

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

In re:

Case No. 6:05-bk-17567-ABB  
Chapter 11

HELL'S BAY BOATWORKS, LLC,

Debtor.

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**ORDER**

This matter came before the Court on the Amended Motion for Reconsideration of Order on Application of Wolff, Hill, McFarlin & Herron, P.A. (Doc. No. 268) filed by Riverside National Bank of Florida ("Riverside") seeking reconsideration of the Order entered by the Court on July 15, 2006 (Doc. No. 259) awarding Debtor's counsel \$55,000.00 for fees and costs. An evidentiary hearing was held on the Motion for Reconsideration on August 15, 2006 at which counsel for Riverside, counsel for the Debtor, counsel for the United States Trustee ("UST"), counsel for various taxing authorities, counsel for the Unsecured Creditors' Committee, and counsel for the Plan Disbursing Agent appeared. The Court makes the following Findings of Fact and Conclusions of Law after reviewing the pleadings and evidence, hearing live argument, and being otherwise fully advised in the premises.

**FINDINGS OF FACT**

*Case Background*

The law firm of Wolff, Hill, McFarlin & Herron, P.A. (the "Firm") is counsel for the Debtor. Attorney David R. McFarlin, who is a partner with the Firm, has principally been carrying out the representation of the Debtor. The Firm was paid a retainer prepetition in the amount of \$15,197.85 (the "Retainer"). The Firm discloses the receipt of the Retainer and its source as the Debtor in the Firm's Verified Statement of Proposed Attorneys and Disclosure of Compensation filed pursuant to 11 U.S.C. §§ 328(a) and 329(a) and Federal Rules of Bankruptcy Procedure 2014 and 2016 (Doc. No. 6) ("Rule 2016 Disclosure"):

3. Compensation. Subject to approval of the Bankruptcy Court, the Debtor has paid or agreed to pay compensation to WHM&H for services rendered or to be rendered by

WHM&H in connection with this case as follows:

...

d. \$15,197.85 was paid as a retainer which WHM&H will take into income for post bankruptcy fees and costs."

Rule 2016 Disclosure at p. 4.

The Firm was required, pursuant to the provisions of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure, to disclose the receipt and the source of the Retainer. The Firm timely complied with those disclosure requirements. No party, including the UST, objected to the Firm's employment application or its Rule 2016 Disclosure.

It was later learned in early February 2006 the true source of the Retainer was not the Debtor, but a third party. The Firm took immediate steps to amend its Rule 2016 Disclosure after the source of the Retainer came to light. The Firm filed a First Supplement to Disclosure of Compensation (Doc. No. 145) on February 9, 2006 disclosing: "WHMH is advised that the source of the retainer paid to WHMH was as follows: Chris Peterson ('Chris') transferred the retainer amount to Bryan Broderick. Bryan Broderick used the funds to acquire a cashier's check naming the debtor as 'remitter' and payable to WHMH. Chris, or an entity controlled by Chris, has expressed interest in acquiring assets of the debtor, but WHMH is unaware of any agreements between debtor and Chris." First Supplement to Disclosure of Compensation at p. 1.

No evidence has been presented contradicting the statements made by the Firm in its First Supplement to Disclosure of Compensation or establishing the Firm knew the true source of the Retainer when it filed its original Rule 2016 Disclosure and purposefully failed to make such disclosure.

Riverside apparently learned of the source of the Retainer in early February 2006, prior to the filing of the First Supplement to Disclosure of Compensation. Riverside took issue with the source of the Retainer on February 6, 2006 in its Emergency Motion to Appoint Chapter 11 Trustee (Doc. No. 128) ("Trustee Motion") alleging: The principal of the Debtor "has demonstrated no objective willingness to entertain any offers or inquiries regarding the purchase or sale of the Debtor's assets except from a gentleman named Chris Peterson, a 'bargain hunter' who has secretly funded the retainer advanced to the Debtor's counsel for the filing of this case, calling the openness of the process into question." Trustee Motion at p. 5.

A hearing was conducted on February 16, 2006 on the Trustee Motion and other matters. Counsel for Riverside stated his concerns about the Retainer on the record: "We're concerned that his comments and his allegiances . . . remember his . . . one of the potential purchasers advanced an amount that equals the retainer for debtor's counsel shortly before the bankruptcy was filed. That appearance raises some questions about Mr. Broderick's closeness with a low ball purchaser who we've heard about for the first two months." Transcript of hearing at p. 30, lines 10-17.

The Court denied the Trustee Motion and the parties proceeded forward to effectuate a sale of the Debtor's assets. Riverside, as part of the joint sale effort, agreed to fund certain case expenses, including certain obligations of the Debtor such as payment of compensation to the Debtor's counsel.<sup>1</sup> Riverside and the Debtor disagree as to the amount to be paid for the Firm's compensation. Riverside set aside in a trust account the amount of \$50,000.00 for the payment of counsel's compensation. The Firm contends the amount to be paid by Riverside towards fees is \$61,000.00.<sup>2</sup>

### *The Firm's Fee Applications*

The Firm filed an Application on April 11, 2006 (Doc. No. 195) ("Application") seeking compensation of fees in the amount of \$54,357.00 and reimbursement of expenses in the amount of \$1,809.72 for the period October 25, 2005 through March 31, 2006. The Firm sets forth the following information regarding the Retainer: "Chris Peterson ('Chris') transferred the retainer amount to Bryan Broderick, managing member of the Debtor. Bryan Broderick used the funds to acquire a cashier's check naming the debtor as 'remitter' and payable to WHMH [the Firm]. Chris, or an entity controlled by Chris, has express interest in acquiring assets of the debtor, but WHMH is unaware of any agreements between debtor and Chris." Application at p. 3, ¶ 3.d.

The Firm addresses the twelve factors to be considered in a fee application determination pursuant to the Fifth Circuit Court of Appeals case Johnson v. Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974): (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; and (12) awards in similar cases. The Firm sets forth facts addressing each Johnson factor in detail in the Application.

The Firm filed a Supplemental Application (Doc. No. 223) ("Supplemental Application") seeking compensation of fees in the amount of \$59,205.00 and reimbursement of expenses in the amount of \$1,993.78 for the period October 25, 2005 through May 5, 2006. The Firm sets forth and addresses each Johnson factor with specific facts in the Supplemental Application.

Riverside filed an Objection (Doc. No. 227) to the Application and the Supplemental Application. Riverside sets forth two grounds for objecting to the Firm's requests for fees: "The Bank objects to the Fee Applications on the basis that the attorney's fees requested in the Fee Applications are unreasonable and excessive in amount for the services provided. The Bank further objects to the Fee Applications, by asserting that the fees sought are unreasonable when reviewed pursuant to the twelve (12) part test established pursuant to Johnson v. Georgia Highway Express, Inc. . . . ." Objection at ¶¶ 6, 7. Riverside addresses each Johnson factor and contends the factors have not been met. Riverside did not raise any objection to the Retainer or discuss the Retainer in its Objection.

The Firm then filed its Second Supplemental Application seeking payment of fees of \$62,133.00 and expenses of \$2,057.44 for the period October 25, 2005 through May 15, 2006 (Doc. Nos. 233, 234). The Firm sets forth and addresses each Johnson factor with specific facts in the Supplemental Application. The Application, the Supplemental Application, and the Second Supplemental Application all meet the fee application requirements contained within the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.

No other party in interest, including the UST and the Unsecured Creditors' Committee, objected to the Firm's Application or Supplemental Application.

A hearing was held on May 17, 2006 on the Application, Supplemental Application, Second Supplemental Application, and Objection, along with other matters, and an award of \$55,000.00 was conditionally granted to the Firm. The Court determined, after consideration of the criteria governing compensation

<sup>1</sup> See Order Approving Riverside Bank of Florida as Prevailing Bidder (Doc. No. 199) at ¶¶ 6-7.

<sup>2</sup> See Notice of Hearing (Doc. No. 196) which refers to the Application as the "Application of Wolff, Hill, McFarlin & Herron, P.A. for Allowance of Attorneys Fees as Attorneys for Debtor-in-Possession and for reimbursement of expenses not to exceed \$61,000.00."

requests, the Objection and arguments presented, and the entire record of this case, a reasonable fee for the services provided by the Firm is \$52,942.56 and the reasonable costs incurred are \$2,057.44. The Court invited the parties to submit proposed orders. Riverside submitted a proposed order that did not contain proposed findings of fact and conclusions of law.

The fee award of \$52,942.56 consists of the following: (i) 153.637 hours billed at the hourly rate of \$310.00 for work performed by David R. McFarlin, Esquire, in the amount of \$47,627.56;<sup>3</sup> (ii) 13.40 hours billed at the hourly rate of \$175.00 for work performed by Jeanne A. Kraft, Attorney at Law, in the amount of \$2,345.00; and (iii) 33.00 hours billed at the hourly rate of \$90.00 for work performed by paralegal staff in the amount of \$2,970.00. The fees awarded are less than the fees requested by the Firm. The Court determined, taking into account all relevant factors, a reduction of the compensation request was appropriate.

An Order was entered on July 14, 2006 (Doc. No. 259) (“Fee Award Order”) approving the Firm’s Application, Supplemental Application, and Second Supplemental Application. The Fee Award Order sets forth the Retainer amount of \$15,000 is to be deducted from the award leaving a net balance of \$40,000.00. The Fee Award Order directs Riverside to pay \$40,000.00 to the Firm upon the fulfillment of two requirements: (a) the Debtor or the Plan Disbursing Agent tenders to Riverside a Deed and Bill of Sale; and (b) the Debtor executes the necessary federal tax returns and quarterly returns.

#### *Riverside’s Motion for Reconsideration*

Riverside filed a Motion for Reconsideration of Order on Application of Wolff, Hill, McFarlin & Herron, P.A. (Doc. No. 263) and an Amended Motion for Reconsideration of Order on Application of Wolff, Hill, McFarlin & Herron, P.A. (Doc. No. 268) (“Motion”) seeking reconsideration of the Fee Award Order. Riverside contends the Firm willfully failed to disclose the source of the Retainer at the outset of this case. Motion at ¶ 9. Riverside contends the Fee Order “was entered in error in light of Debtor’s Counsel’s willful failure to disclose the source of his retainer, thereby violating the sections of the Bankruptcy Code and Rules governing a debtor’s transactions with attorneys.” Motion at ¶ 14. Riverside states it “supplemented and expanded its Objection on the record” at the May 17, 2006 hearing to include argument relating to the Retainer.

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<sup>3</sup> The \$.09 difference (between \$47,627.47 and \$47,627.56) is the result of rounding.

Riverside seeks disgorgement of the Retainer and disallowance of all fees for the Firm “as an appropriate sanction for the purposeful nondisclosure [of the source of the Retainer].” Objection at ¶ 13. Riverside contends the Fee Award Order was entered in error because the Court did not consider the Firm’s “willful failure to disclose the source of the retainer and the resulting conflict” and did not specifically address the twelve Johnson factors.

A hearing on the Amended Motion for Reconsideration was held August 15, 2006, at which counsel for Riverside requested disgorgement of the Retainer and reconsideration of the Fee Award Order. The facts relating to the source of the Retainer were available to Riverside in February 2006, but Riverside did not discuss the Retainer in its Objection. Counsel was unable to explain why the Retainer issue was not addressed in Riverside’s Objection.

The Court, in ruling on the Firm’s fee applications, carefully considered the provisions of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure governing fee applications, the twelve Johnson factors, Riverside’s Objection, the arguments made at the May 17, 2006 hearing, and the entire record of this case. The issue of the disclosure of the Retainer source was determined months earlier. The evidence relating to the source of the Retainer was available to Riverside months prior the August 15<sup>th</sup> hearing on Riverside’s Motion. The Retainer issue was addressed in connection with the Trustee Motion and no newly-discovered evidence has been presented to change the disposition of that issue.

There is no manifest error of law or fact in the Fee Award Order. Riverside has established no basis for reconsideration or amendment of the Fee Award Order.

#### **CONCLUSIONS OF LAW**

Riverside seeks reconsideration of the Fee Award Order pursuant to Federal Rule of Civil Procedure 59. Riverside contends the Fee Award Order was entered in error because the Court did not address the Johnson factors and the Retainer issue. Federal Rule of Civil Procedure 59, made applicable to bankruptcy proceeding through Federal Rule of Bankruptcy Procedure 9023, allows parties to seek amendment of judgments. The only grounds for granting a motion for reconsideration “are newly-discovered evidence or manifest errors of law or fact.” In re Kellogg, 197 F.3d 1116, 1119 (11th Cir. 1999).

All relevant factors were considered in making the fee award determination. Section 330 of the Bankruptcy Code allows a court, after notice and a

hearing, to award “reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person.” 11 U.S.C. § 330(a)(1) (2005). A court, *sua sponte* or on the motion of a party in interest, may “award compensation that is less than the amount of compensation requested.” 11 U.S.C. § 330(a)(2).

The reasonableness of attorney fees and costs is determined through an examination of the twelve criteria enunciated in In the Matter of First Colonial Corp. of Am., 544 F.2d 1291, 1299 (5th Cir. 1977) and Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-20 (5th Cir. 1974). The Firm cited the Johnson case in its fee applications and addressed each of the twelve factors in detail. Each factor has been established. The Court has determined, through an examination of all criteria relevant to fee awards, a reasonable fee for the services provided by Debtor’s counsel is \$52,942.56 and the reasonable costs incurred are \$2,057.44, for a total award of \$55,000.00 pursuant to 11 U.S.C. § 330. The Court determined, taking into account all of the Johnson factors and the entirety of this case, an award of compensation less than the amount sought by the Firm was appropriate pursuant to 11 U.S.C. § 330(a)(3).

Section 329(a) of the Bankruptcy Code governs a debtor’s transactions with its attorney. Counsel representing a debtor “shall file with the court a statement of the compensation paid or agreed to be paid . . . and the source of such compensation.” 11 U.S.C. § 329(a). Federal Rule of Bankruptcy Procedure 2016(b) requires: “Every attorney for a debtor . . . shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code . . .” Fed. R. Bankr. P. 2016(b). The Firm fully and timely complied with all disclosure requirements governing the Retainer pursuant to 11 U.S.C. § 329(a) and Federal Rule of Bankruptcy Procedure 2016(b). No party objected to the Firm’s Rule 2016 Disclosure or its First Supplement to Disclosure of Compensation.

Riverside did not raise the Retainer issue in its written Objection as a ground for objecting to the Firm’s fee applications. Riverside contends it supplemented its Objection verbally at the hearing on May 17, 2006. Many things were considered in making the fee award determination including: (i) the content of the fee applications; (ii) the Objection; (iii) the statutory and case law criteria governing compensation awards (specifically, § 330 and the Johnson factors); (iv) the case history; (v) no party other than Riverside objected to the fee applications; (vi) neither the United States Trustee nor the Unsecured Creditors’ Committee have challenged the

Retainer; and (vii) all arguments presented by the parties on May 17, 2006 either in writing or verbally.

A fee award of \$55,000 was determined to be appropriate. Riverside has not presented any newly-discovered evidence or established that such determination was made in error.

The Retainer issue was first raised and fully litigated in connection with Riverside’s Trustee Motion. The denial of the Trustee Motion resolved the Retainer issue. Riverside has presented no newly-discovered evidence requiring the reconsideration of the Fee Award Order. No manifest error of law or fact in the Fee Award Order has been identified. No basis for reconsideration or amendment of the Fee Award Order has been established pursuant to Federal Rule of Civil Procedure 59.

Accordingly it is,

**ORDERED, ADJUDGED AND DECREED** that Riverside’s Motion for Reconsideration is hereby **DENIED**.

Dated this 13<sup>th</sup> day of September, 2006.

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