

SIGNED.



Dated: December 17, 2009

Randolph J. Haines

RANDOLPH J. HAINES
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re)	Chapter 11
)	
)	CASE NO. 2:08-bk-07465-RJH
)	
MORTGAGES LTD.,)	
)	ORDER GRANTING RADICAL BUNNY'S
Debtor.)	ADMINISTRATIVE CLAIM FOR
)	SUBSTANTIAL CONTRIBUTION

Radical Bunny, L.L.C., seeks an award of \$572,945 in attorneys' fees and \$22,852.75 in costs as a substantial contribution administrative claim pursuant to Bankruptcy Code § 503(b)(3)(D). The Liquidating Trustee and others objected.

Although "substantial contribution" is not defined by the Code, the Ninth Circuit has set forth the governing standard in both *Cellular 101*¹ and *Christian Life*.² *Cellular 101* reiterated that "the principal test of substantial contribution is 'the extent of benefit to the estate.'"³ In that case, after noting that a substantial contribution need not lead to confirmation of a plan, the creditor was held to have "substantially contributed to the estate by developing the only plan that was presented to the bankruptcy court and by waiving its pre-petition claim."⁴ The opinion also noted a conflict among the circuits as to the relevance or importance of a creditor's self interest, with the Fifth and Eleventh Circuits holding that the creditor's

¹*Cellular 101, Inc.v. Channel Communications, Inc. (In re Cellular 101, Inc.)*, 377 F.3d 1092 (9th Cir. 2004).

²*Christian Life Center Litigation Defense Committee v. Silva (In re Christian Life Center)*, 821 F.2d 1370 (9th Cir. 1987).

³377 F.3d at 1096.

⁴*Id.* at 1097.

1 motive or self interest has little to no relevance, with the Third and Tenth Circuit holding that
2 creditors' efforts that are solely or primarily self interested are not compensable. Ultimately,
3 the Ninth Circuit said it need not choose between those competing approaches and need not
4 decide "whether a creditor's motivation may ever be relevant or dispositive," because in the
5 case before it the benefit to the creditor from its own efforts "is outweighed by the extent of the
6 benefit those efforts conferred on the estate."⁵ Yet although the opinion stated the court was
7 not deciding among the conflicting views, that conclusion does seem to conclusively reject any
8 analysis that the benefit to a creditor constitutes a per se disqualification or limitation of a
9 substantial contribution claim. Instead, it seems to be a holding that a substantial contribution
10 claim may be awarded in its entirety so long as the benefit to the estate outweighs the benefit to
11 the creditor. The only restriction or limitation the opinion seems to impose in that regard is that
12 the contribution to the reorganization must be substantial and not "incidental" or "minimal."⁶
13 The concurring opinion elaborated that neither the language of the Code nor its legislative
14 history gave any indication that a creditor's motivation has any relevance at all, and that such
15 consideration of a creditor's motivation would effectively "add" an "altruistic requirement into
16 the statute."⁷

17 Radical Bunny has asserted that it provided a substantial contribution by
18 proposing, outlining, negotiating and ultimately drafting the initial draft of the plan in this case,
19 by permitting the use of what it claimed as cash collateral, by insisting upon and negotiating
20 much more favorable post petition financing than the Debtor proposed and then agreeing to
21 subordination to such financing, and by various other actions to conserve assets and negotiate
22 resolution of disputes.

23 As reflected in their joint statement of material facts, the Liquidating Trustee
24 does not significantly dispute these facts that Radical Bunny alleges as the basis for its

25
26 ⁵*Id.* at 1097-98.

27 ⁶*Id.* at 1098.

28 ⁷*Id.* at 1099 (Brunetti, J., concurring).

1 substantial contribution claim. In particular, the Liquidating Trustee agrees that Radical Bunny
2 “began drafting a joint plan” in October of 2008, and thereafter “worked cooperatively” with
3 the Official Investors Committee to formulate, draft and negotiate that plan. The Liquidating
4 Trustee also agrees that under the plan, Radical Bunny agreed to pledge its claimed interest in
5 the various loans for the exit financing that is the source of payment of all post confirmation
6 expenses, and that without its pledge of those interests the exit financing would not have been
7 available without a ruling as to whether Radical Bunny was secured or unsecured. Ultimately,
8 however, the Liquidating Trustee contends that Radical Bunny’s efforts in preparing and
9 negotiating the plan were duplicative and were performed to protect Radical Bunny’s own
10 interest.

11 The Liquidating Trustee also agrees that Radical Bunny “helped structure
12 agreements on financing, cash collateral and the Plan that insured the cash flow to allow the
13 Debtor to continue operation during and after the Chapter 11 case,” and that counsel for
14 Radical Bunny and counsel for the Official Investors Committee “divided work based upon
15 strength and resources in dealing with these financing issues.” The Liquidating Trustee also
16 agrees that Radical Bunny’s primary attorney “was routinely requested to participate in
17 meetings with the Official Investors Committee, which sometimes requested that Radical
18 Bunny lead the charge on issues that would have adversely affected the estate if the Debtor’s
19 acts went unchallenged.” The Liquidating Trustee also agrees that Radical Bunny allowed the
20 Debtor to use cash collateral that Radical Bunny claimed an interest in, for which Radical
21 Bunny received no adequate protection. And the Liquidating Trustee agrees that Radical
22 Bunny’s “legally presumed first priority security interest” in approximately \$13 million of
23 assets was subordinated to the interim working capital DIP loan to fund the Debtor’s
24 operations, and to a \$5 million final working capital loan, and that no other creditor’s lien or
25 security interest or investor’s ownership interests was subordinated to such loans.

26 Notwithstanding such agreement on the fundamental facts, the Liquidating
27 Trustee opposes the substantial contribution claim on essentially three grounds: (1) because
28 Radical Bunny’s “actions have been motivated only by its own self interest,” (2) because

1 Radical Bunny's efforts "were duplicative of the work" of the Official Investors Committee,
2 and (3) because after the efforts through December 2008 that Radical Bunny claims provided a
3 substantial contribution, Radical Bunny's own trustee took control of Radical Bunny, changed
4 its position, hired new counsel, and opposed confirmation of the plan, although it ultimately
5 dropped such opposition.

6 Some of the Liquidating Trustee's arguments are contrary to the facts to which it
7 has agreed. For example, the argument that Radical Bunny's efforts were "duplicative" cannot
8 stand with the admission that Radical Bunny proposed and drafted the initial plan, was actually
9 requested to and did take the lead in making arguments to preserve the Debtor's assets, and
10 subordinated its claimed security interest to permit the use of cash collateral, DIP loans and exit
11 financing. The other arguments – that Radical Bunny's efforts were motivated by self interest,
12 and that Radical Bunny subsequently changed position – are not recognized by *Cellular 101* as
13 bases for denying a substantial contribution claim. Indeed, the *Cellular 101* opinion makes
14 clear that the substantial contribution need not lead to confirmation of a plan, although here it is
15 undisputed that Radical Bunny proposed, negotiated and drafted the essential form of the plan
16 that was ultimately confirmed.

17 Finally, there does not appear to be any factual or legal objection to Radical
18 Bunny's argument that it alone subordinated its claimed security interest to permit the use of
19 cash collateral, to permit DIP loans and ultimately to permit exit financing, and that no other
20 secured creditor or investor-owner similarly did so. The only implicit argument is that Radical
21 Bunny's claim was never finally allowed as a secured claim, but it is admitted that Radical
22 Bunny's concessions meant its secured status did not need to be litigated and it is undisputed
23 that Radical Bunny had a substantial basis to claim secured status, based upon a timely signed
24 and filed UCC-1 financing statement.

25 Based on the stipulated facts, the Court finds and concludes that Radical
26 Bunny's claim very closely approximates that which was approved by the Ninth Circuit in
27 *Cellular 101*, and that the amount claimed provided a benefit to the estate that was neither
28 incidental or minimal and that exceeded the benefit to Radical Bunny. Radical Bunny's claim

