

Bruce T Beesley

Honorable Bruce T. Beesley
United States Bankruptcy Judge



Entered on Docket
September 22, 2016

MICHAEL LEHNERS, ESQ.
429 Marsh Ave.
Reno, Nevada 89509
Nevada Bar Number 003331
(775) 786-1695
email michaellehners@yahoo.com
Attorney for Chapter Seven Trustee
Allen Dutra

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

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IN RE

NEVADA FIRE SAFE COUNCIL,
NON-PROFIT CORPORATION

Debtor(s).

BK-N- 12-52625-btb
CHAPTER 7

Hearing Date: 8/29/16
and Time: 10:00 a.m.

Mtn No. _____

Est Time: 25 Minutes

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

THIS MATTER came before the Court for the hearing on the Trustee's Motion to Approve the Compromise with the Department of Justice. Michael Lehnern, Esq. appeared upon behalf of the Chapter Seven Trustee' Allen Dutra. Mr. Dutra was also present. David Watts-Vial, Esq. of the Washoe County District Attorney's Office appeared on behalf of the Truckee Meadows Fire Protection District. Bert Guerra, Esq. appeared

1 on behalf of Cross Check Services, LLC. William Cossitt, Esq. appeared on
2 behalf of the United States Trustee's Office. Margaret Newell, Esq.
3 appeared for the United States, on behalf of the United States
4 Department of Agriculture, Forest Service and the United States
5 Department of Interior, Bureau of Land Management. Frank James Cody
6 appeared by telephone in his proper person. Eric Werner, Esq. of Reese,
7 Kintz, Guinasso, LLC appeared on behalf of North Lake Tahoe Fire
8 Protection District, Tahoe Douglas Fire Protection District, Meeks Bay Fire
9 Protection District, Lake Valley Fire Protection District and North Tahoe
10 Fire Protection District.

11 The Court examined the evidence and the testimony submitted to
12 it. Good cause appearing therefore, the Court finds and Orders as follows:

13 **FINDINGS OF FACT**

14 1. Nevada Fire Safe Council (Fire Safe) is a §501(c)(3) non-profit
15 corporation. It began business in 1999. The focus of Fire Safe is to assist
16 communities to create defensible space within and surrounding
17 communities to protect them from destruction from wildfire.

18 2. Fire Safe applied to the United States Forest Service (USFS)
19 and to the Bureau of Land Management (BLM) for grant monies in order
20 to protect communities from destruction from wildfire. Fire Safe would
21 then subcontract with various vendors and service providers to
22 accomplish the tasks as set forth in the grants.

23 3. The Office of the Inspector General (OIG) conducted an audit
24 of Fire Safe in 2011. The OIG found that Fire Safe did not properly
25 account for its grant funds. Funds from numerous federal grants were
26 commingled with Fire Safe's own funds and used to pay unauthorized
27 expenses. As a result of the resulting audits and Fire Safe's numerous
28

1 violations of federal grant procedures, all grant funds were frozen. Fire
2 Safe filed bankruptcy on November 18, 2012.

3 4. The Trustee and certain third parties turned over documents
4 and records to the federal agencies that oversaw administration of the
5 grant funds. After review and analysis of these documents and claims
6 submitted by Fire Safe, USFS and BLM generated a list of sub-recipients
7 by name and the net amount that is to be paid each entity based upon
8 the relevant grant agreement, claims submitted to USFS and BLM from
9 Fire Safe and documentation of work performed. These creditors are
10 referred to as the Schedule "A" Sub-Recipients.

11 5. The United States has offered to pay into the Bankruptcy
12 Estate the sum of \$2,025,906.00. Of this sum \$1,412,902.04 is allocated
13 to the Schedule "A" Sub-Recipients. The remaining \$613,003.96 are
14 reimbursements payable to the estate and may be used by the Trustee
15 to pay the allowed claims in this bankruptcy in order of priority.

16 6. On April 15, 2016, the Trustee filed his Motion to Approve
17 the Compromise of Estate's Claims (DE 31). Each Schedule "A" Sub-
18 Recipient is entitled to receive the lesser of the amount on Schedule "A"
19 or the amount in the entity's proof of claim. The Trustee is to file a new
20 notice to file claims and establish a bar date. A copy of the Agreement
21 between the Trustee and the United States was attached as Exhibit "I" to
22 the Trustee's Motion and the terms of it are incorporated by reference.

23 7. The motion was opposed by Cross Check Services, LLC., Frank
24 James Cody, North Lake Tahoe Fire Protection District, Tahoe Douglas Fire
25 Protection District, Meeks Bay Fire Protection District, Lake Valley Fire
26 Protection District and North Tahoe Fire Protection District.

1 8. A hearing on the Trustee's Motion was set for June 1, 2016,
2 but was subsequently moved to May 31, 2016. On May 31, 2016 this
3 Court entered a minute order continuing the Trustee's Motion to June 22,
4 2016. On June 22, 2016 this Court entered a second minute order that
5 set a status hearing for August 1, 2016. On June 27, 2016 this Court
6 entered a third minute order continuing the Trustee's Motion to August
7 29, 2016.

8 9. The Court granted these continuances and set status
9 conferences to provide a timeframe for the objecting creditors to
10 communicate with the Department of Justice with respect to the amounts
11 that were allocated for the Schedule "A" Sub-Recipients.

12 10. On or about July 5, 2016 the Trustee sent a letter to the
13 creditor matrix that provided an update and sought feedback from the
14 creditors. On July 26, 2016 the Trustee filed a Status Report with this
15 Court (DE 71). The Status Report contained copies of the July 22, 2016
16 letters (minus enclosures) from the Department of Justice to each of the
17 objecting creditors regarding the federal agencies' assessment of the
18 materials reviewed. The Status Report also contained a list of nine
19 creditors that had responded to the Trustee's July 5, 2016 letter. Of
20 those nine, eight were in favor of approval of the Agreement. One
21 creditor, Kimball Tree Service, was not in favor of the agreement.

22 11. The Court finds that the use of federal grant funds is subject
23 to numerous federal regulations and accounting controls. As such, the
24 Debtor's prepetition use of these funds was highly restricted by the
25 terms of the grants and governing federal statutes, regulations and
26 agency policies. The Debtor had no beneficial interest in the grant funds
27 themselves.
28

1 12. The Settlement Agreement requires the Trustee to assume
2 responsibility for making the distributions of \$1,412,902.04 to the
3 Schedule "A" Sub-Recipients. In consideration, the Agreement provides
4 that the Trustee may seek court approval of a statutory commission
5 calculated based on distribution of the funds paid to the Schedule "A"
6 Sub-Recipients as well as the \$613,003.96 that is being paid to the
7 Estate.

8 13. On January 9, 2012 the Debtor acquired a Non-Profit
9 Organization and Management Liability Insurance Policy from Old
10 Republic Insurance, Policy No. ALT 63747.

11 14. This Policy has an aggregate limit of Liability of \$1,000,000.

12 15. On August 26, 2015 this Court entered an order assigning the
13 Debtor's rights against Old Republic to Cross Check. Cross Check's proof of
14 claim is \$249,954.52.

15 16. The Trustee has assigned the Debtor's remaining rights
16 against Old Republic to North Lake Tahoe Fire Protection District, Tahoe
17 Douglas Fire Protection District, Meeks Bay Fire Protection District, Lake
18 Valley Fire Protection District and North Tahoe Fire Protection District
19 (the Districts). This assignment includes the 10% payable to the Estate
20 pursuant to the August 26, 2015 Order referenced in the preceding
21 paragraph. In exchange, the Districts have withdrawn their Opposition to
22 the Trustee's Motion.

23 17. Any finding of fact which is more appropriately deemed to
24 be a conclusion of law shall be so deemed.

CONCLUSIONS OF LAW

1
2 1. The \$1,412,902.04 is allocated to the Schedule "A" Sub-
3 Recipients according to Fire Safe's net allowable unpaid claims under the
4 Debtor's grants.

5 2. The Debtor's use of grant funds was strictly controlled by
6 numerous federal regulations and accounting requirements that are
7 imposed upon federal grant recipients.

8 3. This Court finds that the funds allocated to the Schedule "A"
9 Sub-Recipients are not property of the bankruptcy estate under section
10 541(a) because the Debtor lacked any beneficial or equitable interest in
11 these grant funds and its use of the funds was limited to budgeted and
12 allowed uses defined and controlled by its grants and applicable federal
13 statutes, regulations and agency policies.

14 4. The creditors of the Debtor did not have any contract,
15 express or implied in fact, with the United States. As such, no creditor
16 has the right to directly sue the United States or any of its agencies,
17 officers or employees in connection with Fire Safe's grants or work
18 performed for Fire Safe.

19 5. The Court has considered the factors set forth in *In re A & C*
20 *Properties*, 784 F.2d 1377, 1380-81 (9th Cir. 1986).

21 6. ~~The Court finds that had the Trustee filed suit against the~~
22 ~~United States or any of its federal agencies, he would not have had a~~
23 ~~high probability of success on the merits due to the fact the grant funds~~
24 ~~were not property of the estate due to the control exercised over the~~
25 ~~grant recipient's use of funds.~~

26 7. The Court finds that had the Trustee recovered in such a
27 lawsuit, there would be no difficulty of collection.
28

8. The Court finds that such a lawsuit would have been somewhat complex due to the regulations and audit requirements that concern grant use.

9. The Court finds that this Settlement is in the best interests of all creditors because payment of \$613,003.96 to the estate was conditioned upon having the Trustee pay \$1,412,902.04 to the Schedule "A" Sub-Recipients. If that condition is not met, then creditors receive nothing.

10. Any conclusion of law which is more appropriately deemed to be a finding of fact shall be so deemed.

Approved/Disapproved

Dated: September 5, 2016

Dated: _____

Michael Lehnert
Michael Lehnert, Esq.
Attorney for the Chapter 7 Trustee

Bert Guerra
Bert Guerra, Esq.
Attorney for Cross Check Services, LLC.

Approved/Disapproved

Dated: _____

Margaret M. Newell
Margaret M. Newell, Esq.
United States Department of
Justice Civil Division, Commercial
Litigation Branch Attorney for the
United States of America

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CERTIFICATION PER LR 9021

In accordance with LR 9021, counsel submitting this document certifies as follows:

____ The court has waived the requirement of approval under LR 9021.

____ No parties filed written objections and/or Signature waived at court.

XX ORDER SIGNED OFF BY ALL PARTIES

____ I have delivered a copy of this proposed order to all counsel who appeared at the hearing, any unrepresented parties who appeared at the hearing, and any trustee appointed in this case, and each has approved or disapproved the order, or failed to respond, as indicated below:

/s/ Michael Lehnern, Esq.
Michael Lehnern, Esq.
attorney for Movant