

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)	CASE NO. BK02-80974
)	
BROOK VALLEY IV JOINT VENTURE,)	CH. 7
)	
)	Filing No. 99, 101
Debtor.)	

IN THE MATTER OF:)	CASE NO. BK02-80973
)	
BROOK VALLEY VII JOINT VENTURE,)	CH. 7
)	
)	Filing No. 97, 99
Debtor.)	

ORDER

Hearing was held in Lincoln, Nebraska, on November 7, 2007, regarding Filing No. 99, First Application to Pay Robert F. Craig and the Law Firm of Robert F. Craig, P.C., as Special Counsel to the Chapter 7 Trustee and Filing No. 101, Objection, filed by RCS & Sons, Inc., Leo E. Dahlke, and Robert C. Schropp, in Case No. BK02-80974; and regarding Filing No. 97, First Application to Pay Robert F. Craig and the Law Firm of Robert F. Craig, P.C., as Special Counsel to the Chapter 7 Trustee and Filing No. 99, Objection, filed by RCS & Sons, Inc., Leo E. Dahlke and Robert S. Schropp, in Case No. BK02-80973. Robert Craig and Jenna Taub appeared as Special Counsel for Rick Lange, Chapter 7 Trustee and as Applicant; Jerry Jensen appeared for the U.S. Trustee; and Edward Hotz and Michael Peterson appeared for Leo E. Dahlke, Robert C. Schropp, and RCS & Sons, Inc.

These cases were filed as Chapter 11 cases on April 2, 2002. They were converted to Chapter 7 on June 10, 2004. Rick D. Lange was appointed as Chapter 7 Trustee in each case. He filed applications to employ Robert Craig and the law firm of Robert F. Craig, P.C. ("Craig") as Special Counsel in each case. The applications provide for compensation of Craig on a contingent fee basis determined by multiplying 33.33% times any recovery obtained by Craig, plus reasonable expenses.

Because Craig is counsel for the trustee of a separate estate, Prime, Inc., which has a claim against and was an investor in these two estates, an objection was filed to the appointment of Craig as Special Counsel. Those who are now objecting to these fee applications also raised the objections to the appointment of Craig in the first place. After notice and hearing, the court denied the objections to the appointment of Craig as Special Counsel and approved the employment as of September 16, 2004.

Craig thereafter filed two adversary proceedings, Case No. A04-8089 in Brook Valley IV and Case No. A04-8090 in Brook Valley VII. The adversary proceedings were tried together in a single proceeding resulting in a significant judgment in favor of the Trustee in each case. Those judgments were rendered against the persons and entity who are objecting to the fee applications. They then appealed to the United States Bankruptcy Appellate Panel for the Eighth Circuit ("BAP") and that panel affirmed the trial court judgments but increased the amount of the judgments, finding that this court had erroneously determined that judgments for the full amount proved at trial should

not be entered. The parties that are objecting to this fee application then appealed to the United States Court of Appeals for the Eighth Circuit. That court affirmed the BAP.

The Trustee has collected \$1,528,438.05 on the two judgments. There are apparently additional amounts due which have yet to be collected. These fee applications deal only with the funds the Trustee has currently received.

Using the contingent fee formula contained in the initial application for appointment of counsel, Craig requests, in Brook Valley IV, fees in the amount of \$268,338.73 and expenses in the amount of \$1,865.02 for a total of \$270,203.75. In Brook Valley VII, Craig requests fees of \$241,089.67, expenses of \$1,865.01, for a total of \$242,954.68.

Although the Trustee's application for approval of the appointment of Craig as Special Counsel included the contingent fee information, the order approving the employment of Craig did not accept or reject the contingent fee aspect of the employment. As a result, 11 U.S.C. § 330 is the statutory provision which governs the compensation issue. That section provides that the court may award reasonable compensation for actual, necessary services rendered by the attorney. It further provides that in determining the amount of reasonable compensation, the court shall consider the nature, the extent, and the value of such services taking into account all relevant factors, including the time spent, the rates charged, whether the services were necessary or beneficial and whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, and whether the compensation is reasonable based upon the customary compensation charged by comparably skilled practitioners in cases other than cases under Title 11. 11 U.S.C. § 330(a)(3).

The objectors suggest that a fee based upon a one-third contingency is not reasonable because it amounts to the equivalent of a very high hourly rate. However, the hourly rate, even if considered, does not stand alone with regard to the determination of reasonableness. Rather, the court must consider a number of factors including:

- (1) the novelty and difficulty of the question involved;
- (2) the skill required to perform the legal service properly;
- (3) the experience, reputation and ability of the attorneys;
- (4) the customary fee in the locality for similar legal services;
- (5) whether the fee is fixed or contingent;
- (6) whether the acceptance of the employment would have precluded other employment by counsel;
- (7) the amount involved and the results obtained;
- (8) any time limitations imposed by the client or the circumstances;
- (9) the undesirability of the case;

- (10) the nature and length of the professional relationship with the client;
- (11) awards in similar cases; and
- (12) the time and labor required.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir.1974), made applicable to bankruptcy cases by American Benefit Life Ins. Co. v. Baddock (In re First Colonial Corp. of Am.), 544 F.2d 1291 (5th Cir. 1977). See also In re Chewning & Frey Security, Inc., 328 B.R. 899 (Bankr. N.D. Ga. 2005) (noting that the one-third contingency fee was less than the amount that would have been awarded had the firm billed its reasonable hourly rate for the time spent on the case); In re Olympic Marine Servs., Inc., 186 B.R. 651 (Bankr. E.D. Va. 1995) (court reviewed lodestar factors in awarding contingent fees after "conditional approval" and determined that the fee amount was reasonable, the services rendered were of substantial benefit to the estate, and the firm bore a financial risk in pursuing the litigation); In re Chiapetta, 159 B.R. 152 (Bankr. E.D. Pa. 1993) (provisionally approved contingent fees were awarded because they were reasonable and less than the hourly rate would have been).

In these cases the Trustee brought the adversary proceedings against the now objecting parties because the Trustee believed that they, as insiders who actually were in control during the Chapter 11 proceedings, allowed relief from the automatic stay to be granted, permitted the creditor holding a deed of trust interest in real property owned by the debtors to foreclose through a non-judicial foreclosure proceeding, and created an entity which purchased the real property at the non-judicial foreclosure sale. The result, from the point of view of the Trustee, was that assets which provided a positive cash flow to the estate and which had equity above and beyond the debt owed to the foreclosing creditor, were removed from the estate solely for the benefit of the now objecting parties. Issues in the adversary proceeding included when property is no longer property of the bankruptcy estate, what fiduciary duties do those who operate Chapter 11 estates have to the estates and what rights those parties have to purchase assets from the estates. The issues were novel and complex as can be seen by the written opinions of the trial court, the BAP and the Circuit Court of Appeals. Those opinions are all similar in that they provide for judgments against the objecting parties, but each court had its own reason for validating the judgments.

The amount involved, more than a million and a half dollars, and the total success in obtaining and defending the judgments is a significant factor to consider.

The Trustee had no longstanding professional relationship with Craig, but the Trustee did inquire of other attorneys as to the difficulty of the case, whether any were interested in taking it on, and checked into the experience, reputation and ability of Craig. Craig has been practicing in the bankruptcy field for more than thirty years and has a reputation as an honest and competent attorney.

Although the court did not specifically approve the contingent fee aspect of the employment agreement between the Trustee and Craig, the contingent fee aspect must be seriously considered when determining the reasonableness of the fee. These estates had no money at the time the Trustee was appointed. They had no assets, because the assets had been sold to the objecting parties. Craig agreed to litigate with the objecting parties and did so over a period of two-and-a-half years, putting in over six hundred hours and expending several thousand dollars of Craig's funds, assuming the risk that there would be no compensation or reimbursement of expenses if the

ultimate result of the litigation was not favorable to the Trustee.

The ultimate result of the litigation was highly favorable to the Trustee and of extreme benefit to the estates. As a result of the litigation, there are funds available to cover all administrative expenses and to make a significant distribution to allowed claims.

Finally, although not as significant as the other factors mentioned above, the court must consider the fact that the Trustee and the United States Trustee both strongly support the award of fees as requested. No other parties in interest have objected except for those parties that were the defendants in the adversary proceedings brought by the Trustee. They, as investors in the debtors, have standing to object, but since they are the parties that caused all of the litigation in the first place, through their overt acts and omissions, the court is not inclined to give their objections much weight.

IT IS ORDERED that the application for fees and expenses in each case, Filing No. 97 in Case No. BK02-80973, and Filing No. 99 in Case No. BK02-80974, is approved. The Trustee is authorized to make immediate payment. If this order is appealed, this judge will not grant a stay pending appeal. This litigation has gone on long enough and Craig has waited long enough for his compensation.

DATED: November 16, 2007

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Robert Craig
*Jenna Taub
Edward Hotz
Michael Peterson
Jerry Jensen

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.