

UNITED STATES BANKRUPTCY COURT

DISTRICT OF IDAHO

In Re

EDWARD M. LETTUNICH
and SANDRA L. LETTUNICH,

Debtors.

**Bankruptcy Case
No. 08-02589-JDP**

MEMORANDUM OF DECISION

Appearances:

Edward Lettunich, Meridian, Idaho, Pro Se Debtor.

Bob Burrell, New Plymouth, Idaho, Pro Se Creditor.

Conrad Aiken, RACINE OLSON NYE BUDGE & BAILEY, Boise,
Idaho, Attorneys for Trustee.

Lance Loveland, PARSONS SMITH & STONE, Burley, Idaho,
Attorneys for D.L. Evans Bank.

Introduction

On September 28, 2009, Debtors Edward and Sandra Lettunich (“Debtors”) filed a Motion for Allowance of Administrative Expenses and a supporting affidavit. Docket Nos. 349, 350. The chapter 7 trustee, Gary Rainsdon (“Trustee”), and the major creditor in this case, D.L. Evans Bank (the “Bank”), objected to the motion. Docket Nos. 363, 364.¹ The Court conducted a hearing on October 29, 2009, and thereafter took the issues under advisement. For the reasons set forth below, the Court will grant the motion, but only in part. This Memorandum constitutes the Court’s

¹ The Bank has standing to object to Debtors’ motion. Administrative expenses are payable from the proceeds of liquidated property of the estate, but only after the claims of secured creditors are paid. *See* 11 U.S.C. § 725; § 726(a)(1); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 5 (2000). The Court understands the Bank to have objected to Debtors’ motion in its status as an unsecured creditor, since it appears the value of the collateral it holds to secure its claim is significantly less than the total amount of that claim. *See* 11 U.S.C. § 506(a). However, even if the Bank claims a security interest in the cattle sale proceeds, under § 506(c), Trustee can seek to surcharge that collateral to the extent necessary to recover “the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such [secured] claim” 11 U.S.C. § 506(c); *Hartford Underwriters*, 530 U.S. at 5. While not an issue at this time, it would seem that Debtors’ expenses likely fall into that category. Therefore, the Bank certainly has a pecuniary interest in the outcome of this contested matter.

findings of fact and conclusions of law and disposes of the motion. Fed. R. Bankr. P. 7052, 9014.²

Facts

Debtors owned and operated a large cattle operation in Southwestern Idaho and Eastern Oregon. On November 17, 2008, Debtors filed a chapter 12 petition, and Forrest Hymas was appointed to serve as the chapter 12 trustee.

On February 18, 2009, during the pendency of the chapter 12 case, Debtors sought permission from this Court to sell estate property. Specifically, Debtors sought permission to sell 194 bulls and 75 cow/calf pairs. Docket No. 90. Following a hearing, the Court granted Debtors' request to sell the bulls only, consistent with the terms recited on the record. An order was entered on March 23, 2009. Docket No. 122.

Debtors paid for a number of expenses in preparation for the sale. Their expenditures included vaccinations and other medications for the

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

animals, printing and postage costs to promote the sale, and fuel for the vehicles that were used to care for the animals. The sale took place on March 31, 2009 at the Treasure Valley Auction in Caldwell, Idaho. The sale generated approximately \$150,000, and the gross proceeds were turned over to Mr. Hymas.

On April 29, 2009, the case was converted to a chapter 7 case, and Gary Rainsdon was appointed to serve as liquidating trustee. On September 28, 2009, Debtors filed this motion wherein they seek to be reimbursed for \$12,012.69 they claim constitute administrative expenses. The affidavit of Edward Lettunich, which accompanied the motion, provides information about the expenses.

Discussion

The Bankruptcy Code affords a priority status for administrative expenses. *In re Coolex*, 96.1 I.B.C.R. 35, 36 (Bankr. D. Idaho 1996); 11 U.S.C. § 507(a)(2) (providing second priority status to “administrative expenses allowed under section 503(b) of this title . . .”). Whether a claim constitutes a priority administrative expense is determined under § 503(b),

which provides, in pertinent part:

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

(1)(A) the actual, necessary costs and expenses of preserving the estate[.]

11 U.S.C. § 503(b)(1)(A). This provision is construed narrowly by the courts. *Nat'l. Labor Relations Bd. v. Walsh (In re Palau Corp.)*, 18 F.3d 746, 750 (9th Cir. 1994); *In re Sunny Ridge Manor, Inc.* 90 I.B.C.R. 12 (D. Idaho 1990).

A strict construction regarding administrative expenses serves, in part, to maximize and protect the limited assets of the bankruptcy estate for the benefit of the unsecured creditors. *Burlington N. R.R. Co. v. Dant & Russell, Inc. (In re Dant & Russell, Inc.)*, 853 F.2d 700, 706 (9th Cir. 1988).

The Ninth Circuit Bankruptcy Appellate Panel has summarized the requisite elements to establish administrative expense priority as follows:

[a]dministrative status is allowed when a claim (1) is incurred postpetition, (2) directly and substantially benefits the estate, and (3) is an actual and necessary expense.

Gull Indus., Inc. v. John Mitchell, Inc. (In re Hanna), 168 B.R. 386, 388 (9th Cir. B.A.P. 1994) (citation omitted). “The applicant must prove by a

preponderance of the evidence entitlement to the administrative expense.”

Id.; *In re Coolex*, 96.1 I.B.C.R. at 36.

Debtors have divided their claimed expenses into six separate categories. It is undisputed that each of the claimed expenses were incurred postpetition. Accordingly, this Court will focus on whether each claimed expense was actual and necessary, and whether it directly and substantially benefitted the estate. Each category is examined in turn.

1. Ear Tags and Vaccinations

The first category of expenses is for ear tags, vaccinations, and other medicines purchased by Debtors. Debtors assert that the vaccinations and ear tags were required prior to selling the bulls, and seek an award of administrative expenses in the amount of \$1,248.27. Attached to Mr. Lettunich’s affidavit is a summary of these expenses, along with copies of Debtors’ bank statements and cancelled checks.

Trustee and Bank object to these expenses, arguing that without individual invoices or merchant receipts, it is impossible to tell whether these expenses were actual costs of preserving the assets of the estate.

However, they offer no evidence to dispute the allegations in the affidavit, and in particular, do not seem to dispute that the bulls were indeed tagged and vaccinated prior to sale.

While invoices and receipts certainly would be additional proof of these expenses, they are not critical for Debtors to satisfy their evidentiary burden. Here, in addition to the bank statements and cancelled checks, Debtors have offered the affidavit of Edward Lettunich, wherein he represents that these expenses were actually incurred for vaccinations and ear tags and that such expenses were necessary in order for the animals to be sold. Neither the Trustee nor the Bank have challenged that assertion, and in the absence of such a challenge, the Court is satisfied that Debtors have met their evidentiary burden. These expenses will be allowed as administrative expenses in the amount requested.³

³ There appear to be two inconsistencies between the Debtors' summary and the bank statements and cancelled checks. Debtors' summary indicates the expense for WSI on February 13, 2009 was for \$90.48; the bank statement records show an expenditure of \$90.88. In addition, the expense for Walco on March 30, 2009 is listed in the summary as \$25.89, but the cancelled check on the same date is for \$28.89. Correcting for these apparent errors would result in an additional \$3.40 for the Debtors, but the Court declines to make such an adjustment, and

2. Genetic Testing

The next category of expenses relates to testing the bulls for genetic defects. Debtors assert that a new genetic defect became known throughout the cattle industry in the fall of 2008, and that they were required to test the bulls for this defect prior to the sale. Debtors performed these tests prior to the sale, and now request \$289.11 for this expense. In support, Debtors have attached a bank statement and an invoice from MMI Genomics, Inc. The bank statement has an entry for MMI Genomics on April 23, 2009 for \$240.00. The invoice reveals a balance due of \$49.11. At the hearing, Edward Lettunich explained that he was required to pay \$240 up front, when the testing materials were sent to him, and that the company is still billing him for the balance. He has not paid the remaining balance yet, and explained that he has forwarded the bill to Trustee.

The genetic testing has been shown to be an actual, necessary

instead will limit the award of administrative expenses for this category to the amount supported by Edward Lettunich's affidavit, or \$1,248.27.

expense associated with the sale. However, Debtors are limited to the actual amount paid for this expense, *i.e.*, \$240.⁴

3. Sale Advertising Expenses

Debtors claim \$811.88 for expenses they incurred in publishing and mailing various advertising materials for the March 31, 2009 sale. Trustee objected to these expenses as well, again alleging that Debtors' supporting documentation failed to adequately show that these expenses were actual and necessary. At the hearing, Trustee's counsel pointed out that there was a substantial advertising budget for the sale, and he could not tell from the documentation provided by Debtors whether these items were also included in and paid from that budget. Trustee's counsel further argued that the chapter 12 trustee had previously reimbursed Debtors for postage and printing expenses of \$168 and \$185, respectively, and was concerned about paying Debtors for the same expense twice. *See* Trustee's Ex. A, Docket No. 367.

⁴ Of course, Trustee is not prevented from paying the balance due on this bill.

As with the first category of expenses, Debtors' supporting documentation includes a summary ledger as well as bank statements and cancelled checks for the expenses claimed.⁵ In addition, Debtors have included a receipt for posters from Dominick's Quick Print. Edward Lettunich asserts in his affidavit that \$811.88 is "the *balance* of the advertising expenses incurred in an effort to promote and market the March 2009 sale." Docket No. 350 (emphasis added). He explained at the hearing that he needed to pay these expenses because the chapter 12 trustee did not have sufficient funds available to pay for them. He also stated that he did not include any expenses in this motion for which the chapter 12 trustee had previously reimbursed him.

A review of Debtors' bank statements supports this explanation. Although the bank statements include the expenses for printing and postage referenced by Trustee's counsel, neither of those expenses are highlighted nor included in the summary, as are the other expenses for

⁵ Debtors have circled each of the appropriate expenses on their bank statements and then included that amount in the summary sheet. *See* Docket No. 350, Ex. C.

which Debtors are requesting payment. The Court concludes that Debtors have adequately shown that these expenses were actual and necessary costs to preserve the estate and will be allowed as administrative expenses in the amount of \$811.88.

4. Accounting Services

Debtors next request \$1,052.19 for the accounting services provided by Ken Priebe of Treasure Valley Tax Services, Inc. At the hearing, Edward Lettunich explained that these services were necessary to conclude the chapter 12 case, but noted that Debtors had not actually paid for them. Upon hearing this, the Court explained to Mr. Lettunich that Ken Priebe, and not Debtors, is the creditor for this expense, and that it was his burden to request that such expenses be allowed.⁶ Debtors' claim for the accounting expenses will not be allowed as administrative expenses.

⁶ Of course, as a professional employed by a chapter 12 debtor, the accountant faces an additional significant hurdle to obtain payment, in that, in reviewing the dockets it appears that the Court had not previously approved his employment as required by § 327(a), § 330(a) and Rule 2014(a).

5. Fuel

Prior to the bull sale Debtors were responsible for the health and maintenance of the herd. Because the herd was spread out over several locations in Idaho and Oregon, Debtors incurred significant travel expenses to care for and maintain the herd. Debtors request \$3,371.24 for fuel used by Debtors and their employees from the time the chapter 12 petition was filed through May, 2009. In support of these expenses, Debtors supplied a summary of the expenses and the associated bank statements and cancelled checks. Trustee objected to these expenses also, arguing again that because Debtors did not provide invoices to tie the fuel expenditures to the cattle operation they had failed to meet their burden of proof. Trustee also notes that many of the expenses were incurred well after the March 2009 cattle auction, and after the case was converted to chapter 7.

The total fuel expense on the Debtors' summary sheet matches the amount Edward Lettunich claimed was incurred in his affidavit.

However, several of the entries in the summary are problematic. The first

entry on the summary sheet is for fuel in the amount of \$2,170.16. It lists the date of the transaction as "11/09 - 5/09" then identifies the payment source as "WAMU/Chase Card**." See Docket No. 350, Ex. E. At the bottom of the page appears the notation, "*** Please see Credit Card Statements, charges indicated with a hyphen." *Id.* From the bank statements provided, it is apparent that Debtors intended to indicate the beginning of the date range to be November 2008, rather than 2009. Additionally, while the end of the range is listed as May 2009 and the statement includes one transaction in May, the last fuel transaction actually occurred on April 11, 2009.

More troublesome than these minor discrepancies, however, are the individual entries which are highlighted on the bank statements. Several of these marked entries identify merchants which may not sell fuel, such as Lowes, Meineke, and Farm City Animal Supply. Moreover, the total of all highlighted entries, or \$2,731.10, does not match the amount listed on the summary, or \$2,170.16. Even if the questionable entries were excluded from the final summation, the total would still not match the amount listed

in the summary.⁷ In short, it is unclear why the amount in the summary is so much less than the total of the highlighted entries in the bank statements. Nonetheless, because it is apparent that Debtors incurred at least \$2,170.16 in fuel expenses between the dates listed, that is the figure the Court will utilize in making its calculations.

Also problematic is the second entry of the summary, which lists fuel in the amount of \$67.00 incurred on March 19, 2009. Debtors list the payment source for this expenditure as "Check No. 1015." Docket No. 350, Ex. E. A copy of the cancelled check was also provided, but it is not helpful here. There is no payee listed and the notation on the memo line of the check has been crossed out, rendering it illegible. While it is conceivable that the notation may have been for fuel, it is equally plausible that it was for food or some other expense. Absent additional explanation, this particular entry will not be allowed.⁸

⁷ Excluding these entries would bring the total to \$2,437.89.

⁸ The purchase on March 29, 2009 for \$60.00 was also made with a personal check. The cancelled check for that transaction also does not list a payee, however, the memo line clearly indicates it was for fuel. This expense will

The Court has no additional concerns with the other entries in Debtors' summary. With the exception of the entry on March 19, 2009, Debtors have shown that their fuel expenses were actual and necessary costs of preserving the estate. Accordingly, the Court concludes that Debtors will be allowed \$3,304.24 as an administrative expense for fuel.⁹

6. Wages

The final category in Debtors' request is a salary for Edward Lettunich for the months of January, February and March, 2009. Debtors indicated that \$3,500 had previously been budgeted¹⁰ as Edward Lettunich's salary for each of these months and that only half of that amount for each month had been paid by Mr. Hymas, the chapter 12

be included in the Court's calculation.

⁹ Those expenses which were incurred prior to April 29, 2009, when the case was converted to chapter 7, will be considered administrative expenses of the chapter 12 estate. All other expenses will be considered chapter 7 administrative expenses.

¹⁰ Debtors filed their chapter 12 plan on February 27, 2009. Docket No. 101. Attached as Ex. A to that plan is a monthly budget. This budget includes a monthly salary for Edward Lettunich in the amount of \$3,500. Apparently, this is the budget to which Debtors refer. Debtors' plan was never confirmed.

trustee. As a result, Debtors now request that \$5,240,¹¹ the balance of Edward Lettunich's budgeted salary, be allowed as an administrative expense for this work.

In support of their request, Debtors note that the Bankruptcy Code provides that administrative expenses include "the actual, necessary costs and expenses of preserving the estate, including . . . wages, salaries, and commissions for services rendered after the commencement of the case[.]"

11 U.S.C. § 503(b)(1)(A)(i). Edward Lettunich explains in his affidavit that during these three months he prepared the advertising materials and performed other duties to promote the bull sale. In addition, he explained that he also worked with the cattle by vaccinating, testing, and tagging the animals prior to the sale.

Trustee objects to this category of expenses because, he argues, given the limited documentation provided by Debtors it is difficult to tie Edward Lettunich's labor to the preservation of the assets of the estate.

¹¹ The Court recognizes that if \$3,500 was budgeted for the monthly salary for the three months, or \$10,500 total, then half of that amount would be \$5,250. Debtors only request \$5,240.

Trustee also takes issue with this claim since the budget upon which it was based was never formally approved by the Court because Debtors' plan was never confirmed.

Trustee's objections are well-taken. Debtors have not properly documented, nor provided other adequate evidence to show, that the services in question were necessary to preserve or dispose of the assets of the estate, nor to prove the value of those services. Debtors received a portion of the "wages" described in the budget; without better proof of the services they contend give rise to administrative expense status, it is impossible to tell whether Mr. Lettunich received adequate payment for those services or not.

These concerns, however, are not the only problems with Debtors' request. All of the other expenses approved above as administrative expenses share a common feature – they represent discrete expenditures by Debtors for goods or services necessary for the preservation of the estate provided by or purchased from third-party vendors or entities. A request for payment from the bankruptcy estate for the "salary" of a sole

proprietor chapter 12 debtor is a different matter. In other words, this request is founded not on an actual expense which the Debtors incurred, but rather is premised upon the alleged value attributable of the labor Edward Lettunich performed on behalf of the estate. Although § 503(b)(1)(A)(i) refers to wages and salaries for services rendered to the estate post-petition, the Court was unable to locate any case law where the chapter 12 debtor, operating as a sole proprietor, was allowed an administrative expense for unpaid wages or a salary for personal services performed during the case. This is not surprising since, as one bankruptcy court explained, this clause in § 503(b) “address[es] situations where it is necessary to pay the wages, salaries, [and] commissions . . . of a Debtor’s *employees* as part of ‘the actual and necessary costs and expenses of preserving the estate.’” *In re Am. Home Mortgage, Holdings, Inc.*, 411 B.R. 169, 176 (Bankr. D. Del. 2008) (emphasis added). Edward Lettunich was the co-owner of his business; he was not an employee.

While the Court does not doubt that those services Edward Lettunich performed in preparing the cattle for sale were valuable, they

simply do not qualify as administrative expenses. If the Court were to allow a salary for Edward Lettunich as an administrative expense in this instance, it would open the door for all sole proprietor debtors to advance their own pecuniary interests over that of their creditors by making similar claims, thus fundamentally altering the priority scheme endorsed by Congress.

The creditors do not receive a windfall at Mr. Lettunich's expense as a result of this ruling. Unless the Court orders otherwise, after filing a petition, a chapter 12 debtor remains in possession of property of the estate and conducts the business operation. 11 U.S.C. § 1203. In this case, for example, while financial circumstances compelled the sale of these bulls, at the time of the sale, Edward Lettunich presumably still held out hope to propose and confirm a chapter 12 plan. In that sense, then, his services in preserving cattle and preparing them for sale benefitted Debtors' interest, as well as that of the creditors. That significant efforts may be required to perform a debtor's duties in a bankruptcy case, and that creditors may benefit from those services, does not compel the conclusion that the debtor

should be compensated for those services from the estate before creditors are paid.

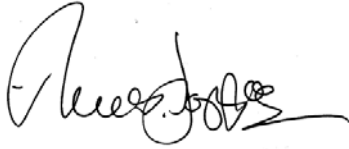
Debtors' request for Edward Lettunich's salary to be allowed as an administrative expense will be denied.

Conclusion

For these reasons, Debtors' motion for administrative expenses will be granted in part. Debtors will be allowed a priority administrative expense in the amount of \$5,604.39. Because \$4,711.11 of those expenses were incurred prior to the conversion of the chapter 12 case to chapter 7, that amount will be treated as administrative expenses of the chapter 12 case. The balance of the expenses, or \$893.28, incurred after conversion, are administrative expenses of the chapter 7 estate. *See* 11 U.S.C. § 726(b) (providing, effectively, that chapter 7 administrative expenses be paid in full before payment is made for administrative expenses incurred prior to conversion). The motion will be denied with respect to any amounts in excess of the expenses approved above.

A separate order will be entered.

Dated: November 25, 2009



Honorable Jim D. Pappas
United States Bankruptcy Judge