

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: ) CASE NO. BK02-81632-TJM  
)  
M & S GRADING, INC., ) CH. 7  
)  
Debtor(s). )

ORDER AMENDING FILING #927

Recently a Memorandum Opinion, Filing #927, was entered which granted the movants' Chapter 11 administrative claim priority for a portion of the accrued interest, liquidated damages, and attorney fees related to delinquent mandatory contributions to the employee benefit plans. In that Memorandum, the liquidated damages were limited to 20% of the still outstanding delinquent amount and the attorney fees were limited to a combination of the still outstanding delinquent amount plus the liquidated damages. The movants were requested to supplement the record so that a final determination of the amounts which would have administrative claim priority in the Chapter 11 case could be determined. At Filing #933, the movants have supplied such information.

After a review of the material provided at Filing #933, it appears that I overlooked the fact that the debtor was delinquent on the mandatory contributions from the beginning of the case, even though all of the mandatory contributions, but for the remaining approximately \$116,000, were eventually received by the Plans. As a result of overlooking that fact, I erroneously limited the liquidated damages and the attorney fees. Therefore, those portions of Filing #927 that limit the liquidated damages to \$23,200 and limit the attorney fees to \$138,200 are withdrawn.

Based upon the calculation contained in Exhibit 1 of Filing #933, the total liquidated damages plus interest accrued up to June 1, 2005, a date within two weeks of the date of conversion to Chapter 7 on June 13, 2005, is \$143,192.55 (Fil. #933, Ex. B to Ex. 1).

Exhibit 2 to Filing #933 is an affidavit from the administrator of the Plans. In it, at paragraph 6, he avers:

All of the attorney fees set out in Docket Entry 880 relate to the collection of the \$116,341 current deficiency along with liquidated damages and interest on said deficiency and on prior deficiencies now paid and relate to looking for assets to satisfy the claim of the funds for the \$116,341 and liquidated damages and interest owed to the health and welfare and pension plans.

To limit the attorney fees to a little more than the current delinquent mandatory contributions is inappropriate. That limitation has been withdrawn, supra. Counsel for the plans worked from the beginning of the case to make certain that the debtor cured the pre-petition delinquency and kept post-petition contributions current. Although counsel did spend quite a bit of time on litigation matters, especially after the trustee was appointed, significant time was incurred prior to the appointment of the trustee in an attempt to get the debtor to pay the mandatory contributions. A considerable amount of the attorney fees incurred in the attempts to remove the trustee, the litigation against the trustee and against the First National Bank of Omaha, and the various appeals from orders denying the relief requested by the movants, although related to efforts by the Plans to obtain payment of the mandatory contributions and ancillary damages, were not reasonable under the circumstances. The circumstances I am referring to include the fact that the First National

Bank of Omaha had an unassailable security interest in all of the assets and yet both the bank and the trustee were required to participate in litigation brought by the Plans, notwithstanding the perfected security interest. In addition, until recently, there was no money in the estate and the money that has come to the estate by virtue of the settlement of one or more avoidance actions has been depleted as the result of the litigation and the incurrence of attorney fees by the Chapter 7 trustee, which fees take priority over the Chapter 11 administrative claims.

Filing #880 is an itemization of attorney fees and disbursements, all incurred on behalf of the Plans. From the beginning of the case in 2002 until the trustee was appointed in December 2004, the attorney fees were \$111,609.90 and disbursements were \$5,677.78. From December 2004 until June 2008, the fees were \$392,235.00 and the disbursements were \$19,078.06. The total is \$503,844.90 in fees and \$24,755.84 in disbursements. I find that \$300,000 of such fees and disbursements were reasonably incurred in an attempt to make certain the contributions were timely made, delinquencies were cured and to collect funds from third parties, including officers of the debtor. That amount is awarded Chapter 11 administrative expense priority.

IT IS ORDERED: Those portions of the Memorandum at Filing #927 that limit the liquidated damages to \$23,200 and limit the attorney fees to \$138,200 are withdrawn. The allowed Chapter 11 administrative expense includes the current deficiency of \$116,341, the interest and liquidated damages on prior and current deficiencies of \$143,192.55, and the attorney fees of \$300,000. The sum of those numbers is \$559,533.55.

DATED: August 20, 2009

BY THE COURT:

/s/ Timothy J. Mahoney  
United States Bankruptcy Judge

Notice given by the Court to:  
Stacey L. Hines  
T. Randall Wright  
\*Maynard H. Weinberg  
Malcolm Young  
U.S. Trustee

Movant (\*) is responsible for giving notice to other parties if required by rule or statute.