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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED  
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U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
CLEVELAND

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

The debtors filed an application to employ Spangenberg, Shibley & Liber LLP as special counsel to prosecute litigation against GE HFS Holdings, Inc., its former lender. (Docket 765, 783). Originally, GE HFS Holdings, Inc. and the committee of unsecured creditors objected. (Docket 775, 784, 785).<sup>1</sup> The committee resolved its objection, as discussed below. For the reasons stated below, the application is granted as modified and the remaining objections are overruled.

**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).

**DISCUSSION**

**A. Background**

The debtors filed an adversary proceeding against GE HFS Holdings, Inc. (GE HFS) relating to their lending relationship. *See* adversary pro. 04-1319. Hahn Loeser & Parks LLP,

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<sup>1</sup> The court heard this matter on December 2 and 16, 2004.

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the debtors' chapter 11 counsel, cannot represent the debtors in this dispute due to a conflict. The debtors initially sought to retain Tucker Ellis & West LLP as special counsel on an hourly fee basis. Tucker Ellis incurred some fees and expenses while the application was pending. The court granted that application over objections, but gave Tucker Ellis time to reconsider the representation because the debtors did not have unencumbered funds with which to pay the firm for its services. On reconsideration, Tucker Ellis declined to continue with the representation.

The debtors then filed an application to retain Spangenberg, Shibley & Liber LLP as special counsel on a contingency fee basis. The unsecured creditors committee and GE HFS object to retaining Spangenberg under the terms proposed.

**B. Bankruptcy Code Provisions**

The debtors filed their application under 11 U.S.C. §§ 327(e) and 328(a). Those sections provide:

§ 327. Employment of professional persons

(e) The [debtor], with the court's approval, may employ, for a specified special purpose, other than to represent the [debtor] in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

11 U.S.C. § 327(e).<sup>2</sup>

§ 328. Limitation on compensation of professional persons

(a) The [debtor], . . . with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an

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<sup>2</sup> No one questions the propriety of retaining Spangenberg under this section although it has not represented the debtors.

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hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

11 U.S.C. § 328(a).

**C. The Objections**

The initial objections raised three points: (1) the fee and expense arrangement is not purely contingent with respect to expenses; (2) the fee payment involves fee sharing; and (3) the proposed retention is not beneficial to the debtors' estates.

1. Reimbursement of Expenses

GE HFS, which asserts a lien on all of the debtors' assets including cash collateral, objected to the retention to the extent it permitted Spangenberg to be reimbursed for expenses out of GE HFS's cash collateral, rather than on a contingent basis. The debtors now acknowledge through a proposed order that the retention "shall [not] modify or amend any prior Order of this Court in respect of the use of cash collateral such that, *inter alia*, the cash collateral of GE HFS will not be used to make any payment of fees or reimbursement of expenses to [Spangenberg], or [Tucker Ellis], absent further order of the Court[ ]," which resolves this objection.

2. Fee Sharing

Bankruptcy code § 504 generally prohibits a person receiving compensation in a bankruptcy case from sharing those fees with anyone else. *See* 11 U.S.C. § 504(a) (prohibiting fee sharing except as provided in § 504(b)). The initial proposed order provided that Tucker Ellis would be paid any allowed compensation from the Spangenberg contingency fee. GE HFS

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viewed this as a prohibited fee sharing arrangement. The debtors now propose an order which states that Spangenberg has agreed to an award of compensation (and expenses) to Tucker Ellis in an amount not to exceed \$33,893.53 and “consents to reducing the payment on its award by an amount equal to any fees or expenses awarded to [Tucker Ellis] in an amount not exceeding” that amount. The revision makes it clear that Spangenberg is not sharing its fee, but rather is agreeing to create a fund from which Tucker Ellis can be paid for its services. The objection is overruled.

**3. The Contingency Fee**

Ordinarily, a debtor’s bankruptcy estate will retain counsel on a contingency fee basis where the action, if successful, will create a fund that is available for distribution to creditors. A typical situation is a chapter 7 debtor with a prepetition personal injury claim. The attorney receives a percentage of any damages awarded and the balance goes to the estate. The twist here is that the recovery sought is a combination of money to be repaid to the estates by GE HFS and subordination of the GE HFS debt. The debtors initially proposed this contingency fee arrangement:

[Spangenberg] shall be paid a legal fee for its services of 33 1/3% of the amount collected on any of the claims for which it has been retained if said claim is settled prior to the scheduled trial date.

If any claim is settled on or after the scheduled trial date or if the matter proceeds to trial [Spangenberg’s] fee shall be 40% of the amount collected.

The term “amount collected” was defined to “include any amount of debt that is equitably subordinated as a result of the Action.” In response to the committee’s objection, the debtors propose to amend that definition to “(1) any sum of money paid or disgorged to the Debtors’

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estates by GE HFS, and (2) any other benefit to the Debtors' estates, as a result of the Action."<sup>3</sup>

GE HFS argues that the language should instead read:

. . . any sum of money paid or disgorged to the Debtors' estates by GE HFS, and (2) any other benefit to the Debtor's estates, as a result of the Action, provided, however, that compensation and reimbursement of expenses shall be allowed to [Spangenberg] only on account of the amount collected that is available for distribution to general unsecured creditors of the estates.

In other words, the debtors and the committee propose that Spangenberg's compensation be based on benefit to the estates (which would include benefit to administrative claimants) while GE HFS proposes that the compensation be limited to benefit obtained for the unsecured creditors. Neither side has cited any definitive law and the court sees no reason to limit the compensation to benefit that inures to the unsecured creditors, given the lack of objection from the committee on that point.

The court will, therefore, approve the modified language proposed by the debtors. In doing so, the court repeats what it has said in court: "benefit to the estates" is an amorphous phrase in this context. As the parties have declined to define it more specifically, the court will leave that definition to another day.

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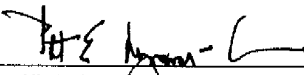
<sup>3</sup> The committee withdrew its objection based on this change.

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CONCLUSION

The debtors' application to retain Spangenberg, Shibley & Liber LLP is granted as modified. A separate order will be entered reflecting this decision.

Date: 20 June 2014

  
\_\_\_\_\_  
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.  
Joseph Hutchinson, Esq.  
John Dawson, Esq.  
Russell Kornblut, Esq.  
Andrew Vara, Esq.  
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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, the debtors' application to employ Spangenberg, Shibley & Liber LLP as special counsel is granted, as modified, *nunc pro tunc* as of November 17, 2004. (Docket 765). The contingency fee agreement attached to the application is approved with these modifications agreed to by the debtors, the committee of unsecured creditors, and Spangenberg:

1. This order does not prejudice the right of any party to object to any fee application filed by Tucker Ellis & West LLP.
2. If the court awards Spangenberg any fees or expenses in connection with this retention, Spangenberg consents to reduce the payment on its award by an amount equal to any fees or expenses awarded to Tucker Ellis & West LLP on application to this court, in an amount not to exceed \$33,893.53.
3. This order does not in any way modify or amend any prior orders of this court regarding the use of cash collateral. Without limitation, the cash collateral of GE HFS Holdings, Inc. will not be used to pay any fees or expenses to Spangenberg or Tucker Ellis & West LLP, absent further order of the court.

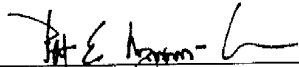
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4. The term "amount collected" as used in the contingency fee agreement shall mean
- (1) any sum of money paid or disgorged to the debtors' estates by GE HFS Holdings, Inc.; and
  - (2) any other benefit to the debtors' estates, as a result of the lawsuit prosecuted by Spangenberg.

Any remaining objections are overruled.

IT IS SO ORDERED.

Date: 20 June 2014

  
\_\_\_\_\_  
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.  
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Nicholas DeCello, Esq.