

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
LOCKWOOD CORPORATION,) CASE NO. BK93-80133
)
Debtor(s).) CH. 7

MEMORANDUM

Hearing was held in Omaha, Nebraska, on April 6, 2006, on KPMG Peat Marwick, L.L.P.'s motion for an order requiring pro rata distribution among Chapter 11 professionals who disgorged funds received on their allowed Chapter 11 administrative claims (Fil. #1229) and resistance by the Chapter 7 trustee (Fil. #1236). James Stumpf appeared as Chapter 7 trustee, and Donald Swanson and Patrick Cole appeared for KPMG Peat Marwick, L.L.P. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A) and (O).

Lockwood Corporation filed this case as a Chapter 11. Three years later, it was converted to Chapter 7. During the pendency of the Chapter 11 case, various professionals received court-approved interim payments on allowed administrative claims. After the conversion to Chapter 7, insufficient funds were available for Chapter 7 administrative claims, so the Chapter 11 professionals disgorged a total of \$488,559.38 from their interim payments. Of that, \$170,000 came from KPMG. There will be about \$275,000 available for distribution after the Chapter 7 administrative expenses are paid, so KPMG argues that those funds should be distributed pro rata among those professionals who were required to disgorge significant portions of their interim payments.

The trustee argues that a pro rata distribution among only certain of the administrative claimants would contravene the requirements of 11 U.S.C. § 726(b), which states that distribution shall be made pro rata among all claims of the same kind.

The case law is clear that pro rata distribution among administrative claimants is mandated by § 726(b) and may require disgorgement from interim payments to professionals in order to equalize the distribution. See, e.g., Specker Motor Sales Co. v. Eisen, 393 F.3d 659 (6th Cir. 2004); In re Chewning & Frey Sec., Inc., 328 B.R. 899 (Bankr. N.D. Ga. 2005); Shaia v. Durette, Irvin, Lemons & Bradshaw, P.C. (In re Metro. Elec. Supply Corp.), 185 B.R. 505 (Bankr. E.D. Va. 1995); In re Lochmiller Indus., Inc., 178 B.R. 241 (Bankr. S.D. Cal. 1995); In re Kingston Turf Farms, Inc., 176 B.R. 308 (Bankr. D.R.I. 1995); Guinee v. Toombs (In re Kearing), 170 B.R. 1 (Bankr. D.D.C. 1994).

The Lochmiller case encourages any professional in the Chapter 11 case who has disgorged funds for the Chapter 7 trustee but has not received a pro rata share of the amounts paid to the

Chapter 11 professionals to move for an order requiring redistribution among the Chapter 11 professionals. 178 B.R. at 254. This is the basis for KPMG's motion. In Lochmiller, other than claims of professionals, it does not appear there were any unpaid Chapter 11 administrative expense claims remaining after payment of Chapter 7 administrative expense claims. Therefore, the court's suggestion that those professionals that had disgorged funds and had not received a pro rata share of the amounts paid to Chapter 11 professionals could move for an order requiring redistribution among the Chapter 11 professionals is clearly correct. But that is not this case. Here, there are administrative claims with the same priority as the claims of the disgorging professionals.

The statute unequivocally states that where, as here, estate assets are insufficient to fully pay administrative claimants, those claims should be paid pro rata. Section 726(b) "embodies the Bankruptcy Code's fundamental goal of the equitable and consistent treatment of similarly situated creditors." Chewning & Frey Sec., 328 B.R. at 917. Moreover, the statute's clear and specific articulation of priorities represents a mandate from Congress, preventing the exercise of judicial discretion. Id. at 916. The Chapter 11 professionals bear the risk of non-payment in a case such as this. Lochmiller, 178 B.R. 253-54. For that reason, the trustee's resistance must be sustained.

A separate order will be entered.

DATED: April 26, 2006

BY THE COURT:

/s/t Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Donald Swanson
Patrick Cole
James Stumpf
United States Trustee

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

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ORDER

Hearing was held in Omaha, Nebraska, on April 6, 2006, on KPMG Peat Marwick, L.L.P.'s motion for an order requiring pro rata distribution among Chapter 11 professionals who disgorged funds received on their allowed Chapter 11 administrative claims (Fil. #1229) and resistance by the Chapter 7 trustee (Fil. #1236). James Stumpf appeared as Chapter 7 trustee, and Donald Swanson and Patrick Cole appeared for KPMG Peat Marwick, L.L.P.

IT IS ORDERED: For the reasons stated in the Memorandum of today's date, KPMG Peat Marwick, L.L.P.'s motion for an order requiring pro rata distribution among Chapter 11 professionals who disgorged funds received on their allowed Chapter 11 administrative claims (Fil. #1229) is denied.

DATED: April 26, 2006

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

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James Stumpf
United States Trustee

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