UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:	)	
	)	
B.B. Walker Company,	)	Case No. 02—10091C—11G
	)	
Debtor.	)	
	)	
	)	
Bender Shoe Company,	)	Case No. 02—10092C—11G
	)	
Debtor.	)	
	)	

ORDER

These cases came before the court on October 22, 2002, for hearing upon a Motion for Leave to File Administrative Expense Claims ("the Motion") that was filed by James P. McDermott as trustee and plan administrator of certain employee benefit plans that were established by the Debtors. Jeffrey E. Oleynik appeared on behalf of James P. McDermott. Appearing in opposition to the motion were the Debtors through their attorney, James K. Talcott, and the Unsecured Creditors' Committee through its attorney, Sarah F. Sparrow. Having considered the evidence offered by the parties, the matters of record in this case and the arguments of counsel, the court makes the following findings of fact and conclusions of law pursuant to Rules 7052 and 9014 of the Federal Rules of Bankruptcy Procedure.

FACTS

Prior to December of 2001, B.B. Walker Company and its subsidiary, Bender Shoe Company, ("the Debtors") had been in the

business of manufacturing and selling shoes. In December of 2001, the Debtors ceased their manufacturing operations and laid off their production employees. Thereafter, on January 14, 2002, the Debtors filed for relief under chapter 11 of the Bankruptcy Code.

Several years prior to the filing of these cases, the Debtors established the B.B. Walker Company Employees' Stock Ownership Plan (the "B.B. Walker ESOP Plan"), the B.B. Walker Section 401(k) Plan (the "B.B. Walker 401(k) Plan") and the Bender Shoe Company Pension Plan (collectively referred to as "the Employee Benefit Plans"). James P. McDermott ("Movant"), is the plan trustee of the B.B. Walker ESOP Plan, the trustee and plan administrator of the B.B. Walker 401(k) Plan and the trustee and plan administrator of the Bender Pension Plan. There is apparent agreement among the parties that these Plans are subject to the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. ("ERISA").

Shortly before these cases were filed, the Debtors' directors adopted resolutions finding that it would be in the best interests of the employees to terminate the Employee Benefit Plans so that the assets in the Plans could be distributed to the participating employees. However, when these cases were filed, the Plans had not been terminated. Since the filing of these cases, the Movant has terminated the B.B. Walker 401(k) Plan and made distributions to the employee/participants in that Plan. The Movant apparently is working on the termination of the B.B. Walker ESOP Plan and the

Bender Pension Plan, but the termination of those plans has not yet occurred.

The professional fees for which reimbursement is sought consist primarily of attorneys' and accountants' fees that apparently have been incurred or will be incurred by the Movant in connection with terminating the Employee Benefit Plans. The work performed by the professionals apparently includes advice regarding the proper procedure for terminating the Plans and the preparation of reports, forms and other documents that are required in connection with the termination of the Plans.

The professional fees incurred to date have been paid by the Movant with funds obtained from the Plans. The Movant seeks reimbursement of these fees as an administrative expense in this case pursuant to § 503. As to the anticipated future fees, the Movant seeks an adjudication that such fees will constitute an administrative expense under § 503 and that he be authorized to submit quarterly applications for the payment of the future professional fees as they are incurred. Because there has been no showing that the fees and expenses constitute obligations for which the Debtors are responsible or that such fees and expenses qualify as administrative expenses under § 503, the motion will be denied.

ANALYSIS

The Movant begins with the argument that the Debtors have an obligation to pay the fees and expenses related to the termination

of the Plans. This argument was not established by the Movant. Although B.B. Walker Company apparently paid most of the administrative fees of the Employee Benefit Plans prior to bankruptcy, it is clear that the Plans do not obligate B.B. Walker Company or Bender Shoe Company to do so. The Plans all expressly provide that expenses incurred by the trustee of the plan related to the performance of the trustee's duties or the administration of the Plans shall be paid by the Plans unless paid by the employer. The following provision from the Bender Pension Plan is typical of all three plans:

> 12.15 Fees and Expenses. The expenses of administering the plan including (a) the fees and expenses of any employee and of the Trustee for the performance of his duties, (b) the expenses incurred by members of the Committee in the performance of their duties under the Plan (including reasonable compensation for any legal counsel, certified public accountants and any agents and cost of services rendered in respect of the Plan), and (c) all other proper charges and disbursements of the Trustee or the members of the Committee (including settlements of claims or legal actions brought against any party, including the Trustee, approved by the Company and the Committee, after consulting with counsel to the Plan), are to be paid by the Plan unless paid in full by the Company. In estimating costs under the Plan, administrative costs may be anticipated. The members of the Committee shall not receive any special compensation for serving in their capacities as members of the Committee. (Emphasis supplied).

This language and the similar language in the other two Plans do not impose any contractual duty or obligation upon either of the

Debtors. The fact that at times in the past the Debtors voluntarily paid Plan expenses does not override the language of the Plans and now create a legal obligation on the part of the Debtors to pay expenses incurred by the Movant as trustee and plan administrator. The language in the Plans regarding the payment of expenses remains unchanged and such language unambiguously calls for expenses of the Plans to be paid by the Plans.

Nor has the Movant been able to point to any statute or federal regulation that requires than an employer pay the type of fees and expenses sought in the Motion. The parties are in agreement that the Plans involved in this case should be terminated so that the assets in the Plans can be distributed to the former employees of the Debtors. The procedure for the termination of the Plans is set forth in 29 U.S.C. § 1341. Under this provision of ERISA, the plan administrator, and not the employer/plan sponsor, is the party that terminates the plan. See In re Esco Manufacturing Co., 50 F.3d 315, 316 (5th Cir. 1995)("Section 1341 allows for termination of an ERISA plan only by the plan administrator or the PBGC and states that a single-employer plan may be terminated only in accordance with that section."). This statutory vesting of responsibility in the plan administrator is not altered by the bankruptcy of the employer/plan sponsor. See In re New Center Hospital, 200 B.R. 592 (E.D. Mich. 1996). Thus, in taking the steps involved in terminating the plans, Movant was

performing one of his responsibilities as a plan administrator, and was not carrying out a duty imposed upon the Debtors.

Under § 403(c)(l) of ERISA (29 U.S.C. § 1103(c)(1)), "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administration." (Emphasis supplied). The reasonable expenses of administering a plan include direct expenses properly and actually incurred by a fiduciary in the performance of such fiduciary's duties to the plan. As noted above, the Movant is the party designated under ERISA to terminate the Plans involved in this case. The fees and expenses in question thus were incurred by Movant in carrying out his duties as plan administrator. Such expenses were incurred in order that distributions could be made to the beneficiaries of the plans and thus benefitted the beneficiaries. The expenses did not benefit the Debtors and were not incurred while Movant was performing any function of the Debtors as employers or plan sponsors. Payment of the expenses thus did not inure to the benefit of the Debtors. Rather, the expenses were expenses incurred in the administration of the Plans and hence properly were payable from the Plans. This is particularly true in light of the fact that the Plans expressly call for such expenses to be paid by the Plans.

Finally, there has been no showing of any basis for treating

the expenses referred to in the motion as administrative expenses under § 503 of the Bankruptcy Code. Movant apparently bases his claim for an administrative expense upon § 503 (b) (1) (A) which authorizes the allowance of an administrative expense for "the actual, necessary costs and expenses of preserving the estate. . . ." Guidance for interpreting and applying this provision is provided in In re Merry-Go-Round Enters., 180 F.3d 149 (4th Cir. 1999). "Since there is a general presumption in bankruptcy cases that all of a debtor's limited resources will be equally distributed among creditors, § 503 must be narrowly construed." Id. at 157. "For a claim to qualify as an actual and necessary administrative expense, '(1) the claim must arise out of a post-petition transaction between the creditor and the debtor-in-possession (or trustee) and (2) the consideration supporting the claimant's right to payment must be supplied to and beneficial to the debtor-in-possession in the operation of the business."' Id. (quoting from In re Stewart Foods, Inc., 64 F.3d 141, 145 n.2 (4th Cir. 1995)) . In order for expenses incurred by an officer or employee to be allowed as a cost of administration, the evidence must be sufficient to show that the claimed expenses were necessary and beneficial to the estate. See In re Microwave Products of America, Inc., 100 B.R. 379 (Bankr. W.D. Tenn. 1989).

Movant failed to show that the expenses arise out of a post-petition transaction with the Debtors. The agreements creating the

Plans, the cessation of Debtors' manufacturing operations and the vote by the Debtors' boards of directors approving the termination of the Plans all occurred before these cases were filed, and no evidence was offered of any post-petition conduct on the part of the Debtors that proximately resulted in the Movant incurring the expenses in question. If the conduct or status giving rise to a claim occurs or exists before the petition is filed, the claim is a prepetition claim even though the actual liability accrues post-petition. See Siegel v. Federal **Home Loan Mortgage Corp., 143** F.3d 525 (9th Cir. 1998); L.F. Rothschild & Co. v. Angier, 84 B.R. 274 (D. Mass. 1988) ; In re Phalen, **145 B.R.** 551 (Bankr. N.D. Ohio 1992). Moreover, there was no showing that the bankruptcy estate of either Debtor received any benefit from the services giving rise to the fees sought by Movant. As noted earlier, the assets of an **ERISA** plan are held solely for the benefit of the plan participants and their beneficiaries and may not inure to the benefit of the employer.[1] When the contribution is made, the trustee and/or plan administrator acquires control over the assets and the plan participants and their beneficiaries acquire an interest in the **assets. A** contribution to the plan by the employer thus severs and terminates, subject to certain limited exceptions under ERISA[2] which are not applicable in this case, any interest in or control

[1]See **29 U.S.C.** § 1103(c).

[2]See 29 U.S.C. § 1103(b).

over the assets that the employer previously possessed. See R.T.C. v. Financial Inst. Ret. Fund, 71 F.3d 1553 (10th Cir. 1995). Therefore, the plan assets generally cannot be considered property of the bankruptcy estate. The bankruptcy estate therefore does not benefit from expenses related to the administration and distribution of such assets. Since such expenses do not benefit the bankruptcy estate, the expenses are not eligible for allowance under § 503.

The Motion requests leave for Movant to file an administrative expense claim under § 503 for professional fees and expenses incurred or to be incurred in terminating the Plans. Since the court has concluded that such expenses do not qualify as administrative expenses under § 503, it would be pointless to grant Movant leave to file a claim. under § 503. The motion therefore will be denied.

IT IS SO ORDERED.

This 25th day of November, 2002.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge