Entered on Docket
September 04, 2007

Hon. Mike K. Nakagawa
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re ELY J. ADES, MARSHA GOODHEAD ADES, Debtors.	CASE NO. BK-S-00-11733-MKN Chapter 11
In re MARSHA E. GOODHEAD, M.D., a Nevada Professional Corporation, Debtor.	CASE NO. BK-S-01-15523-MKN Chapter 11 DATE: February 20, 2007 TIME: 9:30 a.m.

MEMORANDUM DECISION REGARDING SUPPLEMENTAL FEE APPLICATIONS OF SULLIVAN, HILL, LEWIN, REZ & ENGEL AND WILLIAM A. LEONARD, JR., TRUSTEE

This matter was heard on February 20, 2007. The appearances of counsel and parties were noted on the record. After oral arguments were presented, the matter was taken under submission. Each party was permitted to file an additional affidavit or declaration in support of their respective positions. The evidentiary record closed on March 5, 2007.

BACKGROUND

On March 13, 2000, Ely J. Ades and Dr. Marsha Goodhead Ades ("Debtors") commenced a joint Chapter 7 proceeding denominated Case No. 00-11733. William A. Leonard, Jr. was appointed as the Chapter 7 trustee to administer the case.

On May 31, 2001, Marsha E. Goodhead, M.D., A Nevada Professional Corporation (the "Corporate Debtor") commenced a voluntary Chapter 11 reorganization proceeding denominated Case No. 01-15523. Thereafter, Mr. Leonard ("Trustee") was appointed as the Chapter 11 trustee for the Corporate Debtor's estate while remaining as the Chapter 7 trustee of the individual Debtors' estate.

On October 18, 2001, the Trustee filed a motion seeking to convert the Debtors' personal case to Chapter 11, to consolidate the Debtors' personal case with the Corporate Debtor's case, and to approve a disclosure statement accompanying the Trustee's proposed Chapter 11 plan. (Docket No. 223) The Trustee requested that the conversion and consolidation be accomplished through the proposed Plan.

On May 31, 2002, after the disclosure statement was approved, the Court entered an order (a) confirming the Trustee's Plan of Reorganization Dated March 28, 2002 ("Confirmed Plan"), (b) establishing the Plan's effective date as June 17, 2002, (c) converting the Debtors' personal Chapter 7 proceeding to Chapter 11, and (d) substantively consolidating both bankruptcy proceedings. ("Plan Confirmation Order") (Docket No. 293) The Confirmed Plan provided for the continued operation of the Corporate Debtor's business and coordinated full payment of all claims in the consolidated cases.[1] Thereafter, the Confirmed Plan was fully consummated and all allowed claims were paid in full.

[1] A copy of the Confirmed Plan is attached as an exhibit to the Plan Confirmation Order.

On March 30, 2004, the Debtors filed a Motion for Final Accounting, Distribution, and Disgorgement of Funds. (Docket No. 357) The basis for the Debtors' motion was that the Trustee had not filed a final accounting or an application for a final decree closing the consolidated cases. In addition, the Debtors alleged that the Trustee took approximately $40,000.00 out of the estate to pay for post-confirmation administrative fees without Court approval and that the post-confirmation administrative fees were excessive.

On April 1, 2004, the Trustee responded by filing a Motion to Close Case (Docket No. 358) requesting the Court to enter a final decree (1) revesting the Corporate Debtor with full corporate authority, (2) authorizing distribution to the Corporate Debtor of the remaining assets of the consolidated estates, including a bank account (subject to the Trustee's retention of a small trust account to pay administrative fees and costs), (3) discharging the Trustee from any further duties and obligations for the consolidated cases, (4) closing the consolidated cases, and (5) reserving jurisdiction over the proceedings. Both motions were heard on May 11, 2004, after which the Court entered an order denying the Debtors' motion (Docket No. 362), but deferred entry of an order on the Trustee's motion.

On October 29, 2004, the Court entered a Final Decree Closing Consolidated Case. ("Final Decree") (Docket No. 398) The Final Decree closed the consolidated cases <u>nunc</u> <u>pro</u> <u>tunc</u> to September 30, 2004 and discharged the Trustee from any further duties and obligations. The case was administratively closed on September 14, 2005. (Docket No. 403)

On June 13, 2006, the Office of the United States Trustee ("UST") filed an ex parte motion to reopen the bankruptcy case and to reappoint the Trustee. (Docket No. 404) The UST's motion alleged that in spite of its numerous requests, the Trustee had failed to file a final accounting of the assets and that the Trustee was still holding approximately $17,657.48 in one money market account and $123.79 in a separate account. <u>See</u> Ex Parte Motion of the United

States Trustee for an Order Reopening Case Pursuant to 11 U.S.C. §350(B) at 2:25 to 3:2. On June 14, 2006, an order was entered granting the UST's motion. (Docket No. 407)

On July 14, 2006, the Trustee filed an ex parte application to re-employ the law firm of Sullivan, Hill, Lewin, Rez & Engel ("SHLRE") as general counsel (Docket No. 409) and on July 17, 2006, an order was entered approving the requested employment. (Docket No. 412)

On August 2, 2006, the Debtors filed a motion against the Trustee for turnover ("Turnover Motion") of the funds identified in the UST's motion and also requested that the appointment of SHLRE be rescinded or that work performed by SHLRE be paid for by the Trustee and not by the Debtors. (Docket No. 413) The Trustee opposed the motion, indicating that after the case was reopened, the remaining estate funds had been applied to the outstanding administrative claims of SHLRE and the Trustee. (Docket No. 415) According to the record, the amounts paid were $11,791.34 to SHLRE and $6,010.45 to the Trustee. See SHLRE invoice dated July 19, 2006, attached as Exhibit "A" to Declaration of James P. Hill in Support of Supplemental Fee Application ("Hill Declaration 1") and Invoice dated October 12, 2006, attached as Exhibit "A" to Declaration of William A. Leonard, Jr. in Support of Supplemental Fee Application.[2] Moreover, the Trustee argued that he could not file a final accounting because of Debtors' failure to provide a copy of a bank statement for an account that the Debtors

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[2] In connection with these supplemental fee applications, the Trustee has submitted five separate declarations. For ease of reference, the Declaration of William A. Leonard, Jr. in Support of Supplemental Fee Application filed January 23, 2007 (Docket No. 435) will be referred to as "Trustee's Declaration 1"; the Declaration of William A. Leonard, Jr. Re Approval of Supplemental Fee Application of Sullivan, Hill, Lewin, Rez & Engel filed on January 24, 2007 (Docket No. 439) will be referred to as "Trustee's Declaration 2"; the Supplemental Declaration of William A. Leonard, Jr. in Support of Supplemental Fee Application filed on February 16, 2007 (Docket No. 442) will be referred to as "Trustee's Declaration 3"; the Declaration of William A. Leonard, Jr. in Support of Joint Reply to Opposition to Fee Applications also filed February 16, 2007 (Docket No. 445) will be referred to as "Trustee's Declaration 4"; and the Supplemental Declaration of William A. Leonard, Jr. in Support of Fee Applications filed March 5, 2007, will be referred to as "Trustee's Declaration 5".

had opened shortly before entry of the Final Decree. On November 30, 2006, the Court issued an order denying the Debtors' Turnover Motion as moot since the Trustee was no longer holding any of the funds and also denying Debtors' request to withhold compensation to SHLRE inasmuch as no request for compensation had been made. (Docket No. 431)

On January 23, 2007, both SHLRE and the Trustee filed separate supplemental applications for fees and expenses. ("SHLRE Supplemental Fee Application" and "Trustee's Supplemental Fee Application") (Docket Nos. 434 and 435, respectively) Debtors filed written opposition to both applications ("Debtors' Opposition") (Docket No. 441) and renewed their request that the funds in the Trustee's account at the time the case was reopened be turned over to the Debtors.[3]

DISCUSSION

Article 4(K) of the Confirmed Plan provides in relevant part that:

> "Compensation for services rendered and for reimbursement of expenses by a Professional Person after the Confirmation Date need not be approved by the Bankruptcy Court. Professional Persons may invoice the Trustee and/or the Reorganized Debtors directly, and the Trustee and/or the Reorganized Debtors may pay such invoices without further Order of the Bankruptcy Court; provided, however, that in the event of a dispute regarding such compensation or reimbursement, the Professional Person may submit an application to the Bankruptcy Court for review of the request for compensation and reimbursement, and the Bankruptcy Court retains jurisdiction to hear and approve such application and to compel payment thereon."

Article 1(1.35) of the Confirmed Plan defines a "Professional Person" to include any attorneys employed with court approval by the estate as well as the Trustee. Paragraph 4 of the Plan Confirmation Order appoints the Trustee to continue as the trustee under the Confirmed Plan.

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[3] Debtors additionally request that they be reimbursed the amount of $46,200 in legal and accounting fees allegedly incurred as a result of the Trustee's failure to file a final accounting and to close the case. <u>See</u> Debtors' Opposition at 5:22-25.

Although the Final Decree was entered, the Plan Confirmation Order specifically provides that “Notwithstanding the entry of such a final decree and the closing of the bankruptcy cases, the Court shall hear controversies arising thereafter that are within the scope of the provisions of the Plan (or other Order of this Court) regarding retained jurisdiction over the bankruptcy cases and the parties in interest thereto.” Plan Confirmation Order at ¶ 12. Under the Plan, the Court retains jurisdiction over disputes involving the compensation of professionals. See Confirmed Plan at Art. 4(Q)(1)(d).

1. Previous Fees Awarded During the Case.

In the Debtors’ personal case, SHLRE filed an application for approval of first and final compensation on July 8, 2002. See First and Final Application for Payment of Fees and Costs of Counsel for Chapter 7 Trustee (“SHLRE Chapter 7 Fee Application”)(Docket No. 311). In the Corporate Debtor’s case, SHLRE filed an application for allowance of interim compensation on November 14, 2001, see Application for Order: (1) Authorizing Employment of Allf & Paustian in Association with Sullivan, Hill, Lewin, Rez & Engel as Trustee’s Counsel; and (2) Allowing First Interim Fees and Costs for Trustee’s Counsel (“SHLRE Interim Fee Application”)(Docket No. 69 in Corporate Debtor’s Case) as well as an application for second and final allowance of fees in the personal case (after consolidation) on July 8, 2002. See Second and Final Application for Payment of Fees and Costs of Counsel for Chapter 11 Trustee (“SHLRE Final Fee Application”)(Docket No.314).

In an Order entered in the Corporate Debtor case on January 9, 2002 (Docket No. 98 in Corporate Debtor’s Case), SHLRE was awarded interim compensation in the amount of $54,547.50 plus costs in the amount of $2,175.63. In an Order entered on August 23, 2002 (“2002 Fee Order”) (Docket No. 337), SHLRE was awarded first and final fees in the Debtors’ personal bankruptcy proceeding in the amount of $216,150.50 plus costs in the amount of

$18,532.55. Requests for allowance of travel time and pre-award interest as a fee "enhancement" were denied. The 2002 Fee Order further awarded to SHLRE second and final fees in the Corporate Debtor's case in the amount of $56,655.00 plus costs in the amount of $3,990.55. Allowance of compensation for travel time and pre-award interest again was denied. The 2002 Fee Order also confirmed the previous award of interim fees and costs to SHLRE in the Corporate Debtor's case.

The 2002 Fee Order awarded the Trustee first and final fees in the Debtors' personal bankruptcy proceeding in the amount of $31,558.69 plus costs in the amount of $30.00, in addition to second and final fees in the Corporate Debtor's case in the amount of $30,183.69 plus costs in the amount of $621.00. The Trustee's requested allowance of pre-award interest also was denied. The 2002 Fee Order also confirmed a previous award of first interim fees to the Trustee in the Corporate Debtor's case in the amount of $24,565.65 plus costs in the amount of $476.75.

Based on the foregoing, the total amount of fees and costs previously awarded to SHLRE in the consolidated cases was $352,051.73 and the total amount previously awarded to the Trustee in the consolidated cases was $87,435.78. According to the monthly and quarterly reports filed by the Trustee, SHLRE was paid $352,051.34[4] and the Trustee was paid $87,436.39

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[4] Article 4(N)(7) of the Confirmed Plan requires the trustee to file quarterly operating reports after plan confirmation until the case is closed. <u>See also</u> Plan Confirmation Order at ¶ 11. The docket reflects that the Trustee did so. The Trustee's Quarterly Operating Report ending September 30, 2002 ("2002 Quarterly Operating Report")(Docket No. 350) includes a Cash Receipts and Disbursements Record for payments made out of the Corporate Debtor's checking account maintained at JPMorgan Chase Bank. That Record indicates that Check Nos. 107, 108, 117 and 127 were issued to SHLRE in the total amount of $112,972.97. According to the Cash Receipts and Disbursement Record accompanying the Trustee's Quarterly Report ending December 31, 2002 (Docket No. 351), the Chase Bank checking account for the Corporate Debtor was emptied on or about October 30, 2002, when the remaining funds were transferred to the money market account maintained by the Trustee in the lead case, i.e., the Debtors' personal bankruptcy proceeding that was filed first. The Quarterly Operating Report ending September

as of September 30, 2004[5].

According to 2004 Quarterly Operating Report, additional post-confirmation fees of $47,791.49 were paid to SHLRE[6] and additional post-confirmation fees of $88,465.61 were paid to the Trustee[7]. Thus, the total amount of all pre-confirmation and post-confirmation fees paid to SHLRE prior to reopening the case was $399,842.83 and the total amount of all pre-confirmation and post-confirmation fees paid to the Trustee prior to reopening of the case was $175,902.00[8].

2. <u>The Supplemental Fees Requested.</u>

SHLRE's Supplemental Fee Application seeks additional compensation for work performed from August 2, 2004 through February 16, 2007. In support of the application, SHLRE has submitted copies of invoices dated September 17, 2004, July 19, 2006, August 25,

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30, 2004 ("2004 Quarterly Operating Report") (Docket No. 422) also includes a Cash Receipts and Disbursements Record for payments made out the checking account maintained at JP Morgan Chase Bank for the Debtors' personal case. That Record indicates that Check Nos. 111, 114, 132, 146, 155, 167, 175, 183, 191, 199 and 211 were issued to SHLRE in the total amount of $239,078.37 for preconfirmation legal fees and expenses. Combined with the amounts paid from the Corporate Debtor's checking account, the total payment for preconfirmation services was $352,051.34 to SHLRE. As noted, all such amounts previously were approved by the Court.

[5] The 2002 Quarterly Operating Report shows payments made out of the Corporate Debtor's checking account to the Trustee in the total amount of $56,002.39 by Check Nos. 109, 110, 119 and 129. The 2004 Quarterly Operating Report indicates that the Trustee was paid an additional $31,434.00 from checking account for the Debtors' personal case for preconfirmation fees and costs by Check Nos. 113, 133, 147, 156, 168, 176, 184, 192, 200, and 212. Combined with the amounts paid from the Corporate Debtor's checking account, the total payment for preconfirmation services was $87,436.39 to the Trustee.

[6] The 2004 Quarterly Operating Report indicates that SHLRE was paid the additional $47,791.49 for post-confirmation fees and costs by Check Nos. 122, 123, 160, 271 and 274.

[7] The 2004 Quarterly Operating Report indicates that the Trustee was paid the additional $88,465.61 for post-confirmation fees and costs by Check Nos. 124, 125, 159, 214, 240, 270 and 275.

[8] The payment figures do not include the $11,791.34 paid to SHLRE and the $6,010.45 paid to the Trustee after the case was reopened.

2006, September 21, 2006, October 13, 2006, November 21, 2006, December 12, 2006, and February 16, 2007. See Exhibit "A" to Hill Declaration 1 and Exhibit "A" to Supplemental Declaration of James P. Hill in Support of Supplemental Fee Application of Counsel for Chapter 11 Trustee ("Hill Declaration 2")(Docket No. 443). Those invoices reflect that for the period August 2, 2004 through August 31, 2004, SHLRE's attorney's fees were $7,729.00 and its expenses were $1,002.74. There are no invoices reflecting any services by SHLRE from September 1, 2004 through June 25, 2006. For the period from June 26, 2006, i.e., after the case was reopened, through February 16, 2007, the invoices reflect that SHLRE charged fees in the amount of $21,817.00 and advanced costs in the amount of $534.03.[9] If these figures are added to the amounts previously allowed and paid, the total amount of attorney's fees and costs paid to SHLRE's for services in this Chapter 11 proceeding would be $430,925.60.

The Trustee's Supplemental Fee Application seeks additional fees for the period between May 27, 2004 and February 16, 2007. In support of the application, the Trustee has submitted copies of invoices dated June 23, 2006, October 12, 2006, and February 16, 2007. See Exhibit "A" to Trustee's Declaration 1 and Exhibit "A" to Trustee's Declaration 3. The invoices reflect that for the period September 2, 2004 through March 17, 2006, the Trustee's fees were $3,574.00 and no costs were incurred. For the period from June 16, 2006, i.e., after the case was reopened, through February 16, 2007, the invoices reflect that the Trustee's fees were $17,730.00 plus costs of $99.00. The total amount requested for the entire period is $21,304.00 as fees and

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[9] According to SHLRE's invoices, as of September 17, 2004, it was owed a total of $8,731.74 for services performed through August 31, 2004. There is no evidence in the record of any services having been provided between August 31, 2004 and June 26, 2006. The invoice dated July 19, 2006, shows a "previous balance" owed of $16,745.51, but there is no evidence of any services provided in the cases that would explain the difference between the "total due" amount of $8,731.74 set forth in the September 17, 2004 invoice, and the "previous balance" amount of $16,745.51 set forth in the July 19, 2006 invoice.

$99.00 as reimbursement for costs. If these figures are added to the amounts previously allowed and paid, the total amount of fees and costs paid to the Trustee for services in the consolidated bankruptcy proceedings would be $197,305.00.

3. Debtors' Objections to Payment of Supplemental Fees.

Debtors object generally to the payment of any further fees to professionals in this case. As discussed below, the bulk of Debtors' written argument focuses on the delay between the entry of the Final Decree and the filing of a final report by the Trustee. At oral argument, Debtors acknowledged that they have no objections to the specifics of the invoices presented as to the tasks performed, the time taken, or the reputation of counsel or the Trustee. No question was raised that the services set forth in the invoices were actually and competently performed.

That the Trustee is statutorily required to file a final accounting and report with the UST and the Court in order to close the case, see 11 U.S.C. §§ 1106(a)(1) and 704(9), also is not disputed. Even though he had not done so, the Trustee mistakenly believed he was relieved of providing a final accounting and report after the case was administratively closed on September 14, 2005. See Trustee's Declaration 4 at ¶ 6 and Trustee's Declaration 5 at ¶ 10. The case was reopened at the UST's request in June 2006 to ensure that the Trustee files a final accounting and report which still had not been done.

While neither side denies that the Trustee is required to file a final accounting, both sides blame each other for the delay in doing so. The Trustee portrays the Debtors as being amongst the least cooperative debtors in his long experience as a bankruptcy trustee, see Trustee's Declaration 5 at ¶ 3, while the Debtors deny that they ever were uncooperative in any way. See Affidavit of Ely J. Ades and Marsha Goodhead (Docket No. 446) ("Ades Affidavit") at ¶¶ 3, 27, 30, 31 and 32. All of the accounting information, however, apparently was provided to the Trustee by the Debtors' accountant. Id. at ¶ 7. Debtors' accountant states that he cooperated with the Trustee and complied with all requests "to the end of the Bankruptcy Chapter 11 case on September 2004", see Affidavit of Clarice M. Goldberg, CPA dated August 28, 2006 ("Goldberg Affidavit") at ¶ 9, but never states that he provided a copy of the new bank account statement prior to the case being reopened.

After the Final Decree was entered in October 2004, the Trustee indicates that he requested information regarding the new money market account opened by the Debtors but was never provided copies of the bank statement. The Trustee's uncontradicted testimony is that he did not receive a copy of the statement for the new bank account until after the case was reopened. See Trustee's Declaration 4 at ¶¶ 4 and 5 and Trustee's Declaration 5 at ¶¶ 5 and 7. The Trustee's testimony is consistent with the documentary evidence submitted by the Debtors in connection with their Turnover Motion. See Memo from Goldberg Maroney Accociates (sic) LLP to Ely Ades, dated July 17, 2006, attached to [Debtors'] Motion for Turnover of Funds and Objection to Appointment of Counsel (Docket Nos. 413 and 417). See also Second Declaration of William A. Leonard, Jr., in Support of Trustee's Opposition to Motion for Turnover of Funds and Objection to Appointment of Counsel (Docket No. 421) at ¶ 7 and Supplemental Declaration of William A. Leonard, Jr., in Support of Trustee's Second Opposition to Motion for Turnover of Funds and Objection to Appointment of Counsel (Docket No. 423) at ¶ 4.

Debtors also argue that the Trustee paid SHLRE approximately $300,000 in attorneys fees during the Chapter 11 proceeding without court authorization. See Ades Affidavit at ¶ 25. As previously discussed, however, the Court entered orders approving compensation and reimbursement of costs to SHLRE of $352,051.73 for preconfirmation services. Additionally, pursuant to Article 4(K) of the Confirmed Plan, the Trustee was authorized to pay professionals including himself without court authorization for postconfirmation services. Copies of the invoices for postconfirmation services were sent to the Debtors, see Trustee's Declaration 4 at ¶

7 and Trustee's Declaration 5 at ¶ 11, and no objection was made to their payment. Indeed, at oral argument it was conceded that the invoices were received, reviewed and were never objected to by the Debtors.

After the case was reopened, however, the Debtors acknowledged having received invoices for the supplemental fees requested, but now object to the payment of any of them. See Exhibits "C" and "D" to Hill Declaration 1. The Debtors also complain that on or about September 2, 2004, the Trustee withdrew $25,000 from a money market account to pay the remaining fees of SHLRE and himself, thereby causing difficulties for the Corporate Debtor in meeting its operating expenses. See Ades Affidavit at ¶17. Although such difficulties may have occurred, there is no evidence in the record that the Debtors objected to the payment of such fees as authorized by the Confirmed Plan.

Debtors also contend that at a meeting on May 11, 2004, Mr. Ades and his counsel were informed by counsel for the Trustee that there were sufficient funds remaining to pay all administrative fees. See Ades Affidavit at ¶16. Debtors concede, however, that "...on or about September 13, 2004, a new account was established and all deposits after September 15, 2007 (sic) were made to the new money market account #120067641." Id. at ¶19. A review of the exhibits submitted by the Debtors reveals that a new business money market account was opened at BankWest of Nevada on September 13, 2004, bearing account number120093693 (rather than 120067641), and showed that deposits totaling $42,345.87 had been made as of September 30, 2004. The same exhibits show that on or after September 13, 2004, deposits totaling $13,587.82 were made into business money market account number 120067641.[10] The Trustee's omnibus

[10] Scattered amongst the records attached as Exhibit "A" to the Ades Affidavit are copies of a BankWest of Nevada statement for business money market account number 120067641 generated 10/1/2004 at 9:41:00 AM and a BankWest of Nevada statement for business money market account number 120093693 generated 10/1/2004 at 9:41:18 AM, along with

claim objection also was not heard until October 27, 2004, and the order resolving the claim objections was not entered until November 2, 2004. Moreover, the Final Decree was not entered until October 29, 2004, which closed the case as of September 29, 2004, sixteen days after the new money market account was opened. Thus, there were continuing matters left to be resolved after May 11, 2004, and even more that arose after the Debtors opened the new bank account prematurely.

Neither side is without responsibility for the delay in filing a final accounting in this case. The Debtors opened a new bank account prior to entry of the Final Decree in order to deposit funds for which the Trustee was statutorily required to provide an accounting. After the Trustee requested information regarding the new account, Debtors should have ensured that a copy of the bank statement was delivered. For his part, the Trustee should have known that the administrative closure of the case did not relieve him of his responsibility to do an accounting and to file a file report with the Court. He admittedly could have sought earlier relief from the Court to compel the Debtors to produce a copy of the bank statement. See Trustee's Declaration 4 at ¶ 5 and Trustee's Declaration 5 at ¶ 9. In short, both sides could have proceeded more expeditiously but neither one did so. The 2004 Quarterly Operating Report now having been filed, however, the only question is whether professional fees should be permitted for completion of the tasks required of the Trustee for closing the case.

4. Allowance of Supplemental Fees.

Reconciliation Detail reports for each account for the same period. Copies of the same statements and reconciliation reports are attached as Exhibit "A" to the 2004 Quarterly Operating Report. The new account also is identified in Schedule "H" of the 2004 Quarterly Operating Report as Account 3. Before the 2004 Quarterly Operating Report was filed, copies of the same statements and reconciliation reports also were attached to the Turnover Motion that the Debtors filed on August 2, 2006 (as well as the duplicate motion filed on September 18, 2006)(Docket No. 417).

SHLRE and the Trustee both seek compensation under 11 U.S.C. section 330(a)(6) for the time spent in preparation their supplemental fee applications. See SHLRE Supplemental Fee Application at 11:9-12 and Trustee's Supplemental Fee Application at 9:18-21. The statute expressly provides that the amount of such compensation must "be based on the level and skill reasonably required to prepare the application." 11 U.S.C. § 330(a)(6). With respect to the other fees sought in the applications, 11 U.S.C. section 330(a)(1)(A) allows the court to award to a trustee or professional person employed in the proceeding "reasonable compensation for actual and necessary serviced rendered". In determining the reasonableness of the requested compensation, bankruptcy courts are directed to consider "the nature, the extent, and the value of such service, taking into account all relevant factors, including (A) the time spent on such services, (B) the rates charged for such services, (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, (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed, (E)....whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title." 11 U.S.C. § 330(a)(3).

A. Fees Requested by SHLRE.

The Court has reviewed independently the invoices submitted by SHLRE in support of its request. The September 17, 2004 invoice reflects services reasonably provided to the Trustee for the period August 2, 2004 through August 31, 2004 that were not invoiced prior to entry of the Final Decree. The total amount invoiced and therefore allowed for that period is $7,729.00 for attorney's fees and $1,002.74 for costs advanced. The remaining invoices for 2006 also reflect services for the period June 26, 2006 through November 30, 2006, that were reasonably provided to the Trustee in connection with the reopening of the case and in responding to the Turnover Motion. At oral argument, Debtors asserted that it was not necessary for the Trustee to employ counsel at all since only a final accounting was left to be performed in the case. As previously noted, however, the bank statement required to complete that accounting was never provided until after the case was reopened. The total amount reasonably invoiced and therefore allowed for the period is $11,768.50, plus $361.25 for costs advanced.

As to the amounts requested for preparing and defending the instant fee application, the Court finds that a reduction in the requested amount is appropriate. The amounts requested for services in connection with the supplemental fee applications is set forth in SHLRE's billing statement dated February 16, 2007 encompassing services from January 8, 2007 through the statement date. Although the preparation and presentation of a fee application may constitute "actual and necessary" services to a bankruptcy estate, the court must still determine whether the amounts requested are reasonable. See In re Nucorp Energy, Inc., 764 F.2d 655, 662-63 (9^{th} Cir. 1985). Additionally, "...to be compensated for the time and expenses spent litigating a fee application, the fee applicant must demonstrate that the services for which compensation is sought satisfy the requirements of section 330(a)(4)(A) *and* that its case exemplifies a 'set of circumstances' where the time and expense incurred by the litigation is 'necessary' within the meaning of section 330(a)(1). See In re Smith, 317 F.3d 918, 928 (9th Cir.2002); In re Dimas, LLC, 357 B.R. 563, 592 (Bkrtcy.N.D.Cal. 2006).

The Court notes that SHLRE previously billed 23.4 hours and was paid $5,243.00 in fees for preparation of its first and final fee application as counsel for the Trustee in the Debtors' personal case. See SHLRE Chapter 7 Fee Application at 4:20-21. It also billed 2.5 hours and was paid $562.50 for preparation of its first interim fee application as counsel for the Trustee in the Corporate Debtor's case. See SHLRE Interim Fee Application at 4:4. And it also billed 62.5 hours and was paid $13,218.50 for preparation of its second and final fee application as counsel for the Trustee in the Corporate Debtor's case. See SHLRE Final Fee Application at 5:18-19.

SHLRE's supplemental fee application appears to have been cobbled together from its Final Fee Application as well as its opposition to the Turnover Motion. The only additional information is a narrative of the limited events occurring after SHLRE filed the Trustee's response to the Turnover Motion. Notwithstanding that most of the language in the latest fee application was simply reproduced, SHLRE's billing statement reflects that from January 8, 2007 through January 24, 2007, a total of 19.2 hours were charged in the amount of $4,272.00 for preparing the latest request (including a perfunctory supporting declaration), 15.2 hours of which were charged by attorneys. See Exhibit "A" to Hill Declaration 2. Another 6.6 hours were charged in the same period for preparing the Trustee's supplemental fee application resulting in additional fees of $1,194.00. Comparison of the Trustee's supplemental fee application and SHLRE's supplemental fee application, however, reveals them to be nearly identical. The same billing statement also shows that from February 7, 2007 through February 16, 2007, SHLRE billed another 19.5 hours totaling $4,582.50 for defending both of the supplemental fee applications. Costs advanced in the total amount of $172.78 also is reflected in the statement.

Under these circumstances, the Court concludes that presentation of the supplemental fee applications was necessary, but that the amount charged was excessive. The level and skill reasonably required to prepare the supplemental applications appears to have been minimal given that most of the drafting work already had been performed. Since SHLRE already was paid or will be paid for drafting work previously performed, allowing the same work to be charged again in preparing the supplemental fee applications would be duplicative. For these reasons, the Court will reduce to $1,500 the total compensation allowed to SHLRE for the preparation of both supplemental fee applications. The total amount reasonably invoiced and therefore allowed for the period January 8, 2007 through February 16, 2007 is $6,117.50.

In light of the foregoing, the Court will allow to SHLRE the total supplemental amount of $25,615.00 as attorney's fees and $1,536.77 as costs advanced for services rendered between August 2, 2004 and February 16, 2007. Against this allowed amount, SHLRE may apply the funds that were paid by the Trustee after the case was reopened, with the remaining balance to be paid by the Debtors.

B. <u>Fees Requested by the Trustee.</u>

Applying the same analytical framework under Section 330(a) to the Trustee's supplemental fee request, the Court has independently reviewed the Trustee's billing statements dated June 23, 2006 (for services from September 2, 2004 through June 28, 2006), October 12, 2006 (for services from June 26, 2006 through October 12, 2006), and February 16, 2007 (for services from November 8, 2006 through February 20, 2007). Although a substantial amount of time was expended in preparing a final accounting and report, the Court concludes that the time was justified given the complexity of the case, the disputes involved, and the litigious nature of the proceedings. As previously noted, the Trustee could have moved more quickly to compel the Debtors to produce the required bank statement, but there is no assurance that a lesser amount of legal effort would have been required albeit within a shorter period of time. The time expended was not excessive nor were the time entries duplicative of services provided elsewhere. While the Court notes that the Trustee's rate for services unilaterally increased from $205.00 per hour to $300.00 per hour beginning January 1, 2005, the Court believes that the latter hourly rate is appropriate for an experienced and well-credentialed bankruptcy trustee.

It appears, however, that use of the same analytical framework under 11 U.S.C. section

330(a) is inappropriate in this case. For reasonable compensation to a trustee, "the court shall treat such compensation as a commission, based on section 326." 11 U.S.C. § 330(a)(7). Under the statute, the maximum commission that may be awarded to a Chapter 7 or Chapter 11 trustee is based on the funds disbursed by the trustee during the administration of the case. See 11 U.S.C. § 326. In this consolidated case, the 2004 Quarterly Operating Report filed by the Trustee indicates that through September 30, 2004, the cumulative disbursements during the case, including operating expenses during the Chapter 11 proceeding, were $3,748,318. If that figure is used to calculate the maximum fees allowable to a bankruptcy trustee, see In re Orient River Investments, Ltd., 133 B.R. 729, 730 (Bkrtcy.E.D.Pa. 1991), then the most that may be allowed in this case under 11 U.S.C. section 326 is $135,699.54.[11] As previously discussed, the Trustee already has been paid $175,902.00 for services rendered prior to the reopening of the case.

All of the preconfirmation fees allowed to the Trustee were requested at and made at the statutory maximum allowable under 11 U.S.C. section 326(a). Compare Application for Order Allowing First Interim Compensation for Chapter 11 Trustee (Docket No. 70) at 2:14-23 and Supplement to Trustee's First Interim Application for Fees and Costs (Docket No. 94) at 2:12-14 and 3:13-16 with Order Authorizing First Interim Fees and Costs to Chapter 11 Trustee (Docket No. 122) at 2:1-6; and Chapter 11 Trustee's Second and Final Application for Payment of Fees and Costs (Docket No. 323) at 3:25 to 4:7 and Chapter 7 Trustee's First and Final Application for Payment of Fees and Costs (Docket No. 304) at 3:25 to 4:4 with Order on Final Applications

[11] Applying the formula set forth in 11 U.S.C. section 326 to the $3,748,318 cumulative disbursement figure set forth in the 2004 Quarterly Operating Report, the $135,699.54 amount is reached by tallying the following amounts: 25% of the first $5,000 ($1,250); 10% of next $45,000 ($4,500); 5% of the next $950,000 ($47,500); and 3% of the remaining $2,748,318 ($82,449.54).

by Trustee and Trustee's Professionals for Payment of Fees and Costs (Docket No. 337). It is well-established that 11 U.S.C. section 326 places a cap on a trustee's compensation even if the trustee might otherwise be entitled to a greater amount on an hourly fee basis. See 3 Collier on Bankruptcy ¶ 326.02[2][d] (15th rev. ed. 2006, Henry Sommer & Alan Resnick, eds.)[12]. Compare Matter of Rauch, 110 B.R. 467 (Bkrtcy.E.D.Cal. 1990)(discussing whether a Chapter 11 trustee is entitled to the statutory maximum even though he would be entitled to less on an hourly fee basis).

In certain circumstances, a Chapter 11 trustee may be appointed or employed in a different capacity under a confirmed Chapter 11 plan and paid without regard to the provisions of 11 U.S.C. section 326. See, e.g., In re Elder, 325 B.R. 292 (N.D.Cal. 2005)(plan administrator appointed with different duties under separate compensation scheme).[13] In the instant case, however, the Confirmed Plan makes no provision for a plan administrator, a liquidating trustee, or a disbursing agent. Moreover, the Plan Confirmation Order specifically provided for the Chapter 11 trustee to continue as the trustee under the Confirmed Plan, and not

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[12] At the cited paragraph, the treatise authors observe: "Although it is understandable that courts may find the application of section 326(a) harsh in some instances, the courts do not have discretion to award compensation in excess of that which is permitted under the section."

[13] In Elder, the district court affirmed the bankruptcy court's order confirming a plan of reorganization jointly proposed by the appointed Chapter 11 trustee and the unsecured creditors committee. On appeal, the debtor challenged the portion of the plan that allowed for the Chapter 11 trustee as plan administrator to be paid at her normal hourly rate rather than being subject to the fee cap under 11 U.S.C. section 326. The district court viewed the confirmed Chapter 11 plan at issue to be a contract between the interested parties and the plan administrator whose compensation would be controlled by the terms of the plan. 325 B.R. at 301-02. With little analysis, the district court concluded that the plan administrator was legally distinguishable from the pre-confirmation Chapter 11 trustee. Because the plan specifically provided for the Chapter 11 trustee as plan administrator to receive her normal hourly compensation, 325 B.R. at 295 and 300, the district court concluded that the compensation provisions under the confirmed plan applied rather than the provisions of 11 U.S.C. section 326. Id. at 302. In the instant case, there is no similar provision in the Trustee's Confirmed Plan providing for hourly compensation to the Trustee for postconfirmation services.

in any other capacity. See Plan Confirmation Order at ¶ 4. Indeed, the Trustee's counsel indicates that the Plan Confirmation Order "...allowed for the continued operation of the Corporate Debtor's business, [and] allowed for the Trustee to remain as trustee of both estates...." See SHLRE Supplemental Fee Application at 4:7-8.

The Trustee's responsibilities were not altered in any way under the Confirmed Plan and the Plan Confirmation Order merely added information to be included in the postconfirmation status reports. See Plan Confirmation Order at ¶ 11. Additionally, there was nothing in the approved disclosure statement accompanying the proposed plan that referred to a plan administrator, liquidating trustee, or disbursing agent being employed after confirmation or, more importantly, disclosing that compensation of the same person holding the same title would not be subject to the same requirements of 11 U.S.C. section 326 that had applied to all previous allowances of compensation. See Disclosure Statement to Trustee's Plan of Reorganization Dated October 1, 2001. (Docket No. 263) As the proponent of the Confirmed Plan, the Trustee would be hard pressed to justify such a glaring omission.

That the supplemental fees currently are being sought by the Trustee in his capacity as bankruptcy trustee also is evident from the declarations filed in this matter. In each of the five declarations filed by the Trustee in connection with the instant fee applications, the Trustee identifies himself as "the Court-appointed trustee of the consolidated bankruptcy estates of the debtors in the instant bankruptcy cases" and not in any other capacity. See Trustee's Declaration 1 at ¶ 1; Trustee's Declaration 2 at ¶ 2; Trustee's Declaration 3 at ¶ 2; Trustee's Declaration 4 at ¶ 2; and Trustee's Declaration 5 at ¶ 1. Likewise, the two declarations filed by SHLRE in connection with its fee application also refer to the client as being "the Court appointed trustee for the consolidated bankruptcy estates in these cases" and as "the Chapter 11 trustee for the consolidated bankruptcy estates of the debtors (collectively the "Debtors") in the instant bankruptcy cases." See Hill Declaration 1 at ¶ 1; Hill Declaration 2 at ¶ 2.

Because the Trustee's application apparently seeks compensation beyond the commission allowable to a bankruptcy trustee under 11 U.S.C. section 326, it will be denied. Since the issue has been raised sua sponte, however, such denial will be without prejudice to a showing by the Trustee that the statutory cap is not applicable or that the cap has not been exceeded in this case. See generally Collier on Compensation, Employment and Appointment of Trustees and Professionals in Bankruptcy Cases at ¶ 4.09 (2005 Alan Resnick, ed.)(summarizing cases where an attorney who is denied compensation sua sponte is given notice of the basis for the denial and opportunity to present legal argument or evidence in defense of the fee application)[14]. Compare In re Eliapo, 468 F.3d 592, 601-03 (9th Cir. 2006)(notice and hearing required under Bankruptcy Rule 2017(b) before court may sua sponte reduce presumptive fee award to counsel for Chapter 13 debtor).

5. Return of Funds Held at the Reopening of the Case.

The Final Decree provided that "The Trustee is authorized to distribute to the Corporate Debtor the remaining assets of the consolidated estates after payment of all outstanding administrative expenses in accordance with Article IV(K) of the plan of reorganization confirmed by the Court's Order entered May 31, 2002." See Final Decree at 2:17-19. Since Article 4(K) governs the payment of post-confirmation professional fees, the Trustee was permitted to use the available funds to pay outstanding expenses. The Court having reduced the fees only with respect to fees claimed by SHLRE and the Trustee after the case was reopened, the Trustee's payment of pre-reopening allowed fees was authorized by the Confirmed Plan. To the extent any of the payment to the Trustee was for services encompassed by his supplemental

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[14] None of the cases cited in this portion of the Collier treatise deal with a bankruptcy trustee whose fees have exceeded the statutory cap under 11 U.S.C. section 326.

fee application, however, that portion of the payment must be returned to the account for the estate and may be used to satisfy a portion of the supplemental fees allowed to SHLRE.

CONCLUSION

SHLRE's Supplemental Fee Application will be granted in the amounts set forth in this memorandum decision. The Trustee's Supplemental Fee Application will be denied without prejudice also as set forth herein. Separate orders on each application have been entered concurrently with this memorandum decision.

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