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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

ORDER APPROVING TRUSTEE AND PROFESSIONAL FEES

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 believed that a further hearing was necessary to ensure that the distribution

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comported fully with the provisions of Section 726 of the Bankruptcy Code and to ensure that the trustee and professional fees comported with the reasonableness and other requirements of Sections 326 and 330 of the Bankruptcy Code. This need for a hearing was 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 issued an order on September 15, 2003 (Docket # 250), scheduling an evidentiary hearing and oral argument for October 28, 2003.

At the request of the debtor, the Court heard argument on September 16, 2003, directed at the issues arising from a prior Agreed Order (Docket # 221) giving the debtor approximately 40 percent of funds to be distributed on the Von Holdt claim. After the Court was satisfied that none of the consideration for this Agreed Order stemmed from a prepetition claim of the estate, the Court issued a Stipulation and Agreed Order (Docket # 257) authorizing a partial distribution to unsecured creditors. The Stipulation and Agreed Order reserved ruling on the compensation of professionals and the Chapter 7 trustees.

In Stipulated Orders dated October 23, 2003, and October 28, 2003, (Docket ## 257 and 259) the Court approved agreements resolving the

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U.S. Trustee's objections to applications for compensation by Jerry F. Whitmer and Kahn, Kleinman.

On October 28, 2003, the Court heard oral argument from the successor trustee, Mr. Davis; counsel for the United States Trustee, Ms. Kleinman; counsel for the debtor, Mr. Gurbst; and counsel for the successor trustee, Mr. Simon. Mr. Davis indicated that he did not keep truly accurate time records for his work as trustee on this case over the past seven and a half years and that he could not reconstruct more accurate records than those submitted with his final report. He also indicated that his fee as an attorney was \$195 per hour through 1999 and \$200 per hour since January of 2000.

Ms. Kleinman described her work in personally reviewing the requested trustee fees and deciding not to oppose the fees requested by Mr. Davis. Among the factors that Ms. Kleinman referred to were: (1) the even higher ceiling for trustee fees under Section 326 for cases filed on or after October 22, 1994, – the date of the enactment of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394; (2) the absence of guidelines from the U.S. Trustee regarding the necessity for timekeeping by Chapter 7 trustees in cases filed prior to 1997; and (3) the benefit to the estate that stemmed from the trustee's help in successfully

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recovering over \$3 million on a legal malpractice claim, which constituted the only significant asset of the estate not previously liquidated by the initial Chapter 7 trustee.

Mr. Gurbst indicated that both he and the debtor believed the fees sought by Mr. Davis were reasonable and well-deserved, particularly in light of Mr. Davis's efforts to press for and ultimately recover a much larger settlement figure on the legal malpractice claim than might otherwise have been obtained had Mr. Davis opted for an easier or more conservative settlement approach.

The award of trustee fees is governed by Sections 326 and 330 of the Bankruptcy Code and the relevant case law interpreting those two provisions.

Among the key principles are the following:

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. 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.

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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.

In applying this case law, the Court finds that a number of circumstances, many unique to this case, warrant a determination that the requested trustee fees constitute "reasonable compensation . . . taking into account all relevant factors" within the meaning of Section 330(a). In addition to the factors specifically identified in Section 330(a)(3), the Court has considered the following:

- the benefit to the estate that stemmed from the trustee's help in successfully recovering over \$3 million on a legal malpractice claim, which constituted the only significant asset of the estate not previously liquidated by the initial Chapter 7 trustee;
- the debtor's belief that the fees sought by Mr. Davis were reasonable and well-deserved, particularly in light of Mr. Davis's efforts to press for and ultimately recover a much larger settlement figure on the legal malpractice claim than might otherwise have been obtained had Mr. Davis opted for an easier or more conservative settlement approach;
- the unique situation in which the claim of one general unsecured creditor constitutes approximately 98 percent of the total dollar amount of unsecured claims and that creditor has agreed to pay the debtor 40 percent of the proceeds of any distribution for his claim;

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- the absence of any objection by the U.S. Trustee or by the two individuals that would share approximately 98 percent of any additional proceeds that would come from a reduction in trustee fees;
- that all other general unsecured creditors combined would only receive approximately two percent of any additional proceeds that would come from a reduction in trustee fees;
- the even higher ceiling for trustee fees under Section 326 that would have applied were this case filed on or after October 22, 1994, bearing in mind that Mr. Davis was not appointed as successor trustee until January of 1996;
- the absence of guidelines from the U.S. Trustee regarding the necessity for timekeeping by Chapter 7 trustees in cases filed prior to 1997;¹
- the trustee has performed his services, thus far uncompensated, over a span going back more than seven and a half years.

Accordingly, with the exception of those fees previously allowed in the reduced amounts through Stipulated Orders dated October 23, 2003, and October 28, 2003, (Docket ## 257 and 259) the Court hereby approves all of the administrative and professional fees contained in the Amendment to the Trustee's Final Report (Docket # 247).

IT IS SO ORDERED.

/s/ Arthur I. Harris 10/29/2003
Arthur I. Harris
United States Bankruptcy Judge

¹ The Court hastens to caution, however, that trustees who fail to maintain proper time records for work in cases filed after 1996 do so at their own peril.