

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: §
§
TELEQUESTION, INC., d/b/a § CASE NO. 00-33751-SAF-11
TELEQUEST, INC., §
DEBTOR. §

MEMORANDUM OPINION AND ORDER

Gordon McKenna moves the court for the payment of approximately \$90,000 as an administrative expense. Finova Mezzanine Capital, Inc., a secured creditor, objects to McKenna's motion. Daniel Sherman, the Chapter 11 trustee of the bankruptcy estate of Telequestion, Inc., opposes the motion. The court held an evidentiary hearing on the motion on August 13, 2001.

The allowance of an administrative expense constitutes a core matter over which this court has jurisdiction to enter a final order. 28 U.S.C. §§157(b)(2)(A) and (O) and 1334. This memorandum opinion contains the court's findings of fact and conclusions of law. Bankruptcy Rules 7052 and 9014.

On June 6, 2000, Telequestion filed its petition for relief under Chapter 11 of the Bankruptcy Code. At the request of the first secured creditor, Guaranty Business Credit Corporation d/b/a Fidelity Funding, the court, on June 19, 2000, ordered the appointment of a Chapter 11 trustee. The United States Trustee

appointed Sherman as the trustee. By order entered June 26, 2000, the court confirmed that appointment.

Prior to the filing of the bankruptcy petition, McKenna served as the president and the chairman of the board of the debtor. On June 5, 2000, he transferred \$25,000 to attorney Philip Palmer as a retainer for the bankruptcy case. After the appointment of the trustee, with court approval, Sherman employed Palmer as special counsel. With court authorization, Palmer applied the retainer to his fees. McKenna asserts that he should recover the \$25,000 as an administrative expense.

In addition, McKenna asserts that after the filing of the petition, and the appointment of the trustee notwithstanding, he continued to perform the functions of the debtor's chairman of the board. Claiming that the performance of those functions benefitted the estate, he requests \$65,000 in compensation as an administrative expense.

The Bankruptcy Code provides that "[a]n entity may timely file a request for payment of an administrative expense[.]" 11 U.S.C. §503(a). Additionally, § 503(b) provides that, "After notice and a hearing, there shall be allowed administrative expenses . . . including- (1) (A) the actual, necessary costs and expenses of preserving the estate[.]" McKenna bears the burden of proving that his claim is for "actual, necessary costs and expenses of preserving the estate." In re Transamerican Natural

Gas Corp., 978 F.2d 1409, 1416 (5th Cir. 1992). The words "actual" and "necessary" are to be construed narrowly. "[T]he debt must benefit [the] estate and its creditors." NL Indus., Inc. v. GHR Energy Corp., 940 F.2d 957, 966 (5th Cir. 1991).

McKenna provided Palmer with the \$25,000 retainer before the filing of the bankruptcy petition. Administrative expenses cover transactions with the debtor after the filing of the petition. Even though Palmer did not draw on the retainer until after the filing of the petition, McKenna had advanced the funds pre-petition. If McKenna has any right to repayment of the \$25,000 he advanced to Palmer before the filing of the petition, then that right would constitute a pre-petition claim. Pre-petition claims may not be elevated to post petition administrative expenses. See, In re Phones for All, Inc., 249 B.R. 426, 428-29 (Bankr. N.D. Tex. 2000); In re T & T Roofing and Sheet Metal, Inc., 156 B.R. 780, 782 (Bankr. N.D. Tex. 1993).

Finova would accord McKenna the benefit of the doubt by classifying the advance as a pre-petition loan to the debtor to pay the retainer. However, the allowance of a pre-petition claim is not before the court. McKenna was an equity holder of the debtor. Indeed, the advance may have constituted a capital infusion or equity investment pre-petition and not a loan. But, in any event, it does not constitute an administrative expense.

McKenna also requests payment of \$65,000 for services

provided as chairman of the board from the petition date of June 6, 2000, to August 18, 2000, the date the trustee instructed McKenna to vacate the debtor's premises. McKenna was the chairman of the board pre-petition, and received a \$28,000 per month salary. After the filing of the petition, he held that title, but conducted very few board meetings. He does not contend that the title supports the payment of \$65,000. Rather, McKenna contends that he rendered services to support that payment.

McKenna testified that he recruited two senior employees, but the bankruptcy case pre-empted their employment. Therefore, the recruitment was pre-petition work. McKenna also testified that he represented the debtor at a trade association meeting in Spain during this period. However, he was actually serving as the trade association president. Additionally, the trustee testified that the bankruptcy estate received no benefit from McKenna's attending the Spain meeting.

McKenna testified that he attempted to keep the debtor's staff together, retain customers, maintain positive media coverage and solicit new customers. In June, McKenna did talk to customers and attempt to maintain customer contacts. However, the trustee testified that the bankruptcy estate received no benefit from this activity. McKenna attempted to perform his pre-petition management functions post-petition, but the trustee

informed him that the trustee's appointment displaced the debtor from possession of its business, thereby eliminating the need for McKenna's services.

By July 10, 2001, McKenna hired attorney Steven Ungerman, a bankruptcy specialist, in an attempt to acquire the debtor's business from the bankruptcy estate. Toward that end, McKenna met with an investment banker and arranged financing with a factor to facilitate his attempts. The trustee informed Ungerman that McKenna was to perform no management functions. McKenna's work facilitated his own business interests, not the debtor's operations. Thus, the work from July 10 onward benefitted McKenna and not the bankruptcy estate.

The trustee permitted McKenna to remain in his office as a courtesy, until McKenna's presence became too disruptive. The trustee testified that McKenna's presence was counter-productive because the staff did not want McKenna to have management authority, in part, due to McKenna's explosive personality. In fact, McKenna demonstrated the nature of that personality in his behavior during the hearing on this application. The trustee testified that he informed Ungerman that if McKenna continued to interfere with or attempt to manage the debtor's business, then he would be removed from the premises. By August 18, the trustee had had enough, and locked McKenna out of the debtor's offices.

The debtor's secured creditor, Guaranty Business Credit

Corporation, did not want McKenna in a management position and insisted at the commencement of the case that the debtor be removed from possession of its estate by the appointment of a Chapter 11 trustee. The court granted that request. Neither the trustee nor the court authorized McKenna to perform any corporate management functions following the appointment of the trustee. Moreover, the trustee specifically testified that he did not authorize McKenna to either attend the meeting in Spain or travel on debtor business.

Finova contends that this record establishes that McKenna had no operating authority and conferred no benefit on the bankruptcy estate by his activities. Finova argues that the record establishes that, by attempting to reorganize the debtor, McKenna acted in his own self interest. Additionally, the trustee testified that McKenna provided no benefit to the bankruptcy estate.

McKenna has not established that his unauthorized and unrequested work benefitted either the bankruptcy estate or its creditors. In fact, the trustee testified to the contrary. The first secured creditor, Guaranty Business Credit Corporation, had insisted that the debtor be removed from possession to eliminate McKenna's management control and activity. The court had granted that request. The remaining secured creditor, Finova, opposes the motion, maintaining that McKenna provided no benefit to

either it or to the estate. With the appointment of the trustee, the debtor no longer operated as a debtor in possession. Thus, after the trustee's appointment, the cost and expenses of McKenna's position were unnecessary for the administration of the case. Moreover, McKenna performed no authorized transaction with the debtor after the appointment of the trustee. Thus, McKenna performed no services that enabled the debtor to operate as a debtor in possession as a going concern. Instead, McKenna pursued his own business interests in his attempts to re-acquire the business of the debtor. Moreover, he has not established that his efforts resulted in an actual, tangible benefit to the bankruptcy estate or its creditors. See, Matter of DP Partners Ltd. Partnership, 106 F.3d 667, 672-73 (5th Cir. 1997) (noting that under §503, notwithstanding a creditor's self interest in bringing about a result in a bankruptcy case, the creditor may recover actual and necessary expenses if a substantial contribution to the bankruptcy estate results). See also, In re Milo Butterfinger, 218 B.R. 856, 858-59 (Bankr. N.D. Tex. 1997) (holding that the purchaser of an unsecured claim may recover administrative expense for filing a plan of reorganization if that led the debtor to action that paid non-insider creditors in full in cash rather than make payments over time under the plan originally proposed by the debtor). These cases invoke the requirement of a substantial contribution under

11 U.S.C. §503(b) (3) (D). However, to recover an administrative expense, the cases also require McKenna to establish that his self interest in pursuing certain actions resulted in a benefit to the bankruptcy estate. McKenna has not met his burden.

With the appointment of the trustee, McKenna's activities were unnecessary for the estate or its creditors. McKenna had no authority from the trustee or the court to act on behalf of the estate. McKenna has not established that his acts nevertheless benefitted the estate or its creditors. Even his self interest in re-acquiring the debtor's business did not result in a benefit to the estate or its creditors.

Accordingly, the motion must be denied.

Based on the foregoing,

IT IS ORDERED that the motion by Gordon McKenna for payment of an administrative expense is **DENIED**.

Signed this _____ day of August, 2001.

Steven A. Felsenthal
United States Bankruptcy Judge