

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

Case No. 6:01-bk-00533-6B1
Chapter 11

Evergreen Security, Ltd.,

Debtor.

ORDER

This matter came on the First Interim Application of Salem Saxon, P.A. ("Salem Saxon") as Counsel for the Official Committee of Unsecured Creditors (Doc. 746) and Supplemental Application of Salem Saxon, P.A. as Counsel for the Official Committee of Unsecured Creditors (Doc. 992) ("Fee Applications"); and the Objection of R.W. Cuthill to First Interim Application of Salem Saxon as counsel for the Official Committee of Unsecured Creditors and Supplemental Application of Salem Saxon as counsel for the Official Committee of Unsecured Creditors (Doc. 1178) ("Objection"). The following Findings of Fact and Conclusions of Law are made after reviewing the evidence.

FINDINGS OF FACT

Evergreen Security, Ltd. ("Evergreen") filed Chapter 11 on January 23, 2001. R.W. Cuthill, Jr., was appointed as Trustee on March 14, 2001. The Official Committee of Unsecured Creditors ("Committee") filed its Application to Employ Salem Saxon as Counsel for the Committee ("Employment Application") (Doc. 522) and a Verified Statement in Support of the Employment Application ("Verified Statement") on October 16, 2002 (Doc. 523).

Trustee initially objected to the retention of Salem Saxon based upon its representation of approximately 13 broker-defendants in pending fraudulent transfer cases. Salem Saxon's Verified Statement was ambiguous as to whether Salem Saxon had withdrawn from representation of all broker-defendants and whether such withdrawal was full and complete. Salem Saxon filed an Amended Verified Statement in Support of the Employment Application ("Amended Verified Statement") (Doc. 609) on February 18, 2003 verifying that it no longer represented various broker-defendants ("Clients") in

pending adversary proceedings. An order granting the Employment Application was entered on March 12, 2003, *nunc pro tunc* to September 23, 2002 (Doc. 624).

Salem Saxon moved to withdraw as counsel for the Committee on July 25, 2003 (Doc. 735). The Committee filed its Application to Employ Buchanan Ingersoll P.C. as counsel for the Committee (Doc. 736) and a Verified Statement in Support of the Application to Employ Buchanan Ingersoll P.C. as counsel for the Committee (Doc. 737) on July 28, 2003.

Salem Saxon filed its First Interim Application for Compensation and Reimbursement of Expenses as counsel for the Committee on August 4, 2003 (Doc. 746).¹

Salem Saxon filed its Supplemental Application for Compensation and Reimbursement of Expenses on March 4, 2004 (Doc. 992).²

Trustee objects to the Fee Applications based upon Salem Saxon's failure to disclose prior connections with the Committee as required pursuant to F.R.B.P. 2014 in both the Verified Statement and the Amended Verified Statement. Mr. Lash has adequately explained his relationship and communication with the Committee. A conflict of interest between Salem Saxon and the Committee did not exist.

The evolution of the Debtor and complexity of these proceedings provided the basis for the appointment of both a Creditors Committee and a Chapter 11 Trustee. The Trustee and Committee's duplication of responsibilities and services compounded the difficulty of administration. The inability of these two fiduciary entities to work together more efficiently caused an unnecessary duplication in requested administrative expenses.

¹ In the First Interim Application, Salem Saxon sought payment of \$97,546.00 in fees and reimbursement of \$5,301.63 in expenses for September 23, 2002 through May 5, 2003.

² In the Supplemental Application, Salem Saxon sought payment of \$10,760.00 in fees and reimbursement of \$1,187.67 in expenses for May 6, 2003 through November 1, 2003.

Salem Saxon requests attorney fees of \$108,306, representing 472.3 hours at a blended rate of \$230 an hour. A reasonable fee for the services performed by Salem Saxon is \$94,600, representing 440 hours at a blended rate of \$215 an hour. Salem Saxon's request for \$6,489.30 in costs is reasonable.

CONCLUSIONS OF LAW

A creditors committee has a fiduciary duty to the individual members that the committee represents. Counsel for the committee has a fiduciary duty to the committee and its constituency. These fiduciary duties cannot be misdirected by the relationship of the committee's counsel with entities that have interests other than those of the committee or its constituency.³

The integrity of the bankruptcy system demands that the attorneys serving the committee not place themselves in a situation where their independence, loyalty and integrity can be questioned by the unsecured creditor body whom they represent. The Bankruptcy Code depends on inherent checks and balances which Congress built into the law. It is the legal tension created by these checks and balances that to a large extent controls the debtor while under the protection of the bankruptcy statute. If that control is to have meaning and substance, creditors' committees and their attorneys must be totally independent.⁴

All facts which may be pertinent to a court's determination of whether an attorney is disinterested or holds an adverse interest to the estate must be disclosed.⁵ Mr. Lash has disclosed his relationship and communication with the Committee. Salem Saxon did not hold an adverse interest to the Committee. A conflict of interest did not exist. Salem Saxon is entitled to reasonable fees and costs for services rendered.

The reasonableness of requested attorney

³ See Woods v. City National Bank, 312 U.S. 262, 61 S.Ct. 493, 497 (1941).

⁴ See In re Oliver's Stores, Inc., 79 B.R. 588, 597 (Bkrtcy.D.N.J.,1987) (Cited positively by Matter of Celotex Corp., 123 B.R. 917, 920 (Bankr.M.D.Fla. 1991).

⁵ In re Haldeman Pipe & Supply Co., 417 F.2d 1302, 1304 (9th Cir. 1969).

fees and costs is determined through an examination of the criteria enunciated in *In the Matter of First Colonial Corp. of America*⁶ and *Johnson v. Georgia Highway Express, Inc.*⁷ and 11 U.S.C. § 330. Section 330 allows the award of "reasonable compensation for actual, necessary services rendered by [an] attorney..."⁸

In determining the amount of reasonable compensation to be awarded § 330(a)(3)(A-E) states,

(3)(A)...the court shall consider the nature, the

6 *In the Matter of First Colonial Corp. of America*, 544 F.2d 1291 (5th Cir.1977)(stating,

In order to establish an objective basis for determining the amount of compensation that is reasonable for an attorney's services, and to make meaningful review of that determination possible on appeal, we held in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d at 717-19, that a district court must consider the following twelve factors in awarding attorneys' fees...

First Colonial at 1299).

⁷ *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The twelve Johnson factors are:

- (1) the time and labor required;
- (2) the novelty and difficulty of the questions involved;
- (3) the skill requisite to perform the legal service properly;
- (4) the preclusion of other employment by the attorney due to acceptance of the case;
- (5) the customary fee;
- (6) whether the fee is fixed or contingent;
- (7) time limitations imposed by the client or the circumstances;
- (8) the amount involved and the results obtained;
- (9) the experience, reputation, and ability of the attorneys;
- (10) the "undesirability" of the case;
- (11) the nature and the length of the professional relationship with the client;
- (12) awards in similar cases.

See *Johnson*, 488 F.2d 714.

⁸ 11 U.S.C. § 330(A).

extent, and the value of such services, taking into account all relevant factors, including—

- (A)The time spent on such services;
- (B)The rates charged for such services
- (C)Whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
- (D)Whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
- (E)Whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.⁹

After evaluation of the nature, extent and value of the services provided, a review of the considerations contained in §330(a)(3) and the *Johnson* factors, the reasonable number of hours for the services performed is 440 hours at a blended rate of \$215 an hour for a total fee award of \$94,600. Salem Saxon's request for \$6,489.30 in costs is reasonable. Therefore it is,

ORDERED, ADJUDGED AND DECREED that the Objection of R.W. Cuthill, Trustee, to First Interim Application of Salem Saxon, P.A. as counsel for the Official Committee of Unsecured Creditors and Supplemental Application of Salem Saxon, P.A. as counsel for the Official Committee of Unsecured Creditors (Doc. 1178) is **OVERRULED**; it is further

ORDERED, ADJUDGED AND DECREED that Salem Saxon, P.A.'s First Interim Application for fees and expenses as counsel for the Official Committee of Unsecured Creditors (Doc. 746) and Salem Saxon, P.A.'s Supplemental Application for fees and expenses as counsel for the Official Committee of Unsecured Creditors (Doc. 992) are **GRANTED** in the amount of \$101,089.30. The final award reflects \$94,600 in fees and \$6,489.30 in expenses.

Dated this 5th day of January 2005.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge

⁹ 11 U.S.C. § 330(a)(3)(A-E).