UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re:

Case No. 96-28214

J H COLLECTIBLES INC.,

Chapter 11

Debtor.

MEMORANDUM DECISION ON THE UNITED STATES TRUSTEE'S OBJECTION TO THE APPLICATION OF OTTERBOURG, STEINDLER, HOUSTON & ROSEN, P.C., FOR ORDER, UNDER FEDERAL RULE OF BANKRUPTCY PROCEDURE 9019, APPROVING COMPROMISE AND SETTLEMENT OF AMENDED CLAIM.

BACKGROUND

Otterbourg, Steindler, Houston & Rosen, P.C., (OSHR) filed an application with the court for an order approving a compromise and settlement of its amended claim. The United States Trustee filed an objection to approval of the settlement. This court has retained jurisdiction under the plan of liquidation and 28 U.S.C. § 1334(b), and this is a core proceeding under 28 U.S.C. § 157(b)(2)(B). This decision represents the court's findings of facts and conclusions of law pursuant to Fed. R. Bankr. P. 9014, incorporating Rule 7052.

On January 9, 1998, OSHR filed Amended Claim No. 732, all of which was for fees incurred after May 23, 1997, the date on which the order of confirmation of the plan of J H Collectibles, Inc. became final. OSHR was counsel for the Official Committee of Unsecured Creditors, and its duties largely ended upon confirmation. The claim is comprised as follows: (1) $4,116.00 in fees incurred finalizing the settlement with the Union of Needle Trades, Industrial and Textile Employees, AFL-CIO (UNITE); (2) $6,036.00 in fees incurred in preparing the Final Fee Application with exhibits; (3) $8,681.00 in fees incurred for "supplemental administrative services"; and (4) $186,774.00 for fees and expenses incurred in defending the Final Fee

Application. The United States Trustee, M & I Marshall & Ilsley Bank, American National Bank and Trust Company of Chicago, and the Post-Confirmation Committee all objected to payment of the claim.

This court previously determined OSHR's fees incurred for services rendered prior to May 23, 1997, by decision and order dated December 18, 1997. The requested amount was $749,687.50, plus expenses of $90,431.74, and after a contested evidentiary hearing on the matter, the court awarded OSHR $557,832.12, plus expenses of $84,000.10. The appeal of that decision is pending before the District Court as Case No. 98-C-70.

A settlement of the claim for postconfirmation services was filed with the court on March 3, 1998. The parties to the settlement, OSHR, M & I Bank, American National Bank, and the Post-Confirmation Committee agreed that Amended Claim No. 732 of OSHR should be deemed an allowed administrative claim in the amount of $36,800.00. The parties also stipulated that, upon entry of a final order approving the settlement, the Post-Confirmation Committee shall pay the sum in full settlement of any and all claims of OSHR against the debtor's estate. Additionally, after payment is made, OSHR shall withdraw with prejudice its appeal to the District Court.

The United States Trustee contends that the proposed settlement does not meet the standards set forth in *In re American Reserve Corp.*, 841 F.2d 159 (7th Cir. 1987), because OSHR is unlikely to win its appeal and the firm has failed to demonstrate that it is entitled to any fees incurred post-confirmation when it no longer had a client for whom to perform services. On the other hand, OSHR argues that it is likely to prevail on appeal because the decision on its fee application was clearly erroneous, and the firm expended considerable time and expense in defending its fee application.

This court previously determined that the matter was properly before the court because the Post-Confirmation Committee, standing in the shoes of the trustee, is a party to the settlement. *See* Court Minutes, March 10, 1998. Because the parties have agreed that the facts are not in dispute, an evidentiary hearing was deemed unnecessary.

SETTLEMENT STANDARDS

Bankruptcy Rule 9019(a) empowers the court to approve a proposed compromise or settlement "[o]n motion by the trustee and after notice and a hearing." Fed. R. Bankr. P. 9019(a). Otterbourg, Steindler, Houston & Rosen, P.C., has moved for court approval of the compromise.

In *Protective Comm. for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424, 88 S.Ct. 1157, 1163 (1968), the Supreme Court stated a proposed settlement should only be approved by the bankruptcy judge upon a determination that the settlement is "fair and equitable." When considering whether to approve a proposed settlement, the bankruptcy court is charged with an affirmative obligation to apprise itself of the underlying facts and to make an independent judgment as to whether the compromise is fair and equitable. The court is not permitted to act as a mere rubber stamp or to rely on the trustee's word that the compromise is reasonable. *American Reserve*, 841 F.2d at 162-63. However, the court need not conduct a mini-trial on the merits of the settlement. *Id.* at 163.

In determining whether a proposed settlement agreement is fair and equitable, many courts have recited various factors to be examined. The following are pertinent to approval of the compromise before this court: (1) the balance between the likelihood of the plaintiff's or defendant's success should the case go to trial compared to the present and future benefits offered

by the settlement; (2) the prospect of complex, costly and protracted litigation if settlement is not approved; (3) whether the terms of the proposed compromise fall within the reasonable range of litigation possibilities; (4) the competency and experience of counsel who support the settlement; (5) the proportion of class members who object to or support the proposed settlement; and (6) the extent to which the settlement is the product of arm's length bargaining. *See Matter of Energy Co-Op, Inc.*, 886 F.2d 921, 928 (7th Cir. 1989); *American Reserve*, 841 F.2d at 161; *In re Media Cent., Inc.*, 190 B.R. 316, 321 (E.D. Tenn. 1994).

This list is comprehensive but not exclusive. As the Court in *TMT Trailer* stated, the bankruptcy court should consider "all ... factors relevant to a full and fair assessment of the wisdom of the proposed compromise." *TMT Trailer*, 390 U.S. at 424, 88 S.Ct. at 1163. The Court explained that the trial court's decision must be "the result of an adequate and intelligent consideration of the merits of the claims, the difficulties of pursuing them, the potential harm to the debtor's estate cause by delay, and the fairness of the terms of the settlement." *Id.* at 434, 88 S.Ct. at 1168. This court is not making an ultimate determination of the legal and factual issues involved in the disputed claims. For the reasons set forth below, the settlement will be approved and the objection of the United States Trustee will be overruled.

ANALYSIS

As was stated above, the court's first, and arguably most important, step in analyzing a proposed settlement is to balance the likelihood of the plaintiff's or defendant's success on the merits at trial with the present and future benefits offered by the settlement. Amended Claim No. 732 has several parts, which will be discussed separately but will be considered as a whole.

The first part of the claim shows that after confirmation, OSHR incurred $4,116.00 in fees finalizing the settlement with the Union of Needle Trades, Industrial and Textile Employees, AFL-CIO (UNITE), broken down as follows: (1) $254.00 for 1 hour(s) drafting memoranda; (2) $1,118.00 for 3.1 hour(s) of telephone calls; (3) $1,422.00 for 3.9 hour(s) work examining documents; (4) $437.50 for 1.7 hour(s) reviewing files; (5) $197.50 for 0.8 hour(s) of correspondence/letter drafting; (6) $280.00 for 0.8 hour(s) of research; and (7) $407.50 for 1.1 hour(s) listening telephonically to the court's decision on the UNITE settlement. The committee's counsel had taken a major role in advocating this settlement, apparently because debtor's counsel requested that they do so, and had argued for its approval before the court when one of the banks objected. Most of the work was done preconfirmation, but the court's decision did not come until after confirmation, and the fee request in Amended Claim No. 732 includes only this post confirmation work. The U.S. Trustee argued that this time cannot be compensated because committee counsel's duties were finished at confirmation, there was no longer a client, OSHR not been appointed by the court to represent any other entity, and its charges were unreasonable.

There is authority in the Seventh Circuit that retroactive employment of a qualified professional is permissible. The inquiry requires an applicant to demonstrate both the professional person's suitability for appointment and the existence of excusable neglect sufficient to justify the failure to file a timely application. *Matter of Singson*, 41 F.3d 316, 319-20 (7th Cir. 1994). However, this court is satisfied that appointment of a professional under 11 U.S.C. § 327 is not appropriate after confirmation when, as here, there is no longer a "trustee" as that term is used under the Bankruptcy Code. OSHR was merely finishing what it started for the committee, and a

certain amount of wrap-up in concluding counsel's duties is not unreasonable as an administrative claim. The amount requested might be a bit high for these services, but the settlement as a whole must be considered.

The firm also incurred $6,036.00 in fees preparing the Final Fee Application. The U.S. Trustee contends that such charges are unreasonable and unnecessary services and provided no benefit to the estate. In particular, much of the additional time was required because OSHR did not comply with Local Rule 3.02 and had to correct its application.

In general, district and bankruptcy courts are split on the issue whether preparation of fee applications is compensable. Some courts allow compensation, others permit compensation at a regular hourly rate, and other courts permit compensation but with qualifications or limitations. *See, e.g., In re Nucorp Energy, Inc.*, 764 F.2d 655, 658-59 (9th Cir. 1985) (holding application preparation time compensable); *Matter of Braswell Motor Freight Lines, Inc.*, 630 F.2d 348, 351 (5th Cir. 1980) (holding attorney entitled to reasonable fee for preparation of application); *In re Spanjer Bros., Inc.*, 203 B.R. 85 (Bankr. N.D. Ill. 1996) (fee application preparation compensation limited to 5% of total award); *In re Chicago Lutheran Hosp. Ass'n*, 89 B.R. 719, 736 (Bankr. N.D. Ill. 1988) (noting split of authority); *In re Wildman*, 72 B.R. 700, 710 (Bankr. N.D. Ill. 1987) (fee application preparation compensation limited to 3% of total award).

On the one hand, fee applications are required by law and are time consuming for the attorneys. Since they are required, they are part of an entity's overall representation and should be compensated. If an exercise is required by law for an entity to be represented in bankruptcy, it benefits the entity that the attorneys comply with the requirement, as this allows the entity to be represented. On the other hand, as the U.S. Trustee argues, the application is for the attorney's

benefit, not the estate's. Furthermore, it may be part of overhead cost. In the end, compensation for preparation of the application must be reasonable. This court is satisfied that preparation of a fee application in cases as complex as this one should be reasonably compensated. Again, the court must look at the overall settlement as well as the amount allocated to this portion of the claim.

Fees of $8,681.00 were incurred for "supplemental administrative services." The U.S. Trustee objected to allowance of such fees because the services appear to be clerical in nature and for the purpose of closing out the firm's file for administrative purposes. The time records generated by OSHR include such descriptive headings as "Diary & Docket," "Review File," "Pacer-Docket Check," "Telephone Call(s)," "Examine Documents," "Letter," "Correspondence," "Memo," "Preparation of Order," "Correct Papers," "Research Local Rules," "Prepare Legal Papers," and "Service Legal Papers." All services were completed between May 27, 1997, and October 27, 1997. While we continue to believe that a certain amount of wrap-up of a case may be compensable, this looks like mostly overhead, and it is a lot of time spent in closing out a file.

Finally, $186,774.00 was incurred for fees and expenses in defending the Final Fee Application. The U.S. Trustee claims that such request is unreasonable because much of the time was spent doing unnecessary and duplicative services. The firm spent numerous hours attempting to depose attorneys for the banks, attorneys for the U.S. Trustee, members of the committee, as well as OSHR's own attorneys.

As with preparation of the final fee application, some compensation may be allowed for defending a fee application. *See Matter of Hutter Constr. Co.*, 126 B.R. 1005 (Bankr. E.D. Wis.

1991) (debtor's attorneys entitled to proportional fee award for time spent defending fee application); *In re CF&I Fabricators of Utah, Inc.*, 131 B.R. 474 (Bankr. D. Utah 1991) (time spent reviewing objections and appearing in court to present application is compensable); *In re Churchfield Management & Inv. Corp.*, 98 B.R. 838 (Bankr. N.D. Ill. 1989) (3% of total hours charged allowed for "litigating" the attorney fee application). Using the formula set forth in *Hutter*, OSHR quantified this portion of their claim as follows:

> 1. ANB sought to reduce our fees and expenses to a maximum recovery of $455,057.91 which was the greatest reduction sought by the Objectants and, if successful, would have resulted in the least recovery for OSH&R.
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> 2. Calculate the difference between the amounts sought by OSH&R ($840,119.00) and the amount that the Objectant would have permitted the fee applicant to recover ($455,058.00). The difference ($385,061.00) is the denominator in the calculation set forth below.
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> 3. Calculate the difference between the amount approved by the Court ($641,832.00) and the sum sought by the fee applicant ($840,119.00 - $641,832.00 = $198,287.00).
>
> 4. Calculate the difference between the amount approved by the Court and what the Objectant would have permitted the applicant to recover ($641,832.00 - $455,058.00 = $186,744.00).
>
> 5. Divide the results in steps three and four by the denominator indicated in Para. 2
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> $198,287.00 ÷ $385,061.00 = 51.5%
> $186,744.00 ÷ $385,061.00 = 48.5%
>
> 6. Multiply the smaller percentage by the denominator described in Para. 2 (0.485 x $385,061.00 = $186,774.00). This sum represents the amount which can be recovered by OSH&R under the Hutter formula.

Letter from Richard J. Rubin, January 9, 1998, p. 5.

Had OSHR applied its hourly rates, time records reveal that the amount would have been $175,057.50.

The *Hutter* court determined that "attorneys are entitled to be compensated for the time spent in defending fee applications, if the attorneys are successful in the defense." *Hutter*, 126 B.R. at 1013. Whether or not OSHR's defense was successful is a matter of opinion and degree. Because their fees were not reduced as much as the objecting parties would have preferred, OSHR's defense was met with some success. Thus, litigation of the issue was necessary for OSHR to obtain the fees they were awarded.

Next, the court must consider the merits of a continued appeal of OSHR's pre-confirmation fee application. This court's December 18, 1997, Decision reducing the firm's final award of compensation was multi-faceted. The fee request was broken down into various tasks performed by OSHR, and reductions were imposed as warranted. The U.S. Trustee claims that OSHR has failed to show that it is likely to win the appeal. The court that made the decision is usually going to agree with that assessment; otherwise, it would not have decided as it did. Nonetheless, experience teaches that undue confidence in one's own decisions may be misplaced. As with most appeals, there is a risk that some element of this court's judgment may be reversed. "It needs no elaborate discussion to point out that success at the trial level holds no guarantees for ultimate success at the appellate level." *In re Bicoastal Corp.*, 164 B.R. 1009, 1016 (Bankr. M.D. Fla. 1993) (holding that proposed settlement of appeal was fair and equitable); *see also In re Lakeland Dev. Corp.*, 48 B.R. 85, 90 (Bankr. D. Minn. 1985) (noting possibility that decision could be reversed on appeal). At the very least, all parties must submit briefs on appeal. If there is further appeal or remand, litigation costs continue to go up. The proposed settlement amount, $36,800.00, might very well be less than everyone's costs for future litigation, without any guarantee of the finality and certainty that the settlement offers. There is also the cost associated

with the various courts' time devoted to this continued litigation, which is rarely quantified but significant nonetheless. Furthermore, to have an end to the turmoil occasioned by this dispute is undoubtedly a benefit to all concerned. *See In re Lifschultz Fast Freight, Inc.*, 140 B.R. 482, 488 (Bankr. N.D. Ill. 1992) (noting that the concept of "benefit to the estate" in not necessarily limited to an economic analysis).

The terms of the proposed compromise fall within the reasonable range of litigation possibilities. Even if all of the other components of the claim are disregarded, OSHR would probably be entitled to at least $36,800.00 for defense of its application. This amount is far short of their hourly rate for the time spent in actual preparation for and participation in an extensive evidentiary hearing, and it is well within what this court would consider legitimate for such a proceeding.

The remaining factors the court must consider before approving the compromise concern the process by which the settlement was reached. *See In re Hibbard Brown & Co.*, 217 B.R. 41, 46 (Bankr. S.D.N.Y. 1998). The competency and experience of counsel who support the settlement is unquestionably first-rate. Additionally, the favorable reception of the settlement by the law firm, the banks and the Post-Confirmation Committee is further evidence of its fairness. The majority of the parties involved, and all whom hold an economic interest, support the proposed settlement. As the Seventh Circuit noted, "[s]elf-interest concentrates the mind, and people who must back their beliefs with their purses are more likely to assess the value of the judgment accurately than are people who simply seek to make argument." *Matter of Central Ice Cream Co.*, 836 F.2d 1068, 1072-73 n. 3 (7th Cir. 1987). Undoubtedly, the settlement was negotiated at arms length without fraud, collusion, overreaching or duress. Since the integrity of

the negotiation process was not compromised, and all the parties have been effectively represented, the settlement is approved as fair and equitable.

A separate order consistent with this decision will be entered.

Dated at Milwaukee, Wisconsin, May 19, 1998.

BY THE COURT:

Honorable Margaret Dee McGarity
United States Bankruptcy Judge