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2
3 UNITED STATES BANKRUPTCY COURT
4 EASTERN DISTRICT OF CALIFORNIA
5 SACRAMENTO DIVISION
6

7 In re)
8) Case No. 03-33624-A-7
9 CARL and JENNIFER LANE,)
10 Debtors.) Docket Control No. MFB-1
11) Date: November 26, 2007
Time: 9:00 a.m.
)

12 On November 26, 2007 at 9:00 a.m., the court considered the
13 chapter 7 trustee's motion to employ special counsel, to
14 compensate special counsel, and to approve a compromise. The
15 court's ruling on the objection is appended to the minutes of the
16 hearing. Because that ruling constitutes a "reasoned
17 explanation" of the court's decision, it is also posted on the
18 court's Internet site, www.caeb.uscourts.gov, in a text-
19 searchable format as required by the E-Government Act of 2002.
20 The official record, however, remains the ruling appended to the
21 minutes of the hearing.

22 **FINAL RULING**

23 The motion will be granted in part and continued for further
24 hearing.

25 The trustee seeks to employ Kiesel, Boucher & Larson, LLP as
26 special litigation counsel for the estate in the personal injury
27 litigation between the debtor Jennifer Lane and the Roman
28 Catholic Church of Los Angeles, along with other co-defendants.
The proposed compensation for Kiesel is a 40% contingency fee of
the gross recovery of compensatory and punitive damages.

Subject to court approval, 11 U.S.C. § 327(a) permits a
trustee to employ a professional to assist the trustee in the
administration of the estate. Such professional must "not hold

1 or represent an interest adverse to the estate, and [must be a]
2 disinterested [person]." 11 U.S.C. § 327(a). 11 U.S.C. § 328(a)
3 allows for such employment "on any reasonable terms and
4 conditions."

5 However, Kiesel was not employed timely as special counsel
6 for the estate. Even though the subject lawsuit was filed on
7 December 31, 2003, nearly four years ago, and the bankruptcy case
8 was filed on December 19, 2003. For reasons not clear from the
9 record, neither the trustee nor special counsel sought immediate
10 approval of special counsel's employment. In order to be
11 compensated as a professional by a bankruptcy estate, prior
12 judicial approval of the professional's employment is necessary.

13 When the professional does not obtain prior approval of his
14 or her employment, retroactive approval of the employment may be
15 possible. The Ninth Circuit has a two-prong standard for the
16 retroactive approval of employment for estate professionals. The
17 following must be shown: (1) satisfactory explanation for the
18 failure of the estate to obtain prior court approval; and (2) a
19 showing that the professional has benefitted the estate. In re
20 THC Financial Corp., 837 F.2d 389, 392 (9th Cir. 1988).

21 Given the settlement, and the fact that it will pay claims
22 in full or nearly so, it seems clear that special counsel has
23 benefitted the estate.

24 In deciding whether there is a satisfactory explanation for
25 the failure to obtain prior court approval, the court may
26 consider not just the reason for the delay but also prejudice, or
27 the lack thereof, to the estate resulting from the delay. In re
28 Guterman, 239 B.R. 828, 831 (Bankr. N.D. Cal. 1999). And, the

1 decision to grant nunc pro tunc approval of employment of a
2 professional is committed to the discretion of the bankruptcy
3 court. Id.

4 Here, the trustee has not discussed the THC standard. Thus,
5 the court has no basis upon which to grant the approve the
6 employment retroactively. The motion then will be continued to
7 December 10, 2007 at 9:00 a.m., as to the request for employment,
8 to allow the trustee/special counsel to brief the THC standard.
9 In conjunction with this continuance, the court will also
10 continue the request for approval of compensation for Kiesel.
11 Further evidence and briefing shall be filed and served on or
12 before December 3.

13 The court notes that, while the compensation requested is a
14 contingency fee that does not vary with the amount of work
15 performed, the court is required by 11 U.S.C. § 328(a) to
16 consider whether the contingency fee, in light of subsequent
17 developments, was improvident. In re Reimers, 972 F.2d 1127,
18 1128 (9th Cir. 1992) (quoting In re Confections by Sandra, Inc.,
19 83 B.R. 729, 731 (B.A.P. 9th Cir. 1987)). One element of this
20 consideration is how much time this case required of counsel. If
21 time records are not available, the court will accept other
22 evidence that details the amount of work and the tasks
23 undertaken. Neither Kiesel nor the trustee, however, has
24 submitted sufficient evidence detailing the amount of work and
25 the tasks undertaken.

26 The trustee also seeks approval of the settlement agreement
27 reached between the estate and the defendants in the subject
28 personal injury litigation. Under the terms of the settlement,

1 the estate will receive approximately \$450,000, after the
2 deduction of attorney's fees and costs. The trustee expects that
3 the settlement proceeds will likely pay all claims, with
4 statutory interest, in full.

5 On a motion by the trustee and after notice and a hearing,
6 the court may approve a compromise or settlement. Fed. R. Bankr.
7 P. 9019. Approval of a compromise must be based upon
8 considerations of fairness and equity. In re A & C Properties,
9 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and
10 balance four factors: 1) the probability of success in the
11 litigation; 2) the difficulties, if any, to be encountered in the
12 matter of collection; 3) the complexity of the litigation
13 involved; and 4) the paramount interest of the creditors with a
14 proper deference to their reasonable views. In re Woodson, 839
15 F.2d 610, 620 (9th Cir. 1988).

16 The court concludes that the Woodson factors balance in
17 favor of approving the compromise. That is, given that personal
18 injury litigation is costly and difficult, given the risks and
19 delay of further litigation, and given that the settlement
20 proceeds will likely pay all estate claims in full, the
21 settlement is equitable and fair.

22 Therefore, the court concludes the compromise to be in the
23 best interests of the creditors and the estate. The court may
24 give weight to the opinions of the trustee, the parties, and
25 their attorneys. In re Blair, 538 F.2d 849, 851 (9th Cir. 1976).
26 Furthermore, the law favors compromise and not litigation for its
27 own sake. Id. Accordingly, the motion will be granted as to the
28 approval of the compromise but without now approving the

1 employment and compensation of special counsel. This aspect of
2 the motion will be continued to December 10, 2007 at 9:00 a.m.
3 for further hearing.