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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re Case No. 98-18535-A-13F

DOUGLAS L. BEAVERS,
Debtor.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW REGARDING
APPLICATIONS FOR COMPENSATION
BY FORMER CHAPTER 7 TRUSTEE;
CASWELL, BELL & HILLISON, LLP;
AND THE LAW OFFICE OF BETH
MAXWELL STRATTON

On October 12, 2000, a hearing on three fee applications was held in this case which had been converted from Chapter 7 to Chapter 13. The applications were filed by James E. Salven, former Chapter 7 trustee; Caswell, Bell & Hillison, LLP (“Caswell Bell”), former counsel for the former Chapter 7 trustee; and the Law Office of Beth Maxwell Stratton, counsel for the former Chapter 7 trustee.¹

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 in 28 U.S.C. §157(b)(2)(A) and (B).

The applications and objections.

Mr. Salven requests allowance of fees in the amount of \$5,407.50 and reimbursement of expenses in the amount of \$49.20. Caswell Bell requests compensation in the amount of \$5,602 and reimbursement of expenses in the amount of \$202.10. Ms. Stratton requests compensation

¹Ms. Stratton was formerly a partner at Caswell Bell. When she left that firm, a substitution of attorney was filed.

1 in the amount of \$2,520 plus reimbursement of expenses in the amount of \$20.65. The debtor
2 has opposed the trustee's fee application and the application of Caswell Bell on the grounds that
3 the fees requested are excessive and exorbitant. The debtor argues that unsecured debt in the
4 case is only about \$13,000 and that the Chapter 7 trustee and his counsel dealt with one legal
5 issue. Additionally, the debtor asserts that the fees requested by the trustee exceed the cap on
6 compensation for a Chapter 7 trustee set forth in Bankruptcy Code § 326(a).

7 The United States Trustee has filed a response to the trustee's fee application. The
8 United States Trustee asserts that it would be appropriate for the Chapter 7 trustee to be
9 compensated for his services but that his compensation should not exceed the statutory cap of
10 § 326, based on a hypothetical distribution to creditors in the case.

11 The three applications present common factual issues and, to some extent, common legal
12 issues. Therefore, the court is setting forth its findings of fact and conclusions of law in one
13 document, with separate orders to be issued for each application.

14 The background facts.

15 Here, the Chapter 7 trustee identified the debtor's interest in the Westhaven Trust (the
16 "Trust") as an asset for recovery. The debtor had claimed that his interest in the Trust was
17 exempt. In mid-1999, the trustee became aware that the Trust would shortly be making
18 distributions. The trustee filed an adversary proceeding seeking a temporary restraining order
19 and preliminary injunction, as to the funds to be distributed to the debtor by the Trust. The court
20 issued the requested temporary restraining order and preliminary injunction in the adversary
21 proceeding. Absent this effort by the trustee and his counsel, the funds distributed by the Trust
22 to the debtor would likely not have been made available for creditors of the bankruptcy estate.

23 Subsequently, the debtor moved for summary judgment in the adversary proceeding,
24 asserting that his interest in the Trust was exempt and that the trustee had not timely objected to
25 the claim of exemption. The court denied the motion for summary judgment on the grounds that
26 there were disputed issues of material fact about the amount of the debtor's interest in the Trust
27 that he was entitled to exempt and with respect to whether the debtor had waived his interest in
28 the Trust.

1 The hearing on the motion for summary judgment was held on July 12, 2000. The court
2 entered its findings of fact and conclusions of law in connection with its ruling denying the
3 motion orally on the record. Two days later, on July 14, 2000, the debtor converted his case to
4 Chapter 13. His Chapter 13 plan provides that creditors will be paid 100% of their allowed
5 claims. The efforts by the Chapter 7 trustee and his counsel led to conversion of the case to
6 Chapter 13 and a Chapter 13 plan contemplating payment of 100% of allowed claims of
7 unsecured creditors.

8 The legal issues.

9 Bankruptcy Code § 326(a) provides a cap on payment to Chapter 7 trustees. Their
10 compensation may not exceed a sliding percentage of the amounts they disburse or turn over to
11 parties in interest in the case. How then, to compensate a Chapter 7 trustee when the case is
12 converted to Chapter 13 prior to the Chapter 7 trustee distributing any funds to parties in the
13 case?

14 At least three bankruptcy courts within the Ninth Circuit have published decisions
15 concerning this issue. Each of those three cases holds that a Chapter 7 trustee may be entitled to
16 compensation where the case is converted to Chapter 13 prior to funds being collected and
17 disbursed by the Chapter 7 trustee. See In re Colburn, 231 B.R. 778 (Bankr. D. Or. 1999); In re
18 Ferris, 2000 W.L. 877038 (Bankr. N.D. Cal. 2000);² and In re Hages, 252 B.R. 789 (Bankr. N.D.
19 Cal. 2000).

20 As the court stated in Colburn, “the terms of § 326(a) do not address the circumstances of
21 Chapter 7 cases where assets have been found, that convert to Chapter 13 before assets are
22 liquidated and disbursed. Such cases often require the Chapter 7 trustee to render substantial
23 services for the benefit of the estate prior to conversion as mandated by section 704 - - services
24 for which the Chapter 7 trustee would receive no reasonable compensation if the terms of section
25

26 ²The heading for this decision states that it is not intended for publication. However, a
27 footnote in the Hages case states that the author of the Hages decision has verified with Judge
28 Jaroslovsky, who wrote the Ferris decision, that the legend is incorrect and that Ferris may be
cited.

1 326(a) were extended to cover such cases. Such a result cannot have been intended and is
2 unwarranted in light of the specific language used in section 326(a).” In re Colburn at 782.

3 As the court in Ferris put it, “this case involves the panel trustee assigned to a case and
4 charged with statutory responsibilities to maximize return to creditors. There is no justice in
5 denying him compensation for a job done diligently and effectively.” In re Ferris. Because the
6 case is no longer in Chapter 7, the restriction of § 326(a) to compensation based on a percentage
7 of amounts distributed under Chapter 7 no longer applies.

8 The issue then arises whether the compensation of the former Chapter 7 trustee should be
9 limited by the cap of § 326(a) applied to the anticipated distribution under the Chapter 13 plan.
10 Here, the bankruptcy court decisions differ. In Colburn, the bankruptcy court found that because
11 it had already determined that the restrictions of § 326(a) did not apply in the context of the
12 converted case, it would not be appropriate to apply the percentages to a projected distribution to
13 creditors in approving compensation. Rather, the court applied the lodestar approach to trustee
14 compensation. In re Colburn at 785.

15 In contrast, the bankruptcy court in the Hages case concluded that it was appropriate to
16 use anticipated plan payments in the Chapter 13 case as a basis for calculating the maximum fee
17 that the former Chapter 7 trustee could be awarded under § 326(a).³ This court concludes that
18 the Hages decision has the better of it with respect to maximum compensation to a Chapter 7
19 trustee following conversion of the case to Chapter 13.

20 “Whether or not the chapter 7 trustee actually turns over cash to the chapter 13
21 trustee, the chapter 7 trustee turns over an estate that must generate distributions
22 to creditors under a chapter 13 plan that are equal to or greater than they will
23 receive in Chapter 7. . . . Given these realities, it is entirely appropriate to impute
24 the monies that will be distributed by the chapter 13 trustee to the chapter 7
25 trustee for purposes of computing the maximum fee the chapter 7 trustee can
26 charge and allowing interim fees up to that maximum.”

25 ³An important issue in the Hages case was whether the Chapter 13 trustee’s
26 compensation had to be subtracted from compensation to the Chapter 7 trustee, reasoning that §
27 326(c) required compensation to trustees to be aggregated. No one has made that argument here,
28 and the court thus does not address it. Were the court to address it, the court would reach the
same conclusion as did the court in Hages. Section 326(c) does not apply to a Chapter 7 trustee
and a Chapter 13 trustee in this circumstances.

1 In re Hages at 794. The court concludes in Hages that it is appropriate to use the anticipated
2 plan payments as a basis to calculate the maximum fee that the former Chapter 7 trustee can be
3 awarded. Id. This court agrees. Finally, as the Hages case put it, “policy reasons favor giving
4 the Chapter 7 trustee an incentive for increasing the actual dividends to creditors.” Id.

5 The compensation requested.

6 The former Chapter 7 trustee has requested compensation in the amount of \$5,407.50
7 plus reimbursement of expenses in the amount of \$49.20. His expenses will be allowed as
8 actual and necessary expenses. As to his requested compensation, the United States Trustee has
9 asserted that unsecured claims in the case are \$12,920 and priority claims are in the amount of
10 \$115. The debtor essentially agrees, having stated that unsecured claims in the case are about
11 \$13,000. To this amount must be added, as is set forth below, the amount of allowed
12 compensation to Ms. Stratton and Caswell Bell. This brings, as the United States Trustee has
13 pointed out, the total projected distribution in the case under Chapter 13 to \$21,379.75. The
14 maximum compensation using the percentage calculations from § 326(a) on this distribution is
15 \$2,887.97. The court has reviewed in detail the Chapter 7 trustee’s narrative statement and
16 statement of services performed in the case. Based on an hourly rate of \$175, the trustee would
17 be entitled, using a lodestar calculation, to fees in the amount of \$5,407.50. The compensation
18 provided utilizing the percentage cap is far below that. Given that the trustee and his counsel
19 successfully litigated with the debtor until the conversion of the case to Chapter 13, the court is
20 persuaded that compensation to the trustee in the amount of \$2,887.97 is eminently reasonable.
21 It places the trustee in no better and no worse position than if the case had not converted to
22 Chapter 13. Such compensation will be allowed.

23 The court notes that the United States Trustee has suggested that because the Chapter 7
24 trustee’s compensation will be paid as an administrative expense through the Chapter 13 plan it
25 would be appropriate also to compensate the Chapter 7 trustee for a percentage of the amounts
26 distributed to him. The court declines to do so. First, no one has suggested how this number is
27 to be calculated. Second, the court sees no meaningful policy reason for awarding trustees
28 compensation based on the amount they distribute to themselves.

