THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED 04 DEC 17 ... CLEVELAND ... OF OHIO

In re:	)	Case No. 03-25461
	)	
DEACONESS HOSPITAL, LLC, *et al.*,	)	Chapter 11
	)	(jointly administered)
Debtors.	)	
	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**

Hahn Loeser & Parks LLP filed its second application for interim compensation for services rendered to the debtors from May 1, 2004 through October 31, 2004. (Docket 758, 781). The firm requests $270,528.50 in fees and $21,331.45 in expenses. These parties object: creditor Bank One, N.A.; creditor GE HFS Holdings, Inc.; the United States trustee; and the committee of unsecured creditors. (Docket 774, 776, 777, 778, 786). For the reasons stated below, the objections are sustained in part and overruled in part, resulting in an award of $183,648.00 in fees and $21,080.95 in expenses, with the court reserving ruling on $77,749.00 in fees relating to the rejected plan and disclosure statement and time attributable to fee applications. The debtors are authorized to pay $5,095.92 of the expense award, only.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(O).

ISSUES

(1) What amount of fees and expenses should be awarded to Hahn Loeser; and

(2) When should the awarded compensation be paid by the debtors to Hahn Loeser?

DISCUSSION

A professional who provides services in a bankruptcy case may be awarded "reasonable compensation for actual, necessary services" and "reimbursement for actual, necessary expenses." 11 U.S.C. §§ 330(a)(1)(A) and (B). Applications for compensation are reviewed under bankruptcy code § 330, the bankruptcy rules related to professional compensation, the legal principles set forth in *In re Boddy*, 950 F. 2d 334 (6th Cir. 1991), and the guidelines for compensation and expense reimbursement for professionals set forth in General Order No. 93-1 of the Bankruptcy Judges of the Northern District of Ohio (guidelines). As the applicant, Hahn Loeser & Parks LLP (Hahn Loeser or the firm) has the burden of proving it is entitled to compensation in the amount requested. *In re Bolton-Emerson, Inc.*, 200 B.R. 725, 729 (D.Ct. D. Mass. 1996). Expense requests are reviewed with a "strict eye" as to reasonableness. *Bowling v. Pfizer*, 132 F.3d 1147, 1152 (6th Cir. 1998).

Background

The three debtors–Deaconess Hospital, LLC, Indoga, Inc., and Pearlview Square, Inc.–filed these chapter 11 cases intending to reorganization. That intention changed shortly after the filing and the debtors turned their attention to liquidating their assets. With court approval given April 19, 2004, they sold substantially all of their assets to MetroHealth System. (Docket 396, 397).

GE HFS, Inc. (GE HFS) and Bank One, N.A.. filed proofs of claim in which each claims status as a secured creditor. The debtors have not objected to either claim and the secured claims attached to the sale proceeds to the same extent that they enjoyed before the sale.

George Saad, M.D. is the sole decision-maker for the debtors and an insider as that term is used in the bankruptcy code. *See* 11 U.S.C. § 101(31). He is alleged to have personally borrowed more than $5 million from Bank One, some of which has not been repaid. Deaconess and Pearlview guaranteed payment of this debt. Dr. Saad has filed a personal lawsuit against GE HFS that is pending in another court.

The Objections to Specific Fee Requests and the Responses[1]

1. GE, Bank One, and the United States trustee object to fees attributable to internal, non-ECF related filing and case management time, noting that the court found similar time entries not compensable in reviewing the firm's first fee application. The court stands by its ruling, sustains the objection, and reduces these fees by $5,743.50.[2]

2. The United States trustee, Bank One, and the committee of unsecured creditors (committee) object to time billed by Hahn Loeser to try to retain a third-party management firm to handle the debtors' business affairs several months after the filing. The objection is that the efforts did not result in any benefit to the estates. Bank One argues that "[t]he Emergency

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[1] As was true with Hahn Loeser's first application, the objections and responses are stated in several different ways. The court has reorganized the objections to address them collectively and in so doing has considered all positions.

[2] The objectors proposed different amounts for the reduction. The court finds that the United States trustee's number most accurately reflects the court's earlier ruling and so adopts that number.

Motion of Debtors for Authority to Use Estate Assets to Pay BBP Partners, LLC for Third-Party Management Services . . . was particularly wasteful, as the Debtors' prior request to pay Nour about one-third the amount requested to pay BBP was denied; the factual rationale for the BBP request was no longer relevant at the time of the filing; and the same legal considerations that warranted denial of the motion to pay Nour applied equally with respect to the request to pay BBP." (Bank One objection at 6). The firm responds that because the debtors were not able to negotiate a continuing cash collateral order with the secured creditors and other parties in interest, they felt the need to retain a third-party management firm. (Hahn Loeser supplement at ¶ 69). This does not address the heart of the objectors' point, which is that such a motion was destined to be denied and thus could not have conferred–and did not confer–any benefit to the estates. The court finds Bank One's description to be an accurate statement of what transpired and for that reason sustains the objection in the amount of $3,388.00. (*See* Bank One objection, exhibit A, part 2).

3. Bank One objects to Hahn Loeser's request to be compensated for drafting and filing motions requesting emergency hearings, all but one of which the court deemed not to be an emergency and thus relegated to hearing on the regular chapter 11 docket held about every two weeks. The firm replies that "[o]n occasion, diligent efforts to resolve a matter in a timely way were not successful, and pushed the Debtors past the 'deadline date' for timely filing a motion in order for the relief sought to be timely and appropriate," thus resulting in the emergency motions. (Hahn Loeser supplement at ¶ 71). Without agreeing with this characterization of events, the

court believes the better course is to allow the time in this application, with the firm on notice that any future motions alleging an emergency without good cause will not be compensated.[3]

4. Bank One, GE HFS, and the committee object to time spent by Hahn Loeser preparing a plan and disclosure statement on the ground that such an action in these liquidating estates was premature and unnecessary.[4] They contend that the debtors knew or should have known that the proposed plan could not be confirmed for several reasons, chief among them that the plan proposed to put Dr. Saad in control of the debtors postconfirmation, a clear conflict of interest since Dr. Saad would be resolving claims on behalf of the debtors with one creditor to which he is personally liable (Bank One) and one creditor that he has asserted personal claims against (GE HFS). The objectors also point out that at the time the debtors prepared their plan, the major issues had not been resolved (either by agreement or court order): the parties had not completed their investigation into the debtors' claim that GE HFS's claim should be equitably subordinated; the Bank One security interests had not been resolved; the proceeds from the sale of the debtors' property had not been apportioned among the debtors' estates; and no one agreed with the debtors' proposed resolution of any issue. The firm replies that a fundamental purpose of chapter 11 is to propose a plan. This is true. It was clear, however, at the time the debtors

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[3] For guidance on this point, please see this court's March 2, 2004 memorandum adopting the Black's Law Dictionary definition of an emergency as: "[a] sudden unexpected happening; an unforeseen occurrence or condition . . . [A]n unforseen combination of circumstances that calls for immediate action without time for full deliberation." www.ohnb.uscourts.gov.

[4] GE HFS argues generally that all actions taken by Hahn Loeser on the debtors' behalf after selling the majority of their assets have been unnecessary and that the firm is pushing the estates into administrative insolvency. The court will not address this general complaint in connection with this interim fee application.

prepared this plan that it could not possibly be confirmed because of the proposed conflicts of interest and the number of significant unresolved issues. The court will withhold ruling on this part of the application ($53,900.50) until the end of the case to see if anything proposed by the debtors in their rejected plan ends up being an integral part of a final resolution, in which case the court may award some or all of the fees as having been of benefit to the estate.

5. Bank One and the committee object that Hahn Loeser spent an inordinate amount of time preparing its first fee application and addressing retention and compensation issues for other professionals in the case, totaling $23,848.50. Within this category, the committee objects to time spent by the firm objecting to the committee's fee application which resulted in only a *de minimus* reduction. A review of this time is best done at the end of the case when the amount of time devoted to this activity can be evaluated as a whole. The court will, therefore, withhold ruling on this issue.

6. The United States trustee and GE HFS object that Hahn Loeser did not provide receipts for expenses exceeding $25.00 and that certain expenses (even if documented) should not be reimbursed under the guidelines. By the time of the hearing, the firm belatedly provided the receipts and the United States trustee withdrew that part of his objection. The remaining objection is to expenses for parking, taxis, and mileage, totaling $250.50. These expenses are disallowed for the reasons stated in the memorandum of opinion addressing the first fee application. (Docket 709).

Timing of Paying the Allowed Compensation

Hahn Loeser requests that the debtors be authorized to pay the allowed compensation immediately. GE HFS and Bank One contend that there are no unencumbered funds with which

to pay Hahn Loeser at this point in the case and that the firm is limited to a maximum payment of $5,095.92 under earlier agreements.

The genesis of the dispute is a highly-negotiated series of agreed continuing cash collateral orders. The orders all contain provisions substantially similar to this:

> 4. For each week during the period October 4, 2004 through January 30, 2005 (the "Budget Period") the Budget referenced in paragraph 10 of the Financing Stipulation shall be the Budget attached as Exhibit A (collectively, the "Budget").
>
> * * *
>
> 6. To the extent that the actual amount of allowed Professional Fees and costs are less than the amount set forth in the Budget for the budget period, the excess is the cash collateral of GE and Bank One and cannot be used for other Budget items or Professional Fees or costs for other periods of the case, subject to further Court Order. Notwithstanding any of the foregoing, professional fees and costs shall be subject to Bankruptcy Court approval, upon fee applications. GE and Bank One each reserve their respective rights to object to any and all fees and costs, and shall not be prejudiced by the amount of the line item for Professional Fees set forth in the Budget. The Professional Fees and costs through and including April 26, 2004 as ultimately allowed by the Court, after fee applications, objections, if any and a hearing thereon, shall constitute a carve-out of GE HFS's and Bank One's collateral to the extent unencumbered funds are not available to cover such Professional Fees and costs, *provided, however,* that (I) this carve-out shall not extend to any Professional Fees or costs relating to the assertion or prosecution (but not including any investigation) of any rights of the Debtors or the Creditors' Committee to object to, or to file any claims with respect to, the amount, nature, extent, amount [sic], validity, perfection and/or priority of GE HFS's and/or Bank One's claims, or for any other reason . . . (ii) this carve-out shall be limited to the sum of $650,000.00 in total, (iii) of this $650,000.00 carve-out, the carve-out as to the Committee Counsel shall be the sum of $160,000.00 . . . .

(Docket 757). A $160,000.00 carve-out for the committee leaves $490,000.00 for Hahn Loeser. By order dated September 15, 2004, this court approved and the debtors paid $484,904.08 in compensation to Hahn Loeser.

Generally, a carve-out is an " 'invasion' of [cash] collateral for the payment of administrative fees necessary to ensure Debtor's ability to perform its fiduciary obligations to creditors." *In re Phoenix Medical Technology, Inc.*, 2001 WL 1806975 (Bankr. D.S.C.). The parties did not define carve-out in the cash collateral orders other than as quoted above. They now disagree as to how the carve-out provision should be interpreted.

GE HFS and Bank One argue that $490,000.00 is the maximum that can be paid to Hahn Loeser under the cash collateral orders. From that, they subtract the $484,904.08 paid and arrive at a balance of $5,095.92 that is potentially available to pay Hahn Loeser's fees at this point in the case. GE HFS argues further that $3,933.00 in Hahn Loeser fees attributable to asserting or prosecuting claims against GE HFS cannot be paid from this amount.

Hahn Loeser makes two arguments in response: (1) the budgets included line items for professional fees, with the carve-out amount serving as an additional cushion for the professionals; and (2) alternatively, the award can be paid from unencumbered funds. On the first point, Hahn Loeser argues that the cash collateral orders authorize use of cash collateral over and above the carve-out amount. The firm contends that each order included a budget and each budget had a line item for professional fees. The fees in all of the budgets total $1,123,000.00. Thus, the firm's position is that the secured creditors agreed that *after* these line item amounts are spent, an additional $650,000.00 carve-out is available from their cash collateral. GE HFS replies that this contradicts the express terms of the cash collateral orders and is illogical: if GE is fully secured or oversecured[5] (as GE HFS has argued since the beginning of the cases) and

[5] The debtors do not agree.

given that this is a liquidating case with limited assets,[6] why would the secured creditors have agreed that their cash collateral could be used to pay more than $1 million in professional fees, with a cushion of $650,000.00?

Because agreed orders are contractual in nature, they are governed by principles of contract interpretation. *City of Covington v. Covington Landing Ltd. P'ship,* 71 F.3d 1221, 1227 (6th Cir. 1995). Having presided over multiple hearings that resulted in entry of the agreed orders, and having reviewed the language of the agreed orders, the court finds the relevant concept that the parties agreed to is this: compensation allowed by the court for professional fees can be paid out of the creditors' cash collateral, with the payment limited to $650,000.00. The orders do not give any independent force to line items in the budget. This conclusion is buttressed by the motion filed in July 2004 in which the debtors asked that the carve-out be increased from $650,000.00 to $750,000.00. (Docket 528; exh. A). If the debtors believed that the budgets attached to the cash collateral orders represented agreement that the debtors could be paid up to the line item amount, there would have been little reason to ask for the carve-out to be increased. The remaining carve-put amount available to pay the firm is, therefore, $5,095.92.

As its second argument, Hahn Loeser contends that the fees can be paid from unencumbered funds. The firm identifies three such sources. First, several months into the case the debtors sold substantially all of their assets to MetroHealth System. As part of their

[6] According to Deaconess's monthly operating report filed for the period ended October 31, 2004, the debtors have about $969,000.00 in cash plus accounts receivable, a claimed escrow, and inventory. The accounts receivable are listed at about $7 million. These receivables are all over one year old. In September, the debtors collected about $12,000.00 in receivables and in October they collected about $30,000.00. (Docket 744, 770). This asset situation has been about the same since the April 2004 asset sale to MetroHealth System.

negotiations in arriving at the purchase price, the debtors and MetroHealth assumed that it would cost $200,000.00 for the debtors to store patient records. Later, the debtors found a vendor to perform this service for $70,000.00. The debtors now argue that the $130,000.00 difference is their unencumbered money, not the secured creditors' collateral. These funds came into the debtors' hands because they sold collateral subject to a security interest. The fact that the debtors negotiated a lower price for storing their records (consistent with their fiduciary duties) does not release these funds from their characterization as cash collateral. The $130,000.00 "savings" is not unencumbered and cannot be used to pay the fees.

The second source looked to by the debtors arises out of a dispute the debtors had with Hospital Partners of America, Inc. (HPA). HPA agreed to purchase the debtors' assets and then backed out of the deal. The debtors claimed breach of contract and HPA settled that claim by paying $500,000.00. GE HFS argues that this court already decided that these funds are part of its cash collateral. In reviewing the referenced order, the court does not agree that it has conclusively made this determination. Neither, though, has the debtor established that the funds are other than GE HFS's cash collateral. The court declines to decide this issue on an incomplete record in the context of a fee application. The funds cannot, therefore, at this time be used to pay Hahn Loeser's fees.

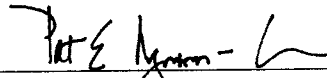
As a third potential source of unencumbered funds, the firm states that neither GE HFS nor Bank One has a security interest in debtor Indoga's assets which were sold as part of the assets sold to MetroHealth. The debtors, though, have not taken any steps to allocate the value of those assets. The general statement that some assets are unencumbered is insufficient to prove the amount of such assets that might be available to pay fees.

CONCLUSION

For the reasons stated, the second interim application of Hahn Loeser & Parks LLP for compensation is approved in the amount of $183,648.00 for fees and $21,080.95 for expenses. The court reserves ruling on $77,749.00 in fees. The balance of the application is denied. The debtors may pay $5,095.92 of the allowed expenses and none of the fees at this time.[7]

A separate order will be entered reflecting this decision.

Date: 17 June 2004



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

Daniel DeMarco, Esq.
Andrew Vara, Esq.
Ronald Beacher, Esq.
Russell Kornblut, Esq.
Joseph Hutchinson, Esq.

[7] Since the funds are not being applied to fees, it is not necessary to resolve GE HFS's contested claim that certain time entries cannot be paid because they relate to the prosecution of claims against this creditor.

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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CLEVELAND

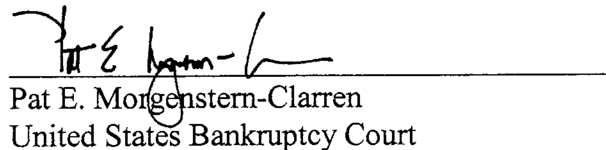
In re:	)	Case No. 03-25461
	)	
DEACONESS HOSPITAL, LLC, *et al.*,	)	Chapter 11
	)	(jointly administered)
Debtors.	)	
	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**ORDER**

For the reasons stated in the memorandum of opinion filed this same date, Hahn Loeser & Parks LLP's second interim application for compensation in the amount of $270,528.50 in fees and $21,331.45 in expenses is allowed in part and denied in part. (Docket 758, 781). The firm is awarded $183,648.00 in fees and $21,080.95 in expenses. The court reserves ruling on $77,749.00 in fees requested. The balance of the fee request is denied and the objections to it are sustained. (Docket 774, 776, 777, 778, 786).

The debtors are authorized to pay $5,095.92 of the expenses, only.

IT IS SO ORDERED.

Date: 17 June 2004



Pat E. Morgenstern-Clarren
United States Bankruptcy Court

To be served by clerk's office email and the Bankruptcy Noticing Center on:
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