



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
August 15, 2023

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * *

In re:

BASIC WATER COMPANY,

Debtor.

Affects All Debtors

Affects Basic Water Company

Affects Basic Water Company
SPE 1, LLC

Case No.: 22-13252-MKN

Chapter 11

Jointly Administered with:

In re Basic Water Company SPE 1, LLC,
Case No.: 22-13253-MKN

Date: April 5, 2023

Time: 9:30 a.m.

**ORDER ON MOTION FOR ALLOWANCE AND PAYMENT
OF ADMINISTRATIVE CLAIM¹**

On April 5, 2023, the court heard the Motion for Allowance and Payment of
Administrative Claim (“COH Expense Motion”), brought by the City of Henderson (“COH”).

The appearance of debtor was noted on the record. After arguments were presented, the matter
was taken under submission.

BACKGROUND

On September 10, 2022, Basic Water Company (“BWC”) and Basic Water Company
SPE 1, LLC (“BWC SPE”), filed separate “skeleton” Chapter 11 petitions. (BWC ECF No. 1;

¹ In this Order, all references to “ECF No.” are to the numbers assigned to the documents
filed in the case as they appear on the docket maintained by the clerk of the court. All references
to “Section” or “§§ 101-1532” are to the provisions of the Bankruptcy Code. All references to
“FBRP” are to the Federal Rules of Bankruptcy Procedure.

1 BWC SPE ECF No. 1). On the same date the Chapter 11 petitions were filed, a Notice of
2 Chapter 11 Bankruptcy Case was entered informing parties in interest of the BWC and BWC
3 SPE Chapter 11 bankruptcy proceedings; the deadline of January 11, 2023, for creditors to file a
4 proof of claim and March 9, 2023, for any governmental unit to file a proof of claim; and set a
5 meeting of creditors required by Section 341 (“341 Meeting”) for October 13, 2022. The 341
6 Meeting was conducted by the Office of the United States Trustee.

7 On September 10, 2022, BWC and BWC SPE filed separate emergency motions for order
8 directing joint administration of their respective Chapter 11 cases for “procedural convenience
9 and cost efficiencies” (“Joint Admin Motion”). (BWC ECF No. 4; BWC SPE ECF No. 22).

10 On September 13 and 14, 2022, orders were entered shortening time for the Joint Admin
11 Motions to be heard on September 16, 2022, along with other motions. (BWC ECF No. 17;
12 BWC SPE ECF No. 12). The Joint Admin Motion and other matters were all scheduled to be
13 heard on September 16, 2022.

14 On September 20, 2022, an order was entered granting joint administration of the cases
15 and BWC was designated as the lead debtor in possession (collectively, “Debtors”). (BWC ECF
16 No. 45; BWC SPE ECF No. 23). A Notice of Deadline to File Combined Matrix was also filed.
17 (BWC ECF No. 46).

18 On September 26, 2022, Debtors filed their schedules of assets and liabilities
19 (“Schedules”)² along with, *inter alia*, their statements of financial affairs. (BWC ECF No. 56;
20 NWC ECF No. 25).³

21 On November 7, 2022, the 341 Meeting was concluded. (ECF No. 120).

22 On November 29, 2022, Debtors filed a Motion for Entry of Order Approving First
23 Amendment to Agreement for Temporary Potable Water Service between Debtors and City of

24 ² BWC’s real and personal property Schedule “A/B” indicates at Item 15 that it owns
25 100% of the common stock in BWC SPE as a wholly owned subsidiary with a value
26 “Unknown.” BWC Schedule “D” lists no secured creditors.

27 ³ Hereafter, all references in this Order to “ECF No.” are to the documents appearing on
28 the docket of the BWC proceeding which has been designated as the lead case in these jointly
administered Chapter 11 cases.

1 Henderson Pursuant to 11 U.S.C. §§ 105(a), 353(b), 1107 (a), and 1108 (“Amendment Motion”).
2 (ECF No. 138). A copy of the First Amendment to Agreement for Temporary Potable Water
3 Service (“Amendment”) was attached to the Amendment Motion as Exhibit “2.”⁴ That
4 Amendment applies to the Agreement for Temporary Potable Water Service dated June 13,
5 2022, between the Debtors and COH (“Potable Water Agreement”). A copy of the Potable
6 Water Agreement was attached to the Amendment Motion as Exhibit “3.” Pursuant to an order
7 shortening time, the Amendment Motion was noticed to be heard on December 21, 2022. (ECF
8 Nos. 146 and 147).

9 On January 3, 2023, an order was entered granting the Amendment Motion
10 (“Amendment Order”). (ECF No. 173).⁵

11 On March 2, 2023, the instant COH Expense Motion was filed by COH, along with a
12 supporting declaration of Candace C. Carylton, Esq. (“First Carlyon Declaration”). (ECF Nos.
13 215 and 216). The COH Expense Motion was noticed for hearing on April 5, 2023. (ECF No.
14 217).

15 On March 23, 2023, Debtors filed an objection to the COH Expense Motion (“Debtors
16 Objection”), along with a supporting declaration of Stephanie Zimmerman (“Zimmerman
17 Declaration”). (ECF Nos. 239 and 240).

18 On March 24, 2023, Bank of Nevada, a division of Western Alliance Bank, as indenture
19 trustee (“Indenture Trustee”) filed a joinder to the Debtors’ Objection (“Indenture Objection”).
20 (ECF No. 241).

21 _____
22 ⁴ Debtors represent that they “agree that the City will have a claim for certain alleged
23 damages arising from a water leak and to pay for the City’s attorneys’ fees and costs incurred in
24 connection with the Chapter 11 Cases.” Amendment Motion at 4:22-24, citing Sections 2 and 3
25 of the Agreement. Debtors also reiterate their agreement that “the City will have a prepetition
26 claim (subject to the Debtors’ reasonable review) related to the damages.” Id. at 7:5-6. On
27 November 30, 2022, Debtors filed a supporting declaration of their principal, Stephanie
28 Zimmerman (ECF No. 143), consistent with those representations. See id., at ¶¶ 10 and 15.
Nowhere in the Amendment Motion or the declaration, however, is there a suggestion that
approval of the Amendment includes a priority administrative claim in favor of COH for all of its
attorneys’ fees and costs incurred since the commencement of the Chapter 11 proceeding.

⁵ No party in interest filed an objection to the Amendment Motion and the only response
was a statement of non-opposition from one creditor. (ECF No. 148).

1 On March 29, 2023, COH filed a reply in support of the COH Expense Motion (“COH
2 Reply”), along with another supporting declaration of Candace C. Carlyon, Esq. (“Second
3 Carlyon Declaration”). (ECF No. 243).

4 **DISCUSSION**

5 The first paragraph of the Agreement states as follows:

6 “This First Amendment to the Agreement for Temporary Potable Water
7 Service (“Amendment”), dated and **effective as of December 5, 2022**, is by
8 and between the City of Henderson, a municipal corporation and political
9 subdivision of the State of Nevada (“City”) and Basic Water Company SPE
1, LLC, a Nevada limited liability company (“BWC SPE”) and Basic Water
Company, a Nevada corporation (“BWC,” and collectively with BWC SPE,
“Customer”) (individually, a “Party” and, collectively, the “Parties”).”

10 Agreement at page 1 of 4 (emphasis added in bold). The Agreement also contains the following
11 language:

12 “3. City’s Attorneys’ Fees. Customer Agrees to be responsible and pay for
13 the City’s attorneys’ fees and costs **incurred in connection with the Chapter**
14 **11 Cases** (“Fees”), which fees shall not exceed, on average, \$30,000 per month.
The City shall invoice Customer periodically for those Fees, and Customer shall
pay those invoices within 30 days of receipt.”

15 Agreement at Section 3 (emphasis added in bold). The Agreement also contains the following
16 provision:

17 “8. Entire Agreement. This Amendment contains the entire understanding
18 and agreement of the Parties with respect to the subject matter hereof, and
19 there have been **no promises, representations, agreements, warranties or**
20 **understandings** by any of the Parties, oral or written, of any character or
nature **binding except as stated in the Agreement, as amended by this**
Amendment.”

21 Agreement at Section 8 (emphasis added in bold).

22 Nothing in the Potable Water Agreement addressed the responsibility for the payment of
23 attorneys’ fees or any other legal expenses incurred by any of the Parties.⁶ It is well established
24 that when parties seek to resolve their differences by agreement or litigation, the so-called
25 “American Rule” requires the parties to bear their own legal expenses, including attorneys’ fees,
26 absent their express agreement or an applicable statute dictating such responsibility. See

27 ⁶ Section 3.1 of the Potable Water Agreement apparently requires the Debtors to
28 indemnify and defend COH from certain claims (including payment of reasonable attorney’s
fees), but does not generally provide for payment of attorneys fees incurred by COH in
connection with these Chapter 11 proceedings.

1 generally Baker Botts L.L.P. v. ASARCO LLC, 135 S.Ct. 2158, 2164 (2015). In this instance,
2 there is no statute allocating responsibility for the attorneys' fees incurred by COH. More
3 important, there was no applicable agreement between the parties addressing attorneys' fees
4 incurred by any party prior to the Amendment that expressly went into effect on December 5,
5 2022.

6 It is not disputed that after the Amendment went into effect on December 5, 2022, COH
7 transmitted its invoices on January 9, 2023, for attorney's fees totaling \$56,121.81. See Exhibit
8 "4" to COH Expense Motion. It is not disputed that those invoices encompassed attorney's fees
9 incurred by COH through December 31, 2022. It is undisputed that under Section 3 of the
10 Agreement, the invoiced fees would be due by February 8, 2023, i.e., within 30 days of receipt.
11 It is not disputed that the invoiced fees were "incurred in connection with the Chapter 11 Cases"
12 as required by broad language of Section 3 of the Agreement. There is no dispute that all of the
13 language of the Agreement was the product of negotiations of the Parties. It also is not disputed,
14 however, that of the \$56,121.81 total amount, only \$6,379.70 was for fees incurred after the
15 December 5, 2022 effective date. Thus, the majority of the fees - \$49,742.11 – were incurred by
16 COH before there was any agreement with the Debtors creating an exception to the American
17 Rule. Under the prism of the American Rule, COH would not be entitled to any attorney's fees
18 exceeding \$6,379.70.⁷

19 But in absence of an agreement amongst interested parties, as an administrative expense
20 under Section 503(b)(3)(D), creditors may be allowed their actual and necessary expenses in
21 making a substantial contribution to a Chapter 11 case. In this instance, both parties dispute
22 whether the court should grant administrative expense status to the amounts asserted in the
23 invoices submitted by COH. See COH Expense Motion at 6:6-28, citing, e.g., Microsoft Corp.
24 v. DAK Industries, Inc. (In re DAK Industries, Inc.), 66 F.3d 1091, 10954 (9th Cir. 1995);
25 Debtors' Objection at ¶¶ 17 through 22, citing, e.g., DAK Industries, supra; Indenture Trustee
26

27 ⁷ There is no apparent dispute that in addition to the \$6,379.70, the Debtors attempted to
28 pay COH the amount of \$24,871.06 representing fifty percent of attorneys fees incurred by COH
prior to the effective date of the Amendment. See Debtors Objection at Exhibit "B."

1 Objection at ¶ 2, citing, e.g., DAK Industries, supra; COH Reply at 3:11-18, citing, e.g., DAK
 2 Industries, supra. The term “actual, necessary costs and expenses” under Section 503(b) is
 3 narrowly construed to keep administrative costs at a minimum. See N.L.R.B. v. Walsh (In re
 4 Palau), 139 B.R. 942, 944 (B.A.P. 9th Cir. 1992), aff’d, 18 F.3d 746 (9th Cir. 1994). The focus
 5 is on whether the claimed expenses arose from a postpetition transaction with the bankruptcy
 6 estate, and whether the transaction directly and substantially benefitted the bankruptcy estate.
 7 See DAK Industries, 66 F.3d at 1094; see also Data Leverage, LLC v. Avery (In re Machevsky),
 8 640 B.R. 210, 214 (C.D.Cal. 2022); Saxton v. Lisowski (In re Saxton, Inc.), 2007 WL 7540972,
 9 at *5 (B.A.P. 9th Cir. July 30, 2007). The burden of persuasion lies with the claimant. See
 10 Partap Investments, LLC v. Kittusamy, LLP (In re Kittusamy, LLP), 2017 WL 957152, at *2
 11 (B.A.P. 9th Cir. Mar 10, 2017).

12 In this instance, there is no dispute that the Potable Water Agreement was negotiated and
 13 entered on June 13, 2022, well before the Debtors filed their voluntary Chapter 11 petitions on
 14 September 10, 2022. There is no dispute that after the petitions were filed on September 10,
 15 2022, the parties negotiated the Amendment that did not go into effect until December 5, 2022.
 16 There is no dispute that the Amendment reflects a postpetition transaction while the Potable
 17 Water Agreement does not. There is no dispute that successful negotiation of the Amendment
 18 was beneficial to the Chapter 11 estates, as well as to COH.⁸

19 But the end product of the negotiations was the Amendment and the Amendment itself
 20 was effective only after December 5, 2022. Only by the Amendment did the parties agree to the
 21 broad language in Section 3 for the Debtors to pay for COH’s attorneys fees and costs “incurred
 22

23 ⁸ Debtors own and operate certain “terminal reservoirs” for their water delivery system
 24 on real property located in Clark County. See Potable Water Agreement at Recital “A.” The Las
 25 Vegas Valley Water District does not have infrastructure located near the terminal reservoirs,
 26 while COH does. Id. at Recital “H.” The Las Vegas Valley Water District and COH are parties
 27 to a separate Interlocal Agreement (ILA), effective on or about June 7, 2022, for the distribution
 28 of water in Southern Nevada. Because the former did not have accessible infrastructure, COH
 agreed to allow the Debtors access to a limited amount of potable (drinkable) water from its own
 public water system for a 6-month period. The subsequent Amendment that went into effect six
 months later provided for up to three additional six month terms if consistent with the ILA. See
 Section 5 of Amendment.

1 in connection with” these Chapter 11 proceedings. The parties certainly could have negotiated
 2 additional language in Section 3 that specifically included any fees incurred prior to the effective
 3 date of the Agreement, but they did not. After the December 5, 2022, effective date, however,
 4 Debtors appear to have incurred possibly significant postpetition administrative liability to COH
 5 for their attorney’s fees for the remainder of the Chapter 11 proceeding. Such fees are not before
 6 the court at this time. For those expenses, of course, the usual standards for allowance under
 7 Section 503(b) would apply.

8 Under these circumstances, the attorney’s fees and expenses incurred prior to the
 9 December 5, 2022, effective date of the Amendment were for the direct benefit of COH rather
 10 than the Chapter 11 estate. The services provided by its counsel certainly carried out COH’s
 11 decision to facilitate the delivery of water within the city, but they produced no discrete or direct
 12 benefit to the Debtors.⁹ In any event, the resulting benefit to the bankruptcy estate prior to the
 13 effective date cannot be measured at this time. For these reasons, the court concludes that COH
 14 has failed to meet its burden of demonstrating that the invoices for services prior to December 5,
 15 2022, should be afforded administrative priority under Section 503(b).¹⁰

16 **IT IS THEREFORE ORDERED** that the Motion for Allowance and Payment of
 17 Administrative Claim (“COH Expense Motion”), brought by the City of Henderson, Docket No.
 18 215, be, and the same hereby is, **DENIED IN PART** and **GRANTED IN PART**.

19 **IT IS FURTHER ORDERED** that the COH Expense Motion is **DENIED** with respect
 20 to the attorney’s fees and expenses invoiced for the period prior to December 5, 2022.

21 **IT IS FURTHER ORDERED** that the COH Expense Motion is **GRANTED** with

22
 23 ⁹ This is unlike a circumstance where a non-debtor recovers estate property or an estate
 24 claim and shares the proceeds with the bankruptcy estate. In those situations, the non-debtor
 25 obtains a direct benefit for the estate that ordinarily might not be obtained. In those situations,
 the expenses incurred by the non-debtor might be allowed as an administrative expense of the
 bankruptcy estate.

26 ¹⁰ As mentioned in note 7, *supra*, Debtors provided COH a check for half of the disputed
 27 amount. It is not entirely clear that the Debtors even had authority to pay the additional amount
 28 of \$24,871.06 to COH inasmuch as it encompassed disputed attorney’s fees incurred before the
 effective date of the Amendment. Ordinarily, such a compromise would require prior court
 approval under FRBP 9019(a).

1 respect to the attorney's fees and expenses invoiced for the period on and after December 5,
2 2022.

3

4 Copies sent via CM/ECF ELECTRONIC FILING

5 Copies sent via BNC to:

6 BASIC WATER COMPANY
7 BASIC WATER COMPANY SPE 1, LLC
8 875 WEST WARM SPRINGS ROAD
9 HENDERSON, NV 89011-4063

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