

IT IS SO ORDERED.



Dated: August 03, 2009  
03:54:23 PM

Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:	*	In Jointly Administered
	*	Chapter 11 Proceedings
	*	CASE NUMBERS 01-44007
PHAR-MOR, INC., et al.,	*	through 01-44015
	*	HONORABLE KAY WOODS
Debtors.	*	

\*\*\*\*\*

MEMORANDUM OPINION REGARDING JOINT MOTION  
OF DEBTOR AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS  
FOR AN ORDER: (A) AUTHORIZING THE RELEASE OF RESERVE FUNDS FOR  
DISTRIBUTION TO CREDITORS; (B) APPROVING IMPLEMENTATION OF FINAL  
WIND-DOWN PLAN FOR THE CLOSING OF THE DEBTOR'S BANKRUPTCY CASE,  
AND (C) APPROVING AMENDMENT TO STIPULATION AND AGREED ORDER  
ENTERED JUNE 5, 2009

\*\*\*\*\*

This cause is before the Court on Joint Motion of the Debtor and the Official Committee of Unsecured Creditors for an Order: (A) Authorizing the Release of Reserve Funds for Distribution to Creditors; (B) Approving Implementation of Final Wind-Down Plan for the Closing of the Debtor's Bankruptcy Cases [sic], and (C)

Approving Amendment to Stipulation and Agreed Order Entered on June 5, 2009 ("Joint Motion") (Doc. # 2892) filed on June 25, 2009, by Debtors Phar-Mor, Inc., et al., (collectively, "Debtor") and the Official Committee of General Unsecured Creditors ("Committee"). McKesson Corporation ("McKesson") filed McKesson Corporation's Opposition to the Joint Motion ("McKesson's Opposition") (Doc. # 2894) on July 6, 2009. Debtor, the Committee, and Fox Rothschild LLP<sup>1</sup> ("Fox") each filed Replies (Doc. ## 2898, 2899, and 2900, respectively) to McKesson's Opposition on July 13, 2009, July 13, 2009, and July 15, 2009, respectively. The Court held a hearing on the Joint Motion on July 28, 2009 ("Hearing"), at which counsel

---

<sup>1</sup>Fox Rothschild LLP was special counsel to Debtor in an adversary proceeding against McKesson, Case No. 03-04069 ("Adversary Proceeding"). The Adversary Proceeding, which was filed on March 4, 2003, alleged a pre-petition breach of contract by McKesson. If Debtor had succeeded on the merits of the Adversary Proceeding, any judgment in Debtor's favor would have reduced McKesson's claim against the bankruptcy estate. After a motion to withdraw the reference was denied by United States District Judge Patricia A. Gaughan on May 22, 2003, the Court issued Adversary Case Management Initial Order ("Case Management Order") on June 3, 2003, which stated that "[d]iscovery shall begin promptly upon the filing of the complaint . . . and should ordinarily be completed by the one hundred twentieth (120th) day following filing of the complaint unless otherwise ordered by the Court." (Case Manage. Order at 2.) By Order dated July 14, 2003, the discovery period was extended through October 30, 2003. By order dated September 23, 2003, the discovery period was extended through January 30, 2004. By order dated December 31, 2003, the discovery period was extended for a period of 90 days after entry of a final order regarding Debtor's motion to compel production of documents and answers to interrogatories. After Judge William T. Bodoh retired in January 2004, Judge Mary Ann Whipple presided over the Adversary Proceeding. On May 14, 2004, the court issued a discovery order regarding Debtor's motion to compel, which ordered McKesson to comply by June 27, 2004. By order dated August 25, 2005, the discovery deadline was extended through November 30, 2005. By order dated November 1, 2005, the court granted the parties' stipulation to extend discovery through March 31, 2006. By order dated March 10, 2006, discovery was further extended through April 30, 2006. On April 27, 2006, the court granted the parties' joint motion and extended discovery through May 19, 2006. Pursuant to order dated July 14, 2006, the court extended the time for the parties to disclose experts and file motions for summary judgment through August 4, 2006. By order dated November 1, 2006, the court extended the date to complete expert depositions until January 31, 2007, with the case to be ready for trial on March 2, 2007. On March 3, 2008, the bankruptcy court denied Debtor's motion for partial summary judgment and rendered judgment in favor of McKesson. On December 31, 2008, United States District Judge Jack Zouhary affirmed judgment in favor of McKesson.

for Debtor, the Committee, Fox, and McKesson were present.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

Based upon the Joint Motion, McKesson's Opposition, each of the Replies, the arguments of counsel and the record before the Court, this Court finds that the Joint Motion should be granted, in part, as set forth herein.

**I. PORTIONS OF THE JOINT MOTION NOT IN DISPUTE**

As may be apparent from its long caption, Debtor and the Committee seek several forms of relief in the Joint Motion. The relief sought in the Joint Motion can be summarized as follows:

(a) authority to distribute all remaining funds in the Debtor's bankruptcy estate (including the funds held in the segregated Phar-Mor I Separate Account, but excluding \$100,000.00 to be held in a reserve account) to creditors;

(b) following distribution of all available remaining cash reserves (as set forth above), authority to file a motion for a final decree to close Debtor's case and continue to wind down Debtor's business affairs and distribute any additional funds

received in the future from the Litigations (as defined in the Joint Motion);

(c) amendment to the Stipulation and Agreed Order Regarding (1) Reclamation Claim of McKesson Corporation; and (2) Completion of Remaining Tasks Under First Amended Joint Plan of Liquidation entered June 5, 2009 ("Stipulation") (Doc. # 2891) to clarify certain dates in paragraph 15 thereof; and

(d) ratification of certain bonus distributions made to John R. Ficarro ("Ficarro") and Martin S. Seekely ("Seekely") in April 2005.

Although McKesson filed a document opposing the Joint Motion, McKesson's Opposition states: "As to the remainder of the relief sought in this Motion, specifically approval of the release of the Phar-Mor I funds and approving the Wind Down Plan (as set forth in Section B) of the Motion, McKesson supports immediate entry of an order approving these aspects of the Motion." (McKesson Opp. ¶ 13.) At the hearing, counsel for McKesson represented that McKesson had no objection to amending the Stipulation to clarify dates in paragraph 15, and further pointed out a typographical error in paragraphs 17 and 20 of the Stipulation. Those paragraphs refer to paragraph 14, but the reference should be paragraph 15. The parties agreed on the record that the Stipulation would be amended to include correction of the typographical error, as well as the clarifications proposed in the Joint Motion.

As a consequence, consistent with (i) the First Amended Joint

Plan of Liquidation of Phar-Mor, Inc. et al, Together With the Official Committee of Unsecured Creditors, Under Chapter 11 of the Bankruptcy Code Dated January 23, 2003 ("Joint Plan") (Doc. # 1494) filed on January 23, 2003; (ii) Order Confirming First Amended Joint Plan of Liquidation ("Confirmation Order") (Doc. # 1651) entered March 13, 2003; (iii) the Stipulation; and (iv) the Joint Motion, this Court finds that: (a) there is no opposition thereto and (b) it is in the best interests of Debtor, the creditors, and Debtor's estate to authorize the following relief:

1. Debtor is authorized (but not required) to make a distribution of substantially all available remaining cash, including the cash held in the segregated Phar-Mor I account (now totaling in excess of \$900,000.00), but excluding a reserve of \$100,000.00, to creditors holding Class 5 unsecured claims in Debtor's bankruptcy case;
2. Debtor is authorized to take all necessary actions to effectuate the "Wind Down Plan," as described in Section B of the Joint Motion (Jt. Mot. at 7-8); and
3. Debtor, the Committee, and McKesson are authorized and ordered to file (within ten days after entry of this Order) an Amended Stipulation, which shall clarify dates in paragraph 15 of the Stipulation, and correct the typographical error in paragraphs 17 and 20.

## II. 10% BONUS DISTRIBUTIONS

Debtor and the Committee seek to amend the Stipulation to ratify the 10% Bonus Distributions (as defined in the Joint Motion) paid to Ficarro and Seekely in or about April 2005. McKesson vigorously opposes this element of relief in the Joint Motion.<sup>2</sup> There does not appear to be any dispute that Ficarro and Seekely were each entitled to a 6% Bonus Distribution (as defined in the Joint Motion) at the time the 10% Bonus Distributions were paid; the only dispute pertains to the amount paid in excess of the 6% Bonus Distribution.

In arguing against the 10% Bonus Distributions, McKesson expressed "outrage" that Ficarro and Seekely received compensation of "over \$4 million" in the post-confirmation period. McKesson argues that, because this amount of post-confirmation compensation is so "extraordinary," disgorgement of the additional bonus payments is required. Despite McKesson's expressed outrage at the amount of post confirmation compensation paid to Ficarro and Seekley, McKesson fails to point to any wrongdoing (i) by Debtor in paying Ficarro and Seekely their post-confirmation salaries or (ii) by Ficarro and Seekely in accepting such compensation. Ficarro and Seekely continued to be employed post-confirmation pursuant to prior orders of this Court. The Joint Plan provided for the post-confirmation

---

<sup>2</sup>McKesson's current position is consistent with its position "during the settlement discussions" that resulted in the Stipulation when "McKesson objected to Messrs Seekely and Ficarro receiving any bonus distribution in excess of the 6% Bonus Distribution." (Jt. Mot. at 9.)

employment of Ficarro and Seekely without a specific termination date. Ficarro and Seekely could be terminated for cause (in which event Debtor and the Committee would jointly select a suitable successor), but otherwise they were to be employed until Debtor was dissolved after distribution of all assets of the bankruptcy estate.

Although McKesson questions the necessity of the long post-confirmation tenure of Ficarro and Seekely, the Joint Plan and the Confirmation Order contemplate that Ficarro and Seekely would be employed until all distributions were made to unsecured creditors and the bankruptcy case was closed. McKesson can point only to the disclosed estimate of "projected operating expenses and professional fees to conclusion of case" to support its position. The Disclosure Statement (Doc. # 1495) estimated that post-confirmation operating expenses and professional fees would be \$3,000,000.00. (Discl. State. at 12.) There is nothing in the record to suggest that Debtor's estimate was disingenuous at the time it was made. Needless to say, no one would have predicted in March 2003 that this case would still be pending in mid-2009. With hindsight, it is clear that the estimate of projected expenses was dramatically low; however, the estimate of percentage recovery to unsecured creditors has also proved to be far lower than actual recovery.

Debtor and the Committee concede that Ficarro and Seekely each received \$82,000.00 more than they would have received had the bonuses been based upon 6% rather than 10%. Despite this concession, Debtor and the Committee request this Court to ratify

the 10% Bonus Distributions on the basis that the "additional 4% performance distribution was in lieu of Messrs. Seekely and Ficarro receiving annual adjustments to their base salaries as reflected in the consumer price index." (Jt. Mot. at 9.) Debtor and the Committee further propose that, going forward, Ficarro and Seekely would receive only the bonuses provided for in the prior orders of this Court. At the hearing, counsel for the Committee explained that, although the agreement was never memorialized in a writing, some time in 2004, Debtor, the Committee, Ficarro and Seekely had agreed to the 10% Bonus Distributions in consideration for Ficarro and Seekely foregoing raises in their annual compensation.<sup>3</sup>

McKesson counters that "Ficarro and Seekely received bonuses in April of 2005, totaling at least \$164,000[.00] and that those bonuses were not disclosed or authorized by this Court's prior orders establishing the compensation of [sic] Seekely and Ficarro." (McKesson Opp. ¶ 8.) Accordingly, McKesson (i) demands that Ficarro and Seekely disgorge the amount of \$164,000.00, and (ii) "objects to any further bonuses being paid to Seekley and Ficarro."<sup>4</sup> (*Id.* ¶ 10.)

This Court finds it curious that McKesson has taken

---

<sup>3</sup>No evidence on this issue was produced by either side. Neither Ficarro nor Seekely were present at the Hearing. Counsel for the Committee was not personally involved in those discussions, which occurred prior to her joining the firm that represents the Committee. McKesson had no evidence that such an agreement was not made - it merely argued that any such agreement would have had to be approved by the Bankruptcy Court.

<sup>4</sup>McKesson has not filed a motion for disgorgement by Ficarro and/or Seekely. Such a motion would provide Ficarro and Seekely with an opportunity to respond.

inconsistent and discordant positions regarding prior orders of this Court. On the one hand, McKesson insists that, because the prior orders of the Court did not authorize the 10% Bonus Distributions, Ficarro and Seekely are required to immediately disgorge the amount paid to them in excess of the authorized 6% Bonus Distribution. On the other hand, "McKesson strenuously objects to any further bonuses being paid to Seekely and Ficarro" (McKesson Opp. ¶ 10), despite the fact that future bonus distributions are contemplated and mandated, under certain circumstances, by those same orders. McKesson's adamant position that the prior orders of the Court must be enforced to the letter regarding past bonus distributions is at odds with its "strenuous" position that there should be no future bonus distributions, despite provision for such in those same orders.

Two prior orders of this Court authorize compensation to Ficarro and Seekely: (i) Stipulation and Order Approving Employment Agreements with Certain of the Debtors' Executive Employees, dated February 5, 2002 ("February 5 Order") (Doc. # 473) and (ii) Order Authorizing the Implementation of a Wind-Down Employee Retention Program Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code, dated November 13, 2002 ("November 13 Order") (Doc. # 1188). The February 5 Order provided for, among other things, Debtor to employ Ficarro and Seekely, as well as three other executives. Ficarro's base salary was "\$270,000.00 per year for the first year" and Seekely's base salary was "\$175,000.00 for the first year." Each base salary was "subject to increase effective on each June 1st

thereafter, beginning with June 1, 2002. The amount of increase, if any, shall be determined by the [Debtor] based upon the individual performance of the Employee and [Debtor], in general." If confirmation of a plan or sale of substantially all of Debtor's assets had not been accomplished on or before June 1, 2002, then "any increase for the Employee shall only be effective after review by the [Committee]." (Feb. 5 Order at 3-5 (emphasis added).)

The November 13 Order authorized Debtor to "implement the terms and conditions of the Wind-Down Employee Retention Program upon the terms and conditions set forth in the Motion as hereinabove [sic] modified."<sup>5</sup> (Nov. 13 Order at 3.) The Wind-Down Motion had four components, only one of which is relevant at this time. The pertinent component is:

The Performance Incentive Program: The Performance Incentive Program is designed for the two (2) remaining members of the Debtors' senior management [*i.e.*, Ficarro and Seekely] who will oversee the wind down to provide them with incentive to maximize recoveries for unsecured creditors. The program will provide a pool of funds based on the expected recovery percentage for unsecured creditors. The pool will be administered by senior management, in consultation with the Committee. The Performance Incentive Program shall be based upon the following projected recovery to general unsecured creditors:

Recovery Range for Unsecured Creditors . . . 20.0% plus  
- Bonus % of Percentage . . . 6% - Cumulative Bonus  
Amount . . . \$255,001 plus 6% percent of the recovery  
amount over 20%.

---

<sup>5</sup>The modifications referred to did not affect the Bonus Distributions, as set forth in the Joint Motion of Phar-Mor, Inc., *et al*, and the Official Committee of Unsecured Creditors for Entry of an Order Authorizing the Implementation of a Wind-Down Employee Retention Program Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code ("Wind-Down Motion") (Doc. # 1075) dated October 15, 2002.

(Wind-Down Mot. at 6 (emphasis added).)

The Court first notes that both the February 5 Order and the November 13 Order are final and non-appealable. Thus, these orders are not subject to collateral attack; their terms are to be enforced, as entered.

The Court further notes that the Committee apparently agreed to the 10% Bonus Distributions at the time such bonuses were paid to Ficarro and Seekely and that the Committee continues to support these payments. (Comm. Reply ¶ 4.) The Committee contends that it had to review and approve any annual increases to the base salaries of Ficarro and Seekely. As a consequence, the Committee argues that it was proper for the Committee to agree to the 10% Bonus Distributions in lieu of annual salary increases.

McKesson relies on the Confirmation Order in arguing that Ficarro and Seekely were not entitled to any increases in salary. McKesson cited to the following language: "The Post-Effective Date Management shall serve in their respective capacities on the same terms, conditions and rights they are presently entitled to, including compensation in accordance with the Debtors' Bankruptcy Court approved employee retention plan." (Jt. Plan at 24.) McKesson argues that this passage limits the compensation Debtor could pay Ficarro and Seekely to their base salaries of \$270,000.00 and \$175,000.00, respectively, because such were the salaries that they were "presently" being paid at the time of confirmation. The Court does not agree with McKesson's interpretation, finding that such

interpretation flies in the face of the plain meaning of the cited language. The phrase "presently entitled to" does not refer merely to the base salaries of Ficarro and Seekely, but instead refers to all of the "terms, conditions, and rights" of employment that Ficarro and Seekely had at the time the Joint Plan was proposed. The terms and conditions of Ficarro's and Seekely's employment were set forth in the February 5 Order and the November 13 Order. The February 5 Order provides for base salaries and describes when and under what circumstances such base salaries could be increased. "The amount of increase, if any, shall be determined by the Company based upon the individual performance of the Employee and the Company, in general." Only if confirmation of a plan or sale of substantially all of Debtor's assets was not approved on or before June 1, 2002, would "any increase for the Employee . . . be effective after review by the official committee of unsecured creditors of [Debtor]." (Feb. 5 Order at 4 and 5.)

Thus, this Court finds and holds that Debtor was not limited to paying Ficarro and Seekely only the base salaries described in the February 5 Order, but Debtor could have provided for annual increases, at its discretion, after review by the Committee. At the hearing, counsel for McKesson referenced an unspecified order in May 2002 that purportedly authorized the sale of substantially all of Debtor's assets, but this Court could not find any such order on the docket. It is clear that the Confirmation Order was not entered until March 13, 2003, which is well beyond the June 1, 2002,

deadline in the February 5 Order. The Disclosure Statement (Doc. # 1495) filed on January 23, 2003, states, "By motion dated July 3, 2002, the Debtors sought authority from the Bankruptcy Court to sell substantially all of their remaining assets and conduct any associated 'going-out-of-business' sales." (Discl. State. at 21.) Thus, it appears that Debtor did not obtain Court approval of the sale of substantially all of its assets on or before June 2, 2002. As a consequence, the Committee would have been required to review and impliedly approve any increases to the annual salaries of Ficarro and Seekely.

Despite the fact that the Committee had or may have had the ability to review and pass on any annual salary increases for Ficarro and Seekely, the Committee did not and does not have authority to increase the amount of the Bonus Distributions, which were authorized by the November 13 Order. Debtor and the Committee seek to justify the extra bonus payments on the basis that (i) Ficarro never received an annual salary increase and Seekely received only one increase of \$10,000.00 in 2006; and (ii) through the efforts of Ficarro and Seekely, the holders of unsecured claims received a distribution of more than 25% instead of the anticipated 16% distribution.

The Committee correctly notes that "Debtors were not required to obtain Court permission to modify or increase the employment terms for [Ficarro] and [Seekely] in their post-confirmation management positions." (Comm. Reply ¶ 1.) However, Debtor did not

increase the salaries of Ficarro and Seekley; instead, Debtor chose to increase the percentage of the Bonus Distribution. Although Debtor could have provided annual salary increases to Ficarro and/or Seekley, after review by the Committee, the fact is that Debtor did not do so. Debtor and the Committee argue that, because Debtor could have paid Ficarro and Seekely more money in the form of annual salary increases, the extra Bonus Distributions should be allowed in lieu of Debtor's failure or refusal to provide for annual salary increases. Although there is some facial appeal to this argument, the extra bonus payments are not authorized by the November 13 Order. At the time the 10% Bonus Distributions were made, Debtor was authorized to pay Ficarro and Seekely a 6% Bonus Distribution and no more. Neither the February 5 Order nor the November 13 Order provide for Debtor and the Committee to agree to pay an increased bonus in lieu of salary increases. Indeed, the prior orders of the Court are silent regarding the type of relief proposed in the Joint Motion. As a consequence, despite the joint agreement of Debtor and the Committee to pay the 10% Bonus Distributions, the extra \$82,000.00 paid to each of Ficarro and Seekely was not authorized by prior court order.

The Committee also argues that McKesson disingenuously implies that the 10% Bonus Distributions were "somehow hidden" because McKesson had actual knowledge of the 10% Bonus Distributions "as early as March 2006 when McKesson took the deposition of Ficarro and questioned him about his salary and other compensation he was

receiving from the Debtors." (Comm. Reply ¶ 3.) Counsel for McKesson argues that a different law firm represented McKesson in the Adversary Proceeding (in which the referenced deposition was taken) and, thus, McKesson was not aware of the 10% Bonus Distributions. Counsel for McKesson allegedly read into the record an exchange from that deposition (Hearing 11:11 a.m. - 11:12 a.m), but he never cited to any page reference.<sup>6</sup> The exchange that was read into the record revealed that the 10% Bonus Distribution was disclosed by Ficarro to McKesson during that deposition. The deposition transcript demonstrates that Ficarro stated that the bonus increased to ten percent. (Ficarro Depo. Tr. at 37-41.)

The fact that McKesson failed to object to the additional bonus payments for more than three years after disclosure of such information is troubling to the Court. Bankruptcy is not a game of "gotcha!" and the court should not be used as a forum to make selective and/or strategic attacks. The 10% Bonus Distributions were made in April 2005. McKesson learned of such payments in March 2006, yet failed to object in any way to such payments until July 6, 2009. Because of the long passage of time without any objection, Ficarro and Seekely had reason to believe that payment of the 10% Bonus Distributions, which were made by Debtor with approval by the Committee, were unassailable.

The equities of this situation favor retention by Ficarro and

---

<sup>6</sup>Counsel for McKesson requested, and was allowed, to file the entire transcript, which includes 190 pages of testimony, but again failed to provide a citation for the Court. (Doc. # 2904, filed July 28, 2009.)

Seekely of the entire 10% Bonus Distributions. Despite that being said, however, the prior orders of the court do not authorize bonus payments in excess of 6%. Pursuant to 11 U.S.C. § 105(a), this Court is authorized to fashion a remedy that is consistent with the prior orders of this Court yet does not work an injustice or provide an advantage to a party that has sat on its rights. Because of the unique circumstances of this case,<sup>7</sup> immediate disgorgement of the extra 4% bonus payments is neither appropriate nor warranted. This Court will require Ficarro and Seekely to "repay" the excess bonus distribution paid in April 2005 from the next bonus distribution they are authorized to receive. Debtor shall withhold the first \$82,000.00 of the next bonus distributions payable to each Ficarro and Seekely and thereafter pay to each Ficarro and Seekely only any bonus distribution in excess of \$82,000.00. To the extent the next bonus distribution is less than \$82,000.00 to each Ficarro and Seekely, Debtor shall not pay any bonus distribution. The "repayment" is required only from the next bonus distribution; if there are any other and/or further bonus distributions payable to either Ficarro and Seekely, such shall be made without regard to whether the entire \$82,000.00 has been repaid. In other words, any recovery/repayment of the 10% Bonus Distributions shall come from only the next bonus payment, but not any other or future bonus distributions.

---

<sup>7</sup>Such circumstances include the fact that McKesson has not moved for disgorgement, which, as stated in note 4, would have provided Ficarro and Seekely a chance to respond.

### III. MCKESSON'S REQUEST FOR FEE APPLICATIONS

McKesson's Opposition purports to request relief in the way of "Court-review of post-confirmation fees and costs of the Debtor's professionals[.]" (McKesson's Opp. ¶ 12.) There can be no question - and McKesson does not dispute - that the Confirmation Order<sup>8</sup> does not require any professional to file post-confirmation fee applications. The Confirmation Order expressly states: "The Plan shall [be], and by entry of this Order, is hereby confirmed[.]" (Confirm. Order ¶ 1.) The Joint Plan provided:

**8.7 Professional Fees and Expenses.** Each professional person or firm retained with approval by order of the Bankruptcy Court or requesting compensation in the Chapter 11 Cases pursuant to sections 330 or 503(b) of the Bankruptcy Code shall be required to file an application for allowance of final compensation and reimbursement of expenses in the Chapter 11 Cases incurred through the Confirmation Date on or before a date to be set by the Bankruptcy Court in the Confirmation Order. Objections to any such application shall be filed on or before a date to be set by the Bankruptcy Court in the Confirmation Order. All compensation and reimbursement of expenses allowed by the Bankruptcy Court shall be paid no later than ten (10) days after entry of the order allowing such fees and expenses.

**14.8 Post-Confirmation Date Fees and Expenses of Professionals.** After the Confirmation Date, the Debtors shall, in the ordinary course of business and without the necessity for any approval by the Bankruptcy Court, pay the reasonable fees and expenses of the professional persons employed by the Debtors and the Committee in connection with the implementation and consummation of this Plan, the claims reconciliation process and any other matters as to which such professionals may be engaged. The fees and expenses of such professionals shall be paid within fifteen (15) Business Days after

---

<sup>8</sup>The Confirmation Order was entered on March 13, 2003. It is also a final order that is not subject to appeal.

submission of a detailed invoice therefor to the Debtors and the Committee. If the Debtors or the Committee disputes the reasonableness of any such invoice, the Debtors, the Committee or the affected professional may submit such dispute to the Bankruptcy Court for a determination of the reasonableness of such invoice, and the disputed portion of such invoice shall not be paid until the dispute is resolved. The undisputed portion of such fees and expenses shall be paid as provided for herein.

(Jt. Plan at 34, 49 (emphasis added).) The plain wording of the Joint Plan provides for professionals to file fee applications only for fees and expenses incurred through the Confirmation Date. Debtor was free to pay all post-confirmation fees and expenses of its (and the Committee's) professionals unless Debtor or the Committee objected to all or a portion of a fee as not being reasonable. Debtor, the Committee or the "affected professional" were each authorized to bring any dispute to the Bankruptcy Court, but McKesson - as a creditor - was not accorded that right. Thus, any post-confirmation payment of fees and expenses was within the discretion of Debtor to pay (absent an objection) in the ordinary course of business without oversight by the Bankruptcy Court.

The Confirmation Order expressly acknowledges the then-pending Adversary Proceeding, to which McKesson now objects as "frivolous" and a waste of resources. (Confirm. Order ¶ 18.) Despite the fact that the Adversary Proceeding was pending at the time of confirmation, McKesson failed to object to the treatment of post-confirmation professional fees and expenses. As noted in the Fox Reply regarding Debtor's adversary proceeding against McKesson:

Phar-Mor obtained opinions from legal advisors and

highly-respected expert witnesses regarding both liability and damages. The Committee considered the results of this analysis and unanimously approved Phar-Mor filing the Adversary Proceeding and devoting the resources needed to pursue the claims.

Despite its characterization of Phar-Mor's claims as "frivolous," McKesson did not file a motion to dismiss the Complaint. Rather McKesson conducted extensive documentary discovery, engaged its own experts, and deposed numerous Phar-Mor witnesses, vendors, and third parties. The parties exchanged in excess of 60,000 pages of documents and deposed approximately 34 witnesses in six states. The extent and vigor of McKesson's efforts to defend the claims demonstrate its view of their merit much more accurately than McKesson's current self-serving characterization.

(Fox Reply at 4-5.)

McKesson finds *Maxwell v. KPMG LLP*, 520 F.3d 713 (7th Cir. 2008) to be "remarkably similar" to the facts presently before this Court. Presumably McKesson finds this similarity because the *Maxwell* court described the underlying lawsuit by the chapter 7 bankruptcy trustee as frivolous, which is the adjective that McKesson now applies to the Adversary Proceeding. McKesson states that the Seventh Circuit Court of Appeals "got it right" because it noted that a court should review the litigation judgment of the chapter 7 trustee and, "in an appropriate case must give consideration to imposing sanctions for the filing of a frivolous suit." *Id.* at 718. Because McKesson characterizes the Adversary Proceeding as "frivolous," McKesson states that this Court should belatedly require fee applications from all post-confirmation professionals.

This Court notes, however, that there appear to be far more

dissimilarities than similarities between the *Maxwell* case and the instant case. In the *Maxwell* case, the chapter 7 trustee brought suit against the auditors of the company that acquired another company for "breach of its duty of care in violation of Illinois tort law." *Id.* at 714. The Court of Appeals held that "nothing in Illinois law permit[ted] such an attempt to succeed." *Id.* at 717. Furthermore, the *Maxwell* court found that the trustee's alleged damages were approximately six times the amount owed to the debtor's unsecured creditors and did not appear to have any basis, stating that the "evidence that the trustee presented to prove damages was outlandish." *Ibid.* The Seventh Circuit Court of Appeals relied on the "extreme weakness of the trustee's case, both on liability and on damages" in characterizing the lawsuit as frivolous. *Id.* at 718. The Court stated, "[F]rivolous suits are forbidden. So frivolousness must depend not on the net expected value of a suit in relation to the cost of suing, but on the probability of the suit's succeeding. If that probability is very low, the suit is frivolous; really that is all that most courts, including ours, mean by the word." *Id.* at 719. Applying the *Maxwell* definition of "frivolous," this Court finds that the Adversary Proceeding was not frivolous. The fact that Debtor did not prevail in the Adversary Proceeding does not mean that its pursuit of a breach of contract action against McKesson had no basis in law or fact.

McKesson's request for fee applications appears really to be a criticism that the Adversary Proceeding was initiated at all.

McKesson argues that it does not know whether it would object to any fee application if the Court ordered applications to be filed, while conceding that it is likely that the fees of Debtor's general counsel would pass muster, but not those of special counsel engaged for purposes of the Adversary Proceeding.<sup>9</sup> McKesson argues that no one did a cost benefit analysis regarding the Adversary Proceeding. (Hearing 11:38 a.m.) The Committee counters that the Adversary Proceeding was commenced only after analysis by professionals of both Debtor and the Committee, which analysis indicated that a pre-petition breach of contract action against McKesson should be pursued. See also Fox Reply at 4. McKesson's argument for fee applications is not based on the fact that Debtor's special counsel "over-lawyered" the Adversary Proceeding; instead, the argument is that Debtor should never have initiated the Adversary Proceeding.

McKesson cites to 11 U.S.C. § 1129(a)(4) and argues that, notwithstanding the express terms of the Confirmation Order, this Court has the authority and the obligation to make sure that payments made in connection with the Joint Plan are reasonable. More than six years ago, this Court expressly found that the Joint Plan met all of the requirements for confirmation under 11 U.S.C. § 1129. What McKesson really wants is for this Court to amend or

---

<sup>9</sup>McKesson referenced Debtor as playing in a "Vegas casino" when it pursued the Adversary Proceeding because Debtor had nothing to lose whereas McKesson was "subjected to an unlimited war chest." (Hearing 11:38 a.m.) A review of the docket of the Adversary Proceeding clearly shows that both parties sought and obtained multiple extensions of the discovery period and that they conducted discovery for more than three years. McKesson - as well as Debtor - caused the Adversary Proceeding to drag on well beyond initial expectation. See note 1, *supra*.

modify the Confirmation Order to require oversight by the Bankruptcy Court of Debtor's post-confirmation professionals. This is something the Court cannot and will not do. McKesson argues that "all of the Debtor's professionals should be required to submit final fee applications and make the requisite showings under § 330 that their fees and costs provided the requisite statutory benefit to this estate." (McKesson Opp. ¶ 5.) There is no support for this argument under the prior orders of this Court or in equity.

McKesson's request for fee applications at this late date is not only not authorized by the Confirmation Order, such an order from this Court would be patently unfair to all post-confirmation professionals. The detailed statements submitted post-confirmation to Debtor for payment may or may not (and likely did not) comport with the detail required in a fee application. Moreover, since confirmation occurred more than six years ago, it is doubtful that, given the long passage of time, the professionals would be in a position to reconstruct the detail required for a fee application. As McKesson acknowledges, granting its request lies in the sole discretion of the Court. (Hearing 11:36 a.m. - 11:38 a.m.) This Court finds that there is no basis, at this late date, to require professionals to submit post-confirmation fee applications. The Court accordingly exercises its discretion to deny McKesson's request for the Court to *sua sponte* enter an order directing professionals to file post-confirmation fee applications.

McKesson also argues that Debtor and the Committee were

required to bring to the attention of the Court and all parties in interest the fact that the post-confirmation fees exceeded the estimate in the Joint Plan. McKesson does not purport to say when such action was necessary or what the consequences would be of such disclosure. Since the Joint Plan had already been substantially completed, it could not be "undone." There would have been nothing for any creditor to vote on subsequent to entry of the Confirmation Order. The Court finds no merit to this argument, which, at best, would be impractical and probably a useless act in any event.

#### **IV. CONCLUSION**

For the reasons set forth above, this Court will enter an order, as follows:

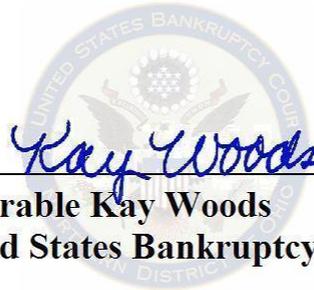
1. Debtor is authorized (but not required) to make a distribution of substantially all available remaining cash, including the cash held in the segregated Phar-Mor I account (now totaling in excess of \$900,000.00), but excluding a reserve of \$100,000.00, to creditors holding Class 5 unsecured claims in Debtor's bankruptcy case;
2. Debtor is authorized to take all necessary action to effectuate the "Wind Down Plan," as described in Section B of the Joint Motion (Jt. Mot. at 7-8);
3. The Stipulation will be amended to change the dates in paragraph 15, as set forth in the Joint Motion, and to correct typographical errors;
4. From the next bonus distribution, Debtor is ordered to

withhold the first \$82,000.00 from payment to each of Ficarro and Seekely; provided, however, that if the total of such next bonus payment is less than \$82,000.00, no further repayment or disgorgement of payment in excess of the authorized 6% Bonus Distribution paid to Ficarro and Seekely in April 2005 shall be authorized or required; and

5. The February 5 Order, the November 13 Order, the Stipulation, the Joint Plan and the Confirmation Order shall all remain in full force and effect, except as expressly modified herein.

# # #

IT IS SO ORDERED.



Dated: August 03, 2009  
03:54:23 PM

Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	In Jointly Administered
	*	Chapter 11 Proceedings
	*	
	*	CASE NUMBERS 01-44007
PHAR-MOR, INC., et al.,	*	through 01-44015
	*	
	*	
Debtors.	*	HONORABLE KAY WOODS
	*	

\*\*\*\*\*  
ORDER GRANTING, IN PART, AND DENYING, IN PART, JOINT MOTION  
OF DEBTOR AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS  
FOR AN ORDER: (A) AUTHORIZING THE RELEASE OF RESERVE FUNDS FOR  
DISTRIBUTION TO CREDITORS; (B) APPROVING IMPLEMENTATION OF FINAL  
WIND-DOWN PLAN FOR THE CLOSING OF THE DEBTOR'S BANKRUPTCY CASE,  
AND (C) APPROVING AMENDMENT TO STIPULATION AND AGREED ORDER  
ENTERED JUNE 5, 2009  
\*\*\*\*\*

This cause is before the Court on Joint Motion of the Debtor  
and the Official Committee of Unsecured Creditors for an Order: (A)  
Authorizing the Release of Reserve Funds for Distribution to  
Creditors; (B) Approving Implementation of Final Wind-Down Plan for  
the Closing of the Debtor's Bankruptcy Cases [sic], and (C)

Approving Amendment to Stipulation and Agreed Order Entered on June 5, 2009 ("Joint Motion") (Doc. # 2892) filed on June 25, 2009, by Debtors Phar-Mor, Inc., et al., (collectively, "Debtor") and the Official Committee of General Unsecured Creditors ("Committee"). McKesson Corporation ("McKesson") filed McKesson Corporation's Opposition to the Joint Motion (Doc. # 2894) on July 6, 2009.

For the reasons set forth in this Court's Memorandum Opinion entered this date ("Memorandum Opinion"), the Court hereby holds:

1. Debtor is authorized (but not required) to make a distribution of substantially all available remaining cash, including the cash held in the segregated Phar-Mor I account (now totaling in excess of \$900,000.00), but excluding a reserve of \$100,000.00, to creditors holding Class 5 unsecured claims in Debtor's bankruptcy case;
2. Debtor is authorized to take all necessary action to effectuate the "Wind Down Plan," as described in Section B of the Joint Motion (Jt. Mot. at 7-8);
3. Debtor, the Committee, and McKesson are authorized and ordered to file (within ten days after entry of this Order) an Amended Stipulation, which shall clarify dates in paragraph 15 of the Stipulation, and correct the typographical error in paragraphs 17 and 20;
4. From the next bonus distribution, Debtor is ordered to withhold the first \$82,000.00 from payment to each of John R. Ficarro ("Ficarro") and Martin S. Seekely

("Seekely"); provided, however, that if the total of such next bonus payment is less than \$82,000.00, no further repayment or disgorgement of payment in excess of the authorized 6% Bonus Distribution (as defined in the Memorandum Opinion) paid to Ficarro and Seekely in April 2005 shall be authorized or required; and

5. The February 5 Order, the November 13 Order, the Stipulation, the Joint Plan and the Confirmation Order (all as defined in the Memorandum Opinion) shall all remain in full force and effect, except as expressly modified herein.

# # #