

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF VERMONT

IN RE:

EAST HILL MANUFACTURING  
CORPORATION

Chapter 11  
Adversary Proceeding  
Case No. 97-11884

300-1

Debtor.

*Appearances:*

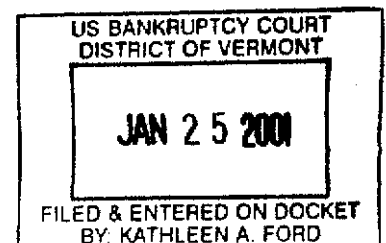
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**MEMORANDUM OF DECISION**  
**REGARDING THE DEBTOR'S ATTORNEY'S**  
**APPLICATION FOR ALLOWANCE**

The matter before the Court is the *Verified Application for Allowance of Second Interim Compensation and Reimbursement of Expenses of Attorney to Debtor* [Dkt. 288-1] ("The Application") filed by the Applicant, Jess T. Schwidde, Esq., on September 20, 2000; *The United States Trustee's Objection to Fee Application by Attorney for Debtor* [Dkt. 296-1] ("U.S. Trustee's Objections"), filed on October 16, 2000; the *Memorandum of Law in Opposition to the Verified Application for Allowance of Second Interim Compensation and Reimbursement of Expenses of Attorney to Debtor* filed by creditor, Charter One Bank (formerly known as Albank, FSB) [Dkt. 297-1] ("Charter One's Objections") on October 16, 2000; and *Debtor's Response to Objections to Debtor's Application for Allowance of Attorney's Compensation and Expenses* [Dkt. 298-1] ("Debtor's Response"), filed on November 3, 2000. A hearing was held on this matter on November 7, 2000, where this Court heard further arguments of counsel and reserved decision.



## JURISDICTION

This Court has jurisdiction over this adversary proceeding under 28 U.S.C. §§ 157 and 1334.

## FACTS

This case was commenced on December 29, 1997, as an involuntary petition under chapter 7 of Title 11, U.S.C. (‘the Bankruptcy Code’). The case converted to a chapter 11 case on May 13, 1998. The Applicant was properly appointed pursuant to 11 U.S.C. §327(a) effective May 15, 1998. The Applicant’s first fee application for compensation of legal services and expenses in the amount of \$10,235.91, covering the period of May 1, 1998 through November 25, 1998, was filed on November 25, 1998 and approved by the Court (Littlefield, J.) on January 13, 1999. The record reflects that the Debtor paid the Applicant those fees and expenses on January 21, 1999.

In the interim, the *Order Confirming East Hill Manufacturing Corporation’s Chapter 11 Plan of Reorganization* (as modified) [Dkt. 238-1] was entered on October 27, 1998 (“Order Confirming Plan”). In pertinent part, the *Plan of Reorganization* filed July 17, 1998 [Dkt. 180-1] provides:

### **5.1 Class I: All Priority (non 11 U.S.C. §507(a)(8)) Administrative Expenses Claims**

All Priority [non 11 U.S.C. §507 (a)(8)] Administrative Expenses Claims, including the statutory fees of the United States Trustee, and East Hill’s professional fees, and the Chapter 7 Trustee’s allowed fees will be paid the full amount of the claims in cash on the effective date of the plan except that professionals must submit their fee applications to the Court and to the U.S. Trustee’s Office for approval and scrutiny, and will be paid only after Court Approval. . . .

### **12.0 Retention of Jurisdiction**

Until East Hill has received a discharge of all its indebtedness as provided for by the Plan, this Court will retain jurisdiction of this case to the fullest extent permitted by the Bankruptcy Code, for all purposes, including the following: . . .

**12.9** To determine the reasonableness of and to make any award for administrative expenses, including attorneys fees and other professional fees applied for before or after the Plan is confirmed, and to provide for payment of these fees.

Furthermore, the Order Confirming Plan provides in pertinent part:

5). Any payment made or to be made by the proponent, by the Debtor, or by a person issuing securities or acquiring property under the Plan, for services or for costs and expenses in or in connection with the case, or in connection with the Plan and incident to the case, have been fully disclosed to the Court and are reasonable or, if to be fixed after confirmation of the Plan, will be subject to the approval of the Court;

...

11). Confirmation of the Plan requires Debtor to control its assets under the Plan;

...

NOW, THEREFORE it is ORDERED that:

...

c). As detailed in part 12 of Debtor's Plan, this Court shall continue and reserve jurisdiction post-confirmation to consider and determine, but not limited to, the following: determination of claims; Applications by Professionals; collection of pre-petition accounts receivables.

Notwithstanding the foregoing, the Applicant did not file an application for approval of his post-confirmation fees and expenses for the period November 25, 1998 through April 30, 1999, which totaled \$8,265.63. Instead, the Applicant invoiced the Debtor directly and received authorization from the Debtor's principal for the Applicant to pay himself the full amount of the compensation request from escrow funds the Applicant was holding for the Debtor. The Applicant received payment on or about June 11, 1999 [see *Second Application for Interim Compensation*, at Exh. C]. Thereafter, on August 4, 2000, the Applicant sought to have the confirmed plan modified to pay post-confirmation administrative fees incurred to date. That request was denied by Order dated September 22, 2000 [Dkt. 293-1] because 1

determined that a fee application was required and no application had been filed. The Applicant then filed the subject *Application*, which includes a request for *nunc pro tunc* approval of the compensation award of \$8,265.63 (which the Applicant admittedly already paid himself) and additional post-confirmation compensation in the amount of \$14,814.42 for the period May 1, 1999 through August 2, 2000, thereby seeking approval of a total interim award in the amount of \$23,080.05. The U.S. Trustee and a creditor, Charter One Bank, each filed an objection to the fee request.

The U.S. Trustee's Objections take issue with the previous payment of compensation for post-confirmation professional services and expenses without a contemporaneous fee application or prior scrutiny or approval by the Office of U.S. Trustee or this Court. The U.S. Trustee also objects to the request for *nunc pro tunc* compensation approval, suggests that any possible future benefits of a pending appeal being pursued by the Applicant should be carefully considered against the Debtor's attorney's fiduciary obligation to the Debtor's estate, and contends that the format and content of the invoices being submitted for consideration and approval fail to comply with the applicable Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under 330 ("U.S. Trustee Guidelines").

The creditor, Charter One Bank, objects to the *Application* to the extent it seeks compensation of \$21,030 for reimbursement of legal services rendered by the Applicant in litigation commenced by the Debtor objecting to the unsecured claims of Charter One Bank and Edward Grossi. According to the record, Mr. Grossi withdrew his claim on the eve of trial and Charter One's claim was allowed in full by

this Court (Littlefield, J.) following a trial in an adversary proceeding [AP. # 99-1014].<sup>1</sup> Charter One Bank essentially contends that the litigation and related ongoing appellate proceedings undertaken by the Applicant on behalf of the Debtor are neither reasonable, necessary nor beneficial to the estate, and that accordingly the request for compensation for services and expenses in connection with the litigation and pending appeal totaling \$21,108.42 should be disallowed entirely.

The Applicant submits in the Debtor's Response, that he did not apply to the court for approval of his post-confirmation fees in the amount of \$8,265.63 because:

Debtor's Attorney's understanding of the current state of the law and the long standing local practice is that the 11 U.S.C. §§327 and 330 requirements for obtaining Court approval of payment of professional fees and expenses ceases upon confirmation when the Debtor is no longer a Debtor-in-Possession. There is no Code provision for filing a fee application in confirmed Chapter 11 cases for post-confirmation fees and expenses. The Plan simply requires that Applicant submit his pre-confirmation administrative fee and expense application for Court approval and the Plan does not and could not confer jurisdiction upon the Court in excess of the requirements of the Code.

The Applicant also asserts that the format and content of his invoices are consistent with his previously approved submissions and complies with the U.S. Trustee Guidelines. Additionally, in the event this court requires prior approval of post-confirmation applications for fees and expenses, the Applicant asserts that such a ruling should be deemed a "new and unanticipated circumstance that would justify the extraordinary relief" of *nunc pro tunc* approval of the disputed fees.

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<sup>1</sup> The Debtor filed an appeal with the U.S. District Court [Case No. 1:00-CV-361] seeking to reverse the adverse ruling of this Court (Littlefield, J.) in favor of Charter One Bank, which overruled the Debtor's objection to the proof of claim filed by the Bank. The District Court affirmed the decision of the Bankruptcy Court on December 5, 2000. Debtor has taken a further appeal to the Second Circuit Court of Appeals. [Dkt. # 94-1]

## DISCUSSION

The Application and Objections filed in this matter raise four discreet issues: (1) whether this court has jurisdiction to require the Applicant to obtain court approval of post-confirmation attorney's fees before being paid; (2) whether the Applicant should be denied fees based solely upon his failure to obtain court approval prior to accepting compensation from the Debtor directly; (3) whether the Application meets the requirements set forth in the U.S. Trustee Guidelines; and (4) whether the fees sought herein are reasonable and were necessary and beneficial to the estate.

### (A) This Court has Jurisdiction to Require the Applicant to Obtain Court Approval of Post-Confirmation Attorney's Fees in This Case

Post-confirmation attorney's fees and expenses are governed by 11 U.S.C. Section 503(b)(2). That section provides an administrative expense priority for "compensation and reimbursement awarded under section 330(a)" and makes no reference to the estate. *See In re Sultan Corp.*, 81 B.R. 599, 601-02 (9<sup>th</sup> Cir. BAP 1987)(chapter 11 approval of post-confirmation legal fees); *In re Tri-L Corp.*, 65 B.R. 774, 777 (Bankr. D. Ut. 1986)(chapter 11 post-confirmation legal fees governed by §503(b)(2) and jurisdiction for approval reserved); *see also In re Berg & Assoc., Inc.*, 138 B.R. 782, 785 (Bankr. E.D.Pa. 1992); *In re Hays Builders, Inc.*, 99 B.R. 848 (Bankr. W.D. Tenn. 1989). Confirmation of a chapter 11 plan does not automatically terminate jurisdiction of the bankruptcy court. *See Hillis Motors, Inc. v. Hawaii Auto Dealers', Ass'n*, 997 F.2d 581, 587 (9<sup>th</sup> Cir. 1993); *In re Spiers Graff Spiers*, 190 B.R. 1001, 1007 (Bankr. N.D.Ill. 1996); *In re Sultan Corp.*, *supra*. Moreover, the bankruptcy court may expressly retain jurisdiction over a reorganization plan, during its consummation, under a provision of the plan itself or the

confirmation order. See In re Johns-Manville Corp., 7 F.3d 32, 34 (2<sup>nd</sup> Cir. 1993)(bankruptcy court retains post-confirmation jurisdiction in chapter 11 proceeding to extent provided in plan of reorganization); In re Neptune World Wide Moving, Inc., 111 B.R. 457, 462 (Bankr. S.D.N.Y. 1990)(bankruptcy court retains post-confirmation jurisdiction under chapter 11 plan in accordance with terms of the plan and confirmation order); see also In re Aylesbury Inn, Inc., 121 B.R. 675, 677 (Bankr. N.D.N.Y. 1990); In re Tri-L Corp., *supra*; In re Hays Builders, Inc., *supra*; see also *Collier on Bankruptcy*, sec. 1142.04[1]. Indeed, the law appears well-settled that the bankruptcy court may retain jurisdiction over post-confirmation attorney's fees.

As referenced above, both the chapter 11 Plan and the Confirmation Order herein made express provisions for this court to maintain jurisdiction over consideration and approval of any post-confirmation professional fees “for services or for costs and expenses in or in connection with the case, or in connection with the Plan and incident to the case . . . [emphasis added]. In light of the express terms and conditions of the Chapter 11 Plan and the Confirmation Order, and applicable case law, I find that this court may, and indeed did, effectively reserve its jurisdiction to all post-confirmation professional fee applications related to the bankruptcy case. Accordingly, I further find that pursuant to the terms of the Plan and the Confirmation Order the Applicant was required to submit all post-confirmation fee applications for review by the U.S. Trustee and this court, and for approval by this court, in advance of payment, for as long as the Debtor is operating under the terms of the Plan.

(B) The Applicant Should Not Be Denied Fees Based Solely Upon His Failure  
to Obtain Court Approval Prior to Taking Compensation from the Debtor Directly

In this instance, the U.S. Trustee contends that the Applicant's failure to seek prior court approval is a fatal error and requires that this court direct disgorgement of the fees paid without approval and a denial of the present Application for *nunc pro tunc* approval. In response, the Applicant asserts that his transgression was not intentional and rather was based upon legitimate confusion. Therefore, the Applicant argues that he should not be denied the compensation he has earned. The Applicant claims to have been confused by the lack of a clear directive in the Bankruptcy Code regarding court approval of post-confirmation fees and the fact that confirmation of a chapter 11 plan ordinarily terminates the existence of the bankruptcy estate by vesting the property in the reorganized Debtor. 11 U.S.C. §1141(b); *see also In re Canton Jubilee, Inc.*, 253 B.R. 770, 776 (Bankr. E.D.Tex. 2000). Ordinarily, upon confirmation, the estate is said to "dissolve." *See Harstad v. First American Bank*, 155 B.R. 500, 508 (Bankr.D.Minn. 1993), *aff'd* 39 F.3d 898 (8<sup>th</sup> Cir. 1994). Thus, neither the trustee nor the Debtor-in-Possession is "in possession" of an "estate" to administer. *See In re Grinstead*, 75 B.R. 2, 3 (Bankr.D.Minn. 1985).

Moreover, there is conflict in the law regarding whether the Bankruptcy Code authorizes the court to permit professionals to apply funds of an "estate" to current billings prior to court approval of the requested compensation. *Compare In re Knudsen Corp.*, 84 B.R. 668 (9<sup>th</sup> Cir. BAP 1988)(Code permits payment without prior approval) *with In re Commercial Financial Services, Inc.*, 231 B.R. 351 (Bankr.N.D.Okla. 1999)(Code prohibits payments without prior approval); *see also In re Bennett Funding Group, Inc.*, 213 B.R. 227 (Bankr. N.D.N.Y. 1997)(chapter 11 trustee may be compensated by monthly draw or advance award which would be monitored pursuant to subsequent fee applications).



Applicant essentially asserts that there can be no services rendered to preserve the estate post-confirmation because no “estate” then exists. Moreover, when the plan of reorganization was confirmed on October 27, 1998 and property of the estate vested in the reorganized Debtor, no longer a Debtor-in-Possession, the reorganized Debtor was free to employ attorneys and other professional persons without obtaining authority from the Bankruptcy Court to do so. *See* 11 U.S.C. §§327(a), 1107(a) (only the chapter 11 Debtor-in-Possession and trustee require court approval to retain professional persons under Code). While the Order Confirming Plan states that “Confirmation of the Plan requires the Debtor to control assets under the Plan,” it also contemplates - - somewhat atypically - - the ongoing pursuit of several substantial objections to claims thereafter by the Debtor. Therefore, unless the bankruptcy court could and did retain jurisdiction to review and approve post-confirmation professional fees, such fees arguably would not be considered fees awarded under §330(a), and would not trigger the notice and hearing requirements of §503(b)(2). I have found that this court retained jurisdiction to approve such fees, however it is also clear that plan confirmation resulted in a loss of exclusive jurisdiction [grounded on 28 U.S.C. §1334(d)] and released the Debtor from Debtor-in-Possession status. Thus, I find that it is credible that the Applicant might have been confused about which services could not be compensated without prior court approval, under the circumstances.

This case raises the very difficult issue of whether to penalize a professional who failed to comply with important procedural requirements even though he ultimately did the right thing. I firmly believe that it is critical for professionals retained in bankruptcy cases to provide all the disclosures required by the Bankruptcy Code and Rules in a complete and timely fashion and to fulfill all requirements set forth in the U.S. Trustee Guidelines. However, I am also acutely aware of the unusual difficulties imposed upon the

fine attorneys of this District who have practiced under four bankruptcy judges during the year prior to my appointment. In particular, I must acknowledge that each of these excellent judges had different styles and sometimes conflicting perspectives on how to enforce the various provisions of the Bankruptcy Code, the Bankruptcy Rules and the U.S. Trustee's Guidelines. These circumstances cannot be ignored. Since the issue presented herein has not previously arisen before me, since this is a court of equity, and since the Applicant has acted in good faith, I find that on balance it would be unfair to penalize the Applicant here for his failure to adhere to the procedural requirements I find to be applicable. I also believe there is ample case law precedent to support this equitable ruling. *See generally* United States v. Energy Resources Co., Inc., 495 US 545, 549, 110 S.Ct. 2139 (1990)(bankruptcy courts, as courts of equity, have broad equitable authority); FDIC v. Colonial Realty Co., 966 F.2d 57, 60 (2<sup>nd</sup> Cir. 1992)(courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity); *see also* In re IBI Security Service, Inc., 133 F.3d 205, 209 (2<sup>nd</sup> Cir. 1998)(bankruptcy court has power to reverse its prior orders pursuant to its general equitable powers); In re Matter of Emergency Beacon Corp., 666 F.2d 754 (2<sup>nd</sup> Cir. 1981)(in absence of reasonable reliance, bankruptcy court has power to modify its orders approving stipulations). However, I want to emphasize that I believe these requirements are otherwise mandatory and I will enforce them in all future cases.

I find that the U.S. Trustee's reliance on In re Keren Limited Partnership, 189 F.3d 86 (2<sup>nd</sup> Cir. 1999) in opposing the request for compensation is misplaced. Keren addresses the issue of requests for bankruptcy court approval of the retention of professional persons *nunc pro tunc* and the prerequisite extraordinary circumstances. Keren establishes a firm policy in this circuit that absent extraordinary circumstances, professionals may only be employed on behalf of the Debtor with prior court approval.

Thus, it is well-settled that professional persons who perform services on behalf of a Debtor without prior court approval of their appointment under Rule 2014 risk denial of compensation.

In this instance, however, it is undisputed that the Applicant was properly and timely appointed by this court to render legal services on behalf of the Debtor regarding the subject objections to claims. The Plan as modified and the Order of Confirmation do not undermine his appointment. The purpose of requiring prior court approval of the appointment of professionals is to ensure their competence and to permit close supervision of the administration of the estate, ward off “volunteers” attracted to a “kitty”, and to avoid the duplication of effort. See In re Singson, 41 F.3d 316 (7<sup>th</sup> Cir. 1994); see also In re Rheam of Indiana, Inc., 133 B.R. 325, 337 (E.D.Pa. 1991), *remanded to* 137 B.R. 151, *vacated by* 142 B.R. 698 (E.D. Pa. 1992) (advance approval of professional required to allow court to ensure the integrity, experience, and competence of the professional seeking to be employed). Because the Applicant was properly appointed before rendering the subject legal services and this court has ongoing authority to reduce or direct disgorgement of any prior fee payments that are deemed excessive or otherwise not in the best interests of the estate under all the circumstances, I find that none of the policy concerns voiced in the *nunc pro tunc* appointment cases exist in this instance. Moreover, even if Keren were applicable here, I believe the circumstances present in this matter constitute extraordinary circumstances consistent with the holding of that case. Therefore, the U.S. Trustee’s objection to the application based upon the Applicant’s failure to have prior court approval is overruled.

(C) The Application Fails to Meet the Requirements  
Set forth in the U.S. Trustee Guidelines

The additional basis of the U.S. Trustee's Objection is that the Application fails to comport with the U.S. Trustee Guidelines. This aspect of the objection is sustained. I have reviewed the subject invoices and find that additional description of the legal services performed is necessary in order for me to evaluate the Application and Charter One's Objections, and in order to find that the Application complies with the requirements set forth in the Guidelines and with the parameters provided by the seminal case in this district, namely, In re S.T.N. Enterprises, Inc., 70 B.R. 823 (Bankr. D.Vt. 1987). The Applicant is therefore directed to file a Revised Application (1) setting forth additional detail for the time entries, (2) reorganizing the invoiced descriptions in categories (so one can readily discern how much time was spent on each discrete aspect of the case and each objection to claim), and (3) including a summary page setting forth how much time was spent and the amount of fees sought in each category of services performed.

(D) No Ruling Can be Made At this Time as to Whether  
the Fees Sought Herein are Reasonable and were Necessary and Beneficial to the Estate

The creditor, Charter One Bank, has filed an Objection to the attorneys fees being sought to the extent those fees represent attorney time and expenses incurred in the unsuccessful litigation against Charter One Bank, and the successful litigation against Mr. Grossi. The creditor is adamant that the legal fees and expenses in this regard totaling \$21,108.42 and contained in the pending fee request, were neither reasonable, necessary nor beneficial to the estate, or, alternatively, were excessive and disproportional to the results obtained. However, a review of the *Application* and the invoices for legal services attached

do not appear to support this contention. The documents filed by the Applicant demonstrate that the Applicant successfully eliminated substantial claims against the estate totaling \$10,157,239.98. The total fees for legal services is \$33,315.96, including a payment of \$10,235.91 already approved by the Court. While Charter One Bank understandably objects to the Applicant incurring approximately \$21,030.00 in challenging its claim and Mr. Grossi's claim in the aggregate amount of over \$69,000, the Applicant was successful in eliminating Mr. Grossi's claim of \$21,551.69. Although the allocation of attorney time and expenses associated solely with the Charter One Bank litigation and ongoing appeal appear large in proportion to the amount disputed, I do not find that they are *de facto* unreasonable. However, I will not rule specifically on this objection until the Revised Application is filed and reviewed.

Lastly, it should be emphasized that orders approving interim fee requests are interlocutory and remain subject to review by this court at any time during the proceeding and appropriate adjustments may be made at a later date, including a direction that an applicant return part or all prior allowed compensation. *See In re Regan*, 135 B.R. 216 (Bankr. E.D.N.Y. 1992). The final post-confirmation compensation request by Applicant will be determined at the conclusion of the case when I can undertake a thorough analysis of the factors enumerated in the statute, and the relevant case law, including the results ultimately obtained in the Charter One Bank litigation and appeal. At that time, I will consider appropriate objections and adjustments, based upon all of the facts and circumstances of the case.


#### CONCLUSION

Under the special circumstances present in this District and the specific factors presented in this case, and in the exercise of this court's equitable powers, I find that the Applicant has provided a satisfactory explanation for his failure to file the required fee application prior to accepting payment from

the Debtor and that it would be unjust to sanction the Applicant for his misapprehension of appropriate procedure. Moreover, to allow the Debtor to enjoy the substantial benefit of the Applicant's services without compensating him would result in an unwarranted windfall to the estate. *See In re Martin*, 102 B.R. 653, 657 (Bankr. W.D.Tenn. 1989).

For the reasons set forth above, the hearing on the *Verified Application for Allowance of Second Interim Compensation* is adjourned to allow the Applicant to file a Revised *Second Application for Interim Compensation and Expenses*. The U.S. Trustee's Objection is overruled to the extent it seeks denial of the Application based upon the *nunc pro tunc* nature of the Application, but sustained to the extent it objects to based upon the lack of compliance with the U.S. Trustee Guidelines. The Objection filed by Charter One Bank is adjourned and will be considered in light of the Revised *Second Application for Interim Compensation and Expenses*. The Applicant is directed to file the Revised *Second Application for Interim Compensation and Expenses* by February 19, 2001 and the U.S. Trustee and Charter One are directed to file any Response to that Application or supplement to their pending Objection by March 1, 2001.

January 25, 2001  
Rutland, Vermont

  
Colleen A. Brown  
United States Bankruptcy Judge