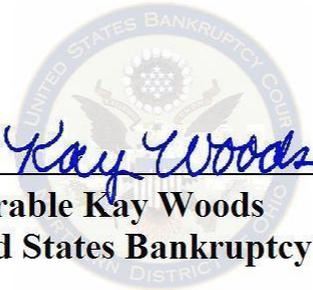


IT IS SO ORDERED.



**Dated: December 22, 2006
11:23:57 AM**

**Honorable Kay Woods
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE:

**RANDALL J. HAKE and,
MARY ANN HAKE,**

Debtors.

CASE NUMBER 04-41352

HONORABLE KAY WOODS

MEMORANDUM OPINION

Before the Court is the Third and Final Application by Attorney for Debtors for Allowance of Compensation as Administrative Claim ("Final Fee Application") filed by Mark A. Beatrice, on behalf of Manchester, Bennet, Powers and Ullman, L.P.A. (collectively, "Beatrice") on August 14, 2006. Beatrice is counsel for Debtors Randall J. Hake and Mary Ann Hake (collectively, "Debtors"), whose original Chapter 11 case (filed on March 25, 2004) was converted to Chapter 7 on April 26, 2006. The Final Fee Application seeks a total of \$45,168.29, which is

comprised of attorney fees in the amount of \$43,429.25 ("Fees") and reimbursement of expenses in the amount of \$1,739.04 ("Expenses"). Attached to the Final Fee Application were Exhibits A-1, A-2, A-3, and B, which provided detail regarding the date, time and description of the Fees and Expenses. Notice of the Final Fee Application set a hearing for September 20, 2006 at 10:00 a.m.

On September 5, 2006, Buckeye Retirement Co., L.L.C., Ltd. ("Buckeye") filed Objection by Buckeye Retirement Co., L.L.C., Ltd. To Third and Final Application by Attorney for Debtors for Allowance of Compensation as Administrative Claim (Docket No. 516) Motion for Continuance and Motion to Convert to Adversary Proceeding ("Buckeye's Objection"). Part of Buckeye's Objection sought a continuance of the September 20, 2006 hearing for a period of sixty (60) days in order to provide Mark M. Gleason, the Chapter 7 Trustee ("Trustee") appointed to the case on August 29, 2006, time to investigate and respond to the Final Fee Application. On September 6, 2006, Trustee filed Trustee's Limited Response to Third and Final Fee Application Filed by Attorney for Debtors ("Trustee's Limited Objection"), which requested thirty (30) days to file a response to the Final Fee Application. On September 7, 2006, the Court entered Order Denying, in Part, Motion for Continuance of Third and Final Application by Attorney for Debtors for Allowance of Compensation as Administrative Claim and Re-Characterizing Hearing as Preliminary Hearing ("September 7 Order"), which provided that the hearing on September 20, 2006 would be treated as a preliminary hearing.

The Court conducted a preliminary hearing on the Final Fee Application on September 20, 2006, at which Beatrice, Trustee and

counsel for Buckeye participated. Because Trustee was still in the process of retaining counsel to represent him, the Court, with the agreement of all parties, continued hearing on the Final Fee Application until November 28, 2006 at 1:30 p.m. (the "Hearing").¹

On October 25, 2006, Buckeye filed Request for Evidentiary Hearing ("First Request"), which consisted of a two-sentence paragraph that merely requested that the Hearing be conducted as an evidentiary hearing. On October 26, 2006, this Court entered Order Denying Request for Evidentiary Hearing (without prejudice) on the basis that the First Request failed to set forth any reason that an evidentiary hearing would be necessary on the Final Fee Application. The Court also noted that Buckeye had failed, among other things, to identify the number of proposed witnesses, the names of the proposed witnesses, the subject matter of the proposed testimony, the anticipated length of time of the proposed testimony and the reasons(s) that testimony would be necessary for resolution of the Final Fee Application.

On November 10, 2006, Buckeye filed Second Request for Evidentiary Hearing ("Second Request"), which specified that Buckeye proposed to call five witnesses, as follows: Debtors, Beatrice, Peter T. Barta (a Buckeye employee), and "F. Dean Armstrong (expert)." Armstrong is counsel for Buckeye. Buckeye's only stated reason for the need for an evidentiary hearing was that "it is not anticipated that the Debtors will stipulate to the

¹ No party at the preliminary hearing requested that the Hearing be conducted as an evidentiary hearing or in any way indicated that the issues to be resolved in the Final Fee Application would require testimony. Before concluding the preliminary hearing, the Court inquired if any party had any other issues that should be brought to the Court's attention. At that time, all parties - including Buckeye - indicated that there were no additional issues.

factual matters set forth in Buckeye's Objection." (Second Request, ¶ 6.) On November 16, 2006, Debtor and Beatrice filed Opposition of Debtors and Applicant to Request for Evidentiary Hearing and Conversion to Adversary Proceeding. The Court conducted a telephonic status conference on November 21, 2006, at which time the Court informed all parties that the Hearing would not be an evidentiary hearing.

On November 14, 2006, Beatrice filed Response of Applicant to Buckeye Objection to Third and Final Application for Compensation and Allowance of Administrative Claim ("Beatrice Response"). Despite being granted more than sixty (60) days to respond to the Final Fee Application, Trustee did not file any objection thereto. No party other than Buckeye has objected to the Final Fee Application.

All parties or their counsel were present at the Hearing. At the Hearing, Buckeye informed the Court that it and Beatrice had "stipulated" that all exhibits attached to the Final Fee Application, Buckeye's Objection, and the Beatrice Response were admissible and could be considered by the Court in making its ruling on the Application.² In addition to offering exhibits at the Hearing, counsel for Buckeye submitted a copy of a case, *Huber v. Taylor*, 2006 WL 3071384 (3rd Cir. October 31, 2006), for the purpose of establishing that damages are not required for a party to prevail on a breach of fiduciary duty claim. Because the *Huber*

² The Court did not ask or require the parties to stipulate to any exhibits. The Court does not believe it was necessary for the parties to "stipulate" that these exhibits could be considered by the Court since they were attached to documents filed with the Court and, therefore, are part of the Court record. Nevertheless, based on the agreement of the parties and the offer of the exhibits, the Court "admitted" these exhibits.

case had not been previously identified by Buckeye, Beatrice asked for and was granted one week to respond to that case. On November 30, 2006, Beatrice filed Supplemental Memorandum of Applicant in Support of Final Fee Application of Counsel ("Supplemental Memo"). On December 7, 2006, Buckeye filed, without leave of court, Buckeye's Response to Supplemental Memorandum of Applicant in Support of Final Fee Application of Counsel.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(1)(A). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. LEGAL STANDARD FOR REVIEW OF FINAL FEE APPLICATION

Pursuant to Order of this Court dated July 8, 2004, Beatrice was retained as Debtors' counsel, in accordance with 11 U.S.C. § 327(a). The application to employ Beatrice, which was dated April 2, 2004, set forth the services to be performed and the hourly rates for such services.

The Final Fee Application seeks compensation pursuant to 11 U.S.C. § 330, which provides that, after notice and hearing, the court may award "reasonable compensation for actual, necessary services" rendered by professionals retained by a debtor and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1)(A) and (B). Section 330 provides that, in determining the amount of reasonable compensation to be awarded to a professional person, including counsel for a Chapter 11 debtor, "the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors. . . ."

11 U.S.C. § 330(a)(3). Section 330(a)(3) thereafter sets forth a non-exclusive list of factors for the court to consider. Furthermore, § 330(a)(4)(A) provides that compensation should not be allowed for "(i) unnecessary duplication of services; or (ii) services that were not - (I) reasonably likely to benefit the debtor's estate; or (II) necessary to the administration of the case." 11 U.S.C. § 330(a)(4)(A).

The Sixth Circuit has adopted the lodestar method for calculating allowable attorney fees in bankruptcy cases.

The Supreme Court has made it clear that the lodestar method of fee calculation is the method by which federal courts should determine reasonable attorney's fees under federal statutes which provide for such fees. . . . Because the [Bankruptcy] Code provides for attorney's fees, and because the plain language of the Code indicates Congress intended no distinction between attorney's fees in bankruptcy cases and those awarded in non-bankruptcy cases, the courts have generally relied upon the lodestar approach when determining attorney's fees in bankruptcy cases. . . . We join these courts in adopting the lodestar method of fee calculation for bankruptcy cases.

In re Boddy, 950 F.2d 334 at 337 (6th Cir. 1991).

Although Buckeye's Objection is based on alleged malpractice and breach of fiduciary duty on the part of Debtors' counsel, Buckeye cited no cases in which these grounds had been upheld in objecting to a fee application for a debtor's attorney. The Court found a few cases³ in which the debtor - as opposed to a creditor - objected to the fee application of its own attorney on the basis

³ These cases include *In re Hogg*, 103 B.R. 207 (Bankr. S.D. 1988), *Billing v. Greenberg, et al.*, 22 F.3d. 1994 (3rd Cir. 1994) and *Shaw v. Replogle, et al.*, 2000 U.S. Dist. LEXIS 18745 (N.D. Cal. 2000), which are all distinguishable from and inapplicable to the instant proceeding.

of alleged malpractice and/or breach of fiduciary duty, but this Court found no case law that paralleled the situation in the instant case.

II. MATTERS NOT IN DISPUTE

The Final Fee Application details Fees in the aggregate amount of \$43,429.25 for the period October 1, 2005 through April 26, 2006. Beatrice does not seek any compensation after Debtors' case was converted to Chapter 7 on April 26, 2006. Beatrice previously submitted two interim fee applications, which were provisionally approved by the Court. The Court previously approved attorney fees of: \$11,182.00 for the period April 2, 2004 through November 30, 2004; and \$28,854.50 for the period December 1, 2004 through September 30, 2005.⁴

The Final Fee Application details 260.30 hours of professional time at a blended rate of \$166.85 per hour. Buckeye has not objected to the reasonableness of the hourly rates charged by any professional or the blended rate set forth in the Final Fee Application. Moreover, Trustee represented that he had reviewed the Final Fee Application and found that the services had been charged at "fair rates." As a consequence, this Court finds that the hourly rates and the blended rate are presumptively reasonable.⁵

Buckeye objects only to the allowance of Fees incurred after January 6, 2006, but has lodged no objection to any Fees for the

⁴ The Final Fee Application notes that \$14,216.81 of the previously approved fees remains unpaid and outstanding.

⁵ This Court has previously held that Mr. Beatrice's hourly rate of \$170.00 was an "ordinary and customary rate for attorneys practicing before this Court." (Order Setting Amount of Sanctions dated February 8, 2006, Doc. # 324, n. 2.)

period October 1, 2005 through January 6, 2006. Trustee supported the Final Fee Application in its entirety and stated on the record that Trustee believed the Fees were reasonable and necessary. Applying the lodestar approach, this Court finds that all Fees requested for the period through January 6, 2006 were reasonable, necessary and provided a benefit to the estate. As a consequence, this Court hereby approves Fees through January 6, 2006 in the amount of \$9,470.50. In addition, for the same reason, this Court gives final approval for the fees provisionally approved in the prior two interim fee applications.

Thus, Fees for the period January 7, 2006 through April 26, 2006 in the aggregate amount of \$33,958.75 (the "Disputed Fees") are the only Fees at issue.⁶

The Final Fee Application also requests reimbursement of Expenses in the amount of \$1,739.04. Buckeye has not objected to the allowance of reimbursement of these Expenses or the expenses previously approved by the Court in the amounts of \$181.40 and \$362.31, respectively. The Final Fee Application provides detail that the Expenses were actually incurred and there has been no suggestion that any expense was not "necessary," as required by 11 U.S.C. § 330(a)(1)(B). As a consequence, this Court hereby approves the Expenses and authorizes Debtors to reimburse Beatrice for the Expenses.

⁶ As set forth *infra*, Buckeye has conceded that Beatrice would be entitled to \$5,000.00 for services performed after January 6, 2006. As a consequence, the amount in dispute is actually only \$28,958.75.

III. DISPUTED FEES

Buckeye does not object to any particular project or task detailed in the Final Fee Application as being unreasonable. Nor does Buckeye object to any specific service as being unnecessary. Instead, Buckeye lodges a generalized objection, contending that "Debtors' counsel should not be compensated for any services after January 6, 2006. . . ." (Objection, p. 4.) The basis for Buckeye's Objection is that "Debtors' counsel breached his fiduciary duty to the estate and/or committed legal malpractice" (Objection, p.4) by (i) failing and/or refusing to accept or advise Debtors to accept either Buckeye's January 6, 2006 offer or Buckeye's January 16, 2006 offer to purchase certain assets from the estate for \$650,000.00; and (ii) failing and/or refusing to pursue or advise Debtors to pursue various fraudulent conveyance claims.

A. Failure to Accept Buckeye's Offer to Purchase

Debtors filed their Amended Disclosure Statement⁷ and Amended Plan on December 30, 2005 (Docs. #285 and #286). The hearing on the Amended Disclosure Statement and Amended Plan was scheduled for January 26, 2006. On January 6, 2006, Buckeye sent Beatrice a letter (Exhibit A to Objection) in which Buckeye:

[O]ffer[ed] the sum of \$650,000 cash to the estate, to purchase all exempt and non-exempt assets listed and not listed in the petition and schedules as amended, and to proceed under a Chapter 7 liquidation. This offer assumes that your clients either move to convert or do not contest the U.S. Trustee's request

⁷ Debtors filed an initial Disclosure Statement on October 3, 2005 (Doc. #200). Both Buckeye (Doc. #224) and the United States Trustee (Doc. #227) objected to the Disclosure Statement. The Court held a preliminary hearing on the Disclosure Statement on November 16, 2005 and instructed Debtors to amend the Disclosure Statement by December 31, 2005. At the preliminary hearing, the Court set a hearing on the anticipated amended disclosure statement for January 26, 2006.

for conversion, although they may contest the request for dismissal. This offer also includes the purchase of all causes of action, listed or not listed, known or unknown.

(Exhibit A to Objection.)

Buckeye's January 6, 2006 letter contained neither a deadline for response nor an expiration date. Indeed, the letter merely asked Beatrice to "consult your clients and advise at your earliest possible convenience." Buckeye contemplated possible further negotiations of the offer because the letter provided a telephone number for Beatrice to call with "any questions or comments."

Buckeye sent a second letter to Beatrice dated January 16, 2006 (Exhibit B to Objection), which stated:

This letter replaces the offer stated in my January 6, 2006 letter. Buckeye offers the sum of \$650,000 cash to the estate, to purchase all non-exempt assets, listed and not listed in the petition and schedules as amended, and transferable under the law, and to proceed under a Chapter 7 liquidation. This offer assumes that your clients either move to convert or do not contest the U.S. Trustee's request for conversion, although they may contest the request for dismissal. This offer also includes the purchase of all causes of action, listed or not listed, known or unknown.

(Exhibit B to Objection (emphasis added).) Buckeye's second letter also contained no deadline for response or expiration date.

Prior to sending the second letter to Beatrice, on January 12, 2006, Buckeye filed Buckeye's Unopposed Motion to Extend Objection Date and Continue Hearing on Debtors' Amended Disclosure Statement ("Motion to Extend Time"), in which Buckeye requested additional time - until February 7, 2006 - to file an objection to Debtors' Amended Disclosure Statement and requested that the January 26, 2006 hearing be continued until February 15, 2006. The basis for

Buckeye's Motion to Extend Time had nothing to do with its pending offer to Debtors, but rather stated that Buckeye needed the additional time to conclude certain depositions in order to prepare an objection to the Amended Disclosure Statement. On January 17, 2006, the Court denied the Motion to Extend.

Buckeye complains that Debtors never responded to the January 6, 2006 offer, but acknowledges that Debtors did respond to the second letter on January 20, 2006. (Exhibit C to Objection.) Buckeye fails to explain how or why Debtors should have immediately accepted the January 6, 2006 offer when Buckeye "replaced" that offer ten days later. Indeed, Buckeye itself argues that Debtors should have immediately accepted either the January 6 offer or the January 16 offer. Consequently, this Court finds no basis for Buckeye's Objection to compensation for the period January 6-16, 2006.⁸

Debtors point out that "Buckeye assumes that a one paragraph letter setting forth an unallocated offer of \$650,000.00 is a matter of routine and could be reasonably relied upon by Debtors to forego any effort to reorganize, when until approved by the Court, Buckeye could have attempted to withdraw or modified its offer."⁹ (Beatrice Response, p. 5.) Because of these and other concerns, Debtors argue that a certain amount of due diligence was necessary before Debtors could respond to the offer. Debtor's counsel conceded at the Hearing that "reasonable minds" could differ over

⁸ The fees for the period January 6-16, 2006 totaled \$4,159.75. Hence, the amount in dispute is actually \$29,799.00 or per footnote 6 *supra* \$24,799.00.

⁹ Debtors note that "the Court itself expressed concerns about the terms and conditions, or lack thereof," in the January 16, 2006 offer, indicating that the language was "a little too vague." (Beatrice Response, p. 5.)

the amount of time due diligence might take in responding to Buckeye's offer. However, Beatrice argued that, at minimum, thirty (30) days (until the middle of February) was a necessary and reasonable period of time to consider the offer. Debtors further contend that the services "rendered between mid-February and mid-April as to a plan of reorganization were reasonable and necessary." (Beatrice Response, p. 5.)

Debtors rejected Buckeye's January 16, 2006 offer on the grounds that it was made in "bad faith" because the offer had "no relation to the true value of the assets" and that the offer was "solely for the purpose of continued harassment of the Debtors, their family members, and associates." (Exhibit C to Objection.) Debtors state that the offer could not be evaluated without an allocation of the purchase price to the various assets. Debtors contend that allocation was necessary because, "since Buckeye claimed charging orders as to certain assets, how the price is allocated could arguably favor Buckeye over other creditors." (Beatrice Response, p. 3.) Furthermore, Debtors maintain that Buckeye failed to respond to their request for an allocation. (Beatrice Response, p. 3.)

Buckeye argues that each of the grounds in Debtors' January 20, 2006 rejection letter are "groundless." (Objection, p. 5.) Buckeye points out that, since its offer was "almost twice the \$353,115 amount payable under the Debtors' plan, . . . payable over a period of years," the only relevant consideration was that Buckeye was willing to make a lump sum cash payment. (*Id.*) Buckeye dismisses Debtors' rejection on the basis that the offer was not specifically allocated to various assets because "[t]here was

nothing to evaluate because the offer was so much greater than the Debtors' proposed plan amount." (Objection, p. 6.) Moreover, Buckeye contends that it made the offer as an investment company rather than for harassment purposes, which Buckeye says is evidenced by Debtors' later acceptance of the offer.

Buckeye also argues that the expressed concern in Debtors' rejection letter about tax consequences is an indicia of breach of fiduciary duty. Buckeye states:

Debtors' counsel's letter, Exhibit C, states a concern regarding tax consequence to Mr. Hake if the Debtors accept Buckeye's offer. Mr. Hake's tax issues are not a concern to the estate, and Debtors' and Debtors' counsel's misplaced concern over the interest of the Debtors and not their estate, further demonstrates breach of fiduciary duty.

(Objection, p. 7.)

Debtors' January 20, 2006 letter states: "without an allocation of the offer . . . , it cannot be fully evaluated by the Debtors. For example, the sale of Mr. Hake's stock in Elm Road Development will trigger a large capital gain, reducing the actual net proceeds to the estate." (Exhibit C to Objection (emphasis added).) Debtors note that:

Buckeye wrongly assumes that the tax consequences are to the Debtor (sic), but as a sale to "proceed under a Chapter 7 liquidation" upon a conversion, as set forth in the offer, gains on the sales would be a burden of the estate under the newly created tax identification number required of all chapter 7 asset cases for individual estates.

(Beatrice Response, p. 3.) Debtors' interpretation is consistent with the content of the January 20, 2006 letter (as set forth above).

As Debtors correctly point out, Beatrice would have needed to continue to provide services relating to other matters even if they had immediately accepted Buckeye's January 6 (or 16), 2006 offer. According to Debtors, these other matters included: the fee application for consultant William Reali; hearings on the request for Rule 2004 examination of Christopher Hake; Buckeye's objection to Christopher Hake's claim; and appeals initiated by Buckeye. Debtors contend that "even if Buckeye's basic premise is accepted, these additional on-going matters were reasonably necessary and services regarding the same are entitled to be compensated." (Beatrice Response, p. 4.)

Although Buckeye's Objection argues that Beatrice is entitled to no compensation after January 6, 2006, at the hearing on the Final Fee Application, Buckeye conceded that some due diligence would be necessary before Debtors could be expected to accept the offer. Buckeye postulated - without articulating any basis - that Beatrice would be entitled, at most, to \$5,000.00 for all services (whether or not related to Buckeye's offer) performed after January 6, 2006. Buckeye made no attempt to explain how it arrived at the \$5,000.00 figure, or how much of the post-offer Fees related to work that would have been required even if Debtors had immediately accepted Buckeye's offer (e.g., briefing and other tasks related to Buckeye's pending appeals, fee application for William Reali, etc.).

Buckeye's Objection to all compensation after January 6 or 16, 2006 is even more puzzling in light of Exhibit D to the Objection, which is the transcript of a hearing before the Court on April 25, 2006. On April 25, Debtors' motion to approve Buckeye's offer to

purchase Debtors' assets was discussed, at which time Victor Buente, counsel for Buckeye, specifically stated:

I want to thank the United States Trustee and Mr. Beatrice for their efforts. Mr. Beatrice made significant efforts over the last week to try to bring an agreement to the Court today and, as he's stated, he's presented this compromise motion which we look forward to addressing in the future.

(Exhibit D to Beatrice Response, p. 8 (emphasis added).) Buckeye itself acknowledges that the efforts of Beatrice in April - which clearly occurred after the January offers - were beneficial and "significant."

Trustee pointed out that, because Buckeye's Objection was general in nature and did not relate to any specific time entries, Trustee had carefully reviewed all entries for January through April. Trustee's recognized that time entries after January 16, 2006 involved negotiations between Debtors and Buckeye. As a consequence, Trustee found that Debtors' counsel's services during the period January through April were reasonable in time and amount. Moreover, Trustee pointed out that Debtors' exclusive period had expired, resulting in Buckeye being free to present its own plan (which could have incorporated the offer to purchase the assets) if Buckeye believed that Debtors' delay was detrimental to the estate. Despite the opportunity to do so, Buckeye never filed a competing plan.

The parties set forth their conflicting viewpoints about whether the estate had to suffer damages in order for Buckeye to be able to opposes the Final Fee Application based upon alleged breach of fiduciary duties. Debtors assert that, because Buckeye's offer to purchase the assets for \$650,000.00 is still outstanding

and can be accepted by Trustee, the estate has suffered no loss. Trustee acknowledges that the offer he has been negotiating with Buckeye looks similar, if not identical, to the pre-conversion deal between Buckeye and Debtors. Buckeye's position is that damages are not necessary, but, to the extent that they are, the requested compensation for services after January 16, 2006 (which would not have been incurred if the offer had been accepted earlier) demonstrate that the estate has suffered a loss.

The Court finds that Buckeye has made representations to Debtors, the United States Trustee and this Court that the offer it made to Debtors prior to conversion would be extended to the Trustee. (Exhibit D to Objection, p. 8.) Based upon this continuing offer, the estate has not been damaged since it is in the same position as it was pre-conversion.

After a thorough review of all pleadings, exhibits and representations of counsel at the hearing, this Court determines that there is no basis to sustain Buckeye's Objection to Beatrice's compensation after January 6 (or January 16), 2006. Neither is there any basis to credit Buckeye's unsupported suggestion that Debtors' counsel is entitled to compensation in the amount of only \$5,000.00 for this period of time. Accordingly, Buckeye's Objection is overruled on this ground.

B. Failure to Pursue or Sell Certain Estate Assets

The second basis in Buckeye's Objection is that Debtors' counsel "failed and/or refused to pursue or sell, or to advise the Debtors' (sic) to pursue or sell, certain estate assets within the limitations period, and by their inaction, Debtors' counsel lost the right for the estate to pursue or sell assets." (Objection,

p. 7.) Buckeye argues that Debtors lacked good faith in not pursuing or selling certain alleged causes of action based upon Debtors' willingness in the first Disclosure Statement to contribute \$10,000 to the plan in lieu of pursuing such causes of action.

Buckeye notes that the Court approved the Amended Disclosure Statement by Order dated February 22, 2006 ("February 22, Order"), in which the Court referenced the alleged fraudulent conveyance actions and stated that, "[t]o the extent such actions may continue to have viability, they are actions that belong to the bankruptcy estate and may no longer be pursued by an individual creditor such as Buckeye. . . ." (February 22 Order, p.9.) Immediately thereafter, on February 23, 2006, "Buckeye demanded that Debtors' counsel bring the 'state court actions alleging preferences and fraudulent transfers' referenced in the [February 22] Order." (Objection, p. 8.) Buckeye states that Debtors never responded to its demand.

Buckeye's attempt to characterize the February 22, 2006 Order as its first knowledge that the alleged fraudulent conveyance actions belonged to the estate, rather than Buckeye, is disingenuous. On November 23, 2005, this Court entered Order Denying Motion of Buckeye Retirement Co., L.L.C., Ltd. for Leave to File Adversary Proceeding for Turnover of Property (Doc. # 245), in which the Court held that Buckeye had failed to follow the test articulated in *In re The Gibson Group*, 66 F.3d 1436, 1438-39 (6th Cir. 1995). Footnote 2 of this Order specifically referenced a September 30, 2005 Memorandum Opinion and Order of the Court in a companion adversary proceeding (Case No. 04-4189)

that granted a motion to dismiss Buckeye's adversary proceeding, which sought to assert these same alleged causes of action. The September 30, 2005 Order provided:

The Complaint purports to set forth avoidance actions under 11 U.S.C. §§ 547 and 548 (preference and fraudulent transfer claims). Preference and fraudulent transfer claims are specifically reserved for the debtors-in-possession or trustee; no other party may bring such actions without the express authorization of the Court.

(September 30, 2005 Order at p. 4.)

Rather than making a demand upon Debtors at that time, Buckeye chose to appeal the Court's September 30, 2005 Order.¹⁰ At least as early as September 30, 2005 - rather than February 22, 2006 - Buckeye knew that only Debtors could pursue causes of action for fraudulent conveyance unless Buckeye obtained leave of the Court to do so on behalf of the estate. Buckeye also knew *The Gibson Group* required, as a condition precedent for leave, that it make a demand upon Debtors. Buckeye states that Debtors never responded to their February 23, 2006 demand, yet Buckeye never sought leave of court, following the criteria in *The Gibson Group*, to pursue these causes of action itself.

Buckeye argues that Debtors did not present any credible testimony at either the hearing on the Amended Disclosure Statement or in deposition about their failure to pursue or sell these causes of action. Buckeye represented at the Hearing that, if it had been allowed to present evidence, Buckeye would have demonstrated through testimony of Debtors and Beatrice that they had no legitimate basis for not initiating these causes of action

¹⁰ The parties stipulated to the dismissal of this appeal.

on behalf of the estate. Furthermore, Buckeye proffered that Barta would have testified Buckeye would have offered to purchase these causes of action for \$20,000.00. Buckeye argues that this proffer establishes that the alleged causes of action had value of at least \$20,000.00 and, thus, that the estate was damaged in at least this amount by Debtors' failure to sell the causes of action.

Buckeye's argument, however, is unavailing. The proffered testimony of Barta about what Buckeye would have done cannot be credited to the extent it is inconsistent with what Buckeye actually did. Both offers made by Buckeye (January 6 and January 16) contain the following identical language: "This offer also includes the purchase of all causes of action, listed or not listed, known or unknown." (Exhibits A and B to Objection (emphasis added).) Buckeye faults Debtors for (i) not accepting its offer, and (ii) not attempting to sell to someone else a portion of the assets encompassed within that offer. Buckeye had already offered to purchase the alleged fraudulent conveyance and other causes of action in the January offers. Despite Debtors' request, Buckeye refused to allocate the offer of \$650,000.00 among the various assets. Although Buckeye had the opportunity to do so, it never offered to purchase the alleged causes of action from Debtors on a stand alone basis. Furthermore, Buckeye never informed Debtors of the value Buckeye placed on such alleged causes of action. Based on Buckeye's actual offer to Debtors, the Barta proffer can only mean that (despite Buckeye's previous refusal to allocate its offer among the various assets), Buckeye intended to allocate \$20,000.00 of the \$650,000.00 to these causes

of action. In light of Buckeye's pending offer to purchase these alleged causes of action (about which Buckeye continued to negotiate with Debtors), it is incomprehensible that Buckeye can fault Debtors for not pursuing these assets on their own and/or not offering to sell the causes of action to a third party.

Debtors argue that the estate has suffered no loss as a result of their failure to pursue the alleged fraudulent conveyance actions. Debtors contend that, contrary to Buckeye's accusation, they did not fail to review and analyze these claims or allow valuable claims to lapse. Debtors explain why they found the claims to be meritless (see Beatrice Response, pp. 7-8) and further assert that pursuit of those causes of action would have caused additional attorney's fees to be incurred without commensurate benefit to the estate. Buckeye failed to proffer any testimony that pursuit of any cause of action would have provided a benefit to the estate after deducting attorney's fees and costs of pursuing such action. Moreover, Debtors note that because they did not pursue these causes of action, Buckeye can now pursue them for its own benefit. (Beatrice Response, p. 7, n. 2.) Because Buckeye's proffer merely allocates \$20,000.00 of the \$650,000.00 offer to the causes of action, there has been no damage to the estate; the entire offer of \$650,000.00 remains outstanding. Buckeye's proffer of the Barta testimony demonstrates only the aggregate value that Buckeye placed on the causes of action.

Trustee reasoned that there were procedures Buckeye could have followed if it believed Debtors' actions were harming the estate, pointing out specifically that Buckeye could have sought authority to pursue the fraudulent transfer claims on behalf of

the estate. Trustee noted that Buckeye failed to avail itself of those procedures.

This Court finds that Buckeye could have sought leave of the Court to pursue these actions on its own, through derivative standing, yet chose not to do so. Furthermore, based on the Barta proffer, Buckeye cannot demonstrate that the estate has suffered any damages as a result of Debtors' failure to pursue the alleged fraudulent conveyance actions. As a consequence, this Court also overrules the Objection on this ground.

C. Request to "Convert" to Adversary Proceeding

In the Objection Buckeye urges the Court to "convert this matter to an adversary proceeding with either [Trustee] or Buckeye as plaintiff, for purposes of determination of damages to the estate as caused by the conduct of Debtors' counsel." (Objection, p. 14.) Buckeye offers no explanation about how a court can "convert" a fee application into an adversary proceeding regarding malpractice and/or breach of fiduciary duty. This Court has never seen or heard of the "conversion" process to which Buckeye alludes. The Federal Rules of Bankruptcy Procedure govern how an adversary proceeding must be commenced, which requires that a Complaint be filed, accompanied by a filing fee, and that a summons be issued.

Moreover, any cause of action for malpractice and/or breach of fiduciary duty belongs to Trustee to pursue on behalf of the estate. Absent following the standard set forth in *The Gibson Group* to obtain derivative standing, Buckeye has no standing to bring any lawsuit for malpractice and/or breach of fiduciary duty. Despite having Buckeye's Objection as he reviewed the Final Fee

Application, Trustee did not join Buckeye or object on any grounds to the Final Fee Application. Trustee not only did not join Buckeye in its request that the Final Fee application be "converted" to an adversary proceeding, he specifically argued that the Final Fee Application was an inappropriate forum to determine those issues. Indeed, Trustee supported the Final Fee Application in its entirety, finding that the services were reasonable and necessary. Counsel for Trustee emphatically stated that Trustee would make a determination about whether he believed any malpractice or breach of fiduciary duty occurred, but he was not prepared to make that argument at this time.

IV. REQUEST FOR EVIDENTIARY HEARING

Although already ruled on, this Court will address the issue of Buckeye's request for an evidentiary hearing because Buckeye orally renewed this request at the end of the Hearing. Despite Buckeye's repeated statements that it needed to be able to present testimony in order to prevail on its Objection, there is nothing in the record that supports this bald statement.

First, Courts are uniform in holding that there is no entitlement to an evidentiary hearing on a fee application. As noted above, the Sixth Circuit follows the lodestar approach in reviewing fee applications. "The critical questions in the lodestar approach, as in the statute, are the reasonableness of the hours spent and the hourly rate sought." *In re Spillane*, 884 F.2d 642 at 647 (1st Cir. 1989), citing *In Re Casco Bay Lines, Inc.*, 25 B.R. 747 (Bankr. 1st Cir. 1982). As a consequence, Buckeye had no entitlement to an evidentiary hearing on the Final

Fee Application and there was no error in the Court's ruling denying that request.

Buckeye's only stated reason for requesting an evidentiary hearing in the Second Request (there was no reason given in the First Request) was that "it is not anticipated that the Debtors will stipulate to the factual matters set forth in Buckeye's Objection, and that Buckeye will, therefore, need to prove those factual matters through testimony and exhibits at an evidentiary hearing." (Second Request, p. 2.) Although the Court did not ask or require the parties to stipulate to the exhibits, the parties chose to stipulate to the admissibility of all documents attached to the Final Fee Application, the Objection, and the Beatrice Response. As a consequence, at least part of Buckeye's proffered need for an evidentiary hearing was obviated.

The Court permitted Buckeye to "proffer" whatever testimony that it chose. On several occasions, Buckeye stated that, if it had been permitted to examine Debtors and/or Debtor's counsel, it would have been able to establish the alleged malpractice and/or breach of fiduciary duty. Despite these broad generalized statements, Buckeye failed to proffer any specific testimony on any issue except the Barta testimony regarding Buckeye's willingness to purchase the fraudulent conveyance actions for \$20,000.00. Buckeye's entire Objection is premised upon Debtors' counsel (i) "not accepting" Buckeye's offer and "not pursuing" the causes of action; or (ii) Debtors' counsel's failure to advise Debtors to accept the offer or pursue the causes of action. Buckeye's initial premise is faulty in that Debtors' counsel had no ability to either accept the offer or pursue the estate's

causes of action. An attorney acts on behalf of his or her client, but cannot take actions without authorization. To the extent the Objection is based on Debtors' counsel's failure to advise Debtors about accepting the offer or pursuing causes of action, such "advice" is not discoverable absent a waiver of the attorney-client privilege. Buckeye ignores Debtors' explicit assertion that they would invoke the attorney-client privilege if called upon to testify. (Beatrice Response, p. 5.) Thus, no purpose would have been served by granting Buckeye's request for an evidentiary hearing.

As set forth above, the testimony that Buckeye alleges it needed to support its objection in reality goes to a potential affirmative cause of action that belongs to Trustee, not Buckeye. This testimony was not only not necessary, it was not relevant to the Final Fee Application where, as here, Trustee supported the Final Fee Application in its entirety.

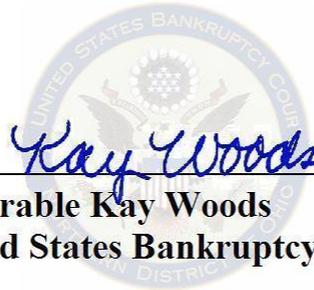
V. CONCLUSION

The Court approves the Final Fee Application in its entirety and also confirms the fees and expenses provisionally approved in the interim fee applications. Beatrice has supplied sufficient information to enable the Court to determine that the Fees are reasonable and necessary, utilizing the lodestar approach. Furthermore, Trustee evaluated the Fees and Expenses and found them to be reasonable, necessary and a benefit to the estate. Buckeye's Objection is overruled in its entirety.

An appropriate order will follow.

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IT IS SO ORDERED.



**Dated: December 22, 2006
11:23:57 AM**

**Honorable Kay Woods
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE:

**RANDALL J. HAKE and,
MARY ANN HAKE,**

Debtors.

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CASE NUMBER 04-41352

HONORABLE KAY WOODS

ORDER

For the reasons in this Court's Memorandum Opinion entered on this date, the Court grants, in its entirety, Third and Final Application by Attorney for Debtors for Allowance of Compensation as Administrative Claim filed by Mark A. Beatrice, on behalf of Manchester, Bennet, Powers and Ullman, L.P.A. on August 14, 2006.

IT IS SO ORDERED

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