United States Bankruptcy Court
District of New Mexico

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Description:	Memorandum Opinion re: [184-1] Application For Compensation to Moses Law Firm (Fees: $ 80,172.78, Expenses: $ 3,009.43) by Stephen Sigurdson, Sandra Sigurdson, [146-1] Second Application For Compensation (Fees: $ 26,356.88,) by Chris W Pierce, William F Davis, [106-1] First Application For Compensation (Fees: $ 24,419.93, Expenses: $ 1512.27) by Chris W Pierce .				
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Comments: Memorandum Opinion on (1) First and Second Fee Applications of Debtor's Counsel and Objections Thereto, (2) APplication for Reimbursement of Creditor's Expenses and Objections Thereto, and(3) Form of Order Confirming Debtor's Plan

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
ASSET MANAGEMENT CORP.,
Debtor. No. 11-01-10819 SA

MEMORANDUM OPINION ON (1) FIRST AND SECOND FEE APPLICATIONS OF DEBTOR'S COUNSEL AND OBJECTIONS THERETO, (2)APPLICATION FOR REIMBURSEMENT OF CREDITOR'S EXPENSES AND OBJECTIONS THERETO, and (3) FORM OF ORDER CONFIRMING DEBTOR'S PLAN

Before the Court are the first and second fee applications of counsel for the estate (Davis & Pierce, P.C.) (docs 106 and 146 respectively) and the Sigurdsons' creditor application for reimbursement of expenses (docs 184 and 185) under the "substantial contribution" provision of 11 U.S.C. § 503(b)(3)(D) and (b)(4). The estate counsel's applications cover only the period from the beginning of the case in February 2001 through the end of that year.

This decision also implicates the form of order confirming the Debtor's Second Amended Plan of Reorganization filed August 13, 2001 (doc 86), as modified by the Debtor's Second Modification of Second Amended Plan of Reorganization Pursuant to 11 U.S.C. § 1127(a) filed December 21, 2001 (doc 140) (together "Debtor's Plan").

The applications at issue are more specifically as follows:

First Debtor's Application (13 Feb – 31 Jul 2001) (doc 106):

Without consideration of substantive issues, the requested amount is actually $24,866.17, which is $25,932.20 (the written amount applied for in the application) for fees, costs and tax, less $854.40 for the billing in excess of $200/hr (as calculated by Davis & Pierce and announced in opening statement at the evidentiary hearing on May 13, 2002), and less $211.63 ($200 plus gross receipts tax at the rate of 5.8125%) for the one hour of work by Mr. Davis on February 9, 2002, before the filing of the employment application. The Employment Order (doc 50), paragraph 8(E) required the disclosure of billings for prepetition services for a ruling at this time; however, it appears that counsel has not sought compensation for any such services so no such ruling is required. Both applications seek payment for bookkeeping services for the Debtor, mostly for production of the operating reports. That employment and the work done will be addressed below.

Second Debtor's Application (1 Aug – 31 Dec 2001) (doc 146):

Again without consideration of the substantive issues, the requested amount is $26,356.88 for fees, costs and tax, which includes a deduction for the fees charged in excess of the $200/hr currently allowed for Mr. Davis' services.

Sigurdsons' Application for Allowance and Payment of Expenses filed 11 June 2002 (docs 184 and 185):

The total amount sought is $80,132.78 for attorney fees and tax, costs of $3,009.43 and expert accounting fees of $4,666.92 (plus interest).

Background

The genesis of this chapter 11 case came about when Sandra and Stephen Sigurdson won large verdicts in state district court against the shareholders of the corporation, Douglas Bauder ("Bauder") and Janet Mehler ("Mehler"), and against the corporation, for breach of contract and for violations of the New Mexico Unfair Practices Act. Bauder and Mehler filed individual chapter 13 cases (both later converted to chapter 7) and the company filed this voluntary chapter 11 case. The Sigurdsons also filed an involuntary chapter 11 petition against a related company, U.S.A. Corporation (also owned by Bauder and Mehler), which case, by tacit agreement of the parties, has not moved much beyond the initial pleading stage.

From the outset, as might be expected, the two sides fought each other, making these cases a landscape of struggle on several fronts. (Despite the occasionally exhibited background animosity between the parties, counsel for both sides have conducted themselves with their usual exemplary

professionalism.) The estate pursued and the Sigurdsons resisted the release of about $20,000 attached by the Sigurdsons prepetition; ultimately the funds came into the estate. The Sigurdsons sought to consolidate this chapter 11 case with the involuntary U.S.A. Corporation chapter 11 case and the individuals' chapter 13 cases, a somewhat novel tactic that failed. (The reason for the proposed consolidation was that three of the Debtor's four store leases were in the name of the other corporation or one of the shareholders.) The Sigurdsons also unsuccessfully sought the appointment of a chapter 11 trustee. And over the course of a year, each side sought confirmation of its own plan and several modified versions thereof, and resisted the efforts of the other to do the same. The Court initially entered an order confirming the Creditor plan (doc 187), then reconsidered that decision and ruled that an order confirming the Debtor's Plan should be entered (doc 203). This opinion and order on compensation and reimbursement is being entered immediately prior to the entry of the written confirmation order so that the provisions of the Debtor's Plan which call for an auction can be implemented. (A portion of the discussion in this opinion discusses the confirmation of that plan.) Each side opposes the compensation or reimbursement of the other's

professionals, and the United States Trustee, following confirmation of the Sigurdsons' plan, questioned some of the reimbursement sought by the Sigurdsons.

Debtor's Counsel's Applications

Sigurdsons' objections to the applications are several. In their objection to the first application (doc 115), they begin by arguing that Davis & Pierce had a conflict of interest such that no compensation is due. The record, including the testimony, makes it clear that Davis & Pierce initially represented Bauder and Mehler as the two of them began their subsequently converted chapter 13 cases. However, the firm quickly recognized the potential conflict of interest, and ceased the representation of the two individuals, accepting no payment for any services and returning to the Asset Management estate a $2,000.00 retainer that had been intended for the Bauder and Mehler chapter 13 cases. The Court finds that the Debtor suffered no harm or cost from this potential conflict before it was cured, and that it never ripened into an actual conflict of interest. Subsequently Davis & Pierce worked closely with Mr. Ottinger, chapter 13 (and later chapter 7) counsel for the two individuals. Davis & Pierce explained that the statements of Bauder and Mehler, as officers of the corporate Debtor, were

closely scrutinized, whichever case they appeared in, and in consequence it was important that both counsel coordinate their efforts closely, even to the point of both appearing at some hearings in both cases. The Court accepts this explanation in part because it is credible, in part because the background animosity between the parties is evident and adds credibility to the testimony, and in part because Sigurdsons' explication of the conflicts is only one possible (and somewhat speculative) explanation of the behavior of counsel.

Sigurdsons also argue that the Debtor's plans have been skewed in favor of Bauder and Mehler as shareholders and as individuals, such as by making certain provisions contingent on Bauder and Mehler retaining control of the Debtor, by not characterizing the subleases differently, by providing an advantage to Bauder and Mehler in the bidding process (which bidding is required to comply with the absolute priority rule), and by refusing to accede to the involuntary petition filed against the companion U.S.A. Corporation. Without going into detail except as below, the Court finds that the objections are not well taken.

Counsel for a debtor corporation must necessarily take their directions from the corporation's officers who will

often also be the corporation's shareholders, and a consequence of that will be that the plan and the management of the case will likely favor the retention of current management and otherwise reflect their interests at least to some degree. "[T]he Code contains a presumption that the debtor will be permitted to operate its business as a debtor in possession after entry of an order for relief,... This assures the debtor considerable control over operations and plan negotiations." 7 Collier on Bankruptcy (15th Ed. Rev. 2002) ¶ 1100.01, at 1100-3. The result is a conflict of interest inherent in the Code provisions for chapter 11 debtors in possession. "The debtor in possession is now wearing the hat of the trustee and acting in a fiduciary capacity on behalf of the unsecured creditors.... Practical men and women will recognize a serious gap between theory and practice here." Citicorp Acceptance Company, Inc. v. Robison (In re Sweetwater), 884 F.2d 1323, 1329 n. 7 (10th Cir. 1989) (approval of assignment of estate's avoiding powers to a fund trustee for collection purposes). (Quotation marks and citation omitted.) Counsel cannot be expected to act contrary to the lawful and ethical direction given them by management. Rather, the Code provides that this built-in bias is counteracted, at least in part, by the creditors acting in

their own interests, 7 Collier on Bankruptcy (15th Ed. Rev. 2002) ¶ 1100.01, at 1100-5-6, and by the oversight of the office of the United States Trustee.

U.S.A. Corporation is a New Mexico corporation whose stockholders and officers are also Bauder and Mehler. Sigurdsons filed an involuntary chapter 11 petition against U.S.A. Corporation on July 17, 2001, No. 11-01-14927 SA; the corporation, represented by Davis & Pierce, contested the petition. No final (evidentiary) hearing has ever taken place on the petition, and the case is still pending. U.S.A. Corporation appears to be the owner of two of the real property leases and five or six equipment leases. See Sigurdon's objection to the Debtor's Motion for Posting of Bond under 11 U.S.C. § 303(e)in the U.S.A. Corporation case, doc. 16 pages 3-4.

U.S.A. Corporation's opposition to the petition would be consistent with all the other actions taken in the Asset Management case by management, not only because one would not expect a corporation necessarily to accede to an involuntary bankruptcy petition, but also because the management of both corporations, and specifically Asset Management, could reasonably attempt to keep control of their business assets, including the subleases. There is no conflict between the two

clients such as would require the disqualification of Davis & Pierce from the representation of both clients. See In re Interwest Business Equipment, Inc. v. United States Trustee (In re Interwest Business Equipment, Inc.), 23 F.3d 311, 318-19 (10th Cir. 1994) ("By our decision today, we do not hold such simultaneous representation of related estates in bankruptcy is per se prohibited. Instead, each such application must be evaluated on its own merits.").

Sigurdson's objections to the second fee application of Debtor's counsel are similar but not identical to the first objection. Objection to Second Interim Application by Attorney for the Debtor for Allowance and Payment of Compensation, at 1 (doc 153). The Court has already addressed the conflict of interest issue, and no more need be said, except to agree that the presumably inadvertent entry for 3/10 of an hour for working on the U.S.A. Corporation case must be disallowed. ($52.50 [.3 x $175] plus gross receipts tax.)

In addition, Sigurdsons argue in essence that all the work done on the Debtor's plans, until the preparation and filing of the Second Modification, was of no benefit to the estate and therefore should not be compensated. Id. at 1-3. In part, this cannot be true, since by definition the Second Modification must have as its base the initial plan. More

than that, of course, is the basic work of initiating and carrying forward the chapter 11 case, including filing schedules and statements, appearing at the section 341 meeting, seeing that operating reports are filed, and getting a plan and disclosure statement filed.

It is true that it took the Debtor a considerable time to finally file a plan which treated the creditors fairly enough to be confirmable. The Second Modification was filed 10 ½ months after the petition was filed, and only under the pressure of the Sigurdsons' filings. Further, the Debtor's plan insisted on paying Bank of Albuquerque as if it had a fully secured claim. Presumably the Debtor did that because the officers had personally guaranteed that debt, as testified to by Mr. Bauder on redirect examination by Mr. Pierce on October 15, 2001, and because the Debtor needed a consenting (slightly) impaired claim for its plan. See 11 U.S.C. § 1129(a)(10). The treatment of Bank of Albuquerque's secured claim should have been treated accurately from the beginning. And another delay arose when from the denial of confirmation of the Debtor's plan following the November 29, 2001 confirmation hearing for several reasons, among them the Debtor's refusal at that time to accept the "net profits" definition which the Debtor did ultimately agree to (thereby

raising questions about management’s good faith in representing the interests of the creditors), and the continuing lack of answers from management about the company’s outside income (pumpkin sales), its net operating losses, depreciation and officers’ salaries. Finally, there is the curiosity of the unauthorized post-petition loan of approximately $20,000.00 to the estate from a shareholder's parents, and the unauthorized repayment of that sum, and its belated and poorly explained appearance in the operating reports. While the loan undoubtedly benefitted the estate at a critical time, management should have disclosed to counsel the loan and its later repayment so that the proper notice could have been given.

The foregoing are all instances of behavior which resulted in unnecessary delay and cost to the estate and its creditors. Given the nature of the behavior, the Court has assumed that the Debtor’s officers rather than counsel caused the delay and cost. For that reason, the Court has not reduced counsel fees accordingly, although if Bauder and Mehler were to contest this assignment of responsibility, either personally or through Davis & Pierce, the Court would reconsider this finding.

Another concern arises from the charge for "accounting" services at the rate of $80.00 per hour. As a preliminary matter, the Debtor's Motion to Employ Attorneys (doc 4) and accompanying notice (doc 8) do not in their titles provide any notice of this proposed employment, and the text of the two documents only briefly mention this service. The Supplemental Affidavit of William F. Davis and Disclosure of Compensation Pursuant to Rules 2014 and 2016 (doc 10) states that Diane Miles-Kazimiroff has an accounting degree, has successfully completed all portions of the Certified Public Accounting examination, but has not accumulated the requisite experience for that designation, at 1, and that her services "are generally of a paralegal nature, in that she assists with the preparation of required court documents, and supporting exhibits, rather than providing books and accounting for the day to day operations of the Debtor." Id. at 2. The Court's order approving the employment of Davis & Pierce includes the approval for these services at the requested rate, so the Court will allow compensation at that rate for such services as are compensable. In the future, however, if Davis & Pierce wish to seek approval to provide "accounting" services to an estate in the context of an application to employ counsel, that request must be more prominent, such as in the title of

the motion and the notice, and accompanied by text in the motion constituting a description of the services to be rendered that is at least as extensive as the description appearing in Mr. Davis' supplemental affidavit (doc 10).

The accounting services rendered to the estate were of questionable value. Although Mr. Kassicieh maintained the books for the Debtor (according to his testimony at the October 15-16, 2001 confirmation hearing), the operating reports prepared or supervised by Ms. Miles-Kazimiroff were inaccurate in material respects. For example, from February 2001 through October 2001 the monthly net income agreed with the monthly cash flow (i.e., MOR-2 agreed with MOR-3), and this number tied into the Postpetition Cumulative Profit or Loss on the balance sheet (MOR-1). Starting in November 2001 and continuing through the most current report, however, net income never again agreed with the monthly cash flow, and there was no explanation given why these numbers were different. In some months the difference was significant: e.g., January 2002 net loss of $3,857 compared to negative cash flow of $25,715, the later of which included an unexplained "non-operating disbursement" of $20,618 which was not calculated into the monthly profit/loss. The forms MOR-7 also contained numerous inaccuracies. For example, the

December 2001, January 2002 and February 2002 MOR-7 forms state that there are no postpetition taxes due or wage payments past due. An attachment to the March 2002 MOR-7 shows that taxes had in fact been delinquent for September 2001 through January 2002, and that wages had not been paid to Bauder and Mehler since February 2001 (except for June and July 2001). The March operating report also contained amended MOR-4 forms for May 2001 through August 2001 showing unpaid postpetition taxes and amended MOR-7 forms showing unpaid wages and taxes from February 2001 through March 2002. In summary, the operating reports had untimely information that was incorrect.

The inaccuracies were evident from the confirmation hearings on October 15-16, 2002, November 29, 2001 and April 30, 2002. Ms. Miles-Kazimiroff's efforts did contribute some value to the estate, in that the reports were not completely useless, but without confidence that the reports are accurate in all material respects, their utility to the estate is considerably reduced.

In the category of "Operating Reports" in the two applications, Davis & Pierce has sought compensation for Ms. Miles-Kazimiroff's work at the rate of $80.00 per hour for a total of 20.9 hours. In light of the deficiencies in the work

in this category and the resulting difficulty experienced by Sigurdsons and the Court in being able to track the finances of the Debtor at the various confirmation hearings, none of the time billed by Ms. Miles-Kazimiroff will be allowed for these two applications. (This reduction is not as draconian as it appears, since the Court is not disallowing any of the time in the Operating Reports category incurred by Messrs. Davis or Pierce.) And the criticism of the Operating Reports work done (or not done) by Davis & Pierce should not obscure the facts that this has not been an easy case and that most of the attorney work has been done by Mr. Pierce at a rate of $175.00 per hour rather than the higher rate which Mr. Davis charges.

The result of the reductions is that the amount allowed for both applications in the Operating Reports category is ($3,514.50 - $30 [overbilling of .4 hour at $275.00/hour] - $1,672.00 =) $1,812.50 plus tax. Taking all these numbers together, Davis & Pierce is allowed fees, costs and New Mexico gross receipts taxes of $49,366.57 for both applications for the period from February 13, 2001 through December 31, 2001 ($24,866.17 + $26,356.88 - $52.50 -$1,672.00 - $30.00 - $101.98 [tax on $1,672 + $30 + $52.50]).

The most recent operating report on file (September 2002, filed November 11, 2002 – doc 210) shows that the estate has incurred unpaid liabilities for taxes of approximately $12,000.00, a loan of $4,000.00, and, left over from 2001 when the debtor was struggling with cash flow, approximately $28,000.00 in back wages to Bauder and Mehler. (An order has been entered allowing the trustee for Mehler's chapter 7 case an administrative claim for chapter 11 post petition wages of $7,240. Doc 188. Presumably this claim is subject to § 1129(a)(9).) The Court's own research suggests additional counsel fees (from January 1, 2002) of approximately $23,000.00; however, given that there as been no further application for approval of the professional fees to date, and the August and September 2002 operating reports have omitted the accruing Davis & Pierce professional fees for some reason, the Court will not further consider this item in this opinion.

The operating reports show a cumulative net profit, for the first nine months of CY 2002 only, of $14,716. But because the accuracy of the operating reports is suspect, the Court is hesitant to rely on them for the year-to-date status of the company. The testimony of Debtor's officers at the October 2001 confirmation hearing was that the profits of the company would be at least $20,000.00 per year, and at that

same hearing, Mr. Rowe testified that his estimate of yearly profitability of $25,000 to $30,000 could be improved, even without taking into account income from any outside sources such as pumpkin and Christmas tree sales. Based on the numbers from Bauder, Mehler and Rowe, which in any event are roughly consistent with the operating report figures, the Court believes that this Debtor can make the payments to counsel as ordered herein, albeit partly over time, and still continue to operate.

As of the end of July 2002, it appears that Debtor's counsel had been paid $18,834.00, based on the (so far) uncontested statement of Sigurdsons' counsel. Response [by Sigurdsons] to Judge's Letter of September 19, 2002 Regarding Applications for Compensation and Reimbursement, at 2 (doc 204). Thus, Davis & Pierce are still owed $30,531.57 in unpaid fees. (Any fees paid after July 2002 can be credited against bills incurred in calendar year 2002 and dealt with in a subsequent application.)

This attorney-fee figure, together with the approximately $44,000 which the estate owes in back taxes, the unpaid loan and the back wages, means that the estate, as of September 2002, owed about $74,500 in chapter 11 expenses. These numbers raise a question about the utility of this

reorganization to the unsecured creditors, and perhaps even of feasibility. However, both sides argued for confirmation (albeit of their own plans) rather than conversion or dismissal, and neither side presented evidence from the operating reports or any other source about the current financial status of the company. In other words, both sides wanted the business to continue rather than lose it. In consequence, the Court orally ruled (twice, as a matter of fact) to confirm a plan. However, in confirming the Debtor's Plan, the Court had no intention of approving a process whereby the Debtor pays little more than taxes and administrative expenses over the five-year period of the plan so that unsecured creditors receive a token payment and the shareholders end up with the business. "According to the good faith requirement of section 1129(a)(3), the court looks to the debtor's plan and determines, in light of the particular facts and circumstances, whether the plan will fairly achieve a result consistent with the Bankruptcy Code. The plan must be viewed in light of the totality of the circumstances surrounding confection of the plan...." In the Matter of Madison Hotel Associates, 749 F.2d 410, 425 (7th Cir. 1984) (citations and internal quotation marks omitted); see also In re MCorp Financial, Inc., 160 B.R. 941, 959 (S.D. Tex. 1993)

("A plan must be proposed in good faith, and the faith of the proposal is ascertained from the objective consequences of the plan, not the moral consciousness of the various proponents.") In effect, the treatment of the attorney fees, and the amount and treatment of administrative expenses more generally, are in this case figuring into the implementation of the Debtor's Plan.

With respect to the fees of Debtor's counsel, the Debtor's Second Amended Plan of Reorganization (doc 86) provides in part as follows:

> Paragraph 1.25: "Fee Request" shall mean an Administrative Claim filed by a Professional person for fees and costs incurred in [sic] behalf of the Debtor or the Committee in this Reorganization Case.
>
> Paragraph 2.1: "Payment of Administrative Claims and Fee Requests.... All Allowed Fee Requests shall be paid in the amount determined by an Order of the Bankruptcy Court approving such Fee Requests, as soon as practicable after the entry of an Order of the Bankruptcy Court approving such Fee Requests, or as may otherwise be agreed upon in writing between the Reorganized Debtor and each such Claimant...."

The Debtor's Second Modification (doc 140) provides in part as follows:

> Change # 5, at page 5: "The term 'Net Profits' shall mean the sum of the total receipts..., less the costs and expenses paid by the Reorganized Corporation, <u>including</u> the cost...to provide the goods and services offered for sale."

(Emphasis added.) Construing the term "including" to mean "including but not limited to", see 11 U.S.C. § 102(3), the Debtor's Plan permits reorganization fees to be paid as part of the operating expenses of the company, and thus to be taken into consideration in reaching the "net profit" figure.

For confirmation of the Debtor's Plan, the Court has been presented with differing proposed orders of confirmation from the two sides for confirmation of the Debtor's Plan. The key difference is that the Sigurdsons' proposed order contains an additional paragraph 16, which provides that the proceeds of the auction will be immediately distributed to the unsecured creditors (rather than first to allowed but unpaid administrative expenses), and that the administrative claims will either be paid out from the reorganized Debtor's post confirmation income or by some reasonable arrangement that the claimant and the reorganized Debtor agree on. The effect is to deliver what might be a one-time lump-sum payment to the unsecured creditors before payment to the administrative claimants. The provisions of the proposed paragraph 16 are contrary to the provisions of § 1129(a)(9), and therefore cannot be imposed on an administrative claimant, even if the result is that the unsecured creditors face the possibility of receiving only a portion of the token $500/month payments.

However, for the reasons set out above it is appropriate, in a different way and on another theoretical basis, to in effect subordinate payment of a portion of the compensation to payment of the claims of unsecured creditors. (The alternative would be to disallow altogether the portion of the compensation to be subordinated.) The Court will order that $15,000.00 of the allowed compensation not yet paid to counsel may be paid by the reorganized Debtor out of its income, but may not be counted as an expense of the business for purposes of calculating the "Net Profit" of which 75% is to be paid to the unsecured creditors. The remainder – $15,531.57 – shall be subject to the provisions of § 1129(a)(9). This treatment does not award the full amount of fees as an administrative cost to be paid immediately, thereby in effect not punishing the unsecured creditors, who are innocent; it places the burden of paying the full amount of the fees on the corporation, which was responsible for the decisions that caused such a delayed confirmation; and it does not ultimately punish the law firm for following the instructions of the corporate officers (which is what the Court presumes happened here, there being no testimony otherwise), although the result is that full payment to the firm will be delayed (beyond the delay that Debtor's counsel may agree upon for the $15,531.57,

in order to facilitate confirmation and implementation). No later than Friday, December 27, 2002, Davis & Pierce shall file and serve on counsel the treatment of its § 507(a) claim which the firm agrees to or demands for the $15,531.57, pursuant to paragraph 2.1 of the Debtor's Plan and § 1129(a)(9).

The Sigurdson Application

The Sigurdson application (the form of which was meticulously prepared and very helpful to the Court) asks for reimbursement for a variety of activities, including not only creditor plan preparation and opposition to the Debtor's plans, but also, among other things, reviewing schedules, conducting a Rule 2004 examination of the shareholders, preparing a proof of claim, monitoring the operating reports, moving to consolidate with other cases, seeking the appointment of a trustee, and contesting the return of garnished funds to the estate (Adv. Proc. 01-1028).

The Sigurdsons' application will be denied. It is clear that the unsecured creditors are better off (at least from the limited vantage point of this early stage in the post-confirmation process) as a result of the Sigurdsons' participation, but the Sigurdsons have not made a "substantial contribution" as that term of art has come to be used in the

Code and in bankruptcy case decisions. Section 503(b)(3)(D) allows reimbursement of the actual, necessary expenses incurred by a creditor in making a "substantial contribution" in a chapter 11 case, and § 503(b)(4) allows reasonable compensation and reimbursement of expenses for professional services reasonably incurred by such a chapter 11 creditor. However, the standard set by Haskins v. United States (In re Lister), 846 F.2d 55 (10th Cir. 1988) precludes the award of any reimbursement in this case.

In Lister, the Tenth Circuit considered whether a bankruptcy court was clearly erroneous when it denied a creditor (Haskins) all of the $326,000 sought by the creditor when he (1) prepetition, gathered information on the debtor's assets and enjoined their transfer, and also commenced garnishment and attachment proceedings, which resulted in the freezing of several hundreds of thousands of dollars which the trustee recovered, (2) post-petition, sought out and negotiated the sale of the estate's assets and proposed the only reorganization plan, although none of the efforts resulted in a sale or confirmed plan, and (3) post-petition, rendered further assistance to the estate, including the recovery of $35,000 – $40,000 in hidden assets. The Tenth Circuit ruled that the benefits rendered were of (1)

"incidental", (2) "no" and (3) "little" benefit to the estate respectively.

The court ruled that the creditor undertook his prepetition efforts solely to collect his judgment, and could not have been undertaken with a view to benefitting the estate which at the time did not even exist. The benefits were thus merely "incidental" and therefore not compensable under § 503(b)(3)(D). Id. at 57. The court found in the statute a requirement that addresses the motivations of the creditor, in addition to whatever objective impact the creditor's action has on the estate. "Generally, creditors are presumed to act primarily in their own interest and not for the benefit of the estate as a whole." Id., citing In re Jensen-Farley Pictures, Inc., 47 B.R. 557, 571 (B.C.D. Utah 1985). See also, e.g., In re Geriatrics Nursing Home, Inc., 195 B.R. 34, 39 (B.C.D. N.J. 1996) ("To succeed on a substantial contribution claim a creditor must demonstrate that its efforts transcended self protection." Administrative expense claim denied when it appeared that the goal of the creditor was the acquisition of the debtor or its assets.) But see Hall Financial Group, Inc. v. DP Partners Ltd. Partnership (In re DP Partners Ltd. Partnership), 106 F.3d 667, 673 (5th Cir.) cert. denied 522

U.S. 815 (1997) (Fifth Circuit considers irrelevant the incentive of self-interest).

In the instant case, the Sigurdsons are not seeking reimbursement for any prepetition activity. However, Lister does not explicitly limit to prepetition activities the theme of personal benefit or incentive as a factor that counsels against reimbursement from the estate. In consequence, the Court has taken into account the fact that the largest unsecured claim in this case is the Sigurdsons', and that a large portion of any increase in distribution to the unsecured creditors will go to them. While it is true that the size of the creditor's claim, or a correspondence of the applicant's self interest, do not alone preclude reimbursement, In re 9085 E. Mineral Office Building, Ltd., 119 B.R. 246, 251-52, nn. 13 and 14 (B.C.D. Colo. 1990), it is also true, in this Court's opinion, that the presence of those factors strengthens the presumption that the creditor is acting in its own interest. In this case, the Sigurdsons' claim of $341,000 is approximately 62% of the total of the unsecured claims voted in Class 5 of the Sigurdson plan. (Tally of Ballots, doc 103.) Taking into account all the nonpriority and non-administrative unsecured claims, including the approximately $16,500 deficiency claim of Bank of Albuquerque, the

Sigurdsons' claim still comprises more than 50% of the total unsecured debt.

Concerning the post-petition negotiations, and conceding that an award could be made even in the absence of a confirmed plan, the Lister court ruled that there was no "actual and demonstrable" or "direct and demonstrable" benefit to the estate when the creditor (unsuccessfully) negotiated a sale of the estate assets and a reorganization plan, and recovered $35,000 to $40,000 for the estate. In the instant case, there is no doubt that without the Sigurdsons' opposition, the return to the unsecured creditors would have been limited to a maximum of $500 per month for sixty months as originally proposed by the Debtor, plus the proceeds of the auction of the corporate stock, less what would have to be paid on the administrative and priority claims. See Objection to Confirmation of Debtor's First Amended Plan of Reorganization filed by the United States Trustee (raising the absolute priority rule objection) (doc 76). Now, the unsecured creditors will also receive some portion of 75% of the net profits of the business over the next five years. However, receipt of such value assumes the success of the confirmed Debtor's Plan, a relatively mild impact from the payment of administrative claims, and of course the existence of some

"net profits" during the next five years. So it is still not clear that Sigurdsons' efforts have resulted in significant additional value to the unsecured creditors, a fact which Sigurdsons candidly acknowledge. Response to Debtor's Objection to Sigurdsons' Attorney and CPA Fee Application, at 2 (doc 197). In consequence, the Court is unable to find that the benefit to the estate is "actual and demonstrable". Lister, 846 F.2d at 57. Compare In re 9085 E. Mineral Office Building, Ltd., 119 B.R. at 253 ("Only because of [Travelers'] pertinacity and willingness to compromise its own claim were the other unsecured creditors able to receive payment one-hundredfold.").

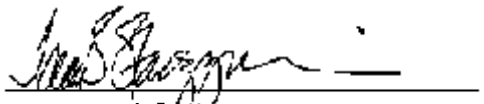
In addition, the Sigurdsons' expenditures in resisting the return of the $20,000 and in seeking consolidation and the appointment of a trustee did not "substantially contribute" to the benefit of the estate; rather, they retarded the progress of the reorganization. In re 9085 E. Mineral Office Building, Ltd., 119 B.R. at 250 n. 11, citing In re Calumet Realty Company, 34 B.R. 922, 926 (B.C.E.D. Pa. 1983) and In re Richton International Corporation, 15 B.R. 854, 856 (B.C.S.D. N.Y. 1981). This is a major factor that offsets the genuine benefit to the estate that resulted from the Sigurdsons' plan

activities, and constitutes one of the reasons for denying the Sigurdsons' application for reimbursement.

Finally, the Court shares the concerns of at least two of the bankruptcy judges for the District of Colorado, who perceive a need to exercise caution in awarding administrative expenses, since dollar-for-dollar administrative expense claims reduce the return to unsecured creditors. In re 9085 E. Mineral Office Building, Ltd., 119 B.R. at 250.

Whether any one of the foregoing factors (Sigurdsons' self interest, proportional size of claim, questionable benefit to estate, offsetting actions taken by Sigurdsons, or minimizing administrative expense claims) is sufficient to result in denial of the application, it is clear that all five factors taken together mandate no award. In making this decision, the Court has not found it necessary to use what appears to be a useful test in 4 Colliers on Bankruptcy (15th Ed. Rev. 2002), ¶ 503.10[5][a]. The Court has also found it unnecessary to decide whether the Sigurdsons adequately disclosed, either in the disclosure statements accompanying their (unconfirmed) plans or otherwise, their intention to file an administrative claim, and for what amount. See In re Diberto, 164 B.R. 1, 3-4 (B.C.D. N.H. 1993); In re Oxford Homes, Inc., 204 B.R. 264, 269-271 (B.C.D. Maine 1997).

An order will issue consistent with this opinion, after which the Court will enter the confirmation order.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on December 18, 2002, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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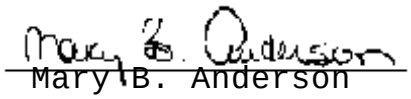

Mary B. Anderson