

1 WRITTEN DECISION - NOT FOR PUBLICATION

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8 UNITED STATES BANKRUPTCY COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 In re) CASE NO. 96-12037-H7
11)
12 VERN D. BLANCHARD dba) MEMORANDUM DECISION
13 AMERICAN MULTI-SYSTEMS,)
Debtor.)

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

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

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25 ¹ The minute order [docket #153 - Case No. 96-12037] gave HF&M until December
26 2, 2005, to file further briefs with a response by Blanchard filed December 16,
27 2005. Subsequently HF&M filed a reply on December 22, 2005, and then Blanchard filed
28 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.

1 This Court has jurisdiction to determine this matter pursuant
2 to 28 U.S.C. §§ 1334 and 157(b)(1) and General Order No. 312-D of
3 the United States District Court for the Southern District of
4 California. This is a core proceeding pursuant to 28 U.S.C.
5 § 157(b)(2)(A).

6 I.

7 FACTS

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

11 That compensation to Higgs, Fletcher & Mack,
12 LLP, for professional services rendered on
13 behalf of the trustee shall be paid by Fletcher
14 Hills Town and Country, and if there is any
15 recovery from the services provided by Higgs,
16 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.

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

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

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

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

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

18 On October 18, 2005, HF&M filed its final application for
19 compensation seeking \$49,273.50 in fees and \$2,809.87 in costs for
20 the period December 8, 1998 through October 31, 2004.² HF&M
21 contends that it entered into a written agreement with the trustee
22 whereby HF&M agreed to be compensated on a contingency basis for
23 services rendered, subject to approval by this Court. HF&M states

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25 ² The amount of HF&M's request changes slightly in the Declaration of John L.
26 Morrell filed in support of the supplemental brief. In paragraph 15, Morrell states
27 that the time period covered for the application is from the date of its employment
28 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.

1 that the "contingency was to be the recovery of assets that Debtor
2 was believed to have fraudulently conveyed out of Debtor's estate
3 and/or concealed from Trustee's administration. In the event the
4 Trustee succeeded in recovering assets, HF&M was to receive a
5 percentage of the value of those assets." [see Initial
6 Application, ¶ 2 at p. 2-3]. HF&M stated that it "now seeks to be
7 compensated on a hourly basis for the reasonable value of the
8 services rendered to the Trustee, and to be reimbursed for its
9 costs incurred in acting as Special Counsel to the Trustee." [Id.
10 ¶ 5 at p. 3].³

11 The debtor objected to HF&M's fee application on several
12 grounds. He contends that there is no basis for compensation
13 pursuant to HF&M's written fee agreement.⁴ Specifically, because
14 HF&M substituted out and was no longer representing the trustee in
15 January 2002, HF&M did not provide the recovery pursuant to its
16 contingency fee arrangement with the trustee. Therefore, debtor
17 argues that HF&M's compensation agreement with the trustee was
18 terminated when it voluntarily withdrew its representation. He
19 also contends that HF&M's request for fees and costs under quantum
20 meruit is barred by the statute of limitations. Lastly, debtor
21 contends that there are no pre-petition assets of which to pay
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25 ³ The Court notes that HF&M's Initial Application is unclear. On the one
26 hand, HF&M appeared to be asking for a percentage and then on the other hand its
27 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.

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

1 compensation.⁵

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

14 HF&M also relies on section 503(b) (2) in its supplemental
15 brief for payment of its fees and costs. It contends that it
16 provided valuable services to the debtor. Finally, HF&M contends
17 it is entitled to its fees and costs based upon quantum merit.
18 This is because the recovery of assets did not occur until November
19 2005. Therefore, the statute of limitations did not begin to run
20 under that time.

21 Debtor's supplemental opposition reiterates that HF&M cannot
22 be compensated pursuant to its contract with the trustee since that
23 contract was effectively terminated on January 16, 2002, when HF&M
24 voluntarily withdrew from its representation of the trustee.
25 Debtor also contends that HF&M cannot be compensated pursuant to
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27 ⁵ The Court does not discuss debtor's arguments regarding whether the assets
28 collected by McMillan are property of this estate because the default judgment is
now a final order.

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

5 II.

6 DISCUSSION

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

8 As an initial issue, it is undisputed that this estate is
9 solvent. As a result, the debtor has standing to challenge HF&M's
10 fee application. See Stoll v. Quintanar (In re Stoll), 252 B.R.
11 492, 495 at n.4 (B.A.P. 9th Cir. 2000).⁶

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

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

25 The Court finds Debtor's arguments with respect to the
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27 ⁶ Defendant CJB Family Trust also filed an objection to HF&M's fee
28 application. CJB Family Trust is not a creditor of this estate and, therefore, does
not have standing.

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

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

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

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

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

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

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

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

17 Because the Court finds that HF&M is entitled to its fees
18 pursuant to the employment order and the standards under section
19 330, the Court need not reach the other arguments advanced by the
20 parties. The Court notes however that HF&M's fees would be
21 entitled to administrative priority under section 503(b)(2).

22 III.

23 CONCLUSION

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

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

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

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Dated: January 25, 2005



JOHN J. HARGROVE
UNITED STATES BANKRUPTCY JUDGE

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