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6 UNITED STATES BANKRUPTCY COURT  
7 EASTERN DISTRICT OF CALIFORNIA

8 In re

Case No. 04-13204-A-11K  
DC No. DMG-7

9 HERBERT THOMAS COTTER

10 Debtor.  
11 \_\_\_\_\_/

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW REGARDING  
APPLICATION FOR PAYMENT OF  
FINAL FEES AND EXPENSES

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13 A hearing was held April 20, 2005, on the application of D.  
14 Max Gardner("Applicant") as attorney for Herbert Thomas Cotter  
15 (the "Debtor") for payment of final fees and/or expenses (the  
16 "Fee Application"). At the hearing, the court asked Applicant  
17 to file a supplemental declaration, and the matter was deemed  
18 submitted as of May 2, 2005. This memorandum contains findings  
19 of fact and conclusions of law required by Federal Rule of  
20 Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52.  
21 This is a core proceeding as defined in 28 U.S.C. §157(b)(2)(A).

22 The Debtor filed his voluntary chapter 11 case on April 14,  
23 2004, in pro se. The petition was filed without Schedules of  
24 Assets and Liabilities, a Summary of Assets and Liabilities, or a  
25 Statement of Financial Affairs. Pursuant to Bankruptcy Code  
26 § 521(a) and Fed. R. Bankr. P. 1007(c), these documents were to  
27 be filed by April 29, 2004. On April 28, 2004, Applicant filed,  
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1 on behalf of the Debtor, an application to extend the time to  
2 file the Schedules and the Statement of Financial Affairs, and  
3 also on that date filed an application for an order authorizing  
4 employment of attorney. On May 7, 2004, an order authorizing  
5 Applicant's employment as attorney for the Debtor was entered.  
6 The application for order authorizing employment states that:

7 "Debtor paid the sum of \$500 on April 13, 2004, for pre-  
8 bankruptcy consultations and for services rendered in  
9 preparing a voluntary petition, list of 20 largest unsecured  
10 creditors, and other documents necessary for a 'skeletal'  
11 filing. The Law Offices of D. Max Gardner has received the  
12 sum of \$9,500 as a retainer from an individual named Ed  
13 Moss, who is a long time patient and personal friend of the  
14 Debtor. Counsel has been advised that the payment of the  
15 \$9,500 does not constitute a loan to the Debtor. That  
16 payment was made on April 27, 2004. It is the intention of  
17 the Applicant to utilize this retainer for services rendered  
18 and costs incurred until such retainer is exhausted.  
19 Thereafter, the payment of further fees and expenses will be  
20 sought from the estate subject to prior Court approval for  
21 their payment."

22 The order authorizing employment, prepared by Applicant,  
23 states, in language standard for orders authorizing employment of  
24 attorneys in this court, that:

25 "All funds received by counsel in connection with this  
26 matter, regardless of whether they are denominated a  
27 retainer or said to be non-refundable, are deemed to be an  
28 advance payment of fees and to be property of the estate  
except to the extent that counsel demonstrates, pursuant to  
the statement required by 11 U.S.C. Section 329 filed before  
ten days after issuance of this order, that such funds were  
received as the reasonable value of actual pre-petition  
services.

... .

Funds that are deemed to constitute an advance payment of  
fees shall be maintained in a trust account maintained in an  
authorized depository, which account may be either a  
separate interest-bearing account or an attorney's trust  
account containing commingled funds. Withdrawals are  
permitted only after approval of an application for  
compensation and after the Court issues an order authorizing  
disbursement of a specific amount."

1 On May 5, 2004, the Debtor filed his Summary and Schedules A  
2 through J, the Statement of Financial Affairs, and a Statement of  
3 Intentions. The Statement of Financial Affairs reflects at ¶ 9  
4 that Applicant was paid \$9,500 by Ed Moss at an unspecified date.  
5 Until the Fee Application, no other information about his fees or  
6 employment was filed by Applicant.

7 The Fee Application was filed April 1, 2005, along with the  
8 declaration of Applicant. The Fee Application states as follows:

9 "6. Total fees allowed or paid to applicant to date  
10 (including retainers and prior approved fee applications):  
11 Allowed: 0 Paid: \$11,000 (from debtor pre-petition and  
12 from a non debtor source.)"

13 Paragraph 6 of the Fee Application goes on to state that  
14 Applicant has received no retainer and has filed no previous fee  
15 applications. In the Fee Application, Applicant requests  
16 approval of fees in the amount of \$18,934.50, but requests  
17 payment of only \$7,434.50. Thus, Applicant requests payment of  
18 \$11,500 less than the fees for which he requests approval.  
19 Applicant also requests approval of reimbursement and  
20 reimbursement of expenses in the amount of \$632.71.

21 The declaration in support of the Fee Application states:

22 "2. This is the first and final fee application filed by  
23 the Law Offices of D. Max Gardner and seeks compensation for  
24 attorney services and costs advanced from the period of  
25 April 14, 2004, through March 31, 2005 ("the subject  
26 period"); a period of approximately one year. It should be  
27 noted that the amount requested is offset by the payment  
28 pre-petition payment [sic] of \$1,500 made by the Debtor and  
\$9,500 made by a friend of the Debtor."

At the hearing, because of the discrepancies among the  
application to authorize employment, the order authorizing  
employment, and the Fee Application, and because of Applicant's

1 failure to file a disclosure of compensation pursuant to Fed. R.  
2 Bankr. P. 2016(b), the court invited Applicant to file a  
3 supplemental declaration and/or brief in support of the Fee  
4 Application. Applicant filed the supplemental declaration of D.  
5 Max Gardner on May 2, 2005.

6 The supplemental declaration acknowledges the discrepancy  
7 between the application for authorization to be employed and the  
8 Fee Application and attributes the \$1,000 difference to an  
9 accounting program.

10 "In my initial Application by Debtor for Order Authorizing  
11 Employment of Attorney, I represented that the Debtor had  
12 paid the sum of \$500 for pre-petition work. When I filed my  
13 first and final fee application, I referred to my office's  
14 accounting program which stated that the sum of \$1,500 had  
15 been paid by the Debtor pre-petition. The \$1,500 amount was  
16 stated as the amount paid in the fee application. I have  
17 verified that my accounting program reported \$1,500 paid by  
the Debtor and believe that amount to be accurate, although  
my general recollection was that the Debtor paid \$500, which  
was why I stated that amount in the Application by Debtor  
for Order Authorizing Employment of Attorney. In any event,  
the proper amount of the offset should be \$1,000 since \$500  
was utilized in pre-petition services. I apologize for the  
confusion."

18 The supplemental declaration also acknowledges that  
19 Applicant was in error and in violation of the order authorizing  
20 employment when he applied the \$9,500 retainer to payment of fees  
21 without court approval. Applicant states that he had not been  
22 aware that he is required to obtain court approval to apply a  
23 retainer contributed by someone who is not the debtor to  
24 outstanding fees. Applicant states that he did not intend to  
25 compensate himself in a manner inconsistent with court orders.

26 However, Applicant continues to request payment of  
27 \$7,434.50. He also suggests that it would be appropriate to  
28 allow him payment of an additional \$500 (because \$500 of what he

1 thought was the retainer was actually used for pre-petition  
2 services.) He continues to request reimbursement of costs in the  
3 amount of \$632.71.

4 Thus, it now appears that prior to the bankruptcy case being  
5 filed, the Debtor paid Applicant \$1,500. After the bankruptcy  
6 case was filed, Ed Moss paid, on behalf of the Debtor, \$9,500 to  
7 Applicant. This entire amount (\$11,000) has been utilized by  
8 Applicant in payment of fees and costs, without court approval.  
9 Some amount, between \$500 and \$1,000, was, apparently, expended  
10 in pre-petition fees. The balance was applied by Applicant to  
11 post-petition fees.

12 The United States Trustee has expressed no views regarding  
13 this application.

14 Under Bankruptcy Code § 330(a), the court may award to an  
15 attorney employed under § 327 reasonable compensation for actual,  
16 necessary services rendered by the attorney and reimbursement for  
17 actual, necessary expenses. Under § 329(a), an attorney for a  
18 debtor:

19 "Shall file with the court a statement of the compensation  
20 paid or agreed to be paid, if such payment or agreement was  
21 made after one year before the date of the filing of the  
22 petition, for services rendered or to be rendered in  
contemplation of or in connection with the case by such  
attorney, and the source of such compensation."

23 The attorney is required to file such statement whether or  
24 not the attorney applies for compensation under the Code.

25 Federal Rule of Bankruptcy Procedure 2016(b) amplifies this  
26 requirement.

27 "Every attorney for a debtor, whether or not the attorney  
28 applies for compensation, shall file and transmit to the  
United States trustee within 15 days after the order for

1 relief, or at another time as the court may direct, the  
2 statement required by § 329 of the Code including whether  
3 the attorney has shared or agreed to share the compensation  
4 with any other entity. . . A supplemental statement shall  
be filed and transmitted to the United States trustee within  
15 days after any payment or agreement not previously  
disclosed."

5 Official Procedural Form B203 has been created to allow the  
6 statement required by § 329(a) and Rule 2016(b) to be made. This  
7 official form is titled "Disclosure of Compensation of Attorney  
8 for Debtor." No Disclosure of Compensation of Attorney for  
9 Debtor has been filed by Applicant in this case.

10 Applicant has never filed the required Rule 2016 Statement.  
11 Though he seeks approval of all fees incurred (paid and unpaid),  
12 the notice of the hearing on the Fee Application refers only to  
13 approval of fees of \$7,434.50 (the yet unpaid amount) and  
14 reimbursement of expenses of \$632.71.

15 "Full disclosure is an essential prerequisite for employment  
16 and compensation." Movitz v. Baker (In re Triple Star Welding,  
17 Inc.), BAP No. AZ-04-1442 MoSZ (9<sup>th</sup> Cir. BAP April 28, 2005)<sup>1</sup>.

18 ". . . The Bankruptcy Code and Federal Rules of Bankruptcy  
19 Procedure impose several disclosure requirements on  
20 attorneys who seek to represent a debtor and who seek to  
recover fees. The disclosure rules impose upon attorneys an  
independent responsibility. Thus, failure to comply with  
the disclosure rules is a sanctionable violation, even if  
proper disclosure would have shown that the attorney had not  
actually violated any Bankruptcy Code provision or any  
Bankruptcy Rule. . . . The disclosure rules are applied  
literally, even if the results are sometimes harsh.  
Negligent or inadvertent omissions do not vitiate the  
failure to disclose. Similarly, a disclosure violation may  
result in sanctions regardless of actual harm to the  
estate."

26 Neben & Starrett, Inc. v. Chartwell Fin. Corp., (In re Park  
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28 <sup>1</sup>To be published. Westlaw citation not yet available.

1 Helena Corp.) 63 F.3d 877, 880-81 (9<sup>th</sup> Cir. 1995)(citations and  
2 quotation marks omitted).

3       The Bankruptcy Appellate Panel of the Ninth Circuit has  
4 stated that under § 327, a professional has a duty to make a  
5 full, candid and complete disclosure of all facts having to do  
6 with his transactions with the debtor. It does not matter how  
7 irrelevant or trivial a particular matter may seem. Mehdipour v.  
8 Marcus & Millichap (In re Mehdi pour), 202 B.R. 474, 480 (9<sup>th</sup> Cir.  
9 BAP 1996) (citations omitted).

10       Thus, full, complete, and accurate disclosure is a pre-  
11 requisite to awarding of any compensation to a professional  
12 employed by the debtor. Once such disclosure has been made, the  
13 bankruptcy court may exercise its discretion in determining  
14 whether to disallow all or part of the requested fees.

15       In this case, a chapter 11 plan has been confirmed,  
16 following appointment by the court of a chapter 11 trustee.  
17 Creditors in the case are being paid in full pursuant to the  
18 plan. In fact, there is a surplus following payment to all  
19 creditors. No one has asserted that the fees requested by  
20 Applicant are not reasonable compensation for actual, necessary  
21 services.

22       The issue before the court is to what extent any fees should  
23 be denied based on Applicant's failure to disclose that he  
24 received \$1,500, rather than \$500, for pre-bankruptcy services  
25 and his work in preparing the petition; Applicant's utilizing the  
26 retainer of \$9,500 to pay fees absent any court approval; and  
27 Applicant's failure to file a Rule 2016 Statement. In the case,  
28 Applicant spent 97.1 hours at an hourly rate of \$195 for total

1 fees of \$18,934.50. He requests reimbursement of expenses in the  
2 amount of \$632.71. Thus, the total of fees and expenses is  
3 \$19,567.21. Applicant now acknowledges that he received \$11,000,  
4 all of which he has applied to fees incurred either before or  
5 after the case was filed. Of this amount, according to the  
6 supplemental declaration, \$500 was utilized for pre-petition  
7 work.<sup>2</sup>

8 To make matters even more complicated, the invoice attached  
9 to the application for payment shows that Applicant spent 2.8  
10 hours at \$195 per hour from March 25 through April 14, 2004, on  
11 behalf of the Debtor. This would equate to pre-petition fees of  
12 \$546. This \$546 has not been deducted from the \$18,934.50  
13 requested by Applicant.

14 The failures of Applicant to disclose accurately the amount  
15 received from the Debtor prior to filing the case are  
16 significant, even if inadvertent. They have resulted in an  
17 amount of uncertainty about this application that adequate, full  
18 and accurate disclosure would have prevented. During the course  
19 of this chapter 11 case, Applicant has received in payment of  
20 fees \$10,500 without any court approval and as to \$1,000 of that  
21 amount, without any prior disclosure. (This assumes that \$500  
22 was for pre-petition services.)

23 What then, given the stringent disclosure requirements  
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25 <sup>2</sup>Of course, the supplemental declaration also indicates a  
26 violation of the order authorizing employment in that the order  
27 authorizing employment requires the attorney to hold all funds  
28 received in trust, unless a statement is filed within ten days  
that any such funds were received as the reasonable value of  
actual pre-petition services.



1 placed on attorneys employed by debtors in bankruptcy cases on  
2 the one hand and the mere inadvertence by Debtor's counsel on the  
3 other hand, is the appropriate remedy, particularly in light of  
4 the successful conclusion of the chapter 11 case and the surplus  
5 being returned to the Debtor?

6 The court is persuaded that the failure to disclose and the  
7 payment without court authorization truly were inadvertent rather  
8 than deliberate. For that reason, and based on all the facts and  
9 circumstances of this case, the court will reduce the requested  
10 additional compensation by only the \$1,000 that was not  
11 previously disclosed. Thus, the court will approve fees in the  
12 amount of \$17,934.50, rather than the \$18,934.50 requested. The  
13 Fee Application requested approval of fees of \$18,934.50, but the  
14 notice of application requested only approval of the unpaid  
15 amount. Only the notice was served on all creditors. The Fee  
16 Application was served on Debtor, the U. S. Trustee, the chapter  
17 11 trustee and his counsel, and the County of Kern Tax Collector  
18 and its counsel. However, as all creditors have been paid in  
19 full, the court waives this notice defect. This means that the  
20 court will allow payment of fees in the amount of \$6,434.50, and  
21 reimbursement of expenses in the amount of \$632.71. Applicant  
22 may submit a proposed form of order.

23 DATED: May 19, 2005.

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27 /S/\_\_\_\_\_  
28 WHITNEY RIMEL, Judge  
United States Bankruptcy Court