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6 UNITED STATES BANKRUPTCY COURT
7 EASTERN DISTRICT OF CALIFORNIA

8 In re Case No. 05-11397-A-11K
9 LAS AMERICAS BROADBAND, INC. DC No. JTH-1
10 Debtor. FINDINGS OF FACT AND
11 CONCLUSIONS OF LAW REGARDING
12 APPLICATION FOR ALLOWANCE OF
INTERIM ATTORNEY FEES AND
COSTS FILED BY JOHN T. HEANEY,
SPECIAL COUNSEL FOR DEBTOR

13 A hearing was held February 22, 2006, on the First
14 Application for Allowance of Interim Attorney Fees and Costs of
15 John T. Heaney, special counsel for debtor. Opposition to the
16 application was filed by the Creditors' Committee, and the
17 chapter 11 trustee joined in the Committee's opposition.
18 Following the hearing, the court took the matter under
19 submission. This memorandum contains findings of fact and
20 conclusions of law required by Federal Rule of Bankruptcy
21 Procedure 7052 and Federal Rule of Civil Procedure 52. This is a
22 core proceeding as defined in 28 U.S.C. §157(b)(2)(A) and (O).

23 Background Facts.

24 The debtor filed this chapter 11 case on February 28, 2005.
25 On June 1, 2005, an order was entered authorizing the employment
26 of Heaney as special counsel to continue his joint representation
27 of the debtor and Dick Clark International Cable Ventures, LTD.
28 ("DCICV") in state court litigation against U.S.A. Broadband,

1 Inc. ("USAB") and other defendants. The order authorizing
2 Heaney's employment stated that the employment was on the terms
3 and conditions set forth in a Fee Agreement dated September 22,
4 2003, as amended (the "Fee Agreement") between Heaney and the
5 debtor and DCICV.

6 The Fee Agreement provides for a reduced hourly rate of \$150
7 per hour, which is one-half of Heaney's customary hourly rate.
8 The hourly fees and costs were to have been billed and paid
9 monthly. Additionally, the Fee Agreement provides that Heaney
10 will receive a contingent fee of 25% of any settlement, judgment,
11 or other recovery collected. The Fee Agreement also provides for
12 an attorney's lien against any proceeds recovered for the
13 contingent fee and any otherwise unpaid hourly fees and costs.

14 In December 2005, this court approved a settlement with one
15 of the defendants in the state court action. That settlement
16 resulted in plaintiffs' receiving the total amount of remaining
17 policy limits of two insurance policies covering the settling
18 defendant, Grant Miller, in the amount of \$3,148,217.34. In
19 accordance with the terms of the Fee Agreement and the order
20 authorizing his employment, Heaney seeks allowance of contingent
21 fees based on the settlement of \$787,054.34, together with his
22 reduced hourly fees through December 31, 2005, of \$141,840.34,
23 and unreimbursed costs advanced through December 31, 2005, of
24 \$23,281.47.

25 As of February 28, 2005, when the debtor filed its chapter
26 11 case, the accumulated unpaid portion of Heaney's bills for his
27 reduced hourly charges was \$88,125.40, together with \$15,843.87
28 for costs advanced, mainly deposition reporter's fees, expert

1 witness fees, and the like.

2 The State Court Action.

3 The state court action is summarized in the application. In
4 the early 1990's, the debtor and DCICV obtained from the Mexican
5 government a concession to develop a cable television system in
6 the city of Tijuana, Mexico. Commencement of the project was
7 delayed for about six years because of litigation filed by other
8 Mexican cable television providers. However, by the end of 2001,
9 the debtor and DCICV, at a cost of over \$8,000,000, had completed
10 construction of the basic infrastructure of the system and
11 brought it online. Their business plan then required additional
12 capital to expand the system to profitability or to break even.
13 Thus, they entered into an asset purchase agreement with USAB.
14 Pursuant to that agreement, the debtor and DCICV transferred all
15 their rights and interests in the Tijuana project to USAB in
16 exchange for shares of stock. Unfortunately, USAB failed to
17 perform, and eventually went out of business. This led to the
18 litigation filed against USAB and individual defendants,
19 including Grant Miller and Paul Moore by the debtor and DCICV.

20 Heaney was first consulted about the dispute on August 11,
21 2003. He originally proposed representing the debtor and DCICV
22 at his standard hourly rate of \$300 per hour. The debtor and
23 DCICV then suggested that he undertake the representation on a
24 purely contingent fee basis in the amount of 40% of any recovery
25 plus costs advanced. Heaney was concerned that this would create
26 impossible cash flow problems for his practice, and therefore the
27 parties agreed to the hybrid fee arrangement. However, despite
28 the promise of the debtor and DCICV to pay him fees and costs

1 each month in the reduced hourly rate of \$150 per hour, in fact
2 payments were not made as promised. The last payment made to him
3 for fees and costs was \$5,100 received in June 2004.

4 In December 2003, Heaney filed two separate lawsuits against
5 USAB and individual defendants in San Diego County Superior
6 Court. The defendants then filed a lawsuit in Delaware. Thus,
7 plaintiffs had to battle the enforceability of a choice of law
8 and forum selection clause in the asset purchase agreement.
9 Plaintiffs prevailed, and the San Diego actions proceeded. The
10 Delaware action was stayed and eventually dismissed. USAB then
11 went out of business, and its attorneys withdrew. The focus of
12 the litigation shifted to the remaining individual defendants.
13 The defendant that has settled, Grant Miller, was covered by two
14 policies of insurance purchased by USAB for its officers and
15 directors. The primary policy was of the self-liquidating type,
16 whereby the insured's costs of defense were subtracted dollar for
17 dollar from the remaining policy limits. Between July 2004 and
18 the eventual settlement, defense counsel for Miller consumed over
19 \$850,000 of his coverage.

20 Extensive discovery commenced in the spring of 2004. Heaney
21 successfully opposed a motion for summary judgment filed by Grant
22 Miller. In October 2005, a settlement was achieved with Grant
23 Miller, whereby his insurance carriers agreed to pay the total
24 amount of remaining policy limits. That amount, \$3,148,217.34,
25 is now in Heaney's client trust account.

26 Since the hearing on this application, the chapter 11
27 trustee has filed a motion to approve a settlement with Moore,
28 MBC, and USAB. That settlement adds \$300,000 to the proceeds of

1 the litigation. That settlement also results in stock and a note
2 being returned to the plaintiffs. Further, the trustee has filed
3 a motion to approve a settlement of the division of the proceeds
4 of the litigation between the debtor and DCICV. The settlement
5 that the trustee will ask the court to approve is a division of
6 forth-five percent of the proceeds to DCICV and fifty-five
7 percent of the proceeds to the bankruptcy estate.

8 The Opposition by the Committee and the Trustee.

9 The Committee's opposition, in which the trustee joined,¹
10 asserts that it is premature to award any fees to Heaney.
11 According to the Committee, the various claims of liens against
12 the proceeds need to be determined before any payment to Heaney.²
13 Second, the Committee believes that the proceeds must be
14 allocated between DCICV and the debtor before determining
15 Heaney's payment. According to the Committee, it is possible
16 "depending upon the allocation of the Settlement Payment that
17 Heaney's services would yield no benefit to the estate herein
18 whatsoever." The Committee says that it is necessary to apply
19 the lodestar approach to Heaney's fee application. The lodestar
20 approach divides the total fees requested by the number of hours
21 spent. If you use the lodestar approach, his hourly rate is

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23 ¹On March 17, 2005, the chapter 11 trustee filed a
24 withdrawal of his joinder in the objection by the Creditors'
Committee to this application.

25 ²The trustee's motion for approval of the division of the
26 litigation proceeds between the debtor and DCICV describes the
27 notices of lien that have been filed in the litigation. The
28 motion also states that other creditors may claim a lien on the
proceeds. The trustee takes the position that some of the liens
are avoidable.

1 \$794.75, which the Committee asserts is unreasonable.

2 According to the Committee, it is possible that the estate
3 will prove to have not benefitted at all by the work performed by
4 Heaney, if, as a result of the eventual allocation between the
5 debtor and DCICV, combined with the amount of liens against the
6 proceeds, there are no funds left to pay unsecured creditors and
7 administrative priority claims.

8 Finally, the Committee says that there is no legal basis for
9 this court to award the prepetition fees and costs of \$103,969.27
10 to Heaney. The attorney's lien asserted by Heaney does not
11 affect this result, according to the Committee. That is because,
12 according to the Committee, the attorney's lien was not disclosed
13 in the application to employ Heaney.

14 Heaney on the other hand argues that the court approved his
15 employment with specific reference to the fee agreement, and the
16 fee agreement gives him an attorney's lien.

17 The Issues for the Court to Decide.

18 Although this is an interim fee application under 11 U.S.C.
19 § 331, by its very nature it asks the court to make
20 determinations of reasonableness and benefit to the estate
21 pursuant to 11 U.S.C. § 330. Thus, the court must decide whether
22 the services of Heaney benefitted the estate. Second, the court
23 must determine if the attorney's lien asserted by Heaney is
24 enforceable in the context of this bankruptcy case. Third, it is
25 necessary to analyze the question of the prepetition fees
26 incurred by Heaney and whether it is appropriate to award them in
27 this administrative expense claim.

28 In support of its analysis, the court turns first to 11

1 U.S.C. § 330(a). The prior October 2005 version of § 330(a) is,
2 as all parties acknowledge, applicable to this case. That
3 section provides, in relevant part, as provides:

4 ". . . In determining the amount of reasonable compensation
5 to be awarded, the court shall consider the nature, the
6 extent, and the value of such services, taking into account
all relevant factors, including -

7 (A) the time spent on such services;
8 (B) the rates charged for such services;
9 (C) whether the services were necessary to the
administration of, or beneficial at the time at which the
service was rendered toward the completion of, a case under
this title;

10 (E) whether the compensation is reasonable based on the
11 customary compensation charged by comparably skilled
practitioners in cases other than cases under this title."

12 As the Committee has noted, a professional seeking
13 compensation has the burden to prove the reasonableness of his or
14 her fees. In determining the reasonableness of a fee request, a
15 court is to exercise its discretion after considering all
16 relevant factors.

17 Benefit to the Estate.

18 The benefit to the estate of Heaney's services is
19 unquestionable. It is true that it will be necessary to allocate
20 the settlement proceeds between the two plaintiffs, and the
21 debtor will likely not be entitled to all the proceeds. It is
22 also true that lien claims against the settlement amount will
23 need to be resolved. But, absent the services performed by
24 Heaney, there would be no settlement amount to divide between the
25 plaintiffs and there would be no settlement amount to which
26 claims of lien could attach. The fees sought by Heaney are less
27 than the fees incurred by the defendants. If Heaney were to be
28 paid today on the totally contingent fee basis he was initially

1 offered, his application would be more than \$300,000 above the
2 present application. As counsel for the debtor observed at oral
3 argument on the application, by his efforts, Heaney obtained a
4 result akin to creating a silk purse of the proverbial sow's ear.

5 The state court action was legally and factually complex.
6 It required lengthy discovery and motions on venue and summary
7 judgment. The eventual recovery was the policy limits of the
8 only defendant covered by insurance. The corporate defendant is
9 out of business, and the remaining individual defendant is not
10 covered by any insurance. Thus, the magnitude of the recovery is
11 all that could reasonably be obtained.

12 No one has challenged Heaney's skill and experience.
13 Similarly, no one has challenged the quality of the
14 representation. At every significant juncture, he succeeded in
15 prevailing on behalf of the plaintiffs.

16 There was substantial risk of nonpayment. The substantial
17 risk of nonpayment is, after all, the heart and sole of a
18 contingent fee arrangement. Here, absent a settlement or a
19 judgment, there would be no funds from which to pay the 25%
20 contingent fee amount. The time requirements of this litigation
21 precluded Heaney from undertaking work for other clients. The
22 standard contingent fee arrangement for this type of litigation
23 is 40%, not the 25% currently being sought.

24 The fact that the proceeds had not been allocated at the
25 time of the hearing does not affect the benefit to the estate.
26 The court does not find persuasive the Committee's argument that
27 it is first necessary to allocate the proceeds between the
28 plaintiffs before awarding any fees to Heaney. Once Heaney's

1 fees are subtracted from the settlement amount, and the remaining
2 proceeds are allocated between the plaintiffs, each plaintiff
3 will necessarily bear a pro rata share of the fees and costs of
4 Heaney. Similarly, the Committee's argument that there is no
5 benefit to the estate before liens against the proceeds are
6 determined is not persuasive. The fact is, there are funds from
7 which these liens can be paid if the liens are not avoided. This
8 is in and of itself a benefit to the estate.

9 Further, the court has concluded that the attorney's lien
10 against the proceeds is enforceable. In California, an
11 attorney's charging lien can be created by express contract.
12 Witkins California Procedure Attorneys Section 193 (Lexis 2005);
13 Saltarelli & Steponovich v. Douglas, 40 Cal. App. 4th 1, 6 (Cal.
14 Ct. App. 1995). The language of the written fee agreement of
15 September 22, 2003 here does create such a lien. Nothing further
16 is required to perfect the lien. It is in essence a "secret"
17 lien. In re Bouzas, 294 B.R. 318, 322 (Bankr. N.D. Cal. 2003).
18 The Ninth Circuit has recognized that this attorney's charging
19 lien survives in bankruptcy even if the case was settled just
20 after the bankruptcy filing. In re Pacific Far East Line, Inc.,
21 654 F.2d 664 ((9th Cir. 1981)(decided under Chapter XI of the
22 former Bankruptcy Act).

23 Due to the attorney's lien, the court need not consider
24 whether the hourly fees and costs incurred prior to the
25 bankruptcy case are simply an unsecured claim that does not have
26 an administrative expense priority.

27 For all the foregoing reasons, the application will be
28 approved. Applicant may submit an appropriate form of order

1 consistent herewith.

2 DATED: March 21, 2006.

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4 /S/
5 WHITNEY RIMEL, Judge
6 United States Bankruptcy Court
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