

SIGNED.



Dated: April 01, 2011

James M. Marlara
JAMES M. MARLAR
Chief Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:)	Chapter 11
BASHAS' INC.,)	Nos. 2:09-bk-16050-JMM
BASHAS' LEASECO INC.,)	2:09-bk-16051-JMM
SPORTSMAN'S, LLC,)	2:09-bk-16052-JMM
)	(Jointly Administered)
<u>Debtors.</u>)	MEMORANDUM DECISION

On March 24-25, 2011, this court heard evidence on the application of Deloitte Financial Advisory Services ("Deloitte") for an administrative expense award of:

Fees	\$403,403.25
Costs	<u>16,431.15</u>
Total	\$419,834.40

(ECF NO. 2528). The Debtors disputed Deloitte's application (ECF No. 2574). After submission of all evidence, oral and documentary, the court now rules.

1 **DISCUSSION**

2 **A. Background**

3
4 The Bashas' entities filed Chapter 11 proceedings on July 12, 2009. Their combined
5 plan was approved on August 13, 2010. Since that date, the reorganized Debtors have been
6 operating pursuant to the plans, as confirmed.

7 In the post-confirmation phase, the Debtors have been reviewing and finalizing
8 remaining claims against the estate, whether they be general pre-petition claims, or post-petition
9 administrative claims. The current dispute involves the latter type of claim.

10
11 **B. Deloitte's Involvement with Bashas'**

12 **1. Pre-Petition (June 8 - July 11, 2009)**

13
14 Deloitte was initially engaged, pre-petition, on June 8, 2009. At that time, Bashas' was
15 contemplating a bankruptcy filing, and felt that it would need to hire a financial advisor to assist it
16 in the process.

17 Deloitte estimated that its fees, for the pre-petition work, would be in the range of
18 \$150,000 for what was termed "Phase I" work, and \$150,000 for "Phase II" tasks. Either as part of,
19 or separate from the "phase" tasks, was work on a computer "model" which was estimated to cost
20 in the range of \$40,000 - \$50,000. Bashas' expected the pre-petition total, for all services, to be
21 \$350,000.

22 Prior to Bashas' filing its bankruptcy petitions on July 12, 2009, Deloitte presented
23 bills to Bashas' totaling \$466,251. Bashas' paid these bills in full, without noting a controversy in
24 regard thereto. This figure exceeded Bashas' expectation by \$116,251, or one-third over budget.

1 the \$403,403.25 that it requests. In the same breath, though, Bashas' does not appear to take issue
2 with Deloitte's costs of \$16,431.15. The court notes that this position is internally inconsistent, since
3 payment of an administrative expense (like costs) requires the conferring of some sort of benefit.
4 If Deloitte did nothing to benefit the estate, as Bashas' urges, then why accept its claim for payment
5 of costs?

6 7 **C. Disinterestedness** 8

9 Bashas' has asked this court to blur the distinction between the work done by Deloitte
10 in the pre- and post-petition periods. In effect, it argues that Deloitte's fee, and the work associated
11 therewith, crosses back and forth across the demarcation line of July 12, 2009. In making the
12 argument, Bashas' asserts that work done pre-petition, and monies paid for pre-petition work, may
13 be offset and/or disputed in deciding what fee is appropriate for post-petition work.

14 This argument must be rejected for several reasons.

- 15 • First, Bashas' and Deloitte had a legal duty, at the outset of the
16 bankruptcy cases, to state what disputes, if any, existed or were likely
17 to exist, based on their pre-petition relationship. This is the
18 "disinterestedness" requirement. In its application to employ Deloitte,
19 Bashas' expressly noted that no claims against Deloitte existed, and
20 therefore maintained that the legal test for employment as an estate
21 professional was met. (See ECF No. 18 at 2, para. 5.) The application
22 was signed by Bashas' attorneys. Implicitly, Bashas' was representing
23 that it did not feel that Deloitte held an "interest adverse to the estate."
24 11 U.S.C. § 327(a). Another amended application, along the same
25 lines, was filed by Bashas' on July 16, 2009 (ECF No. 80), wherein the
26 same types of statements were made. If Bashas' knew that there was the
27 potential that it would contest an overpayment, it was required to so
28 state. Bashas' made these representations knowing that it had already

1 paid for services which exceeded its budget by 33%. Bashas'
2 mentioned nothing about a dispute.

- 3 • Second, if Deloitte's pre-petition services were of no value to the estate,
4 Bashas' should have disclosed this in its Disclosure Statement, and
5 noted that it contemplated material litigation against Deloitte.
6 11 U.S.C. § 1125. Bashas should have, by that point in the case,
7 commenced an adversary proceeding to recoup any alleged
8 overpayment. No such adversary proceeding is on file to this date.
- 9 • Third, Bashas' paid Deloitte the entire pre-petition billed amount of
10 \$466,251, before filing its Chapter 11 cases, and did not list any claim
11 against Deloitte in its schedules. Bashas' is therefore judicially
12 estopped from contending, at this late date, that Deloitte's pre-petition
13 charges were excessive. Hamilton v. State Farm Fire & Cas. Co., 270
14 F.3d 778 (9th Cir. 2001).
- 15 • Fourth, as a debtor and debtor-in-possession are legally different legal
16 entities, there is no "mutuality," an essential element of any setoff. 11
17 U.S.C. § 553.
- 18 • Fifth, paying the pre-petition bills, without putting Deloitte on notice
19 of a dispute, waives Bashas' ability to so claim now.

20 The court finds and concludes that Bashas' has no right of offset for any pre-petition
21 work done by Deloitte, and is judicially estopped from making such claims now.

22 23 **D. Warnings**

24
25 At the first hearing where the Debtors' request to employ Deloitte was heard, July 17,
26 2009, the court expressed its concerns about the high costs of Deloitte's employment and questioned
27 Bashas' business judgment on the issue. At Bashas' urging, the matter was continued to July 29,
28 2009 (ECF No. 106), at which time it was re-argued.

1 **F. Deloitte's Application for An Administrative Expense Claim**

2
3 Today, Deloitte seeks an administrative expense for work performed for the Debtors
4 between July 12 and September 30, 2009 in the amount of \$403,403.25 (ECF No. 2528). The
5 Debtors oppose the request for any fees.

6
7 **G. Analysis of the Claim and the Objection**

8
9 The starting point for deciding the Deloitte claim begins with the opinion of Bashas'
10 own "replacement" financial advisor, Christopher Linscott.

11 Mr. Linscott testified that, in his professional opinion, Deloitte had earned 50% of
12 what it has requested. Therefore, the court finds this testimony convincing, and awards Deloitte
13 \$201,701.62, as not being in controversy.

14 That leaves the remaining balance, or \$201,701.63 to sort out.

15 In presenting its case, Bashas' failed to specifically identify disputed time entries.
16 Although some time records (but not all) were part of the record (Ex. O), Bashas' made no real effort
17 to precisely state what it considered to be specific unworthy work. Instead, Bashas' entire case
18 hinged on what appeared to be merely a generalized sense of some sort of wrong having been dealt
19 it.

20 Bashas' complained about Deloitte's high cost. But Bashas' knew what to expect, and
21 went into the engagement with its eyes open. Pre-petition, it thought its Deloitte expenses would
22 be capped at:

23

24 Phase I	\$150,000
25 Phase II	150000
26 The "Model"	<u>50,000</u>
27 Total	\$350,000

28

1 Yet, when Bashas' received Deloitte's pre-petition statement for \$466,251, fully 33% higher than
2 expected, it simply paid it. Bashas' was clearly on notice of what to expect in the way of expense.

3
4 **H. Is Deloitte Entitled to the Balance of its Requested Administrative Claim?**

5
6 To decide this question, the court must refine Bashas' concerns, as expressed in its
7 objection (ECF No. 2574). In that regard, Bashas' has only two concerns, noted as being:

- 8 1. Fees for schedule preparation were excessive; and
9 2. The financial analysis model was never performed.

10
11 **1. Schedules**

12
13 In regard to Bashas' objection, Bashas' never proved how much, or what specific
14 Deloitte time entries proved its case for rejection. Bashas' Ex. O contained detailed time entries of
15 Deloitte's work for the post-petition period beginning July 12, 2009 and ending on or about
16 August 28, 2009. The total hours spent by Deloitte's professional team for that period were 708.7,
17 at a billed amount of \$310,851.00. Although Mr. Buhr, Bashas' Chief Financial Officer, was shown
18 to be the recipient of an email containing this information and is dated September 29, 2009, Mr.
19 Buhr testified at the hearing that this was the "first time I've seen detail at this level." This testimony
20 is inconsistent with Bashas' own exhibit, which shows that Mr. Buhr received the same
21 information 18 months ago.

22 In addition, none of Bashas' witnesses were asked to specify which of the disputed
23 time entries were objectionable. Nor were the Deloitte witnesses cross-examined as to any of the
24 detailed contents of this important document, Ex. O.

25 Similarly, the difficulty in attempting to analyze Mr. Linscott's letter (Ex. Z) of
26 March 16, 2011, where he opines on his opinion of excess, is that it lumps and overlaps conclusions
27 from both the pre- and post-petition periods. Of all the witnesses who could have assisted the court
28 on a detailed analysis of the Deloitte fees, such as by looking at and describing each relevant time

1 entry in Exhibit O, Mr. Linscott's testimony was, more or less, just conclusionary, also based upon
2 a sense of what he felt a reasonable fee should be. The court expects more proof from an objecting
3 party when the professional fee requested is not from an attorney,¹ and therefore outside the court's
4 expertise.

5 Bashas' attorneys delegated the basic preparation of schedules and statements to
6 Deloitte, and now Bashas' maintains that its own attorneys and paralegals were more efficient and
7 qualified to do the work than Deloitte. This may be true, but Bashas' attorneys are experienced
8 enough with national firms such as Deloitte to realize that the choice to delegate these tasks would
9 be cumbersome and expensive. Deloitte should not have been hired to do this work in the first
10 place. Bashas' has no cause to now question the lumbering effort that it commissioned.

11 Large national firms the size of Deloitte have large, convoluted and (to the court's
12 mind) overly cumbersome internal procedures. But the way in which they do business is not a
13 secret. Any company that chooses to hire such a firm should not be surprised that a particular job
14 will be over-managed, over-worked, over-delegated and over-charged. That is to be expected and
15 these facts are known to all. The use of such a firm, in most Chapter 11 cases, is simply not
16 necessary. The court recognizes that large national firms such as Deloitte have high overhead and
17 high exposure on liability issues. Their rates are high, and their methods complicated, for exactly
18 these reasons. They must take care to do any job right (which sometimes also means slowly), lest
19 they themselves will become an easy target for a professional liability claim.

20 But that is what Bashas' initially wanted, and which it was on clear notice of when it
21 pleaded with this court to let it hire Deloitte. Bashas was on notice of how high the bill would be,
22 but went ahead anyway. Bashas' claim that it was intimidated or "threatened" by the creditors is not
23 credible, considering the high quality and well-earned reputation of its chosen counsel. Even if true,
24 which this court doubts, it does not mean that Bashas' current corporate frustration is to be taken out
25 on the financial advisor which it voluntarily chose, after being repeatedly warned of the financial
26 risks inherent in such choice, and having observed first-hand the extent of such runaway charges.

27
28 ¹ See, e.g., this court's methods in In re AVC Villa Del Lago at Ocotillo Devco, LLC, 2010 WL 11983 (Bankr. D. Ariz. 2010), a case cited by Bashas'.

1 **2. The Financial Model**

2
3 Bashas' complains that Deloitte never completed or delivered a financial "model" that
4 measured up to its expectations. But the evidence presented by Bashas' does not support that
5 contention. The parties' evidence was that the model was in the development stage, and was bulky
6 in its use. Even as late as October 23, 2009, the parties were still in discussion as to the methods
7 for fine-tuning the model. See Ex. L. This was the week prior to Deloitte's termination. And, even
8 Bashas' counsel acknowledged the next day that it had "some functional benefit," but that Bashas'
9 needed it to operate more quickly (Ex. M). Even Mr. Linscott thought the value of the model was
10 in the \$50,0000 range (Ex. Z).

11 And, even if the model was not completed to Bashas' satisfaction when it terminated
12 Deloitte, it deprived Deloitte of the ability to conclude the work on which it had spent time and
13 effort to that point.

14 In the final analysis, the court was left with nothing concrete on which to base a
15 decision which would warrant cutting Deloitte's fees in this area. In legal terms, Bashas' failed to
16 carry its burden of proof on the objection.

17 Bashas' proof merely gathered opinions reflecting disappointment, but lacked a precise
18 legal dissection of an accounting issues. Proof failing, so must its objection.

19
20 **I. A Last Issue**

21
22 During the hearing, Bashas' argued that Mr. McClamm spent \$5,839.50 on
23 engagement issues, which Bashas' considered to be Deloitte's internal overhead, and not chargeable
24 to it. But Bashas' failed to tie the assertion to any time entry or entries. No testimony was given by
25 any witness which proved the assertion.

26 Bashas' failed to carry its burden on this challenge.
27
28

1 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

2
3 The court, having completed its analysis of Deloitte's request, can now answer the
4 questions presented to it in the parties' Joint Pretrial Statement (ECF No. 2884):

5 **Fact Issues**

<u>Issue</u>	<u>Court's Answer</u>
1. Are the fees sought by Deloitte in its Final Fee Application reasonable compensation for actual, necessary services rendered by a professional person pursuant to 11 U.S.C. §330?	Yes
2. Are the out of pocket expenses sought by Deloitte in its Final Fee Application reimbursement of actual, necessary expenses pursuant to 11 U.S.C. §330?	Yes
3. Did Deloitte provide a benefit to the estate commensurate with the fees incurred?	Yes
4. Did Deloitte complete or deliver a useable "By Location Financial Model" to Bashas'?	Yes, at its pace. It did not finish due to Bashas' decision to terminate Deloitte.
5. Did Deloitte provide less experienced staff members, who charged high and unadjusted rates, after this court limited Deloitte's engagement budget?	No
6. Did Deloitte comply with the June 15, 2009 Engagement Letter for services rendered Bashas'?	Irrelevant
7. Is the blended rate of over \$400.00 per hour a reasonable rate to gather and send documents?	Yes, and failure of proof by Bashas'.
8. Were the post-petition charges of Deloitte, when combined with pre-petition monies already paid, reasonable within the meaning of 11 U.S.C. §330, based on the complexity of the task involved and the quantity of work performed?	As to post-petition, yes. As to pre-petition, waived and irrelevant.
9. Were there any instances where Deloitte exceeded the budget established by this court's order of August 19, 2009?	Unknown. Bashas' failed to carry its burden.

- 1 10. Were there any instances where Deloitte performed tasks No
 2 not approved by Bashas' pursuant to this court's order of
 3 August 19, 2009?
 4 11. Were there any instances where Deloitte otherwise failed No
 5 to comply with the terms of this court's order of
 6 August 19, 2009?
 7 12. Were there actions or omissions of Bashas' that caused the No
 8 work of Deloitte to be delayed or more time-consuming?
 9

10 **Legal Issues**

<u>Issue</u>	<u>Court's Answer</u>
1. Are the fees requested by Deloitte in its Final Fee Application reasonable pursuant to the factors set forth in 11 U.S.C. §330?	Yes
2. Are the out of pocket expenses requested by Deloitte in its Final Fee Application reimbursement for actual, necessary expenses pursuant to 11 U.S.C. §330?	Yes
3. Did Deloitte provide a value to the estate post-petition commensurate with for the amounts charged for the services performed?	Yes
4. Deloitte asserts that 11 U.S.C. § 329 provides only for review of pre-petition fees and expenses of attorneys, not other professionals, and that pre-petition fees and expenses are not properly at issue.	What a party asserts is not a question to be answered by the court.
5. Bashas' asserts that an issue to this proceeding is whether Deloitte was unreasonably compensated for work performed pre-petition and whether Deloitte's fees should be adjusted due to the merits of this particular case, pursuant to 11 U.S.C. §§327, 328, 329, 330, and 331.	What a party asserts is not a question to be answered by the court.

1 **RULING**

2

3 Deloitte's administrative claim for fees and costs will be granted in its entirety. The

4 reorganized Debtors will be ordered to pay \$419,834.40 to Deloitte. A separate order will be

5 entered.

6 Any appeal from the order must be filed within 14 days from its entry on the docket.

7

8 DATED AND SIGNED ABOVE.

9 COPIES to be sent by the Bankruptcy Notification

10 Center ("BNC") to the following:

11 Jared Parker, Attorney for Deloitte Financial Advisory Services

12 Michael McGrath, Attorney for Debtors

13 Office of the U.S. Trustee

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