

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

In re:

Case No. 6:03-bk-04923-ABB
Chapter 7

AQUAMARINE USA, INC.,

Debtor.

ORDER

This matter came before the Court on the Omnibus Amended Application for Award of Compensation and Expenses (Doc. No. 831) ("First Omnibus Application") and the Second Omnibus Application for Award of Compensation and Expenses (Doc. No. 832) ("Second Omnibus Application") (collectively, the "Omnibus Applications") submitted by attorney Robert B. Branson ("Branson") and the Law Office of Robert B. Branson, PA (collectively, "Applicant") as counsel for Aquamarine USA, Inc., the Debtor and former Debtor in Possession herein ("Debtor"). The Applications were filed in response to the Order entered on April 12, 2007 (Doc. No. 825) denying the Applicant's previously filed applications (the Initial, Second, and Final Applications) and granting the Applicant leave to file an omnibus amended application setting forth all fees sought by the Applicant relating to work performed for the Debtor and remedying the applications' deficiencies.¹ The Court makes the following findings and conclusions after reviewing the pleadings, hearing live argument, and being otherwise fully advised in the premises.

The Debtor filed a voluntary Chapter 11 petition on May 1, 2003 and was authorized to engage Applicant as Debtor's counsel pursuant to the Order entered on June 5, 2003 (Doc. No. 19). The

¹ The Applicant previously filed an Initial Application seeking fees of \$53,240.50 and costs of \$448.22 (Doc. No. 360), a Second Application seeking fees of \$11,318.50 and costs of \$140.00 (Doc. No. 451), and a Final Application seeking fees of \$90,840 and costs of \$310.00 (Doc. No. 734). An Order was entered on June 28, 2004 (Doc. No. 411) approving the costs sought in the Initial Application and deferring determination of the reasonableness and payment of the fee claim. The United States Trustee ("UST") filed an Objection to the Final Application (Doc. No. 755), which was sustained by the April 12, 2007 Order.

case was converted to Chapter 7 on February 21, 2007 (Doc. No. 802) and jurisdiction was retained to address the fee applications filed by various applicants.²

The Applicant, through its Omnibus Applications, seeks an award of fees and expenses pursuant to 11 U.S.C. Section 330 for services provided to the Debtor during the course of the Debtor's bankruptcy case. The First Omnibus Application and the Second Omnibus Application address the same time period, April 30, 2003 through September 19, 2006, but they differ materially in several respects.³ The Applicant provided no explanation for the differences.

The Applicant in the First Omnibus Application requests a total fee award of \$104,460.00, consisting of attorneys' fees of \$76,285.00 for 277.40 hours billed at the hourly rate of \$275.00 and paralegal fees of \$28,175.00 for 281.75 hours billed at the hourly rate of \$100.00.⁴ The hourly rates are reduced in the Second Omnibus Application to \$185.00 for attorneys and \$85.00 for paralegals. The total time, however, was increased significantly in the Second Omnibus Application to 433.50⁵ hours for attorneys and 487.95 for paralegals, resulting in a request of attorneys' fees of \$80,197.50 and paralegal fees of \$41,475.75, for a total fee request of \$121,673.25.

This case has been difficult involving complex boat ownership and lien rights issues, an angry and active creditor body, several failed attempts at reorganization, and a recalcitrant principal

² The USCC and the UST recommended conversion after an auction of estate and non-estate assets on January 25, 2007 failed to generate sufficient funds to satisfy administrative claims which were to be paid pursuant to the Amended Plan of Reorganization.

³ The First Omnibus Application was timely filed within the fourteen-day time period set forth in the April 12, 2007 Order. The Second Omnibus Application was filed several weeks after the fourteen-day time period had elapsed.

⁴ The Applicant acknowledges in the First Omnibus Application it had originally charged the Debtor an hourly attorney rate of \$185.00 and an hourly paralegal rate of \$85.00 (which are the rates contained in the Applicant's First and Second Applications), but the Applicant fails to apportion its time between the lower initial rates and the higher rates. All attorney time is billed at the rate of \$275.00 per hour and all paralegal time is billed at the rate of \$100.00 per hour in the First Omnibus Application.

⁵ The Applicant's attorney time calculations and total time requested differ. The General Summary of Time consists of total attorney hours of 403.1 whereas the Applicant seeks payment of 433.50 attorney hours.

of the Debtor whose actions, and inactions, impeded the resolution of this case. The Applicant was required to expend significant time and effort in representing the Debtor. The Applicant's contributions were beneficial to the Debtor and the estate.

The reasonableness of attorneys fees and costs is determined through an examination of the criteria enunciated in In the Matter of First Colonial Corp. of America⁶ and Johnson v. Georgia Highway Express, Inc.⁷ After consideration of the First Colonial and Johnson factors, the fees and costs incurred by the Applicant are reasonable. The Applicant, however, is only entitled to fees and costs of \$65,000.00 pursuant to an agreement executed by Branson in which he agreed to limit the Applicant's fees and costs to \$65,000.00 to be paid on a subordinated basis.

The Debtor, USCC, and Florida Land Reserve, Inc. ("FLRI"), an entity controlled by Earl Smith who also controlled the Debtor, resolved various claims through a Settlement Term Sheet and the Aquamarine Customer Trust Agreement ("Trust Agreement") executed by the parties on September 21, 2004. The settlement was not consummated and

USCC instituted an adversary proceeding⁸ against FLRI. The parties' claims were resolved through a global settlement memorialized in a Settlement Agreement dated February 15, 2006 (Doc. No. 634). Branson was actively involved in the settlement negotiations and executed the Settlement Agreement as counsel for the Debtor. The Settlement Agreement was approved by Order entered on March 24, 2006 (Doc. No. 656).⁹

The Settlement Agreement incorporates the Trust Agreement. The Trust Agreement was executed by Smith on behalf of the Debtor and FLRI and by counsel for USCC as the Liquidating Trustee. Branson was aware of the terms of the Trust Agreement at all times throughout his employment as Debtor's counsel. Article XIV of the Trust Agreement sets forth a distribution scheme in which the Applicant's fees and costs shall be paid after the Liquidating Trustee and other professionals are paid and caps the Applicant's fees and costs at \$65,000.00, which will be paid on a pro rata basis with claimants holding Allowed Customer Claims:

14.1 The Liquidating Trustee shall make distribution as follows:

(a) amounts set[] forth in 11 U.S.C. § 326(a) as allowable compensation to the Liquidating Trustee; followed by

(b) reasonable out of pocket expenses incurred in connection with the Liquidating Trustee's administration of the Creditor Trust

(c) holders of Allowed Customer Claims with post confirmation interest thereon or otherwise as set forth under the Plan or this Agreement on a pro rata basis along with Counsel to the Debtor (capped at \$65,000.00);" and

(d) to the extent funds remain, the remainder shall be paid to Counsel for the Debtor to the extent unpaid in paragraph c,

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. Johnson at 714.

⁸ The Official Committee of Unsecured Creditors of Aquamarine USA, Inc. v. Florida Land Reserve, Inc., Adversary Proceeding No. 6:05-ap-00164-ABB.

⁹ The Order at p. 2 provides: "The Customer Trust shall be deemed created with all powers, rights, duties and obligations pertaining thereto, vested upon entry of this Order." The Settlement Agreement was amended on August 15, 2006 by deleting Paragraphs 17 and 18 (AP Doc. No. 26).

thereafter distributed to Florida Land Reserve.

Doc. No. 719, Exhibit 1, Article XIV, ¶¶ 14.1(c)(d) at p. 13. The Applicant is bound by the terms of the Trust Agreement and the Settlement Agreement.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the Applicant, Robert B. Branson and the Law Office of Robert B. Branson, PA, is hereby awarded total fees and costs of \$65,000.00 and such award shall be paid in accordance with the terms of the Trust Agreement and Settlement Agreement approved by the Court by Order entered on March 24, 2006.

Dated this 14th day of June, 2007

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