

POSTED ON WEBSITE  
NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

|                        |   |                        |
|------------------------|---|------------------------|
| In re:                 | ) | Case No. 08-26007-D-11 |
|                        | ) |                        |
| RICHARD J. LEWIS, III, | ) | DCN: SMR-5             |
|                        | ) |                        |
|                        | ) | Date: February 3, 2010 |
| Debtor.                | ) | Time: 10:00 a.m.       |
|                        | ) | Dept: D                |

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

## MEMORANDUM DECISION

On December 21, 2009, attorney Stephen M. Reynolds ("Counsel") filed a motion for a first and final allowance of compensation as counsel to the debtor (the "Motion"), Docket Control No. SMR-5. For the reasons set forth below, the Motion will be granted in part and denied in part.

## I. BACKGROUND

This voluntary chapter 11<sup>1</sup> case was commenced on May 8, 2008 by Richard J. Lewis, III (the "debtor"). Insofar as Counsel's employment and compensation are concerned, the case has suffered from a lack of attention to detail from the beginning. At the time the case was commenced, Counsel filed a statement pursuant to § 329(a) and Rule 2016(b) in which he certified that he had received a \$25,000 retainer for his services as counsel for the

1. Unless otherwise indicated, all Code, chapter, section and Rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

1 debtor. Over a year later, on August 26, 2009, after the court  
2 had required Counsel to account for his retainer, he filed an  
3 amended Rule 2016(b) statement indicating that the retainer had  
4 actually been \$23,500.

5 Within a month after the petition was filed, on June 5,  
6 2008, Counsel filed an application for approval of his employment  
7 as counsel for the debtor-in-possession. However, he failed to  
8 serve the application until October 29, 2008, and as a result, no  
9 order authorizing his employment was issued until November 10,  
10 2008.

11 In addition, as will be discussed below, despite the  
12 conditions contained in the order authorizing his employment,  
13 Counsel was apparently prepared to allow the case to be dismissed  
14 without court approval of his compensation.<sup>2</sup>

15 Counsel handled the process of confirming a plan with  
16 greater care, obtaining confirmation of the debtor's plan of  
17 reorganization (the "plan") in a timely manner, on December 15,  
18 2008.

---

19  
20 2. As with the majority of employment orders issued by this  
21 department, the order expressly provided that (1) no compensation  
22 would be permitted to Counsel except upon court order following  
23 application pursuant to §330(a), (2) that all funds received by  
24 Counsel in connection with this matter, whether denominated a  
25 retainer or said to be nonrefundable, were deemed to be an  
26 advance payment of fees and property of the estate, except to the  
27 extent Counsel demonstrated, in a Rule 2016(b) statement filed  
28 before ten days after issuance of the order, that such funds were  
received as the reasonable value of actual pre-petition services,  
and (3) that funds of the estate so constituting an advance  
payment of fees would be maintained in a trust account,  
withdrawals to be permitted only after approval of an application  
for compensation.

Dismissal of a chapter 11 case has the effect of vacating  
certain court orders; orders approving employment of counsel are  
not among them. See § 349(b)(2).

1 On June 12, 2009, PIDC Pennsylvania Venture Fund ("PIDC"),  
2 one of the debtor's largest creditors, filed a motion to set  
3 aside the plan confirmation order, or alternatively, to amend the  
4 plan or for relief from the automatic stay. PIDC's claim had not  
5 been disclosed by the debtor in his bankruptcy schedules. On July  
6 1, 2009, four other previously undisclosed creditors, together  
7 holding a claim double the amount of PIDC's, joined in PIDC's  
8 motion.<sup>3</sup> The debtor has since admitted that neither PIDC nor  
9 these four other creditors received timely notice of the case.<sup>4</sup>

10 The debtor met PIDC's motion not with opposition but with a  
11 motion to dismiss the case, in which he contended he was unable  
12 to complete the reorganization called for by the plan, that  
13 dismissal would put all creditors on an equal footing, and that  
14 conversion of the case to chapter 7 would not likely result in a  
15 meaningful distribution to unsecured creditors. Counsel set the  
16 motion to dismiss for hearing on August 19, 2009.

17 Thus, it was clear Counsel contemplated the case being  
18 dismissed as early as August 19, 2009, yet he had not sought  
19 approval of his compensation. As a result, on August 14, 2009,  
20 the court issued an order requiring Counsel to file a declaration  
21 accounting for his retainer and stating his intentions for any  
22 remaining balance. The court set a hearing for September 2,

---

23  
24 3. By civil minute order dated July 21, 2009, the court  
25 converted PIDC's motion to an adversary proceeding, as required  
by Rule 7001(5).

26 4. Counsel has testified he learned of these claims in May  
27 or June of 2009, long after the plan was confirmed, and that if  
28 he had known of the existence of these creditors, they would have  
received notice of the case and the plan. The court accepts this  
representation.

1 2009, and continued the hearing on the debtor's motion to dismiss  
2 to the same date.

3 Although Counsel filed a responding declaration on August  
4 26, 2009, as required, he did not file a motion to approve his  
5 compensation until October 21, 2009. In the meantime, on  
6 September 2, 2009, the court dismissed the case on terms  
7 agreeable to the debtor and the previously omitted creditors, and  
8 retained jurisdiction to determine fee awards.

9 Counsel's initial motion for approval of fees (the "Initial  
10 Fee Motion"), heard November 18, 2009, was fraught with defects -  
11 - (1) the motion and Counsel's supporting declaration were not  
12 signed; (2) the declaration stated that billing records were  
13 attached as an exhibit but the exhibit was missing; and (3) the  
14 motion passingly stated that contemporaneous time records were  
15 not submitted due to "computer problems," but rather, that the  
16 time records were reconstructed.<sup>5</sup> As a result of these multiple  
17 defects, the Initial Fee Motion was denied without prejudice.  
18 The court afforded Counsel an opportunity to file another motion,  
19 but made clear in both a tentative ruling and at the hearing on  
20 the Initial Fee Motion that Counsel's explanation as to the  
21 absence of contemporaneous time records was wholly inadequate and  
22 should be supplemented.

23 The present Motion followed. Counsel contends he applied  
24 \$5,030 of the retainer to pre-petition services and the filing

---

25  
26 5. This fact was not disclosed in Counsel's supporting  
27 declaration wherein he purportedly attaches a "true and correct  
28 copy of [his] billing records." Declaration of Stephen M.  
Reynolds in Support of Counsel's Motion for First and Final  
Allowance of Compensation as Counsel for Debtor, filed October  
21, 2009, ¶5.

1 fee, leaving a balance of \$18,500.<sup>6</sup> Although Counsel believes he  
2 provided at least \$27,900 worth of services post-petition (93  
3 hours at \$300 per hour), he seeks approval of \$18,500, the  
4 remaining balance of the retainer.

## 5 II. STANDARDS FOR EVALUATING FEE APPLICATIONS

6 Reasonableness of professionals' compensation in bankruptcy  
7 cases is determined by looking at the nature, extent, and value  
8 of the services rendered. § 330(a)(3); In re Eliapo, 298 B.R.  
9 392, 401 (9th Cir. BAP 2003). The relevant factors include the  
10 time spent, the rates charged, whether the services were  
11 necessary to the administration of, or beneficial at the time  
12 they were rendered toward the completion of the bankruptcy case,  
13 whether the services were performed within a reasonable amount of  
14 time commensurate with the complexity, importance, and nature of  
15 the problem, issue, or task addressed, whether the professional  
16 is board certified or otherwise has demonstrated skill and  
17 experience in the bankruptcy field, and whether the compensation  
18 is reasonable based on the customary compensation of comparably  
19 skilled attorneys in cases other than bankruptcy cases.  
20 § 330(a)(3).

## 21 III. ANALYSIS

22 Despite the court's admonitions, Counsel's present Motion  
23 and supporting declaration added nothing to his earlier single-  
24 sentence explanation of the absence of contemporaneous time  
25 records. This time, however, he did submit the exhibit

---

26  
27 6. Although Counsel's amended Rule 2016(b) statement  
28 indicates he received a retainer of \$23,500, his declaration  
indicates the retainer was actually \$23,530.

1 comprising his reconstructed time records.<sup>7</sup>

2       Particularly after the Initial Fee Motion was denied,  
3 Counsel was expected to demonstrate a heightened sense of caution  
4 and detail in his second attempt. Instead, at a minimum, the  
5 newly-submitted so-called time records reflect a gross  
6 indifference to the requirements a professional needs to comply  
7 with in representing debtors in chapter 11 cases.

8       The court recognizes that these time records were  
9 essentially reconstructed after the fact; yet the amounts of time  
10 Counsel has chosen to attribute to the enumerated tasks cannot be  
11 justified. For example, he billed one hour for a three-sentence  
12 notice of related cases, one and one-half hours for a standard-  
13 form order approving disclosure statement that required only that  
14 he fill in a few blanks, four hours for a three-paragraph  
15 conclusory opposition to a relief from stay motion with little or  
16 no factual or legal analysis, and five hours for a notice of  
17 motion and two-and-one-half page motion to dismiss case, on top  
18 of five and one-half hours for a debtor declaration and  
19 opposition to the PIDC motion that were never filed. Counsel has  
20 also charged for "filing" various documents -- a service that is  
21 secretarial in nature and therefore not chargeable. These and  
22 several other instances lead the court to conclude that Counsel  
23 has given little or no effort to accurately reconstruct his time  
24 records, and the resulting product deprives the time entries of

---

26       7. Continuing with the inattentive way in which Counsel has  
27 approached his compensation in this case, the Motion itself bears  
28 the same date as his earlier motion, and does not bear Counsel's  
signature, despite the court's notation in its tentative ruling  
that the earlier motion was not signed.

1 any credibility.<sup>8</sup>

2       However, regardless of how deficient Counsel's explanation  
3 and re-creation of his time entries, he did take the case through  
4 plan confirmation in a timely fashion. Thus, Counsel's services,  
5 to some extent at least, were necessary to the administration of  
6 the case and beneficial at the time they were rendered toward the  
7 completion of the case. Therefore, some amount of compensation  
8 will be awarded.

9       Based on the court's review of the record in this case, and  
10 given the court's general familiarity with the case, the court  
11 concludes that the rate charged (\$300 per hour) is not  
12 disproportionate to the quality of the services provided and that  
13 the services were performed competently. However, the gross  
14 indifference Counsel has demonstrated in processing his fee  
15 applications coupled with the extreme and obvious overcharges in  
16 the time entries make it difficult for the court to conclude that  
17 the amount of time allegedly spent (93 hours) is proportionate to  
18 the problems addressed by Counsel in the case. In these  
19 circumstances, therefore, the court will award Counsel the sum of  
20 \$15,000 for his post-petition services.

21 / / /

22 / / /

23

24       8. The court has considered Counsel's supplemental  
25 declaration, filed January 11, 2010, but finds that it does  
26 little to correct the problem. The court also recognizes  
27 Counsel's comment at the hearing that certain listed blocks of  
28 time may include other services, such as reviewing a related  
pleading, that are not described in the entry. However, the  
debtor has the burden of proof on this Motion (Eliapo, at 402),  
and this explanation does not account for any of the particular  
blatant overcharges listed above.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IV. CONCLUSION

For the reasons set forth above, Counsel will be awarded compensation for services rendered and reimbursement of costs incurred in the total amount of \$15,000 for the post-petition period. The balance of funds held by Counsel in his trust account shall be returned to the debtor. The court will issue an appropriate order.

Dated: February 10, 2010

/s/  
ROBERT S. BARDWIL  
United States Bankruptcy Judge