

SIGNED.

Dated: September 5, 2017




Paul Sala, Bankruptcy Judge

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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA**

In re:
ERIK and DARYL DE JONG,
Debtors.

Chapter 11
Case No. 2:14-bk-00886-PS

**MEMORANDUM DECISION ON
REMAND FROM BANKRUPTCY
APPELLATE PANEL**

The court has received the Judgment and Memorandum Decision of the Bankruptcy Appellate Panel [Dkt. 791] (“Memorandum”) which affirmed in part and vacated in part this court’s September 30, 2016 Amended Order re: Proof of Claim #5 [Dkt. 707]. The court held a hearing on August 1, 2017 to discuss with counsel for the Debtors and counsel for JLE-04 Parker, L.L.C. (“JLE”) whether and what further proceedings the parties believed the court should set in the remanded matter. While the parties agreed that the court is required to calculate the Debtors’ net profits from their dairy operations to fix the amount of JLE’s claim and that the court should hold further hearings, the parties differed in how they believed the court should proceed. JLE believes that additional briefing, in which the parties can point to specific items in the record, would be helpful to the court in determining JLE’s damages. The Debtors believe that further briefing would create an unnecessary expense and that the court should set an additional evidentiary hearing prior to determining JLE’s damage claim. To address the matter, the court issued a Preliminary Memorandum Decision and invited the parties to file any

1 objections thereto. The court heard argument on the objections on August 29, 2017.

2 Having considered the parties' suggestions, and argument on the parties' objections to the
3 Preliminary Memorandum Decision, the court does not believe that additional briefing or
4 hearings would be beneficial to determining the extent of JLE's damages consistent with the
5 BAP's ruling. Instead, the court's factual findings contained in its Memorandum Decisions
6 dated April 19, 2016 [Dkt. 625] and September 30, 2016 [Dkt. 706] are sufficient for the court to
7 calculate JLE's damages.

8 1. Prior Damages Ruling

9 The court previously ruled that JLE was entitled to following damages [Dkt. 706]:

10 Pre-petition

11 Pre-petition silage \$ 416,623.98

12 Pre-petition profits \$ 191,541.45

13 Pre-petition hay conversion \$ 720.00

14 **Total \$ 608,885.43**

15 Credit for 60.29% of pre-petition rent \$ 29,812.92

16 (\$49,449.19 X .6029)

17 **Total pre-petition claim \$ 579,072.51**

18 Post-petition

19 Post-petition silage \$1,134,635.52

20 Post-petition profits \$ 521,644.79

21 **Total \$1,656,280.31**

22 Credit for 60.29% of post-petition rent \$ 84,364.20

23 (\$139,930.67 X .6029)

24 **Total post-petition claim \$1,571,916.11**

25 2. Remand

26 The BAP remanded this matter "for a calculation of damages consistent with this
27 memorandum." Dkt. 791, page 33, lines 20-21. As noted above, the court awarded JLE three
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1 types of damages: Hay damages; Silage damages; and Profit damages. The court can comply
2 with the BAP's mandate based upon the court's prior findings.

3 A. Hay damages

4 The pre-petition hay conversion damages were not part of the BAP's remand.
5 Accordingly, that portion of the court's damage award is unchanged.

6 B. Silage damages

7 1. Post-petition

8 The BAP determined that the court erred in awarding separate damages for the value of
9 the silage that would have been lost had the Debtors not consciously trespassed on JLE's
10 property. Accordingly, the BAP vacated the "court's post-petition damage award...." Dkt. 791,
11 page 33, lines 19-20. For the reasons set forth in the BAP's Memorandum, JLE is not entitled to
12 any award for post-petition silage damages.

13 2. Pre-petition

14 Although the court awarded JLE pre-petition silage damages based upon the same
15 rationale the BAP found erroneous in awarding post-petition damages, the BAP did not vacate
16 the pre-petition silage damages. Given the specificity of the BAP's reversal and mandate
17 concerning post-petition damages,¹ the court will not alter the award of pre-petition damages.
18 Should the BAP, or District Court, determine in a subsequent appeal that pre-petition silage
19 damages are improper, the amount of the pre-petition claim should be reduced by \$416,623.98.²

20 C. Profits

21 The BAP determined that the Debtors' net profits are the proper measure of JLE's
22 recovery. In determining the Debtors' net profits, the BAP instructed that silage usage should be
23 accounted as an expense. The court's prior determination accounted for silage as an expense
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25 ¹ The BAP's Memorandum Decision specifically refers to **postpetition** profits in at least five instances: "Finally,
26 Debtors maintain that the bankruptcy court's calculation of **postpetition** profits was not supported by the evidence
27 and constitutes clear error" [page 25, lines 25-27]; "The court calculated the amount of silage used by Debtors on a
28 daily basis and multiplied that number by the number of days they used JLE's property **postpetition** to arrive at a
total representing Debtors' benefit" [page 31, lines 18-22]; Debtors contend that the bankruptcy court erred in
calculating JLE's **postpetition** claim" [page 32, lines 13-14]; "Therefore, we vacate the bankruptcy court's
postpetition damage award" [page, lines 13-14]; "We VACATE the bankruptcy court's **postpetition** damage
award" [page 33, lines 19-20].

1 prior to calculating the Debtors' net profits. Accordingly, the court's prior determination that the
2 Debtors' profited by trespassing on JLE's property in the amount of \$191,541.45 pre-petition
3 and \$521,644.79 post-petition, is the correct calculation of the benefit received by the Debtors.

4 In its decision, the court made numerous findings. Among those findings were that the
5 Debtors' net profits per day from their dairy operations were \$10,262.98 [Dkt. 625, page 26,
6 lines 23-24] and that 39.71% of those profits were attributable to the Debtors' trespass on JLE's
7 property [Dkt. 625, page 27, lines 13-17].³ From those findings, the court calculated the
8 Debtors' pre-petition and post-petition profits attributable to the Debtors' trespass on JLE's
9 property. The court made those findings after hearing four days of trial that included the live or
10 deposition testimony of nine witnesses, and after the court considered the over 125 exhibits
11 admitted at the trial. The BAP did not question or vacate any of those findings.

12 The court's determination of the Debtors' profits from their dairy operation gave credit to
13 the Debtors for the cost of silage used in the Debtors' operation. In determining the Debtors'
14 profits, the court relied primarily on the Debtors' accountant prepared financial statement for the
15 six-month period ending June 30, 2014, which the court admitted as trial exhibit 237.⁴ As noted
16 in the court's Memorandum Decision, the court based its profit findings on the accountant
17 prepared financial statement (instead of the Debtors' monthly operating reports as requested by
18 JLE) largely because it reflected the silage and depreciation expenses. See Dkt. 625, page 25,
19 line 24 through page 26, line 6. Where the court's determination of net profits was consistent
20 with the BAP's instructions, the court need not recalculate the profit damage award. JLE is
21 entitled to pre-petition profit damages of \$191,541.45 and post-petition profit damages of
22 \$521,644.79 reflecting the benefit obtained by the Debtors from trespassing on JLE's property.

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26 ² The amount reflects the pre-petition silage damages previously awarded by the court. Dkt. 706, page 2, line 5.

27 ³ The percentage reflects the increased number of cows the Debtors were able to milk by trespassing on JLE's
28 property.

⁴ As explained in the court's Memorandum Decision, Exhibit 237 establishes a net profit from dairy operations for
the period of January 1, 2014 through June 30, 2014 of \$1,711,752.00. Dkt. 625, page 26, lines 7 through 14. That
figure is the baseline from which the court ultimately determined the Debtors' daily profits of \$10,262.98. Dkt. 625,
page 26, lines 15-24. To calculate JLE's profit damages, the court multiplied the daily benefit from the trespass by

