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**U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

In re:)
) In Chapter 11 proceedings
)
) Case No.: 2:10-bk-23048-DPC
TWO BROTHERS XI, INC. et al,)
)
) **ORDER DENYING APPLICATION FOR**
) **ALLOWANCE OF SUPERPRIORITY**
) **CLAIM**
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I. Introduction

Secured Creditor Enterprise Bank and Trust (“Enterprise”) seeks allowance of superpriority administrative expense claims relating to Debtors Two Brothers V, Inc. (“TBV”), Two Brothers IX, Inc. (“TBIX”), and Two Brothers X, Inc. (“TBX”) (the “Superpriority Application”) (Dkt. #1366). Enterprise contends it is entitled to superpriority administrative expense claims because the adequate protection provided to it by the Debtors was insufficient to cover the actual decrease in the value of its collateral. Because Enterprise has not proven that its collateral decreased in value, the Court denies Enterprise’s Superpriority Application.

II. Background

TBV, TBIX, TBX and Two Brothers VI, Inc. (“TBVI”) (collectively, the “September Debtors”) operate gas stations and convenience stores. The September Debtors each filed bankruptcy under Chapter 11 on September 2, 2010 (the “Petition Date”). Enterprise holds a senior secured lien on each of the four gas stations operated by the September Debtors. TBV owns and operates a gas station located at 2635 W. Deer Valley Road, Phoenix, AZ 85027 (the “Deer Valley Property”), TBV owns and TBVI operates a gas station located at 28 Signal Butte Road, Apache Junction, AZ 5220 (the “Signal Butte Property”), TBIX owns and operates a gas station located at 3981 E. Guadalupe Road, Gilbert, AZ 85234 (the “Guadalupe Property”) and TBX owns and

1 operates a gas station located at 1163 W. Broadway Road, Mesa, AZ 85210 (the
2 “Broadway Property”).

3 On September 16, 2010, the September Debtors each filed their bankruptcy
4 schedules (TBV - Case no. 10-28114, Dkt. #20; TBIX - Case no. 10-28118, Dkt. #20;
5 TBX - Case no. 10-28120, Dkt. #21) valuing each gas station as follows:

GAS STATION	VALUE IN DEBTORS’ SCHEDULES
Deer Valley Property	\$575,000
Signal Butte Property	\$525,000
Guadalupe Property	\$625,000
Broadway Property	\$550,000

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12 On September 21, 2010, the parties agreed the September Debtors would make
13 monthly adequate protection payments to Enterprise in exchange for the continued use
14 and possession of Enterprise’s collateral (Dkt. #116). Adequate payments have been
15 made to Enterprise in the following amounts:

GAS STATION	TOTAL ADEQUATE PROTECTION PAYMENTS MADE
Deer Valley Property	\$40,656.98
Signal Butte Property	\$37,106.20
Guadalupe Property	\$41,177.22
Broadway Property	\$38,562.02

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22 More than six months after the Petition Date, on March 29, 2011, the Debtors
23 filed appraisals of each gas station (Dkt. #318, 319, 320, 321). These appraisals valued
24 the gas stations as follows:
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GAS STATION	MARCH 2011 APPRAISAL
Deer Valley Property	\$1,085,000
Signal Butte Property	\$860,000
Guadalupe Property	\$1,015,000
Broadway Property	\$980,000

Thereafter, Bankruptcy Judge Case appointed examiner Peter S. Davis at the request of Enterprise and other senior secured creditors (Dkt # 577, 578). The parties stipulated that the September Debtors would segregate \$23,636 for payment to the examiner (Dkt. # 630, 634). The September Debtors thereafter segregated and paid \$23,636 to the examiner.

Following a plan confirmation hearing, Judge Case entered a “Memorandum Decision Re: Plan Confirmation” on January 16, 2013 (the “Confirmation Decision”) (Dkt. #1416). According to the Confirmation Decision, the gas stations are now valued at the following amounts:

GAS STATION	JANUARY 2013 DECISION
Deer Valley Property	\$1,300,000
Signal Butte Property	\$1,100,000
Guadalupe Property	\$1,350,000
Broadway Property	\$1,250,000

In light of the Confirmation Decision, Enterprise contends its collateral depreciated at a rate greater than the amount of adequate protection payments it received and is, therefore, entitled to superpriority administrative expense claims in the amount of the inadequacy of its protection payments (Dkt. # 1366, 1433, 1464).

To maintain the argument that its collateral depreciated in value, Enterprise relies on the Debtors’ March 2011 appraisals for initial valuations of the gas stations. However, these appraisals apply a bulk sale discount to the properties. Enterprise contends those discounts should not be applied because the Court rejected the application of the bulk sale discount as a valuation approach in its Confirmation Decision and in its earlier decision

1 valuing the March Debtors' collateral (Dkt. #865). Enterprise argues the gas stations
2 should be initially valued as follows:

GAS STATION	MARCH 2011 APPRAISAL WITHOUT BULK DISCOUNT
Deer Valley Property	\$1,550,000
Signal Butte Property	\$1,225,000
Guadalupe Property	\$1,450,000
Broadway Property	\$1,350,000

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9 The Debtors, on the other hand, argue that Enterprise is not entitled to
10 superpriority administrative expense claims because Enterprise did not prove its collateral
11 has declined in value. Further, the Debtors contend the adequate protection payments
12 paid to Enterprise adequately protect Enterprise (Dkt. # 1423, 1465). To support this
13 argument, the Debtors contend that Enterprise must provide valuations of the gas stations
14 as of the Petition Date to determine whether its collateral declined in value and that the
15 payments made by the September Debtors to the court-appointed examiner should be
16 added to the total amount of adequate protection payments made to Enterprise. The
17 Debtors also argue that Enterprise does not qualify for an administrative claim because
18 Enterprise's claim is based on a pre-petition transaction with the Debtors.

19 **III. Issues**

20 Section 507(b) provides a creditor with a superpriority claim if the following
21 requirements are met: (1) adequate protection was provided previously and has proved
22 inadequate; (2) the creditor has a claim allowable under § 507(a)(2) (which in turn
23 requires that the creditor have an administrative expense claim under § 503(b)); and (3)
24 the claim must have arisen from either the automatic stay under § 362, or the use, sale or
25 lease of the collateral under § 363, or the granting of a lien under § 364(d). *Ford Motor
Credit Co. v. Dobbins*, 35 F.3d 860, 865 (4th Cir. 1994).

26 The Debtors contend that requirements (1) and (2) have not been met and,
27 therefore the only issues are whether Enterprise has allowable administrative expense
28 claims and whether the adequate protection payments made by the September Debtors
were inadequate.

1 **IV. Analysis**

2 A. Administrative Expense Claims

3 Section 507(a)(2) grants priority to administrative expenses allowed under §
4 503(b). Section 503(b)(1) provides that the “actual, necessary costs and expenses of
5 preserving the estate” are entitled to be allowed as administrative expenses. Enterprise
6 cannot establish an administrative expense claim unless it can demonstrate that its claims
7 are (1) actual and necessary costs or expenses of preserving the Debtors’ estates and (2)
8 those costs or expenses were incurred post-petition. *See In re Jartran, Inc.*, 732 F.2d 584,
587 (7th Cir. 1984).

9 1. *Actual and Necessary Cost*

10 A trustee’s use of a secured creditor’s collateral during the case qualifies as an
11 actual and necessary cost of preserving the estate. *See In re J.F.K. Acquisitions Group*,
12 166 B.R. 207, 212 (Bankr. E.D.N.Y. 1994); *Bonapfel v. Nally Motor Trucks (In re Carpet*
13 *Ctr. Leasing Co., Inc.)*, 991 F.2d 682, 687 (11th Cir. 1993). Here, the September Debtors’
14 use of the gas stations and its proceeds went to maintain the properties and operate the
15 businesses. The use of Enterprise’s collateral was an essential aspect of the September
16 Debtors’ efforts to reorganize because they could not continue to operate without use of
17 Enterprise’s cash and real property. Enterprise’s claim, stemming from the use of its
collateral, is an actual and necessary cost of preserving the estate.

18 2. *Incurred Post-petition*

19 To qualify for an administrative expense, the claim must also be based on a post-
20 petition transaction. A claim is based on a post-petition transaction when the debtor-in-
21 possession’s actions give rise to legal liability for the associated claim. *In re Mammoth*
22 *Mart*, 536 F.2d 950, 955 (1st Cir. 1976). For example, “when the debtor-in-possession
23 commits a tort, or accepts services from a third party without paying for them, the debtor-
24 in-possession itself caused legally cognizable injury, and the resulting claims for
compensation are entitled to first priority.” *Id.*

25 In this case, the September Debtors negotiated for the continued use of the
26 collateral and became liable for adequate protection payments. To the extent that these
27 payments were inadequate to protect Enterprise, it should be entitled to administrative
28 priority. *See In re California Devices*, 126 B.R. 82 (Bankr. N.D. Cal. 1991) (holding that

1 post-petition use of a debtor's collateral is sufficient to constitute an administrative claim
2 for insufficient adequate protection).

3 The Debtors argue, however, that the expense was not incurred post-petition
4 because Enterprise has not provided the Debtors with any further loans since 2003 and
5 2004, well before the Debtors' September 2010 petitions. In support of this contention,
6 the Debtors rely on *Mary Holder*, 2012 WL 4434362 (Bankr. D. N.J. 2012) which held
7 that a secured creditor who loans money to a debtor pre-petition is not entitled to a
8 superpriority administrative expense claim because no further money was provided by
9 the creditor to the debtor post-petition.

10 However, the *Mary Holder* decision is contrary to the decisions of many other
11 circuits, including the 11th Circuit which held that a negotiation for continued possession
12 of a secured lender's collateral in return for adequate protection is a post-petition
13 transaction providing new value to the estate. *In re Carpet Ctr. Leasing*, 991 F.2d at 686-
14 87. Moreover, the creditor in *Mary Holder* sought superpriority for the entire amount of
15 its pre-petition secured claim, whereas Enterprise only seeks superpriority claims to the
16 extent its collateral declined in the value, less any adequate protection payments received.
17 Accordingly, this Court finds the *Mary Holder* decision unpersuasive and that
18 Enterprise's claims may be properly based on post-petition transactions with these
19 estates.

18 B. Inadequate Adequate Protection

19 To determine whether adequate protection provided by the September Debtors
20 was inadequate and to determine the amount of a superpriority administrative expense
21 claim, the following values must be considered: (1) the value of Enterprise's collateral at
22 the Petition Date of these cases, (2) the value of the collateral now; and (3) the total
23 amount of adequate protection payments made. If the value of Enterprise's collateral
24 declined by an amount greater than the amount of adequate protection payments it
25 received, then Enterprise is entitled to a superpriority administrative expense claim in the
26 amount of the decline in value of its collateral, less any adequate protection payments
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1 received. *In re J.F.K. Acquisitions Group*, 166 B.R. at 212; *In re California Devices, Inc.*,
2 126 B.R. at 85-86.¹

3 Enterprise and the Debtors agree that the current values of Enterprise's collateral
4 are set forth in the Confirmation Decision. However, the parties disagree over the total
5 amount of adequate protection payments made and whether or how the March 2011
6 appraisals relate to valuations of Enterprise's collateral at the Petition Date.

7 *1. Total amount of adequate protection payments made*

8 It is undisputed that the parties agreed that the September Debtors would make
9 adequate protection payments to Enterprise in return for the continued use and possession
10 of Enterprise's collateral. It is also undisputed that the September Debtors made adequate
11 protection payments to Enterprise in the following amounts: the Deer Valley Property -
12 \$40,656.98; the Signal Butte Property - \$37,106.20; the Guadalupe Property -
13 \$41,177.22; and the Broadway Property - \$38,562.02. However, the Debtors also contend
14 that \$23,635.99 in fees paid to the court-appointed examiner should qualify as additional
15 adequate protection to Enterprise.

16 A debtor has the burden of establishing that it provided adequate protection to a
17 creditor. *See In re Grant Broadcasting of Philadelphia, Inc.*, 71 B.R. 376, 386 (Bankr.
18 E.D. Pa.), *aff'd*, 75 B.R. 819 (E.D. Pa. 1987). "The whole purpose in providing adequate
19 protection for a creditor is to insure that the creditor receives the value for which the
20 creditor bargained prebankruptcy." *In re O'Connor*, 808 F.2d 1393, 1396 (10th Cir.
21 1987). Whether value has been provided to a creditor so as to constitute adequate
22 protection is a factual question that "is to be decided flexibly on the proverbial 'case-by-
23 case' basis." *Id.* at 1396-97 (citing *In re Martin*, 761 F.2d 472 (8th Cir. 1985); *In re*
24 *Monroe Park*, 17 B.R. 934 (D.C. Del. 1982)).

25 ¹ This Court recognizes some courts find that a creditor who has stipulated to adequate protection payments
26 is only entitled to a § 507(b) superpriority claim for unforeseeable decreases in the value of their collateral.
27 *See, e.g., In re Callister*, 15 B.R. 521, 530 (Bankr. D. Utah 1981). These courts reason that the creditor
28 should have better predicted the amount of foreseeable decreases in the value of its collateral, such as
depreciation, when it agreed to the amount of adequate protection payments. *See id.* at 533. However, this
Court finds that the *Callister* interpretation encourages creditors to not stipulate or agree to the amount of
adequate protection payments and to not cooperate with the bankruptcy process. *See In re California*
Devices, 126 B.R. at 85-86 (holding that "[t]he *Callister* approach discourages the secured creditor from
cooperating in the reorganization process"). Accordingly, this Court finds that, although Enterprise agreed
to the adequate protection payment amounts, it will be entitled to a superpriority claim attributable to *any*
decrease in value of its collateral and such claims will not be limited to only unforeseeable losses.

1 The Debtors argue that Enterprise received value of \$26,635.99 paid to the
2 examiner because Enterprise should be solely liable for the examiner's fees. In other
3 words, the Debtors contend their payments to the examiner should be treated as made
4 directly to Enterprise. However, the Court already dismissed the argument that the
5 secured creditors should be solely liable for the examiner's fees when it denied the
6 Debtors' Motion to Surcharge on March 18, 2013 (Dkt. #1492). Because Enterprise and
7 other secured creditors are not solely liable for the examiner's fees, Enterprise did not
8 receive value when the September Debtors made payments to the examiner. Payments
9 made by the September Debtors to the examiner should not serve as additional adequate
10 protection to Enterprise.

11 *2. Initial value of the properties*

12 The Debtors argue that a valuation of the gas stations as of the Petition Date must
13 be provided to determine whether the properties have decreased in value. Enterprise, on
14 the other hand, contends that the March 2011 appraisals are sufficient representations of
15 the value of the gas stations on the Petition Date, even though those appraisals were six
16 months after the Petition Date.

17 The starting point to value collateral under § 507(b) is the Petition Date. *See In re*
18 *Weinstein*, 227 B.R. 284, 296 (9th Cir. B.A.P. 1988) ("Adequate protection is provided to
19 safeguard the creditor against depreciation in the value of its collateral during the
20 reorganization process"). In this case, the September Debtors filed bankruptcy in
21 September 2010. Accordingly, the gas stations should be initially valued as of September
22 2010 to determine whether Enterprise's collateral declined in value.

23 However, this Court has not been supplied with collateral appraisals from
24 September 2010. While Enterprise relies on the March 2011 appraisals to support its
25 contention that its collateral decreased in value, the Court finds that the March 2011
26 appraisals, taken almost six months after the Petition Date, are inaccurate representations
27 of the value of the collateral as of September 2010. The only evidence of the collateral
28 values as of September 2010 is contained in the September Debtors' schedules. Those
listed values are considerably lower than the values established by the Confirmation
Decision. Enterprise has, therefore, not proven its collateral has declined in value since
September 2010.

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V. Conclusion

Enterprise has not established that its collateral declined in value between the Petition Date and the date of the Confirmation Decision because no September 2010 appraisals were submitted to the Court and the values identified in the September Debtors' schedules suggest that Enterprise's collateral has increased in value since the Petition Date. Enterprise's Superpriority Application is denied without prejudice. If valuations of Enterprise's collateral as of September 2010 are submitted, the Court will review those valuations and then make a determination as to whether the adequate protection payments made by the September Debtors were insufficient to cover any post-petition diminution in the value of Enterprise's collateral so as to entitle Enterprise to a superpriority administrative expense claim.

So ordered.

Dated: May 2, 2013



DANIEL P. COLLINS
UNITED STATES BANKRUPTCY JUDGE

COPY of the foregoing mailed by the BNC and/or sent by auto-generated mail to:

All interested parties