WRITTEN DECISION - NOT FOR PUBLICATION

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SOUTHERN DISTRICT OF CALIFORNIA
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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re	)	CASE NO. 96-12037-H7
	)	
VERN D. BLANCHARD dba AMERICAN MULTI-SYSTEMS,	)	MEMORANDUM DECISION
	)	
Debtor.	)	
	)	

Higgs, Fletcher & Mack LLP ("HF&M"), special counsel for the chapter 7 trustee, filed its final application seeking approval of compensation. Debtor Vern D. Blanchard ("Blanchard") objected. The matter was heard on November 17, 2005. After considering the pleadings and oral argument, the Court gave the parties additional time to file briefs and took the matter under submission.[1]

At issue is whether HF&M is entitled to its attorneys' fees and costs pursuant to the terms set forth in the order authorizing its employment (the "employment order").

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[1] The minute order [docket #153 - Case No. 96-12037] gave HF&M until December 2, 2005, to file further briefs with a response by Blanchard filed December 16, 2005. Subsequently HF&M filed a reply on December 22, 2005, and then Blanchard filed a sur-reply on January 9, 2005. HF&M filed another sur-reply on January 11, 2006. None of these documents were authorized. The Court does not consider the briefs filed by either party after the December 16, 2005 date because they were submitted without leave from this Court. Even if the Court did consider the briefs, they simply repeat arguments already made. HF&M repeatedly makes a request for the opportunity to make oral argument regarding its fees. However, the Court finds that there is no need for further oral argument on this matter since the interpretation of the employment order is an issue of law.

This Court has jurisdiction to determine this matter pursuant to 28 U.S.C. §§ 1334 and 157(b)(1) and General Order No. 312-D of the United States District Court for the Southern District of California. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

I.

FACTS

On or about December 8, 1998, an order was entered authorizing the employment of HF&M, as special counsel for James L. Kennedy, the chapter 7 trustee. Paragraph 2 of the employment order states:

> That compensation to Higgs, Fletcher & Mack, LLP, for professional services rendered on behalf of the trustee shall be paid by Fletcher Hills Town and Country, and if there is any recovery from the services provided by Higgs, Fletcher & Mack, LLP, then subject to notice to creditors and court approval of the fees and costs of Higgs, Fletcher & Mack, LLP, Fletcher Hills Town and Country will be reimbursed for the fees and costs it advanced to Higgs, Fletcher & Mack, LLP.

The ex parte application (the "application") filed in support of the employment order also contained the same language. The application further stated that HF&M was employed:

> To analyze and dispose of, through abandonment or litigation, or otherwise, the estate's interest in an option to purchase stock in Game Tech International, Inc., as well as transfers by and between the debtor and a variety of family and other trusts.

On or about June 2, 1999, HF&M on behalf of the chapter 7 trustee, filed an adversary complaint (Adversary No. 99-90357)(the "adversary") against the debtor and others seeking, inter alia to avoid fraudulent transfers and alleging a conspiracy to effect fraudulent transfers. HF&M was involved in the adversary until

January 16, 2002, when a substitution of attorney was filed. Evidently at that time, Fletcher Hills Town and Country ("FHTC"), the creditor who was funding HF&M's efforts, decided it was too expensive for it to continue to support the litigation. Additionally, there were insufficient assets in the estate to fund HF&M's continued efforts. [see decl. of John L. Morrell in support of suppl. br. ¶¶ 10 and 11]. Accordingly, HF&M withdrew its representation and Scott A. McMillan ("McMillan") substituted in and took over the litigation on purely a contingency basis.

After many discovery disputes and several appeals, McMillan obtained a default judgment against the debtor and other defendants on February 3, 2005, in the amount of $14,631,640. The judgment was entered on March 8, 2005. Thereafter, McMillan began locating assets and executing on the judgment. As part of his collection efforts, he successfully recovered almost one million shares of GameTech stock and real estate, the total value of which exceeds the amount of claims in this estate.

On October 18, 2005, HF&M filed its final application for compensation seeking $49,273.50 in fees and $2,809.87 in costs for the period December 8, 1998 through October 31, 2004.[2] HF&M contends that it entered into a written agreement with the trustee whereby HF&M agreed to be compensated on a contingency basis for services rendered, subject to approval by this Court. HF&M states

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[2] The amount of HF&M's request changes slightly in the Declaration of John L. Morrell filed in support of the supplemental brief. In paragraph 15, Morrell states that the time period covered for the application is from the date of its employment to the present and the amounts incurred are $51,212.50 in fees and $3,005.89 in costs. HF&M provides no explanation or back-up documentation for the discrepancy between its initial application and its supplemental brief regarding the amounts requested or the time period covered . Therefore, the Court uses the numbers stated in the initial application.

that the "contingency was to be the recovery of assets that Debtor was believed to have fraudulently conveyed out of Debtor's estate and/or concealed from Trustee's administration. In the event the Trustee succeeded in recovering assets, HF&M was to receive a percentage of the value of those assets." [see Initial Application, ¶ 2 at p. 2-3]. HF&M stated that it "now seeks to be compensated on a hourly basis for the reasonable value of the services rendered to the Trustee, and to be reimbursed for its costs incurred in acting as Special Counsel to the Trustee." [Id. ¶ 5 at p. 3].[3]

The debtor objected to HF&M's fee application on several grounds. He contends that there is no basis for compensation pursuant to HF&M's written fee agreement.[4] Specifically, because HF&M substituted out and was no longer representing the trustee in January 2002, HF&M did not provide the recovery pursuant to its contingency fee arrangement with the trustee. Therefore, debtor argues that HF&M's compensation agreement with the trustee was terminated when it voluntarily withdrew its representation. He also contends that HF&M's request for fees and costs under quantum meruit is barred by the statute of limitations. Lastly, debtor contends that there are no pre-petition assets of which to pay

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[3] The Court notes that HF&M's Initial Application is unclear. On the one hand, HF&M appeared to be asking for a percentage and then on the other hand its hourly rates. HF&M later clarifies in its supplemental brief that it not entitled to any percentage of recovery, but is limited to receiving its hourly rates in the event there was a recovery.

[4] There is no separate written fee agreement that the Court is aware of. The only "agreement" is embodied in the employment order.

compensation.[5]

In its supplemental brief, HF&M contends that its work in filing the complaint, conducting discovery, etc. led to the recovery of assets, and that under the employment order, HF&M is entitled to be compensated. HF&M asserts that "the order is clear that HF&M is entitled to compensation of its reasonable fees and costs if MF&M's work lead to *any* recovery." [see supp. br. ¶ 8 at p. 6]. HF&M also argues that its right to payment was not contingent on recovery while it was employed, nor was its right to receive payment as an administrative professional based on a pure contingency arrangement. Rather, because FHTC was paying for HF&M on an hourly basis, it was limited to seeking on reimbursement of those hourly rates.

HF&M also relies on section 503(b)(2) in its supplemental brief for payment of its fees and costs. It contends that it provided valuable services to the debtor. Finally, HF&M contends it is entitled to its fees and costs based upon quantum merit. This is because the recovery of assets did not occur until November 2005. Therefore, the statute of limitations did not begin to run under that time.

Debtor's supplemental opposition reiterates that HF&M cannot be compensated pursuant to its contract with the trustee since that contract was effectively terminated on January 16, 2002, when HF&M voluntarily withdrew from its representation of the trustee. Debtor also contends that HF&M cannot be compensated pursuant to

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[5] The Court does not discuss debtor's arguments regarding whether the assets collected by McMillan are property of this estate because the default judgment is now a final order.

section 503(b) since it did not request continued employment. With respect to the statute of limitations, the debtor contends that since all work was completed in January 2002, the action would have been actionable then. The time to make a claim has passed.

II.

DISCUSSION

A. DEBTOR'S STANDING TO OBJECT TO HF&M'S FEES

As an initial issue, it is undisputed that this estate is solvent. As a result, the debtor has standing to challenge HF&M's fee application. See Stoll v. Quintanar (In re Stoll), 252 B.R. 492, 495 at n.4 (B.A.P. 9th Cir. 2000).[6]

B. FEES AND COSTS ARE WARRANTED GIVEN THE PLAIN LANGUAGE IN THE EMPLOYMENT ORDER

Whether HF&M is entitled to its attorneys' fees and costs under the employment order depends upon how the order is interpreted. Since the employment order embodies the agreement between the trustee and HF&M, the Court interprets the order as it would a contract under California law. "Under California law, the interpretation of a contract is a question of law...." Renwick v. Bennett (In re Bennett), 298 F.3d 1059, 1064 (9th Cir. 2002). "If contractual language is clear and explicit, it governs." Id. citing Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1264 (1992). Debtor also relies on California contract law for his interpretation of the employment order.

The Court finds Debtor's arguments with respect to the

[6] Defendant CJB Family Trust also filed an objection to HF&M's fee application. CJB Family Trust is not a creditor of this estate and, therefore, does not have standing.

termination of the employment order upon substitution of counsel without merit. There is no evidence that the trustee's agreement to compensate HF&M as set forth in the employment order terminated when HF&M withdrew. Neither the plain language of the employment order, nor the substitution order [docket #70 in the adversary] indicates that the agreement was terminated when HF&M voluntarily withdrew its representation.

Further, although not a model of clarity, the plain language of the employment order states that HF&M was entitled to compensation in the event of <u>any recovery</u>. The employment order does not specifically spell out that it was HF&M that had to make the recovery. Moreover, the employment order states that HF&M is entitled to compensation if there is any recovery <u>from services provided by HF&M</u>. [<u>see</u> ¶ 2 of employment order]. Thus, the sole issue for the Court is to determine whether HF&M provided services that can be directly attributed to the recovery.

The Court has examined HF&M's time sheets at length and finds that all HF&M's services, with the exception of three hours, are attributable to the recovery. Initially, HF&M's services included reopening the case, undertaking significant and detailed investigations and analyses of the factual bases for the trustee's complaint against the debtor and others, and performing significant research on legal theories and developing strategies. These activities were essential to the initiation of the litigation. HF&M then drafted the complaint followed by a first amended complaint. The defendants filed a motion to dismiss the first amended complaint and for a more definite statement. The Court denied the motion to dismiss, but granted defendants' motion for a

more definite statement. After HF&M filed the second amended complaint, defendants again moved to dismiss and for a more definite statement. The Court denied the motions and ordered defendants to file an answer by May 5, 2000. Rather than answering, the defendants filed an appeal. Defendants aggressively challenged the various complaints over many months. HF&M spent considerable time defending the various motions to dismiss on behalf of the trustee.

HF&M also undertook discovery and gathered evidence. Mr. McMillan, substitute counsel, was able to continue the prosecution of the adversary because of the work already accomplished by HF&M. [see decl. of Scott A. McMillan filed in support of HF&M's suppl. br.]. HF&M's initiated the adversary and prevented it from being dismissed. Without these services, there would be no judgment, no execution, and no collection.

The only services that the Court finds not compensable are 3.0 hours spent by Morrell in preparing and attending the hearing on the motion to compromise the adversary. The compromise provided that the adversary would be dismissed and each side would bear their own fees and costs. These services did not promote the recovery. Therefore, the fees should be reduced by $975.

With respect to the remaining request of $48,298.50 in fees, the Court must evaluate the reasonableness of HF&M's fees under the standards set forth in section 330(a)(3). The Court finds that fee request meets the standards set forth in section 330(a)(3). The Court finds that the time spent was reasonable given the extent of the investigation that was needed prior to filing the adversary and the defendant's aggressive tactics in trying to get both the first

and second amended complaints dismissed. The Court also finds that the rates charged were reasonable. Under section 330(a)(3)(C), the Court finds that HF&M's services were beneficial to the estate, since the subsequent recovery of assets will result in a 100% plus interest payout to creditors. Without HF&M's efforts, the lawsuit may never have been filed or it may have been dismissed. The Court also finds the services were provided in a reasonable amount of time commensurate with the complexity of the issues and was reasonable based upon the customary compensation charged by comparably skilled practitioners in cases other than cases under title 11. Therefore, fees are awarded in the amount of $48,298.50 and costs are awarded in the amount of $2,809.87. As stated in the declaration of Morrell submitted in support of the supplemental brief, $35,896 in fees and $1,168.60 in costs were paid by FHTC and must be reimbursed to them. The remaining amounts are owed to HF&M.

Because the Court finds that HF&M is entitled to its fees pursuant to the employment order and the standards under section 330, the Court need not reach the other arguments advanced by the parties. The Court notes however that HF&M's fees would be entitled to administrative priority under section 503(b)(2).

III.

CONCLUSION

HF&M's request for its fees and costs is granted in the amounts of $48,298.50 and $2,809.87 respectively for the reasons explained above.

This Memorandum Decision constitutes findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure

order in conformance with this Memorandum Decision within ten (10) days from the date of entry hereof.

Dated: January 25, 2005

JOHN J. HARGROVE
UNITED STATES BANKRUPTCY JUDGE

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West F Street, San Diego, California 92101-6991

In re: Bankruptcy Case No. 96-12037-H7

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

MEMORANDUM DECISION

was enclosed in a sealed envelope bearing the lawful frank of the bankruptcy judges and mailed to each of the parties at their respective addresses listed below:

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Said envelope(s) containing such document was deposited by me in a regular United States Mail Box in the City of San Diego, in said District on January 25, 2006.

Karen Nickerson

Karen Nickerson (Deputy Clerk)
Judicial Assistant to the Honorable John J. Hargrove