NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP Nos. NV-11-1061-HKwJu NV-11-1082-HKwJu
ALFRED J.R. VILLALOBOS,	(Related Appeals)
Debtor.	Bk. No. 10-52248
UNITED STATES OF AMERICA,	
Appellant,	
v.	**M E M O R A N D U M**[1]
ALFRED J.R. VILLALOBOS; ARVCO CAPITAL RESEARCH, LLC,	
Appellees.	

Argued and Submitted on July 21, 2011
at Las Vegas, Nevada

Filed - August 19, 2011

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable John L. Peterson, Bankruptcy Judge, Presiding

Appearances: Virginia Cronan Lowe of the U.S. Department of Justice argued for Appellant; Chris D. Nichols of Belding, Harris & Petroni, Ltd. argued for Appellees.

Before: HOLLOWELL, KWAN[2], and JURY, Bankruptcy Judges.

[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

[2] The Hon. Robert N. Kwan, Bankruptcy Judge for the Central District of California, sitting by designation.

The United States of America, on behalf of its agency, the Internal Revenue Service (IRS), appeals the bankruptcy court's order approving the debtor's request for postpetition financing, as well as the bankruptcy court's nunc pro tunc approval of the debtor's expenses in accordance with a proposed budget. For the following reasons, we REVERSE the bankruptcy court's approval of the financing and REMAND for further proceedings consistent with this decision. We also REVERSE the order approving the debtor's expenses and REMAND the matter to the bankruptcy court to issue sufficient findings of fact and conclusions of law to support approval or disapproval of the expenses in the debtor's proposed budget, as well as to support approval of the debtor's budget nunc pro tunc to the petition date.

I. FACTS

Alfred J.R. Villalobos (the Debtor) has been a private investment banker for over 30 years. On June 9, 2010, the Debtor filed a voluntary chapter 11[3] petition. He serves as the debtor-in-possession (DIP) of his bankruptcy estate. His estate is large, with bankruptcy schedules listing assets in excess of $62 million, including real property estimated at $29,075,000 and personal property totaling $33,344,410. According to the Debtor's schedules, he receives monthly income of $100,000, representing draws from his continuing business operations, and averages monthly expenses of $72,865. Since the petition date,

[3] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All Rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

however, the Debtor has received no more than a couple thousand dollars in income.

The Debtor owns 23 parcels of real property (Properties), with a combined value of $29,075,000, including a $10 million residence in Zephyr Cove, Nevada, a $5.4 million vacation home in Lahaina, Hawaii, and two suites in a commercial office building with a combined value of $5 million. The Debtor estimates that substantial equity exists in all but one of the Properties.

The Debtor also owns, and serves as the managing member of, several businesses, including Arvco Capital Research, LLC (ACR), Arvco Financial Ventures, LLC (AFV), and Arvco Art, Inc. (AAI). Each of the businesses filed separate chapter 11 cases, all of which are jointly administered with the Debtor's chapter 11 case. The Debtor owns 100% of AAI and 99% each of AFV and ACR. ACR no longer operates, but has outstanding accounts receivable of approximately $9,075,000. The Debtor acts as Chairman of AFV, a company providing investment banking and financial advisory services. AAI is a holding company for the Debtor's art collection. Each of the related entities is operating as a DIP.

Among the Debtor's assets are five luxury automobiles, including two Bentleys, a Hummer, a BMW, and a Mercedes, with an aggregate scheduled value of $390,000. The Debtor listed a pending lawsuit against the California Public Employees Retirement System (CalPERS) and the California Attorney General as an asset; he estimated the value of the claims at $10,000,000 (the California Litigation).[4] However, the California Attorney

[4] California v. Villalobos, et al., Case No. SC107850.

General filed a $41,000,000 proof of claim in the Debtor's and ACR's cases. The California Attorney General asserts claims for multiple violations of securities and unfair competition laws. The Debtor continues to incur costs related to the California Litigation, including substantial attorneys' fees.

The Debtor's Motions To Incur Unsecured Debt

On October 14, 2010, the Debtor filed a motion for authorization to incur unsecured debt under § 364(b) and allow the expense as an administrative expense under § 503(b) (the Motion to Incur Debt). In the Motion to Incur Debt, the Debtor sought authorization of a non-ordinary course $5,000,000 no-interest line of credit from co-debtor ACR to fund the Debtor's day-to-day activities, bankruptcy professional fees and attorneys' fees for counsel retained in the California Litigation. The line of credit was to be funded by co-debtor ACR's collection of its accounts receivable. The Debtor provided no information to explain why the line of credit was necessary, as opposed to the equity draws that had been typical prior to the bankruptcy.

The California Attorney General and the Official Committee of Unsecured Creditors (Committee) both filed objections to the Motion to Incur Debt. The Committee requested that the bankruptcy court impose certain safeguards to protect the creditors in the ACR case. The Committee asserted that ACR should be required to retain at least the first $310,000 collected on its receivables to pay, in full, all undisputed unsecured creditors of the ACR estate. The California Attorney General opposed the Motion to Incur Debt, arguing that it was

premature, namely, that there was no evidence that ACR actually had any funds that could be lent to the Debtor. Additionally, the Attorney General argued that there was no credit agreement between the Debtor and ACR and no budget listing what expenses would be paid with the Loan, in contravention of Local Rule 4001(b)(2) and Rule 4001(c)(1)(A).[5]

The bankruptcy court held a hearing on November 2, 2010. At the hearing, the bankruptcy court expressed concern that the Motion to Incur Debt had not been properly noticed and denied it without prejudice.

On November 18, 2010, the Debtor amended the Motion to Incur Debt (the Amended Motion). With the Amended Motion, the Debtor included a copy of a credit agreement and a monthly budget (the Budget). The credit agreement outlined a $5,000,000 line of credit similar to the one contemplated by the Motion to Incur Debt, drawn on ACR's accounts receivables, but bearing interest equal to the Federal Short Term Rate as published by the IRS in accordance with § 1274(d) of the Internal Revenue Code, 26 U.S.C. §§ 1-9834, and maturing twelve months after the effective date of a plan of reorganization in the case (the Loan). The Amended Motion did not provide any information clarifying the need for the Loan.

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[5] The United States Trustee (UST) echoed this concern, noting that the Debtor had not provided a budget until he filed his Reply, three days before the hearing. Additionally, the UST expressed concern that the Motion to Incur Debt had been brought on an expedited basis but the Debtor had not asserted circumstances justifying expedited relief.

The Amended Motion was intended to address the concerns of the Committee by stipulating that any order approving the Loan would specify that the first $310,000 collected from ACR's accounts receivable would be retained to ensure payment of ACR's undisputed unsecured creditors.

The Committee responded to the Amended Motion and asserted that after further investigation, it appeared to the Committee that a more substantial reserve was required. The Committee explained that while ACR's undisputed unsecured claims were scheduled at $310,000, ACR's disputed debts brought the total owed to well over $1 million, exclusive of any claim arising from the $95,000,000[6] California Litigation, in which ACR was listed as a co-defendant.[7] The Committee also objected based on further investigation of ACR's assets. Of the $24,075,638 in assets listed on ACR's schedules, ACR claimed $10,000,000 was attributable to claims related to the California Litigation. Additionally, at least $5,000,000 in scheduled assets were attributable to claims against Apollo Management and Aurora Resurgence Capital, and the Committee questioned whether those accounts were collectable considering that both entities had filed proofs of claim against ACR.

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[6] The alleged damages listed on ACR's schedules differs from the $41,000,000 asserted in California's proof of claim.

[7] ACR's schedules, showing the California Attorney General as a creditor, were not included in the excerpt of record. However, we may take judicial notice of relevant documents filed on the bankruptcy court's electronic docketing system. See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989).

The Debtor's Motion To Pay Ordinary Course Expenses

Also on November 18, 2010, the Debtor filed a motion to approve nunc pro tunc payment of ordinary course expenses pursuant to §§ 363(c)(1) and 1115 (the Expense Motion). In the Expense Motion, the Debtor requested approval of prior and future payment of certain expenses. The Debtor asserted that his monthly expenses were ordinary course expenses necessary to preserve estate assets. The Debtor sought approval of the Budget nunc pro tunc to the petition date and prospectively during the bankruptcy case.[8] The Debtor did not, however, explain why nunc pro tunc approval was necessary or appropriate.

The Budget included monthly expenses totaling $128,052, broken into two general categories: (1) Mortgages and Other Property Expenses and (2) Personal Expenses. The Mortgages and Other Property Expenses included $55,419.00 for the Properties, including three properties with mortgages in excess of $10,000 per month. The Personal Expenses consisted of fixed monthly costs totaling $50,200. The fixed costs included a $39,000 projected monthly payment to the IRS to pay for 2009 taxes, estimated by the Debtor at $2.6 million. The remainder of the fixed costs included insurance, pool service, dry cleaning, cleaning services, and $1,700 for medications.

[8] Neither the Expense Motion nor the order approving the Expense Motion (Expense Order) included an ending date for the Budget. At oral argument, the Debtor informed the Panel that the Budget had been approved until June 2011, and a new budget of $10,000 per month was pending approval in the bankruptcy court. The IRS stated it was unaware that the new budget was finalized or set for approval by the bankruptcy court.

Finally, the Debtor's budgeted semi-variable Personal Expenses totaled $22,433. The semi-variable expenses included dental, medical, utilities, homeowners' insurance and food. They also included $13,643 per month for an office mortgage. Additionally, the Debtor included over $2,585 for ownership expenses on the five luxury automobiles, and tuition expenses for his grandchildren, totaling $117,500 for the 2010-2011 school year.

The IRS filed an objection to both the Amended Motion and the Expense Motion. The IRS had become aware, shortly after the Debtor filed the Amended Motion, of a tax liability owed by the Debtor. It filed a proof of claim asserting a priority tax claim in the amount of $2,529,506.37. The IRS objected to treating the Loan as an administrative expense because the Debtor was proposing to use the Loan proceeds to pay personal expenses that the IRS argued were not necessary to preserve the estate. The IRS claimed that approving the Amended Motion would violate the absolute priority rule by elevating the Debtor's personal expenses over the claims of priority creditors like the IRS.[9]

[9] The Committee and the California Attorney General also filed objections to the Amended Motion, but have not appealed the bankruptcy court's decision. Both echoed the IRS's objections that various budgeted expenses were not necessary to preserve the estate. However, the Committee also objected on several other grounds. The Committee renewed its objection that a litigation budget should be provided for the California Litigation. The Committee also contended that expenses in the California Litigation should not be approved to the extent they would be used to defend nondischargeable securities fraud claims.

For similar reasons, the IRS objected to the Expense Motion. It argued that the bankruptcy court should consider each expense category separately and permit administrative expense priority only for the actual, necessary expenses of preserving the estate. The IRS contended that use of any estate funds to pay the Debtor's personal expenses was not necessary to preserving the Debtor's estate. Additionally, the IRS asserted that approval of the Expense Motion nunc pro tunc was improper because the Debtor failed to timely file monthly operating reports, which had precluded creditors from objecting to his ongoing expenses.

Finally, the IRS argued that both the Debtor and ACR were violating their fiduciary duties by agreeing to the Loan. The IRS claimed that the Debtor was improperly attempting to pay personal expenses ahead of priority creditors and that ACR was failing in its duty to protect and preserve its estate by proposing to lend money without showing any resulting benefit to its estate.

The Debtor replied to the IRS's objections on December 9, 2010. He asserted that "[t]he vast majority" of the budgeted expenses involved costs of preserving and administering the Debtor's estate. To the extent the expenses included personal living expenses, the Debtor argued he simply "could not survive" without them. The Debtor also explained that he should not be denied nunc pro tunc approval for failing to file monthly operating reports because he was only able to compile the operating reports after more information regarding the California Litigation became available.

The Hearing and the Bankruptcy Court's Rulings

On December 16, 2010, the bankruptcy court held a hearing on the Amended Motion and the Expense Motion (the Hearing). At the Hearing, the Debtor testified that most of the Budget expenses were needed to preserve valuable estate property until he could liquidate assets.

More specifically, the Debtor explained that he planned to sell nearly all of the Properties and automobiles and needed the financing to preserve the Properties until they could be sold for the benefit of his estate. To that end, the Debtor testified that all but two of the Properties were up for sale and listed with real estate agents. He also testified that he planned to sell three of the cars and had already spoken with car dealers about selling the two Bentleys. He planned to sell the Hummer but had to have it shipped from Hawaii before it could be sold. He explained that he planned to keep his "old Mercedes," with a value of $15,000, because he "may need that car." The BMW was the car he used daily, and he stated he intended to keep it.

The Debtor also testified that the tuition payments for his grandchildren's college and private school were expenses that he had committed to pay and had historically paid. He explained that $40,000 of the tuition was due (at the time of the Hearing) to cover the fall semester for his three college-aged granddaughters, with an additional $60,000 due in June 2011. The Debtor also testified that he had already paid about $18,000 for tuition to cover private elementary and high school tuition for his three grandsons. The Debtor also disclosed that the three college-aged granddaughters would be seeking other sources of

funding after the 2010-2011 school year. He did not discuss whether he planned to continue to pay the tuition of his three grandson's private school.

At the conclusion of the Hearing, the bankruptcy court granted the Expense Motion and Budget. The bankruptcy court made no findings as to the reasonableness of any of the expenses contained in the Budget, but stated, regarding the tuition payments:

> THE COURT: I'm not going to throw the kids out of college.
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> . . .
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> THE COURT: I'm going to hold that they are ordinary expenses of this debtor and they have been traditionally and they're going to continue.

Hr'g Tr. (Dec. 16, 2010) at 52:24-53:5.

The bankruptcy court took the Amended Motion under advisement. On January 19, 2011, the bankruptcy court entered an order approving the Amended Motion (the § 364 Order). The § 364 Order granted the Amended Motion for "good cause," but did not articulate any findings that the Loan or proposed expenses were actual, necessary costs and expenses of preserving the Debtor's bankruptcy estate or that ACR acted in good faith in providing the Loan.

On February 3, 2011, the bankruptcy court entered two separate orders, the Expense Order and an order granting a similar motion to approve expenses of AFV. The IRS timely appealed the § 364 Order and the Expense Order.[10]

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[10] The IRS requested that we consolidate the two appeals. The BAP denied the IRS's request on April 8, 2011. However, the parties have been allowed to jointly brief the appeals.

Although not provided to us in the record on appeal, the IRS filed a motion for a stay pending appeal. The bankruptcy court denied that motion in an order dated April 13, 2011 (Stay Order). As part of the Stay Order, the bankruptcy court explained that it had approved the Amended Motion and Expense Motion, in part, because the Debtor had sufficient assets to pay all administrative creditors and the IRS's priority claim. The IRS did not seek a stay from the Bankruptcy Appellate Panel (BAP).

II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(D), (M). We address our jurisdiction under 28 U.S.C. § 158 below.

III. ISSUES

(1) Did the bankruptcy court err in approving the Amended Motion?

(2) Did the bankruptcy court err in approving the Expense Motion?

(3) Did the bankruptcy court err in approving payment of the Debtor's expenses nunc pro tunc to the petition date?

IV. STANDARDS OF REVIEW

We review de novo whether an appeal is moot. See Menk v. Lapaglia (In re Menk), 241 B.R. 896, 903 (9th Cir. BAP 1999). We review a bankruptcy court's order approving a loan under § 364(b) and permitting the debtor to use estate property under § 363 for an abuse of discretion. See Mark IV Props., Inc. v. Club Dev. & Mgmt. Corp. (In re Club Dev. & Mgmt. Corp.), 27 B.R. 610, 611-12 (9th Cir. BAP 1982) (§ 364(b)); Walter v. Sunwest Bank (In re Walter), 83 B.R. 14, 17, 20 (9th Cir. BAP 1988)

(§ 363). A bankruptcy court's order allowing or disallowing administrative expenses under § 503(b)(1) is reviewed for abuse of discretion. Gonzalez v. Gottlieb (In re Metro Fulfillment, Inc.), 294 B.R. 306, 309 (9th Cir. BAP 2003).

A bankruptcy court abuses its discretion when it applies the incorrect legal rule or its application of the correct legal rule is "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." United States v. Loew, 593 F.3d 1136, 1139 (9th Cir. 2010), quoting United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc). A factual finding is clearly erroneous if it is "illogical, implausible, or without support in the record." United States v. Loew, 593 F.3d at 1139.

V. DISCUSSION

A. Mootness

The first issue we consider is whether the appeal of the § 364 Order has been rendered moot by the absence of a stay pending appeal. Because we have no jurisdiction over a moot appeal, we address this threshold issue first. See, e.g., Gator.com Corp. v. L.L. Bean, Inc., 398 F.3d 1125, 1128-29 (9th Cir. 2005); Burchinal v. Cent. Wash. Bank (In re Adams Apple, Inc.), 829 F.2d 1484, 1487-88 n.4 (9th Cir. 1987). We were concerned that the IRS's appeal of the § 364 Order was statutorily moot under § 364(e). Statutory mootness, unlike constitutional mootness, is applied to bar judicial review of orders even when a live dispute exists. See e.g., Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25, 33-34 (9th Cir. BAP 2008).

The Bankruptcy Code permits a debtor to incur unsecured debt outside of the ordinary course of business "allowable under section 503(b)(1) as an administrative expense." 11 U.S.C. § 364(b). After a bankruptcy court approves a loan under § 364, § 364(e) protects debtors and lenders by providing that:

> [t]he reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

If the Loan fell within the scope of § 364(e), we would be required to dismiss the appeal of the § 364 Order as moot.

At oral argument on appeal, the parties informed us that no proceeds have been advanced under the Loan. Therefore, our concern that the appeal of the § 364 Order was moot has been allayed. Transamerica Commercial Fin. Corp. v. Citibank, N.A. (In re Sun Runner Marine, Inc.), 945 F.2d 1089, 1094 (9th Cir. 1991) (explaining that prior precedent held an appeal moot only to the extent that "the bankruptcy court grants cross-collateralization under § 364, postpetition credit is extended in reliance thereon, an appeal is taken, and no stay pending appeal is sought.") (emphasis added). Because no funds have been advanced, ACR will not be prejudiced in any way by reversal of the § 364 Order. We conclude that § 364(e) does not render moot the IRS's appeal of the § 364 Order and we next consider the merits of that appeal.

B. The § 364 Order

A trustee or DIP in a chapter 11 case may incur unsecured debt in the ordinary course of business that is allowable under § 503(b)(1). 11 U.S.C. § 364(a). However, in order to incur unsecured debt outside the ordinary course of business, the trustee or DIP must seek bankruptcy court authorization after notice and a hearing. 11 U.S.C. §§ 364(b), 1107(a). Section 364(b) states:

(b) The court, after notice and a hearing, may authorize the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title as an administrative expense.

Debt incurred under § 364(b) is allowable as an administrative expense under § 503(b)(1) only if it is an actual, necessary cost or expense of preserving the estate. In re Club Dev. & Mgmt. Corp., 27 B.R. at 611-12. "An order granted pursuant to § 364(b) must be supported by such a finding." Id.

The IRS argues that § 364 allows a debtor to incur a debt only if all of the proceeds of that debt are used to pay expenses that qualify as administrative expense claims under § 503(b)(1). Section 503(b)(1) provides administrative expense priority to those expenses that are the actual, necessary costs and expenses of preserving the estate. The IRS asserts that most of the expenses in the Budget, which the Debtor proposes to pay from the proceeds of the Loan, are personal expenses not otherwise entitled to administrative expense priority under § 503(b)(1). Accordingly, the IRS argues that the bankruptcy court erred in

granting the Amended Motion.

The case law is not clear regarding whether the bankruptcy court must determine that the claim created by the loan itself meets the requirements for administrative expense priority under § 503(b)(1), or, whether a debtor must show that all the expenses he intends to pay from the proceeds of the loan meet the requirements. Compare In re Kmart Corp., 359 F.3d 866, 872 (7th Cir. 2004) (§ 364(b) only addresses a debtor's ability to incur debt or obtain credit and not the way the proceeds of the credit will be expended) with 3 Collier on Bankruptcy ¶ 364.02 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2009) (better view may be that the requirements of each provision, § 364(a) and § 503(b)(1), must be met to approve a financing motion). We need not resolve this issue because the bankruptcy court did not make any factual findings or legal conclusions at the Hearing or in the § 364 Order regarding whether the Loan, or the expenses to be paid from its proceeds, were actual, necessary costs of preserving the estate.[11]

The failure to provide findings of fact and conclusions of law in compliance with Rule 7052 warrants reversal unless a full understanding of the question is possible without the aid of separate findings. See Vance v. Am. Haw. Cruises, Inc., 789 F.2d

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[11] Later, in the Stay Order, the bankruptcy court offered some reasoning for approving the Amended Motion. It concluded that a stay pending appeal was not warranted, in part, because the Debtor had enough assets to pay all administrative expenses and the IRS's priority tax claim. However, the ability to repay an objecting creditor's claim is not the test for approval of a loan under § 364(b).

790, 792 (9th Cir. 1986) (discussing this rule in the context of Fed. R. Civ. Proc. 52, which is substantially similar to Rule 7052); see also Veal v. Am. Home Mortg. Servicing, Inc. (In re Veal), 450 B.R. 897, 919 (9th Cir. BAP 2011). Here, it is unclear from the Hearing and the § 364 Order what legal rule the bankruptcy court applied. Because there is no articulated legal standard, we are unable to review whether the bankruptcy court abused its discretion in approving the Amended Motion. On remand, the bankruptcy court may decide to apply either of the standards asserted by the IRS or the Debtor, or any other applicable legal standard, and should provide sufficient factual findings so that its decision can be evaluated on appeal.

C. The Expense Order

In the Expense Motion, the Debtor sought approval of his budgeted expenses as ordinary course expenses under §§ 363 and 1115. The IRS objected to the proposed Budget because it contended that many of the expenses were personal in nature, particularly those related to the Properties, the automobiles, and the tuition payments.[12]

There is scant authority regarding how individual chapter 11 debtors may pay expenses post-BAPCPA.[13] Prior to BAPCPA, individual chapter 11 debtors were generally permitted to pay expenses from their postpetition income, which was not property

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[12] The IRS also objected to payment of expenses related to the California Litigation. However, these expenses were not included in the Budget and are not before us on appeal.

[13] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, April 20, 2005, 119 Stat. 23.

of the estate. See e.g., In re Goldstein, 383 B.R. 496, 498 (Bankr. C.D. Cal. 2007); Cusano v. Klein, 264 F.3d 936, 945 (9th Cir. 2001). However, with BAPCPA's addition of § 1115, individual chapter 11 debtors no longer have the option to pay expenses with postpetition income because virtually all property, including postpetition income from personal services, is property of the estate. Instead, individual chapter 11 debtors must now seek payment of personal expenses from estate property, which may create problems considering the resulting diminution in estate assets and the fact that personal expenses do not always neatly fall within the scope of "actual, necessary" expenses under § 503(b)(1) or ordinary course of business expenses under § 363.

The Debtor argues that because of the addition of § 1115, he must be permitted to pay personal expenses (like a chapter 13 debtor) or be forced out of chapter 11 before his case could even begin. The Debtor contends that § 1129(a)(15) should guide the approval of personal expenses.

Section 1129(a)(15) incorporates the "disposable income" test utilized in chapter 13. See § 1325(b)(1)(B)-(2). Under § 1129(a)(15), a debtor must commit all of his or her projected disposable income to a plan of reorganization for at least five years if an allowed unsecured creditor objects to the plan. The calculation of disposable income takes into account a debtor's reasonable expenses related to certain support and maintenance obligations. See §§ 1129(a)(15), 1325(b)(2); In re Roedemeier, 374 B.R. 264, 272-73 (Bankr. D. Kan. 2007). Because the Bankruptcy Code recognizes a debtor's need to pay personal expenses after confirmation of a plan, the Debtor argues that he

must likewise be permitted to pay reasonable personal expenses prior to plan confirmation.

At least two commentators have suggested § 1129(a)(15)'s disposable income test is the proper test for approving pre-confirmation budgets and personal expenses of individual chapter 11 debtors under § 363. See 5 Norton Bankr. L. & Prac. 3d § 106:3 (Hon. William L. Norton, Jr. et al. eds. 2011); Sally Neely, How BAPCPA Changes Chapter 11 Cases for Individuals- Or-No, This is Not Your Mother's Chapter 11!!, SS029 ALI-ABA 625, 647 (WEST 2011). However, the IRS, relying on the BAP's pre-BAPCPA holding in In re Walter, argues that personal living expenses and attorneys' fees, which benefit a debtor individually but not the estate, cannot be paid out of monies or assets of the estate. 83 B.R. at 19.

In Walter, the BAP quoted with approval the requirement, set out in Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1070-71 (2d. Cir. 1983), that a DIP articulate a "business justification" for using property outside the ordinary course of business. Id. at 19-20. The IRS asserts that the bankruptcy court erred by failing to make an inquiry into the justifications for paying the Budget expenses. Walter, however, imposed the business justification test for approval of expenses outside of the ordinary course of business under § 363(b)(1). Here, the Debtor sought approval of his expenses as ordinary course expenses under § 363(c). Additionally, at oral argument, the IRS conceded that not all expenses must have an identified business justification, but some measure of reasonableness is required. The IRS argued that the maintenance

of five luxury vehicles and expensive homes, as well as payment of tuition for six grandchildren, did not fall within the realm of reasonableness.

Here again, we do not need to reach a decision regarding the proper standard to impose because the bankruptcy court failed to provide sufficient findings of fact or conclusions of law to support approval of the Budget under any test. The Expense Order was granted for "good cause" but did not articulate a legal standard or make factual findings. At the Hearing, the bankruptcy court simply stated that the tuition costs had been traditionally paid by the Debtor as his ordinary expenses. Nevertheless, a finding that the Debtor may have historically paid certain expenses is insufficient, without more, to support an appellate review regarding whether the bankruptcy court abused its discretion in approving the Expense Motion.

Given the uncertainty in this area of law, the identification of the proper Bankruptcy Code section for approval of personal expenses of individual chapter 11 debtors, it is all the more important for the bankruptcy court to articulate the legal rule being applied and the explicit findings of fact that support the legal rule.

The bankruptcy court's justification in the Stay Order did not correct these deficiencies. Whether the Debtor has sufficient funds to pay administrative and priority creditors has no bearing on whether certain expenses are ordinary course expenses or whether they are allowable under § 363(b) or § 363(c). Accordingly, we must reverse and remand the Expense

Order.[14]

VI. CONCLUSION

For the foregoing reasons, we REVERSE and REMAND both matters for additional findings of fact and conclusions of law consistent with this decision.

[14] Because our decision remands both matters to the bankruptcy court, we need not reach the issue of nunc pro tunc approval of the Budget. However, we do note that such retroactive relief is limited and requires specific findings in the Ninth Circuit. See Wirum v. Warren (In re Warren), 568 F.3d 1113, 1116 n.1 (9th Cir. 2009) quoting United States v. Sumner, 226 F.3d 1005, 1009-10 (9th Cir. 2000).