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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:) Case No. 92-17020
)
Terry Michael Philips,) Chapter 7
)
Debtor.) Judge Arthur I. Harris

SCHEDULING ORDER

This nearly eleven year-old case came before the Court for a final hearing on compensation on August 26, 2003. Although the current Chapter 7 trustee, Steven S. Davis, was present in the courtroom, no one appeared with questions or objections to the requested compensation or to the proposed distribution contained in the trustee's final report, as amended (Docket ## 246 & 247). The proposed distribution – in excess of \$2,181,000 – would include:

- \$102,559.09 as a trustee fee for Mr. Davis;
- \$11,406.45 as a trustee fee for Brian A. Bash, who served until he resigned and was replaced by Mr. Davis in January of 1996;
- approximately \$16,000 in trustee attorney's fees;
- approximately \$51,000 in Chapter 11 attorney's fees and expenses; and
- approximately \$2,092,000 to general unsecured creditors, including nearly \$780,000 to the debtor, Terry Philips.

Notwithstanding the absence of objections to the proposed distribution, the Court believes that a further hearing is necessary to ensure that the distribution comports

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fully with the provisions of Section 726 of the Bankruptcy Code and to ensure that the trustee and professional fees comport with the reasonableness and other requirements of Sections 326 and 330 of the Bankruptcy Code. This need for a hearing is appropriate if for no reason other than that most of the relevant proceedings transpired before this case was transferred to the undersigned judge on October 7, 2002.

Accordingly, the Court will hold an evidentiary hearing and oral argument on this matter on **October 28, 2003, at 9:00 a.m.**

Among the items the Court would like the current trustee and/or interested parties to address are:

- a general history of the proceedings in this case (the current trustee should feel free to incorporate prior written descriptions, at least to the extent that such prior written descriptions are available; the Court will also permit the trustee to submit affidavits or declarations and testify on his own behalf in a narrative fashion)
- the final resolution of the patent litigation, including any settlements and payments from third parties or insurance
- the final resolution of the malpractice litigation, including any settlements and payments from third parties or insurance
- the circumstances that led up to the December 16, 1999, Agreed Order (Docket # 221) (hereinafter, "the Agreed Order," a copy of which is attached) as well as the settlement of the adversary proceedings, 93-1445

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and 95-1512

- the nature of the circumstances and consideration that resulted in the debtor receiving approximately 40 percent of the proceeds of the Von Holdt claim under the Agreed Order
- the trustee's and/or other parties' understandings concerning the operation of the Agreed Order (*e.g.*, whether the phrase "such distribution" on page two is limited to moneys derived from settlement of the malpractice claim or includes moneys not derived from settlement of the malpractice claim)
- whether the trustee's calculation of the proposed distribution accurately reflects the claimants' assignment under the Agreed Order of the first \$35,000 they are to receive (the proposed distribution appears to give the first \$35,000 to claimants and not to Terry Philips)
- any argument why, under 11 U.S.C. § 726, general unsecured creditors are not entitled to be paid in full, with post-petition interest, before payment to the debtor of nearly \$780,000 (assuming some or all of the consideration leading up to the Agreed Order was a prepetition claim of the debtor and therefore an asset of the debtor's estate)
- the estimated time that the current trustee has incurred on this case (including any time since the final report was filed) not reflected in the billing records accompanying the final report
- the current trustee's regular hourly rate(s) since 1996
- any relevant case law or reasons why the Court should not apply the following principles from case law interpreting Sections 326 and 330:
 1. Section 326 sets the maximum compensation payable to the trustee, it does not establish a presumptive or minimum compensation. *See In re Miniscribe Corp.*, 309 F.3d 1234, 1241 (10th Cir. 2002); *In re Lan Associates XI, L.P.*, 192 F.3d 109, 115-16 (3d Cir. 1999); *Kandel v.*

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Alexander Leasing Corp., 107 B.R. 548, 551 (N.D. Ohio 1988)(Judge Dowd); *In re Computer Learning Centers, Inc.*, 285 B.R. 191, 229-30 (Bankr. E.D. Va. 2002); *In re Citi-Toledo Partners II*, 254 B.R. 155, 165 (Bankr. N.D. Ohio 2000)(Judge Speer)

2. A court awarding trustee fees must begin by assessing reasonableness under Section 330(a) before applying the percentage based cap under Section 326(a). See *In re Miniscribe*, 309 F.3d at 1241; *In re Lan Associates*, 192 F.3d at 121-22; *In re Computer Learning Centers*, 285 B.R. at 229-30; *In re U-Can Rent, Inc.*, 262 B.R. 147, 152 (Bankr. M.D. Ga. 2001); *In re Citi-Toledo Partners*, 254 B.R. at 165-66

3. The lodestar method is an appropriate test to determine the amount of reasonable compensation to be awarded, “taking into account all relevant factors” as required under Section 330(a). See *In re Miniscribe*, 309 F.3d at 1243-44; *In re Boddy*, 950 F.2d 334, 337-38 (6th Cir. 1991); *In re U-Can Rent*, 262 B.R. at 153

- any factors or unusual circumstances that the current trustee believes justify an award above the lodestar (*e.g.*, lack of any interim payments over the years, relatively large payout to unsecured creditors, etc.)
- any argument why calculation of the statutory cap for trustee compensation under 11 U.S.C. § 326(a) should include moneys disbursed or turned over in this case to the debtor
- any argument why the relevant parties should not consider amending their prior Agreed Order to achieve approximately the same monetary distribution, while at the same time assuring compliance with 11 U.S.C. §§ 326(a), 510, and 726 (for example, the relevant parties might agree to amend the Agreed Order to reduce the Von Holdt claim, including post-petition interest, to \$1.2 million – all administrative claims and general unsecured creditors would then be paid in full, with the general unsecured creditors receiving post-petition interest, and the remaining money going to the debtor under Section 726(a)(6))

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- any argument concerning the need to pay interest on administrative and general unsecured claims under 11 U.S.C. § 726(a)(5) before payment to the debtor under 11 U.S.C. § 726(a)(6) and the application of that rate to administrative and unsecured claims in this case (for example, the Court is inclined to follow case law interpreting the “legal rate” in Section 726(a)(5) as that provided for under 28 U.S.C. § 1961, which would be the rate in effect as of the petition date of December 24, 1992 – 3.72 percent, compounded annually from the petition date, or approximately 49.45 percent through December 24, 2003; *see, e.g., In re Dow Corning Corp.*, 237 B.R. 380 (Bankr. E.D. Mich. 1999); administrative claimants would only receive postpetition interest from the date that compensation was awarded; *see, e.g., In re Glados, Inc.*, 83 F.3d 1360 (11th Cir. 1996))
- what steps should be taken should agreement not be reached to amend the Agreed Order, assuming the Court finds that the proposed distribution does not comport with 11 U.S.C. § 726 (*e.g.*, vacate the Agreed Order and resolve the debtor’s objection to the Von Holdt claim under Section 502 and Bankruptcy Rule 3007)¹

In addition, the Court would like a representative of the United States

Trustee to provide evidence describing what steps have been taken under

28 U.S.C. § 586 with respect to any review of the trustee’s final report and the

requested trustee and other professional fees contained therein. The Court would

¹ Although the Court is reluctant to revisit and possibly vacate an Agreed Order that was approved and entered nearly four years ago, the Court is troubled by a proposed distribution that appears not to comport with the absolute priority established under Section 726. While the Court has no trouble with a claimant willing to subordinate its claim or a portion of the proceeds of its claim, at least at this point, the Court does not understand how the debtor should receive such a large distribution without all the other general unsecured creditors being paid in full, with post-petition interest.

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also like to know the United States' Trustee's position on the fee applications and the status of any outstanding objections to professional compensation in this case, including:

Docket #144 – Objection to application for compensation by Jerry F. Whitmer

Docket #163 – Objection to application for compensation by Kahn, Kleinman

Accordingly, in order to secure the just, speedy, and inexpensive determination of this matter, the parties are directed to comply with the following deadlines:

(1) EVIDENTIARY HEARING. An evidentiary hearing² and oral argument on compensation of the trustees and professionals, and the proposed distribution (Docket ## 246 & 247) will be held at the U.S. Bankruptcy Court, Room 3102, 127 Public Square, Cleveland, Ohio, on October 28, 2003, at 9:00 a.m.

(2) WITNESS LISTS AND EXHIBITS. No later than October 21, 2003,

² The Court will permit the trustee and other professionals to testify on their own behalf in a narrative fashion and also encourages the submission of affidavits or declarations. Such witnesses will still be subject to possible examination by parties in interest or the Court.

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each party will file with the Court and provide opposing counsel with a list of (i) the witnesses the party intends to call along with a statement of the issues about which each witness is expected to testify and (ii) the exhibits the party intends to introduce at the evidentiary hearing.

(3) STIPULATIONS. No later than **October 21, 2003**, the parties are to file any Stipulations of Fact.

(4) ADDITIONAL BRIEFING. Any party wishing to submit additional briefing should do so no later than **October 21, 2003**.

(5) EXPERT TESTIMONY. No later than **October 21, 2003**, any party intending to present expert testimony shall comply with the disclosure requirements of Fed. R. Civ. P. 26(a)(2), made applicable to this matter under Bankruptcy Rules 7026 and 9014.

If any date indicated above creates a scheduling conflict, any party with such a conflict shall be responsible for conferring with the remaining counsel and the Courtroom Deputy, Ms. Stephanie Zelman, [(216) 522-4373, ext. 3015] no later than **September 26, 2003**, to schedule an acceptable alternate date.

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IT IS SO ORDERED.

/s/ Arthur I. Harris 09/15/2003
Arthur I. Harris
United States Bankruptcy Judge