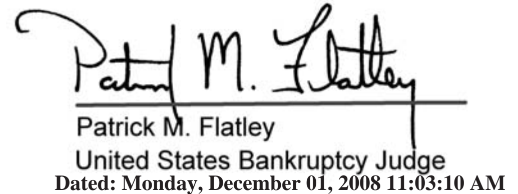
In re Ohio Valley Amusement Company, Case No. 03-50356, 2008 Bankr. LEXIS 3191, 2008 WL 5062464 (Bankr. N.D.W. Va. Dec. 1, 2008).

Order Entered.



Patrick M. Flatley
United States Bankruptcy Judge
Dated: Monday, December 01, 2008 11:03:10 AM

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

IN RE:	)	
	)	
OHIO VALLEY AMUSEMENT CO.,	)	Case No. 03-50356
	)	
Debtor.	)	Chapter 11

MEMORANDUM OPINION

Unauthorized by the court, James B. Fromhart made two post-petition loans to Ohio Valley Amusement Company (the "Debtor") totaling $700,000. Mr. Fromhart now seeks to be allowed an administrative claim against the Debtor's estate in that amount.

The Debtor seeks entry of summary judgment on Mr. Fromhart's application for administrative expenses on the basis that the loan was not made in the ordinary course of the Debtor's business, and was made without court approval.

For the reasons stated herein, the court will grant the Debtor's motion for summary judgment.

I. BACKGROUND

The Debtor is primarily engaged in the business of leasing video lottery machines to various establishments in West Virginia. When it filed its February 3, 2003 Chapter 11 bankruptcy petition, the Debtor's principal was Francis Tucker. After the Debtor confirmed its November 14, 2007, plan of reorganization, Francis Tucker was no longer a shareholder or officer of the Debtor.

According to the Debtor's Statement of Revenues and Expenses for calendar year 2005, the Debtor claimed to earn $3,290,575 in gross revenue, and claimed a yearly net income of $300,153. The Debtor claimed net revenue of $17,956 in January 2006, $9,457 in February, and $54,938 in March. In April 2006, the Debtor listed an unexplained deduction from its monthly revenues for a "bad debt expense" in the amount of $250,285, and, therefore, claimed a net loss of $250,710 for

the month.

In the ordinary course of its business, the Debtor maintained four bank accounts: (1) an "operating" account, (2) a "state" account[1] (3) a "location" account, and (4) a "payroll" account. At the end of April 2006, the Debtor's bank records reflect that the "operating" account had a negative balance of $34,410, the "state" account had $1,611, the "location" account had $141,643, and the "payroll" account only had $1,426.

In May 2006, the Debtor's annual video lottery license fee was due to the State of West Virginia. The Debtor states that it was licensed to operate 502 video lottery machines, and that the permit fee was $1,000 for each machine, or $502,000. W. Va. Code § 29-22B-1103. For the month of May 2006, the Debtor realized $233,667 in gross business revenues, and claimed to have a net operating profit of $21,130. In short, it appears that the Debtor had insufficient funds in its bank accounts to make the required payment to the State of West Virginia.[2]

Without court approval, Francis Tucker, executed two post-petition loan agreements with Mr. Fromhart on behalf of the Debtor. On April 10, 2006, the Debtor deposited $200,000 in loan proceeds in its "State" bank account. Mr. Fromhart asserts that this deposit represents the proceeds of his loan. That loan was not reduced to writing until May 30, 2006, but the promissory note states that "the parties agree that the sum was loaned on the 23rd day of December 2005." The loan's

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[1] This "state" account appears to be the bank account required by W. Va. Code § 29-22B-1401, which mandates that each video lottery licensed permit holder "maintain in its bank account an amount equal to or greater than the Lottery Commission's share of the gross terminal income from its operation of video lottery machines . . . ." The State Lottery Commission has the right to electronically transfer those funds out of the account on dates established by the Commission.

Of the total revenues generated by a video lottery terminal, the State's share of the revenue is determined under § 29-22B-1408. Two percent of gross terminal revenue is paid to the State Lottery Fund. § 29-22B-1408. After that deduction, the Commission's share of gross terminal profits is determined on a sliding scale from 30% to 50%, depending on how much income a video lottery terminal generates.

[2] Each month the Debtor deducted from its gross operating revenue an amount due for "taxes and licenses." As of December 31, 2005, the Debtor allocated $609,796.36 for this expense category. From January 2006 through April 2006, the Debtor had paid into this expense category $216,926.70. No satisfactory explanation is before the court detailing where this money went.

interest rate is 16% per annum, and payments were to be $615.38 per week, made by the Debtor to Mr. Fromhart in the form of wages. Also, the Debtor agreed to provide Mr. Fromhart and his family with health insurance, and to suspend all rent for a tavern owned by Mr. Fromhart so long as Mr. Fromhart, his spouse, and his sons, were living. The loan was an unsecured, cash transaction.

In addition to the $200,000 deposited in the Debtor's bank account on April 10, 2006, Francis Tucker negotiated a second loan from Mr. Fromhart in the amount of $500,000. The proceeds from this loan were paid in installments from April 28, 2006 to May 1, 2006. The loan was an unsecured, cash transaction – $227,000 of the loan was cash transferred to the Debtor by Ms. Fromhart, and the remainder was from the proceeds of a loan that Mr. Fromhart obtained from a bank so that he could re-lend the money to the Debtor. Like the first loan, this second loan was also reduced to writing on May 30, 2006. The loan was to be repaid by the Debtor at a 7.5% annual interest rate, and the note called for monthly payments until the loan was paid. Francis Tucker states that the loans from Mr. Fromhart enabled the Debtor to make its annual video lottery license payment, and allowed the Debtor to continue its operations.

Regarding the need for court approval of these post-petition loan transactions, Francis Tucker stated in his affidavit that he was in constant contact with the Debtor's bankruptcy attorney regarding the need of the Debtor to raise capital. When he mentioned the possibility of obtaining a loan from Mr. Fromhart, the Debtor's attorney said that Francis Tucker and Mr. Fromhart must obtain court approval. Based on that conversation, Mr. Fromhart made the $500,000 loan. After the loan was made, Francis Tucker stated that he informed the Debtor's attorney, who allegedly stated that he would obtain court approval for the transaction.

On May 16, 2007, Mr. Fromhart first filed his applications for administrative expenses. Six claims were filed in the total amount of $1,040,000; four of the applications concerned loans made to an affiliated debtor company, Mound City, and two applications represented the $700,000 in loans made to the Debtor. All of the applications were withdrawn without explanation on July 23, 2007, but Mr. Fromhart asserts that the applications in the Debtor's case for administrative expenses in the amount of $200,000 and $500,000 were withdrawn improperly. Mr. Fromhart also claims to have no knowledge of the remaining four administrative expense claims filed in his name.

On November 6, 2007, the Debtor filed its Amended Disclosure Statement and Plan of Reorganization. No administrative claim was listed in favor of Mr. Fromhart based on the earlier

withdrawal of his claims. On December 14, 2007, the Court confirmed the Debtor's plan, which called for a transfer of stock ownership from Francis Tucker to his brother Tom Tucker (490 shares), an attorney, Rod Berry (20 shares), and the remainder to the entity that recapitalized the Debtor, Alexas Entertainment, LLC (490 shares). Alexas also holds a note payable to it by the Debtor in the amount of $724,000. As represented by the Debtor, this arrangement was necessary because the majority of the shareholders in a West Virginia video lottery business must be residents of West Virginia and Alexas is a foreign business entity.

II. DISCUSSION

The Debtor argues that Mr. Fromhart cannot have an administrative claim against its bankruptcy estate on the grounds that Mr. Fromhart failed to follow the requirements for post-petition financing set forth in 11 U.S.C. § 364. Mr. Fromhart contends that his loans helped the Debtor operate, and that the court should give *nunc pro tunc* approval to his post-petition lending such that he be allowed an administrative claim against the estate.[3] Construing all inferences in favor of Mr. Fromhart as the non-moving party on summary judgment, the court agrees with the Debtor that Mr. Fromhart's claims for administrative expenses should be denied.

Section 364 of the Bankruptcy Code provides four methods for a debtor in bankruptcy to obtain post-petition credit; only two of those methods are applicable in this case.[4] First, a debtor may obtain unsecured credit and incur unsecured debt in the ordinary course of business. § 364(a). The creditor is rewarded for continuing to do business with the debtor by an administrative expense

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[3] Mr. Fromhart also contends that the Debtor's motion for summary judgement should be denied on the basis that the Debtor's counsel needs to be deposed, and, in general, that more discovery is necessary. Mr. Fromhart, however, has failed to meet the requirements of Fed. R. Civ. P. 56(f), and has not submitted an affidavit showing that he cannot present facts essential to justify his opposition to summary judgment. Moreover, Mr. Fromhart has not identified the particular information sought, or how that information will preclude entry of summary judgment.

[4] Not applicable to this case are §§ 364(c) and 364(d). Under § 364(c), if the debtor is unable to obtain unsecured credit either in or out of the ordinary course of business based on the enticement of an administrative expense claim, three options are available to bait the creditor: a super-priority administrative expense, a lien on property of the estate that is not otherwise secured by a lien, or a junior lien on property of the estate that is already subject to a lien. Under § 364(d), the court may approve the imposition of a senior or equal lien on property of the estate that is already subject to liens if the debtor cannot otherwise obtain credit and the existing lien holders are afforded adequate protection.

claim against the estate under § 503(b)(1), which, if not timely paid, is entitled to second tier priority under § 507(b)(2). § 364(a). The administrative expense claim available under § 364(a) is generally entitled to full payment in a confirmed Chapter 11 plan. § 1129(a)(9). Second, a debtor may obtain court approval to obtain unsecured credit and incur unsecured debt outside of the debtor's ordinary course of business. § 364(b). A creditor that lends to a debtor outside the ordinary course of business is also entitled to an administrative expense claim against the estate. *Id.*

In this case, the only issues are whether: (1) Mr. Fromhart's loans to the Debtor were in the ordinary course of the Debtor's business under § 364(a), or, (2) if the loans were not in the ordinary course of the Debtor's business, should Mr. Fromhart's failure to obtain court approval for his post-petition lending be excused. As the party seeking the allowance of an administrative expense claim, Mr. Fromhart bears the burden of proof on both issues. *E.g.*, *In re Merry-Go-Round Enterprises*, 180 F.3d 149, 157 (4th Cir. 1999) (creditor has burden of proving an administrative expense claim); *General Amer. Transp. Corp. v. Martin (In re Mid Region Petroleum, Inc.)*, 1 F.3d 1130, 1132 (10th Cir. 1993) ("[T]he party claiming entitlement to administrative expense priority has the burden of proof"); *In re Alpha Corp. of Virginia*, No. 91-1809, 1992 U.S. App. LEXIS 30367 at *10 (4th Cir. Nov. 18, 1992) ("Because the debtor-in-possession did not get court approval for incurring this indebtedness, the burden was upon [the administrative expense claimant] to prove that it was incurred in the ordinary course of business.").

1. Borrowing in the Ordinary Course of Business

In support of his assertion that his $700,000 in loans to the Debtor were made in the Debtor's ordinary course of business, Mr. Fromhart directs the court's attention to the affidavit of Francis Tucker:

> Cash flow was a vital day to day concern of OVAC. Some of the cash flow concerns were relieved by a series of loans from Brad Fromhart ("Fromhart"), each loan in the amount of $100,000. All but one of these loans from Fromhart to OVAC, during the latter part of 2005, were repaid. I didn't think we needed any court approval for these loans, so I didn't think to mention or run these loans past our Bankruptcy Attorney. They seemed like ordinary month to month transactions.

(Document No. 1095).

"[T]he courts have engaged in a two-step inquiry for determining whether a transaction is in 'the ordinary course of business': a 'horizontal dimension' test and a 'vertical dimension' test."

In re Roth Am., Inc., 975 F.2d 949, 952 (3d Cir. 1992) (*citing* Benjamin Weintraub & Alan Resnick, *The Meaning of "Ordinary Course of Business" Under the Bankruptcy Code – Vertical and Horizontal Analysis*, 19 UCC L.J. 364 (1987)); *see also* 3 *Collier on Bankruptcy*, ¶ 363.03[1] (Alan N. Resnick & Henry J. Sommer eds., Matthew Bender 2008) (explaining the vertical and horizontal dimension tests).

The "horizontal dimension" test, considers "whether from an industry-wide perspective, the transaction is of the sort commonly undertaken by companies in that industry." *Roth Am.*, 975 F.2d at 953. *See also Martino v. First Nat'l Bank (In re Garofalo's Finer Foods)*, 164 B.R. 955, 962-63 (Bankr. N.D. Ill. 1994), *aff'd in part and rev'd in part*, 186 B.R. 414 (N.D. Ill. 1995). The "vertical dimension" test considers the creditors' expectations and whether the economic risk of the transaction is different from those accepted by creditors that extended credit to the debtor pre-petition. *See, e.g.*, *In re James A. Phillips, Inc.*, 29 B.R. 391, 394 (S.D.N.Y. 1983) (concluding that "ordinariness" is a creditor's expectation of transactions a debtor is likely to undertake in the ordinary course of business). Consonant with the horizontal and vertical dimension tests, the Court of Appeals for the Fourth Circuit in *Bowers v. Atlanta Motor Speedway (In re Southeast Hotel Props. Ltd. P'ship)*, 99 F.3d 151, 158 (4th Cir. 1996), analyzed a post-petition transaction to see whether the type of transaction was a "common practice" in the debtor's industry, and whether a creditor could "reasonably expect" a debtor to enter into that type of post-petition transaction.

At the time it obtained the loans from Mr. Fromhart, the Debtor was engaged in the video lottery business. Primarily, the Debtor leased video lottery machines to various business establishments and received a percentage of each video lottery machine's revenue. Although the parties have not presented the court with evidence of the types of transactions that are common in the video lottery industry, logically, one could expect any business to resort to a lender in an effort to overcome cash flow problems, but such borrowing is not necessarily regarded as being in the ordinary course of a debtor's business. *E.g.*, *Dobin v. Presidential Fin. Corp. (In re Cybridge Corp.)*, 304 B.R. 681, 686 (Bankr. D.N.J.) ("Cybridge is in the business of entering into personal service contracts. Secured borrowing is not the essence of Cybridge's business. . . . It is undoubtedly true that virtually all businesses rely on credit; that does not lead to the conclusion that secured borrowing is ordinary course."), *aff'd* 312 B.R. 262 (D.N.J. 2004). Although Mr. Fromhart apparently made several unauthorized loans to the Debtor, the court does not believe that borrowing

large sums of money, in cash, off the books of the Debtor[5] is a type of transaction that is a common practice in the Debtor's video lottery industry, and certainly not one that a creditor would reasonably expect to the Debtor to engage in.

It would certainly strain credulity to anoint the two loans from Mr. Fromhart to the Debtor as transactions within the ordinary course of the Debtor's business given that over half the proceeds – $427,000 out of $700,000 – were provided in cash, off the books of the Debtor, and carried with them rather unusual terms. In this court's experience, the transactional structure of the Fromhart loans were, at the very least, unconventional, if not downright foolhardy. Based on the record before the court, and construing all inferences in favor of Mr. Fromhart as the non-moving party, the court concludes that borrowing money to finance a video lottery business is an extraordinary transaction that is not commonly undertaken in the operation and leasing of video lottery machines, and, moreover, that a creditor could not reasonably expect the Debtor to enter into the transactions at state here upon such irregular terms.

Consequently, Mr. Fromhart's loans to the Debtor were not made in the Debtor's ordinary course of business and do not qualify as an administrative expense under 11 U.S.C. § 364(a).

2. Borrowing Outside the Ordinary Course of Business

Mr. Fromhart agrees that he never obtained court approval for his post-petition loans to the Debtor. Nevertheless, Mr. Fromhart contends that it is appropriate for the court to grant *nunc pro tunc* approval of his loans. *Nunc pro tunc* approval is necessary, Mr. Fromhart argues, based on the compelling equities of the case. Mr. Fromhart asserts that without *nunc pro tunc* approval, the Debtor will be unjustly enriched, and that the Debtor, "in effect, manipulated [him] to loan his life savings."

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[5] It does not appear as if the Debtor itself considered the loans from Mr. Fromhart to be in its ordinary course of business. From February 2006 to June 2006, the Debtor's balance sheet reflects $750,000 in current notes payable. Apparently, the Debtor did not carry the loans from Mr. Fromhart – which were received in April and May 2006 – on its books as a business expense. Moreover, the Debtors balance sheet for the same period of time shows declining balances in the Debtor's long term loans payable. In addition, Francis Tucker stated that he informed his bankruptcy counsel about the need to obtain post-petition financing, and he stated that the Debtor's bankruptcy counsel told him that the Debtor would have to obtain court approval for any such loan.

The plain language of § 364(b) requires court approval – "after notice and a hearing" – of any unsecured credit or debt incurred outside the ordinary course of the Debtor's business. Assuming that the requirements for gaining court approval for a loan outside a debtor's ordinary course of business under § 364(b) are met, *nunc pro tunc* approval of that extension of credit generally requires "extraordinary" circumstances. Courts have cited the following factors for consideration in determining whether *nunc pro tunc* approval of a previously unauthorized loan is appropriate:

1. Whether the court is confident that it would have approved the loan if the application for court approval had been timely made;
2. Whether the court is reasonably persuaded that no creditor has been harmed by the continuation of the business made possible by the loan;
3. Whether the debtor and the lender honestly believed they had the authority to enter into the transaction.

In re Lite Coal Mining Co., 122 B.R. 692, 695-96 (Bankr. N.D.W. Va. 1990) (citing *In re Am. Cooler Co.*, 125 F.2d 496 (2d Cir. 1942) (addressing *nunc pro tunc* approval of lien pursuant to § 364(d)). Other courts add the requirement that there must be "something more compelling in the nature of equities and absence of prejudice to interested parties to allow such an extraordinary dispensation." *In re Lehigh Valley Prof'l Sports Clubs, Inc.*, 260 B.R. 745, 751 (Bankr. E.D. Pa. 2001); *see also In re Blessing Indus.*, 263 B.R. 268, 274 (Bankr. N.D. Iowa 2001) ("[A] party seeking a *nunc pro tunc* order in this context must satisfy all three factors set forth in *American Cooler*, as well as demonstrate that extraordinary, if not unusual, circumstances exist which warrant *ex post facto* approval.").

Here, the court is not at all confident that it would have approved the $200,000 loan, or the loan terms, if they had timely been presented to the court. Mr. Tucker states that the $200,000 was used in the Debtor's ordinary course of business to fund its operations, but other than a bank account entry reflecting a $200,000 deposit on April 10, 2006, no corresponding entry exists on the Debtor's balance sheet reflecting the new liability. In fact, from January 2006 through March 2006, the Debtor reported net positive income of $82,351.68, and it does not appear from the Debtor's statement of revenues and expenses that it needed the loan to fund its continuing operations. The loan from Mr. Fromhart may be related to a one-time "Bad Debt Expense" deduction from income entry on the Debtor's April 2006 Statement of Revenues and Expenses, but no explanation is before

the court as to what that expense entails. In fact, "bad debt expense" entries are normally associated with accounts receivables that cannot be collected – they are not expenses that must be paid to third parties and are not deducted from gross revenues in a cash-based accounting method.

Also, the purported terms of the loan are atypical. Loan payments were to be in the form of wages, the Debtor agreed to provide Mr. Fromhart with health insurance, and to suspend all rent due from Mr. Fromhart's business establishment known as Elites. Although the loan was made on April 10, 2006, the parties agreed that the loan date was deemed to be December 23, 2005, and the loan was not reduced to writing until May 30, 2006. Both the circumstances of the loan, and the loan terms, are highly unusual. The loan was in cash, and the requirement that Mr. Fromhart be paid wages was likely in violation of the video lottery lease agreement between the Debtor and Mr. Fromhart's tavern that required both the Debtor and Elites to be independent contractors.[6] In sum, the court is not confident that it would have approved the $200,000 loan had a timely application been made by the parties to the court because it does not appear as if the Debtor needed the money based on its Statement of Revenues and Expenses, the money was loaned off the Debtor's books, and the terms of the loan are highly unusual and problematic.

Regarding the $500,000 loan made by Mr. Fromhart to the Debtor, funded on April 28th and May 1, 2006, and reduced to writing on May 30, 2006, the Debtor's bank records reflect that the Debtor was short on cash. The total sum in the Debtor's four bank accounts as of May 1, 2008 was $144,660, and the Debtor's "operating" bank account had a negative balance of $34,410. For the month of May 2006, the Debtor realized $233,667 in gross business revenues, and had a net operating profit of $21,130. The Debtor's annual $502,000 video lottery license fee was due on May 1, 2006. Without the $500,000 loan from Mr. Fromhart, it does not appear as if the Debtor would have been able to make that payment. Unlike the $200,000 loan that was funded in April 2006, the $500,000 loan has more conventional terms (although half of it was in cash, and it may have violated the parties' video lottery lease agreement and applicable State law). It bears interest at 7.5%, and calls for monthly payments until paid. In fact, the court approved a similar type loan made by Alexas to the Debtor in 2007 to pay the same yearly video lottery license fee.

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[6] Counsel for the Debtor also asserted that video lottery operator cannot employ a person working for a video lottery retailer under applicable State law.

Assuming, without deciding, that the court would have approved of Mr. Fromhart's $500,000 loan to the Debtor, and that no creditor has been harmed by the continuation of the Debtor's business that was made possible by the loan, the court finds no evidence to support the requirement that the Debtor and Mr. Fromhart honestly believed that they had authority to enter the transaction without court approval.

By April 2006, the Debtor had been operating under bankruptcy protection for over three years. As early as March 17, 2003, the Debtor had requested permission from the court to incur post-petition debt so that it could purchase new video lottery machines. At all relevant times, the Debtor was represented by competent counsel who knew the requirements of 11 U.S.C. § 364, and how to obtain court approval to incur post-petition debt. No reason has been advanced by any party as to why Francis Tucker, on behalf of the Debtor, and Mr. Fromhart failed to seek court approval of their loan transaction. Attempting to explain this failure, Mr. Fromhart submitted the affidavit of Francis Tucker:

> For several weeks before the May 2006 deadline to pay the State of West Virginia, I was in constant communication with our Bankruptcy Attorney regarding the urgency of getting money for the license. I mentioned the possibility of getting a loan from Brad Fromhart – like all the other loans we got from him – to our Bankruptcy Attorney, who said we should get court approval. I asked Fromhart for the loan. Fromhart loaned the money. Our Bankruptcy Attorney said he would get court approval. Our Bankruptcy Attorney told me this over the phone while Fromhart was in OVAC's office making sure his loan was safe. I don't know why court approval was never gotten. About the time of all this, a company named Alexas became more and more interested in OVAC.

(Document No. 1095, ¶ 6).[7]

In sum, both Francis Tucker and Mr. Fromhart knew that they had to obtain court approval before Mr. Fromhart could make the loan to the Debtor. Notwithstanding that knowledge, Mr. Fromhart proceeded at his own peril and loaned $500,000 to the Debtor, on an unsecured basis,

[7] Contrary to Francis Tucker's assertion, the time records for the Debtor's attorney, submitted to the court in his application for compensation, fail to reflect any time entries related to obtaining a loan from Mr. Fromhart in April of May of 2006. There are no time entries between March 28, 2006 and May 15, 2006.

without taking any steps to first obtain the court's approval.[8] *Nunc pro tunc* approval of a post-petition loan is not available to a party that knows court approval of the loan is necessary, but then fails to take affirmative steps to obtain that approval before loaning the money. *E.g.*, *Bezanson v. Indian Head National Bank et al., (In re J.L. Graphics)*, 62 B.R. 750, 755 n.1 (Bankr. D.N.H. 1986) ("In this procedural context, in which relief is available in a matter of days even hours if the circumstances are urgent the rationale for permitting retroactive validation orders for secured borrowing and attachment of liens to post-petition transactions no longer exists."), *aff'd*, 818 F.2d 1027 (1st Cir. 1987).

IV. CONCLUSION

The loans allegedly made by Mr. Fromhart to the Debtor were not made in the ordinary course of the Debtor's video lottery gaming business. No court approval was obtained for the loans, and *nunc pro tunc* approval is not applicable in this case because the court is not convinced that the $200,000 loan was necessary to continue the Debtor's operations, or that it would not have approved of the terms for the $200,000 loan had those terms been presented to it. *Nunc pro tunc* approval of the $500,000 loan is improper because it was made without court approval when the parties both knew that court approval was necessary.[9]

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[8] It is astounding to the court that Mr. Fromhart engaged in at least two loan transactions with the Debtor over the course of three weeks in which he loaned $700,000 to the Debtor, well over half of it in cash, and did so apparently without the benefit of legal counsel or more conventional transactional structuring. The assistance of competent legal counsel could have saved Mr. Fromhart considerable difficulty and untoward consequences.

[9] Regarding the status of unauthorized post-petition loans to a debtor, *Collier on Bankruptcy*, provides the following guidance:

> Where the borrowing is out of the ordinary course of business and prior court authorization is not obtained, the lender may be relegated to the status of a general unsecured creditor or the loan transaction may be cancelled or disregarded. Indeed, it could be argued that if the loan is not entitled to administrative expense treatment, it is not a claim recognizable in the bankruptcy, since it is neither a prepetition claim nor a claim treated under section 502 or 503 as if it had arisen prepetition. The debtor's failure to obtain court approval before entering into postpetition financing agreements may also support a finding of bad faith, warranting dismissal of the bankruptcy case.

3 *Collier on Bankruptcy* ¶ 364.03[2] (Alan N. Resnick & Henry J. Sommer, eds., 15th ed. rev. 2008).

The court is making no determination in the context of the Debtor's motion for summary judgment on how to treat the claim of Mr. Fromhart against Francis Tucker and/or the Debtor. The court is only determining that his claim is not entitled to administrative expense status under 11 U.S.C. § 503(b).