.

9 Radical Bunny filed a secured proof of claim in ML's case,  
10 claiming that the \$200 million in outstanding loans were secured  
11 by a perfected security interest in all of ML's assets, as  
12 reflected in UCC-1 financing statements executed by ML in favor  
13 of Radical Bunny as secured creditor, which were filed with the  
14 Arizona Secretary of State and recorded in the real property  
15 records of Maricopa County in March, 2007. No party filed an  
16 objection to Radical Bunny's secured proof of claim.

17 The Investors were represented in ML's case by two  
18 committees: (1) the Official Investors Committee ("OIC"), which  
19 was formed on August 5, 2008; and (2) the Committee of Investors  
20 in the Value-to-Loan Opportunity Fund I LLC ("VTL Committee").  
21 An Official Unsecured Creditors Committee ("OCC") was formed on  
22 August 6, 2008.

23 Radical Bunny's sole source of income was from loan payments  
24 made by ML. Since it had no income, certain creditors filed an  
25 involuntary chapter 7 petition against Radical Bunny on October  
26 8, 2008. That case was converted to a voluntary chapter 11 on  
27 October 20, 2008, and a chapter 11 trustee ("RB Trustee") was

1 appointed in Radical Bunny's case on December 30, 2008. The RB  
2 Trustee opted to employ his own bankruptcy counsel in the case,  
3 but DMYL continued to serve as special counsel for Radical Bunny  
4 in the ML case commencing on October 20, 2008.

5 Beginning in September/October 2008, and continuing over the  
6 next few months, Radical Bunny/DMYL along with the OIC drafted  
7 and negotiated a joint plan of reorganization with ML and other  
8 constituents. After December 30, 2008, however, the newly-  
9 appointed RB Trustee withdrew Radical Bunny's support for the  
10 joint plan.

11 Later, the OIC filed a plan of reorganization on its own  
12 with no joinder from the various constituencies, including  
13 Radical Bunny ("OIC Plan"). Radical Bunny voted against the OIC  
14 Plan, and on May 5, 2009, filed a 28-page objection to it, one of  
15 fourteen objections filed to the OIC Plan. Radical Bunny filed  
16 three substantive motions opposing confirmation of the OIC Plan  
17 and filed two substantive objections to it prior to confirmation.  
18 The bankruptcy court confirmed a "revised" OIC Plan on May 20,  
19 2009 (the "Plan").

20 Various parties throughout ML's bankruptcy case asserted  
21 that Radical Bunny did not have a valid, perfected security  
22 interest. ML listed Radical Bunny as an unsecured creditor in  
23 its schedules, holding more than 98% of all liquidated and  
24 undisputed unsecured non-priority claims. This issue was not  
25 adjudicated by the bankruptcy court prior to confirmation of the  
26 Plan, but the Plan treated Radical Bunny as a secured creditor.

27 **B. The Substantial Contribution Claim.**

1 On July 6, 2009, pursuant to sections 503(b)(3)(D) and  
2 503(b)(4),<sup>3</sup> Radical Bunny filed an application for an  
3 administrative claim requesting that ML's estate pay its  
4 attorneys fees of \$572,945.50 and costs of \$22,852.75 incurred  
5 from June, 2008 through December 30, 2008 ("Substantial  
6 Contribution Claim"). It was supported by DMYL's time sheets, as  
7 well as declarations from Radical Bunny's manager and the lead  
8 DMYL attorney representing Radical Bunny in ML's bankruptcy case.  
9 Radical Bunny contended that it made substantial contributions to  
10 ML's case in three specific areas: (1) formulation of plan of  
11 reorganization ("Plan Activities"); (2) preservation of estate  
12 assets ("Asset Preservation Activities"); and (3) settlements  
13 with ML's borrowers ("Settlement Activities").

14 Trustee objected to the Substantial Contribution Claim in  
15 its entirety, arguing generally that Radical Bunny had not met  
16 its burden to show a proper administrative claim.

17  
18 \_\_\_\_\_  
19 <sup>3</sup> Section 503(b) provides, in relevant part:

20 After notice and a hearing, there shall be allowed,  
21 administrative expenses ... including-

22 ...  
23 (3) the actual, necessary expenses, other than compensation  
24 and reimbursement specified in paragraph (4) of this  
25 subsection, incurred by-

26 ...  
27 (D) a creditor ... in making a substantial contribution  
28 in a case under Chapter 9 or 11 of this title;

29 ...  
30 (4) reasonable compensation for professional services  
31 rendered by an attorney ... of an entity whose expense is  
32 allowed under paragraph (3) of this subsection, based on the  
33 time, the nature, the extent, and the value of such  
34 services, and the cost of comparable services other than in  
35 a case under this title, and reimbursement for actual,  
36 necessary expenses incurred by such attorney . . . .

1 At an initial hearing, the bankruptcy court ordered Radical  
2 Bunny to file a supplemental memorandum explaining how the change  
3 of management and counsel for Radical Bunny (the appointment of a  
4 chapter 11 trustee and his counsel on December 30, 2008) should  
5 or should not affect its Substantial Contribution Claim. Radical  
6 Bunny filed its supplemental "Change of Management" memorandum on  
7 August 14, 2009.

8 On November 11, 2009, Radical Bunny and Trustee filed a  
9 Joint Statement of Material Facts in connection with Radical  
10 Bunny's Substantial Contribution Claim. On that same date,  
11 Trustee filed a brief in further support of his objection.  
12 Radical Bunny filed a Pre-Hearing Memorandum on November 12,  
13 2009, and on November 16, 2009, the parties filed a Supplement to  
14 Joint Statement of Material Facts. The bankruptcy court held a  
15 final hearing on the matter on November 18, 2009, and took it  
16 under advisement.

17 Based on the pleadings submitted, Radical Bunny proposed  
18 that the court analyze its activities in three categories: Plan  
19 Activities (for which it claimed \$118,810.00 in fees); Asset  
20 Preservation Activities (for which it claimed \$356,253.00 in  
21 fees); and Settlement Activities (for which it claimed \$87,882.50  
22 in fees). The facts and arguments before the bankruptcy court  
23 with respect to each of Radical Bunny's activities were as  
24 follows:

25 **1. Plan Activities:**

26 For the \$118,810.00 incurred here, Radical Bunny/DMYL began  
27 meeting with the OIC and its counsel in September, 2008, to

1 formulate a plan of reorganization for ML, when it became  
2 apparent that ML was unable to do so. In October, 2008, Radical  
3 Bunny/DMYL began drafting a joint plan, which it forwarded to the  
4 OIC, and continued to work cooperatively with the OIC and  
5 numerous other constituents, including ML, to formulate, draft,  
6 and negotiate a joint plan of reorganization with acceptable  
7 terms. Radical Bunny/DMYL prepared a further joint plan draft,  
8 which it forwarded to the OIC on November 4, 2008. By  
9 December 23, 2008, many terms of the joint plan negotiated by  
10 Radical Bunny/DMYL and the OIC with other constituents were  
11 finalized with only two issues remaining: management of the  
12 reorganized debtor and allocation of default fees. Although the  
13 joint plan was not confirmed, Radical Bunny's/DMYL's draft  
14 provided the framework for the ultimately confirmed Plan.

15 DMYL also drafted a form operating agreement for the joint  
16 plan, but it was ultimately rejected and redrafted by the OIC.  
17 Radical Bunny also incurred fees supporting a joint objection  
18 with the OIC and the OCC to ML's request to extend the  
19 exclusivity period.

20 Finally, under the Plan, rather than litigate its secured  
21 status, Radical Bunny agreed to pledge its claimed interests in  
22 ML's loans for the exit financing that was the source of payment  
23 for all post-confirmation expenses. But for this effort, exit  
24 financing would not have been available without a ruling that  
25 Radical Bunny was unsecured.

26

27

28

1 **Trustee's Contentions:**

2 Trustee did not dispute that Radical Bunny played a role in  
3 the joint plan process, but contended that Radical Bunny's Plan  
4 Activities were duplicative and performed only to protect its own  
5 interest, not the estate's or other creditors. Specifically,  
6 Trustee argued that even though Radical Bunny worked with the OIC  
7 on a joint plan through December, 2008, beginning in January,  
8 2009, Radical Bunny changed its position and began working with  
9 ML on a plan in order to get better treatment for itself. More  
10 importantly, Radical Bunny voted to reject the OIC plan and filed  
11 a 28-page objection to the very plan it claims it drafted.  
12 Because of expenses incurred by the OIC and others in negotiating  
13 with RB Trustee and fending off Radical Bunny's aggressive  
14 objection to confirmation to the OIC Plan, Trustee argued that  
15 Radical Bunny's efforts not only failed to provide a substantial  
16 contribution but instead hindered ML's reorganization efforts and  
17 benefitted only Radical Bunny with favored treatment in the Plan.<sup>4</sup>

18 Alternatively, Trustee argued, even if Radical Bunny made a  
19 contribution to the OIC Plan, its sudden switching of sides and  
20 aggressive opposition to its confirmation overshadowed any early  
21 contribution, especially when Radical Bunny admits that the OIC  
22 and ML (being paid by the estate) incurred at least \$70,000 in  
23 costs to fight Radical Bunny over the OIC Plan.

24  
25  
26  
27 <sup>4</sup> Trustee conceded that Radical Bunny's sudden change in  
28 support for the OIC Plan in January, 2009, was perhaps due to the  
appointment of the RB Trustee on December 30, 2008.



1           **2. Asset Preservation Activities:**

2           Radical Bunny contended that it gave up significant rights  
3 for the benefit of ML and its estate. For the \$356,253.00  
4 incurred here, Radical Bunny engaged in the following:

5                   **a. Cash Collateral:**

6           Radical Bunny allowed ML to use initial cash collateral of  
7 \$304,101, in which Radical Bunny claimed an interest, for  
8 operating expenses. Radical Bunny received no adequate  
9 protection payment in exchange. Other than cash collateral, ML  
10 had no source of funds to continue operating, and Radical Bunny's  
11 consent to use it permitted ML to continue managing all of the  
12 loans, which directly benefitted all Investors. No other secured  
13 creditor allowed its cash collateral to be used to fund ML's  
14 operations.

15                   **b. DIP Financing:**

16           In the first week of ML's case, Radical Bunny, along with  
17 other creditors and individual investors (no official committees  
18 had yet been formed), objected to ML's proposed \$5 million  
19 working capital "gap period" loan that was tied to an additional  
20 \$124,100,000 construction loan. This loan was to be secured by a  
21 super-priority lien on all assets of ML; interest and points were  
22 15%. Radical Bunny/DMYL found a lender willing to provide ML  
23 postpetition financing without a lien on all assets of the  
24 estate. ML did not go with Radical Bunny's proposed lender, but  
25 ML did get more favorable terms with its initially proposed  
26 lender - no encumbrance on all estate assets and a reduced  
27 interest rate of 13%. Radical Bunny asserted that its efforts,

1 along with the efforts of the OIC and the OCC, prevented ML from  
2 entering into financing that was unreasonably burdensome to ML's  
3 estate.

4 Radical Bunny subordinated its presumed first priority  
5 security interest in \$13 million in assets to a \$500,000  
6 "interim" working capital DIP loan to fund ML's operations. From  
7 this loan, \$50,000 was reserved for adequate protection of  
8 Radical Bunny. Further, Radical Bunny's claimed first priority  
9 security interest in ML's assets was subordinated to ML's \$5  
10 million "final" working capital loan. Radical Bunny received a  
11 \$50,000 payment from this loan, which is the only money it  
12 received from ML from the involuntary filing date through the  
13 entry of the confirmation order. No other creditor's lien or  
14 security interest was subordinated to either of these loans.

15 **c. Tempe Land Company/Centerpoint Project:**

16 Radical Bunny claimed a security interest in two ML loans  
17 advanced to Tempe Land Company ("TLC") and secured by a pending  
18 construction project known as Centerpoint. Radical Bunny/DMYL  
19 and others objected to initial proposals for a postpetition loan  
20 of \$124,100,000 to TLC (of which \$75 million would go towards  
21 Centerpoint) that would have been unreasonably burdensome to  
22 Radical Bunny and other creditors of ML's estate.

23 Radical Bunny subordinated its claimed first priority  
24 security interest in the TLC loan as collateral for a  
25 \$2.8 million interim loan for the preservation of Centerpoint.  
26 None of the Investors' interests in the TLC loan were  
27 subordinated for this loan.

1 Radical Bunny/DMYL also worked with the OIC to uncover ML's  
2 alleged wrongful disbursement of a portion of the interim loan,  
3 which improperly went to an affiliate of TLC. The alleged  
4 improperly used funds were not recovered.

5 **Trustee's Contentions:**

6 As to the Asset Preservation Activities, Trustee contended  
7 generally that Radical Bunny failed to quantify how its actions  
8 preserved or increased ML's estate. For the cash collateral,  
9 Trustee argued that even if Radical Bunny was a secured creditor,  
10 which he disputed, its agreement to subordinate its claim was  
11 nothing more than a means to protect its interests, and thus any  
12 benefit to the estate was merely incidental. As for DIP  
13 financing, Trustee argued that Radical Bunny's efforts to prevent  
14 approval of financing that would jeopardize what it believed to  
15 be its collateral, do not rise to the level of making a  
16 substantial contribution to the estate. Further, several other  
17 constituents lodged identical objections to ML's proposed  
18 financing, so Radical Bunny's efforts were duplicative.

19 **3. Settlement Activities:**

20 Radical Bunny/DMYL and others challenged unreasonable  
21 settlements ML proposed with a multitude of ML's borrowers. For  
22 the \$97,882.50 incurred here, Radical Bunny/DMYL, along with  
23 others, including eight professionals employed by ML, negotiated  
24 settlements with approximately 50 different ML borrowers. In  
25 particular, Radical Bunny's/DMYL's actions, in conjunction with  
26 the OIC and others, ensured that ML did not pursue court approval  
27 for an unfavorable settlement with TLC that would have given away

1 an estate asset of a lien on 2.76 acres of land in downtown Tempe  
2 worth over \$10 million.

3 **Trustee's Contentions:**

4 For the Settlement Activities, Trustee argued that Radical  
5 Bunny's/DMYL's negotiation and settlement actions were  
6 duplicative of those performed by numerous other professionals in  
7 the case. Specifically, the OIC monitored the litigation and  
8 settlements with ML's borrowers and objected and negotiated where  
9 necessary. Moreover, Radical Bunny's actions did nothing more  
10 than protect its own interests.

11 **C. Substantial Contribution Order.**

12 On December 17, 2009, the bankruptcy court entered an order  
13 granting Radical Bunny's Substantial Contribution Claim in full  
14 and directed Radical Bunny to submit a final form of order.

15 In its order, the bankruptcy court first set forth the law  
16 governing substantial contribution claims in this circuit,  
17 recognizing that the principal test is the "extent of benefit to  
18 the estate." Cellular 101, Inc. v. Channel Commc'ns, Inc., 377  
19 F.3d 1092, 1096 (9th Cir. 2004). The bankruptcy court noted  
20 Cellular 101's discussion about the circuit split regarding the  
21 relevance of a creditor's self-interest in a substantial  
22 contribution claim, but observed the Cellular 101 court did not  
23 have to determine that issue because, there, whatever benefit the  
24 creditor received from its efforts "[was] outweighed by the  
25 extent of the benefit those efforts conferred on the estate."  
26 Cellular 101, 377 F.3d at 1097-98. With respect to self  
27 interest, the bankruptcy court interpreted Cellular 101 to hold

1 that benefit to a creditor does not constitute a per se  
2 disqualification or limitation of a substantial contribution  
3 claim. Rather, the bankruptcy court concluded:

4 a substantial contribution claim may be awarded in its  
5 entirety so long as the benefit to the estate outweighs  
6 the benefit to the creditor. The only restriction or  
7 limitation [Cellular 101] seems to impose in that  
8 regard is that the contribution to the reorganization  
9 must be substantial and not 'incidental' or 'minimal,'  
10 (emphasis added).

11 With this established, the bankruptcy court then applied  
12 Cellular 101 to the facts of the case. It initially noted that  
13 Trustee did not significantly dispute the facts Radical Bunny  
14 alleged as the basis for its Substantial Contribution Claim, as  
15 reflected in the parties' joint statement of material facts.  
16 First, Trustee had agreed that Radical Bunny began drafting a  
17 joint plan in October of 2008, and worked cooperatively with the  
18 OIC to formulate, draft, and negotiate the joint plan. Further,  
19 Radical Bunny pledged its claimed interest in various loans for  
20 ML's exit financing that was the source of all post-confirmation  
21 expenses, and without its pledge of those interests the exit  
22 financing would not have been available without a ruling as to  
23 whether Radical Bunny was secured or unsecured.

24 Next, Trustee agreed that Radical Bunny helped structure  
25 agreements on financing, cash collateral, and the OIC Plan that  
26 insured cash flow to allow ML to continue operations during and  
27 after the case, and that DMYL and the OIC divided that work  
28 accordingly. The bankruptcy court also noted that Trustee lodged  
no factual or legal objections to Radical Bunny's argument that  
it alone subordinated its claimed security interest to permit use

1 of cash collateral (for which it received no adequate  
2 protection), to permit DIP loans and, ultimately, exit financing,  
3 and that no other secured creditor or Investor similarly did so.

4 Finally, Trustee had agreed that DMYL's lead attorney in the  
5 case was routinely requested to participate in meetings with the  
6 OIC, which asked him to lead the charge on issues that would have  
7 adversely affected the estate if ML's acts went unchallenged.

8 Based on these admissions by Trustee, the bankruptcy court  
9 rejected his argument that Radical Bunny's efforts were  
10 "duplicative." The court also rejected Trustee's arguments that,  
11 because Radical Bunny's efforts were motivated by self-interest  
12 and because it subsequently changed position on the OIC Plan, it  
13 was not entitled to its Substantial Contribution Claim. The  
14 court believed such actions "are not recognized by Cellular 101  
15 as bases for denying a substantial contribution claim." In fact,  
16 the court noted, Cellular 101 "makes clear that the substantial  
17 contribution need not lead to confirmation of a plan, although  
18 here it is undisputed that Radical Bunny proposed, negotiated and  
19 drafted the essential form of the [P]lan that was ultimately  
20 confirmed."

21 In regards to its "alleged" secured status, which Trustee  
22 asserted undermined Radical Bunny's "subordination" argument, the  
23 bankruptcy court noted Trustee's admission that Radical Bunny's  
24 concessions meant its secured status did not need to be litigated  
25 and, in any event, Radial Bunny had a substantial basis to claim  
26 secured status based upon timely signed and filed UCC-1 financing  
27 statements.

1 Although Radical Bunny segregated its Substantial  
2 Contribution Claim into three areas of activity with certain fees  
3 requested for each, the bankruptcy court adopted a "net benefit"  
4 approach as to Radical Bunny's contributions. Based on the  
5 above, it "[found] and conclude[d] that Radical Bunny's claim  
6 very closely approximate[d] that which was approved by the Ninth  
7 Circuit in Cellular 101, and that the amount claimed provided a  
8 benefit to the estate that was neither incidental or minimal and  
9 that exceeded the benefit to Radical Bunny."

10 On December 21, 2009, the bankruptcy court entered an order  
11 allowing in full Radical Bunny's Substantial Contribution Claim  
12 and directing the immediate payment of \$595,798.25 to DMYL.  
13 Trustee appealed.

## 14 **II. ISSUES**

- 15 1. Did the bankruptcy court err in its interpretation and  
16 application of controlling law with respect to the Substantial  
17 Contribution Claim?  
18 2. Did the bankruptcy court make erroneous findings of fact  
19 with respect to the Substantial Contribution Claim?

## 20 **III. JURISDICTION**

21 The bankruptcy court had jurisdiction under 28 U.S.C. §§  
22 157(b) (2) (B) and 1334. We have jurisdiction under 28 U.S.C. §  
23 158.

## 24 **IV. STANDARD OF REVIEW**

25 The question of substantial contribution is a fact intensive  
26 inquiry we review for clear error. We review the bankruptcy  
27 court's conclusions of law and statutory interpretation de novo.

1 Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R.  
2 25, 32 (9th Cir. BAP 2008).

3 **V. DISCUSSION**

4 **A. Applicable Law.**

5 Under section 503(b)(3)(D), a creditor who makes a  
6 substantial contribution to a chapter 11 case may recover an  
7 administrative expense. Section 503(b)(4) authorizes  
8 compensation for legal services allowable under section  
9 503(b)(3).

10 A creditor seeking administrative priority for its legal  
11 fees and costs bears the burden of proof to demonstrate that the  
12 creditor has made a substantial contribution to the estate.  
13 Andrew v. Coopersmith (In re Downtown Inv. Club III), 89 B.R. 59,  
14 64 (9th Cir. BAP 1988) ("The burden of proof under Bankruptcy Code  
15 § 503(b)(4) to show that a substantial contribution was made is  
16 on the party seeking compensation[.]"); see also In re Catalina  
17 Spa & R.V. Resort, Ltd., 97 B.R. 13, 17 (Bankr. C.D. Cal. 1989)  
18 (same); In re Granite Partners, L.P., 213 B.R. 440, 447 (Bankr.  
19 S.D.N.Y. 1997) (applicant bears the burden of proving, by a  
20 preponderance of the evidence, that he has rendered a substantial  
21 contribution).

22 Case law does not clearly define what sort of conduct or  
23 activities constitute a "substantial contribution in a case" that  
24 would support an award of fees and costs as an administrative  
25 expense. The Ninth Circuit has determined that the measure of  
26 any substantial contribution is the "'extent of the benefit to  
27 the estate.'" Cellular 101, 377 F.3d at 1096 (quoting Christian



1 Life Ctr. Litig. Defense Comm. v. Silva (In re Christian Life  
2 Ctr.), 821 F.2d 1370, 1373 (9th Cir. 1987)). The benefits  
3 conferred by the claimant must be direct and not "incidental" or  
4 "minimal," and must outweigh the benefit received by the  
5 claimant. Id. at 1098. Further, claimant's actions must foster,  
6 rather than retard, progress of the reorganization. Id. at 1096.

7 Although the court has broad discretion to grant  
8 administrative expense requests, it must construe section 503(b)  
9 narrowly to keep fees and administrative costs to a minimum and  
10 preserve the limited estate assets for the benefit of creditors.  
11 NLRB v. Walsh (In re Palau Corp.), 139 B.R. 942, 944 (9th Cir.  
12 BAP 1992) (citing Burlington N. R.R. Co. v. Dant & Russell, Inc.  
13 (In re Dant & Russell, Inc.), 853 F.2d 700, 706 (9th Cir. 1988)).

14 In determining whether a substantial contribution has been  
15 made, the Fifth Circuit has held that the bankruptcy court  
16 should, at minimum:

17 weigh the cost of the claimed fees and expenses against  
18 the benefits conferred upon the estate which flow  
19 directly from those actions. Benefits flowing to only a  
20 portion of the estate or to limited classes of  
21 creditors are necessarily diminished in weight.  
Finally, to aid the district and appellate courts in  
the review process, bankruptcy judges should make  
specific and detailed findings on the substantial  
contribution issue.

22 Hall Fin. Group v. DP Partners, Ltd. P'ship (In re DP Partners  
23 Ltd. P'ship), 106 F.3d 667, 673 (5th Cir. 1997).

24 **B. The Bankruptcy Court Erred In Its Interpretation And**  
25 **Application Of Cellular 101.**

26 Trustee argues that the bankruptcy court incorrectly  
27 interpreted and misapplied the legal standard for substantial  
28 contribution claims under sections 503(b) (3) (D) and 503(b) (4).

1 We reject Trustee's argument that substantial contribution  
2 claims must be denied if the creditor acted primarily in its own  
3 interest, even if the creditor provided a demonstrable benefit to  
4 the estate, as that is not the law in our circuit. As the  
5 bankruptcy court correctly noted, the Cellular 101 court rejected  
6 this notion, stating that "the existence of a self-interest  
7 cannot in and of itself preclude reimbursement." Cellular 101,  
8 377 F.3d at 1098.

9 Therefore, under Cellular 101, a substantial contribution  
10 claimant's actions can be motivated by self-interest. However,  
11 in pursuit of that interest, the claimant must confer a direct,  
12 not incidental or minimal, benefit to the estate that outweighs  
13 the benefit claimant received, and claimant's actions must  
14 foster, not retard, the progress of reorganization.

15 Clearly, the bankruptcy court recognized that Cellular 101  
16 governs substantial contribution claims. However, we disagree  
17 with its "net benefit" approach to the analysis. In other words,  
18 the bankruptcy court concluded that even if a claimant incurred  
19 fees for engaging in certain efforts that did not benefit the  
20 estate, as long as the claimant's efforts resulted in a "net"  
21 benefit to the estate then claimant is entitled to all fees  
22 requested. Cellular 101 does not stand for this proposition.  
23 There, the creditor engaged primarily in one activity - the plan  
24 - and even then the court awarded only a partial claim.

25 Rather than a "net benefit" approach, courts review  
26 independently each of a claimant's activities to then decide  
27 whether that activity benefitted the estate sufficiently to award

1 the claimant expenses incurred for that activity. In re D.W.G.K.  
2 Rests., Inc., 84 B.R. 684, 689-90 (Bankr. S.D. Cal. 1988)  
3 (although decided before Cellular 101, court analyzed  
4 independently each of the seven activities claimant contended  
5 conferred a benefit to the estate to determine if they were  
6 entitled to fees for that activity); Williams v. White Mountain  
7 Communities Hosp., Inc. (In re White Mountain Communities Hosp.,  
8 Inc.), 234 Fed. Appx. 756 (9th Cir. July 9, 2007) (court analyzed  
9 each of the two activities claimant engaged in to determine if  
10 either directly benefitted the estate); In re Sentinel Mgmt.  
11 Group, Inc., 404 B.R. 488, 495-98 (Bankr. N.D. Ill. 2009) (court  
12 reviewed independently claimant's four areas of activities);  
13 In re 9085 E Mineral Office Bldg., Ltd., 119 B.R. 246 (Bankr. D.  
14 Colo. 1990) (court reviewed each of the five areas for which  
15 claimant requested compensation to determine whether claimant was  
16 entitled to expenses for efforts in that area, granting partial  
17 award); In re Stoecker, 228 B.R. 205 (Bankr. N.D. Ill. 1991)  
18 (same); In re U.S. Lines, Inc., 103 B.R. 427 (Bankr. S.D.N.Y.  
19 1989) (same).

20 Here, the bankruptcy court erred by not reviewing each of  
21 Radical Bunny's three areas of activity independently to  
22 determine whether or not each conferred a direct, not incidental  
23 or minimal, benefit to the estate that was outweighed by the  
24 benefit Radical Bunny received.

25 **C. The Bankruptcy Court Clearly Erred In Its Factual Findings.**

26 Even if we agreed with the bankruptcy court's "net benefit"  
27 approach, it did not make sufficiently detailed findings to

1 support its conclusion that Radical Bunny was entitled to its  
2 Substantial Contribution Claim in full.

3 **1. Plan Activities.**

4 As for the \$118,810.00 awarded for Plan Activities, Trustee  
5 argues that the bankruptcy court erred when it concluded that  
6 Radical Bunny/DMYL played a necessary role in the Plan and was  
7 entitled to an award, especially when it failed to analyze  
8 whether any of Radical Bunny's concepts from the joint plan  
9 survived in the Plan, or compare the benefits Radical Bunny  
10 received in the Plan to what it may have contributed. Actually,  
11 he argues, it was the OIC that revised, filed, and proposed the  
12 OIC Plan that, with more revisions by the OIC in light of Radical  
13 Bunny's objections, became the Plan.

14 We reject Trustee's argument in part. In the parties' joint  
15 statements of fact, Trustee admitted that concepts from Radical  
16 Bunny's/DMYL's draft of the joint plan ultimately became part of  
17 the Plan.

18 We do agree, however, with Trustee that the bankruptcy court  
19 erred by not performing any analysis in weighing the benefits  
20 Radical Bunny received in the Plan compared to the benefits its  
21 Plan Activities conferred on the estate or other creditors.  
22 While Radical Bunny's act of pledging its claimed interests in  
23 ML's loans facilitated ML's exit financing to pay all post-  
24 confirmation expenses and benefitted the estate and other  
25 creditors, a portion of Radical Bunny's claim for Plan Activities  
26 included fees incurred for drafting an operating agreement that  
27 was discarded and redrafted by the OIC, and for filing a joint

1 objection with the OIC and OCC to ML's request to extend the  
2 exclusivity period. We see nothing in the record where Radical  
3 Bunny explained how either of these two acts conferred a benefit  
4 to the estate, much less that it outweighed whatever benefit  
5 Radical Bunny received. The bankruptcy court did not address  
6 this.

7 Moreover, while the bankruptcy court correctly observed that  
8 a claimant's changing position on a plan is not a basis for  
9 denying a substantial contribution claim, the court erred by not  
10 factoring in the \$70,000 Radical Bunny admits ML and the OIC  
11 incurred in defending against Radical Bunny's objections to the  
12 OIC Plan, particularly since the only apparent result of Radical  
13 Bunny's objections was better treatment for itself, not the  
14 estate or other creditors.

15 We recognize that we may affirm the bankruptcy court on any  
16 grounds supported by the record. Canino v. Bleau (In re Canino),  
17 185 B.R. 584, 594 (9th Cir. BAP 1995). Nonetheless, this record  
18 does not support the court's decision to award \$118,810.00 for  
19 Plan Activities.

## 20 **2. Asset Preservation Activities.**

21 As for the \$356,253.00 awarded for Asset Preservation  
22 Activities, Trustee argues that Radical Bunny failed to quantify  
23 how its actions preserved or increased ML's estate, how the  
24 benefit to the estate was more than incidental, or how its  
25 efforts were not duplicative, and the bankruptcy court erred by  
26 not considering the comparative benefits received or account for  
27 duplicated efforts.

1 We reject Trustee's argument that Radical Bunny's efforts  
2 here were duplicative. He conceded facts to the contrary. We  
3 also reject Trustee's argument that protecting one's interest  
4 precludes reimbursement. Cellular 101, 377 F.3d at 1098.

5 Although it appears that Radical Bunny's Asset Preservation  
6 Activities directly benefitted the estate by ensuring cash flow  
7 to ML, Radical Bunny did not provide the bankruptcy court with a  
8 sufficiently detailed analysis of the value of those benefits to  
9 the estate. As a result, the bankruptcy court could not conduct  
10 the proper benefit analysis or make the required findings with  
11 respect to the quantum of benefit.

12 As for Radical Bunny's efforts with respect to the TLC-  
13 Centerpoint Project, we see no specific objection from Trustee.  
14 We also see no analysis from the bankruptcy court to quantify the  
15 benefits on this issue.

16 **3. Settlement Activities.**

17 Finally, for the \$97,882.50 awarded for Settlement  
18 Activities, Trustee argues that the bankruptcy court erred in  
19 finding, with no evidence whatsoever in the record to support it,  
20 that Radical Bunny/DMYL protected estate assets by objecting to  
21 what it thought were "bad" settlements with ML borrowers, and  
22 participating in negotiations with those borrowers to achieve  
23 more favorable results to the estate. He also contends these  
24 efforts were duplicative, as many others, particularly the OIC,  
25 were involved in litigation and settlements of multiple lawsuits  
26 between ML and its borrowers.

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1 In the joint statements of fact, the parties agreed that  
2 Radical Bunny's/DMYL's efforts, along with others, prevented ML  
3 from entering an unfavorable settlement in which ML proposed to  
4 "give away" a lien on a \$10 million property in downtown Tempe.  
5 The bankruptcy court made no findings about whether Radical  
6 Bunny's Settlement Activities directly benefitted the estate, or  
7 whether such benefits outweighed any benefit to Radical Bunny.

8 Even if Radical Bunny/DMYL could take credit here, which may  
9 be difficult considering the involvement of at least eight other  
10 professionals, we see nowhere in the record where Radical Bunny  
11 articulated how efforts here increased dollars available to the  
12 estate and/or other creditors. Mere conclusory statements by a  
13 claimant that its acts resulted in substantial contribution are  
14 insufficient for an administrative expense claim. U.S. Lines,  
15 Inc., 103 B.R. at 430. Although a court's own first-hand  
16 observation of the services provided may be a sufficient basis on  
17 which to find a substantial contribution, the bankruptcy court  
18 made no findings here whatsoever, so the basis for this award is  
19 unknown. Id.

20 Even though we may affirm the bankruptcy court on any  
21 grounds supported by the record, no findings exist in the record  
22 to support the \$97,882.50 awarded to Radical Bunny for its  
23 Settlement Activities.

## 24 VI. CONCLUSION

25 Based on the foregoing, we REVERSE the order granting  
26 Radical Bunny's Substantial Contribution Claim and REMAND it back  
27 to the bankruptcy court so it may conduct a proper benefit

1 analysis in accordance with Cellular 101 and make more detailed  
2 findings.

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