

SIGNED.



Dated: February 18, 2010

James M. Marlara
JAMES M. MARLAR
Chief Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:) Chapter 11
HARLAN J. RATLIFF and THERESA L.) No. 4:09-bk-03138-JMM
RATLIFF,) Adversary No. 4:09-ap-00275-JMM
Debtors.)

COCHISE AGRICULTURAL PROPERTIES,)
LLC; TODD CAMPBELL and STEPHANIE)
MCRAE, individually and as husband and wife,)
and derivatively on behalf of Cochise)
Agricultural Properties, LLC,)

Plaintiffs,

vs.

RATLIFF FARMS, LLC, an Arizona limited)
liability company; HARLAN JEFFERSON)
RATLIFF and THERESA H. RATLIFF,)
husband and wife; and SECURITY TITLE)
AGENCY, INC., an Arizona business,)

Defendants.)

MEMORANDUM DECISION RE:

1) ATTORNEYS' FEES AND COSTS

AND

2) FORM OF JUDGMENT

Pending before the court are two matters which must be concluded before this case becomes final at the trial level. They are:

1. Plaintiff's Application for an Award of Attorneys' Fees (DN 83); and
2. Finalization of the form of Judgment.

1 The court notes that on January 12, 2010, the Defendants Harlan J. Ratliff and Theresa H. Ratliff
2 filed a notice of appeal (DN 102). However, that appeal is premature because matters at the trial
3 level will not be concluded until the court decides the two matters still remaining, and a final
4 judgment is entered. Once judgment is entered, then the appeal becomes timely. FED. R. BANKR.
5 P. 8002(a).

6 The bankruptcy court retains jurisdiction, despite the filing of a notice of appeal, to
7 rule upon ancillary matters such as awarding attorney's fees. *Masalosaló v. Stonewall Ins. Co.*, 718
8 F.2d 955, 957 (9th Cir. 1983) (citing *White v. N.H. Dept. of Employment Sec.*, 455 U.S. 445, 102
9 S.Ct. 1162 (1982)); *see also United States v. Edwards*, 800 F.2d 878, 884 (9th Cir. 1986). This, of
10 course, includes finalizing the judgment.

11 A timely appeal only deprives the bankruptcy court of the power to alter, expand or
12 vacate the order at issue. *In re Padilla*, 222 F.3d 1184, 1190 (9th Cir. 2000). "The bankruptcy court
13 retains jurisdiction over all other matters that it must undertake 'to implement or enforce the
14 judgment or order' [that is on appeal]." *In re Sherman*, 491 F.3d 948, 967 (9th Cir. 2007) (citing
15 *Padilla*, 222 F.3d at 1190) (alteration added). Here, once the final issues are resolved, and a
16 judgment is rendered and entered by the Clerk, the notice of appeal will simply be deemed
17 premature and treated as timely.

18 19 **A. Attorneys' Fees**

20
21 Plaintiffs seek \$340,736.35 in fees, for work expended by four different firms on their
22 behalf. Two of the firms, Lewis and Roca and Stinson Morrison Hecker, were engaged after the
23 Debtors filed bankruptcy proceedings. The other two firms were general litigation counsel who
24 performed the bulk of the litigation on the non-bankruptcy, state court causes of action, or who bore
25 the bulk of the trial-related duties.

26 The Defendants have objected to the fee request in general, but except for their
27 arguments concerning the Stinson Morrison Hecker fees, have not provided the court with specific
28 dates and times of the services provided which they feel were unreasonable. Their grievance simply

1 complains that the requested fees are excessive, and leaves it to the court to ferret through the fee
2 application in search of improper entries.

3 The Plaintiffs submitted detailed time records for each firm, totaling approximately
4 135 pages (*see* DN 83). Defendants have not pointed to any specific fee entry (with the general
5 exception to the Stinson Morrison Hecker fees) which they feel were inappropriate.

6 The Stinson Morrison Hecker and Lewis and Roca fees were generated solely in
7 response to the Defendants having filed voluntary federal bankruptcy proceedings. Those filings
8 necessitated bringing attorneys into the fray who could advise as to the Plaintiffs' rights with regard
9 to that new legal development. In view of the issues involved, the court does not believe that the
10 fees generated by any firm were unreasonable.

11 Accordingly, Plaintiffs' application for an award of attorneys' fees in the amount of
12 \$340,736.35 will be granted.

13
14 **B. Costs**

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16 Plaintiffs seek taxable costs of \$5,637.95. No objection has been made to that request.
17 They will be granted.

18
19 **C. The Form of Judgment**

20
21 The parties' concerns as to the form of judgment break down into the following
22 categories:

- 23 1. What actual award should be made as to all Plaintiffs, and especially as
24 to Plaintiffs Campbell/McRae?
25 2. Is interest appropriate?
26 • At what rate, state or federal;
27 • May interest be awarded post-petition;
28 • Was it appropriate to award pre-judgment interest?

1 3. Is setoff or recoupment appropriate to allow payment to Plaintiffs
2 before distribution to the Defendants?

3 Each of these questions will be answered in the following paragraphs.

4
5 **1. The Actual Monetary Award**
6

7 Plaintiffs Campbell/McRae were, together, 50% members of Cochise Agricultural
8 Properties, LLC ("CAP"). Campbell/McRae brought suit derivatively on behalf of CAP, and both
9 the corporation and Campbell/McRae were the Plaintiffs in this action. While both the 50%
10 Campbell/McRae members, and CAP were injured by the Defendants' actions, there is practical
11 merit to the argument that only the portion taken from Campbell/McRae needs to be actually
12 compensated. While a wrong, and an injury, also occurred to CAP, CAP, if paid in full, would
13 ultimately distribute half of any recovery (excluding fees and costs) back to Defendants.

14 It would be a meaningless gesture to require the Defendants to pay the full damage
15 amount to CAP, only to then have CAP distribute half of that sum back to Defendants for their 50%
16 share. Instead, only the amount by which Campbell/McRae have been individually damaged needs
17 to be repaid. That sum, as of October 26, 2006, is \$178,188.14.

18 This represents a practical solution, without diluting the importance of the finding of
19 legal liability to both Campbell/McRae and CAP.

20
21 **2. Is Interest Appropriate, and At What Rate?**
22

23 Pre-judgment interest is appropriate on a sum which is easily liquidated. The
24 Memorandum Decision (DN 77), at 37, sets forth the court's reasoning in holding that the damage
25 amount was readily calculable as of October 20, 2006.

26 The Defendants argue that a federal rate of interest should apply, rather than Arizona's
27 10% rate applicable to debt. ARIZ. R. STAT. § 44-1201(A). The court disagrees. This case
28 presented a question of liability under an Arizona contract, between Arizona residents, who were

1 the only members of an Arizona limited liability company. Moreover, the corporation's operating
2 agreement, signed by all the members (parties to this action) provided that the governing law was
3 "the laws of Arizona. . . ." (Ex. D-311 at 25, para. 10.5.) Arizona's law regarding what interest rate
4 to apply was therefore decided by the parties themselves.

5 Thus, interest is calculable, to the date of bankruptcy on the amount owed to
6 Campbell/McRae, as follows:

7		
8	October 26, 2006 Principal	\$178,188.14
9	Interest at 10% from	
10	October 26, 2006 to October 25, 2007	17,818.81
11	Interest at 10% from	
12	October 26, 2007 to October 25, 2008	17,818.81
13	Interest at 10% from	
14	October 26, 2007 to February 24, 2009 (date of bankruptcy filing) (\$48.81 x 122 days)	<u>5,954.82</u>
15	Total due as of date of bankruptcy filing	\$219,780.58
16		

17 The next question is: is interest accruing post-bankruptcy eligible for payment as
18 well? If so, to February 24, 2010, the Defendants would owe an additional, post-bankruptcy amount
19 of \$11,863.99. The court concludes that such post-petition damage is also recoverable, as the
20 setoff/recoupment doctrines would so allow. *See, e.g., Newbery Corp. v. Fireman's Fund Ins. Co.*,
21 95 F.3d 1392, 1399 (9th Cir. 1996); *In re Madigan*, 270 B.R. 749 (9th Cir. BAP 2001). However,
22 the setoff and recoupment doctrines would only be applicable so long as the stream of income from
23 the N.K. note exists. Once the N.K. note is paid in full, then any unpaid balance remaining would
24 be a general unsecured claim, and bankruptcy principles would then apply.

1 **3. Setoff or Recoupment**

2
3 In its decision, the court concluded that setoff and/or recoupment doctrines required
4 full payment to the injured parties, from the Ratliffs' share of the corporate proceeds, prior to the
5 Ratliffs receiving any further distribution. (Memorandum Decision at 38-39, DN 77.) This is
6 because the primary liability of the Ratliffs is to CAP, the corporation. CAP was then obligated to
7 distribute in accordance with its Operating Agreement. Only when the corporation is fully repaid
8 what the Ratliffs wrongfully diverted from it (plus fees and costs) are any proceeds from the N.K.
9 note to be divided between the members according to their 50/50 interests.

10 In this analysis, it is the corporation which owes the Ratliffs 50% of the existing and
11 future proceeds, and it is the Ratliffs who owe the corporation \$356,376.28 (after the offset of
12 \$1,858.61), together with interest, as well as fees and costs. (See Memorandum Decision at 37,
13 DN 77.) Simply because this court, in part C.1. above, recognized the practical reality of only
14 requiring the other 50% members to be paid their share of the damage does not change the legal
15 analysis. The Ratliffs owe the corporation money; the corporation owes the Ratliffs money. This
16 is the very definition of "mutuality." The court's legal authority for imposing this remedy is found
17 at pp. 38-39 of its Memorandum Decision (DN 77).

18 As a result, the Ratliffs are not entitled to any distribution until they have repaid, out
19 of the currently held and future N.K. payments, what they owe to the corporation.

20
21 DATED AND SIGNED ABOVE.

22
23 COPIES to be sent by the Bankruptcy Notification
24 Center ("BNC") to the following:

25 Robert D. Mitchell, Attorney for Plaintiffs

26 Rob Charles, Attorney for Plaintiffs

27 Sally M. Darcy, Attorney for Defendants

28 Office of the U.S. Trustee