UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

Bristol Harbor Realty Associates,

Debtor.

CASE NO. 96-22697

DECISION & ORDER

BACKGROUND

On September 16, 1996, Bristol Harbor Realty Associates and related entities (collectively "Bristol") filed petitions commencing Chapter 11 cases. Bristol: (1) operated a golf course and a marina; (2) acted as a real estate agent to sell and rent condominiums at the Bristol Harbor Resort; and (3) owned, developed and sold nearby lots for single family residences and commercial businesses. Bristol had been experiencing financial difficulties for a number of years and had been engaged in lengthy and protracted workouts with a number of its creditors, including Canandaigua National Bank ("Canandaigua National") which held a first mortgage on Bristol's real estate, including the golf course, marina and undeveloped lots, as well as a security interest in all of Bristol's personal property.

The Chapter 11 was filed to stay a pending foreclosure sale which had been scheduled by Canandaigua National and to give Bristol one last opportunity to find a resolution to its financial problems.

Because of the protracted workouts with creditors most of Bristol's major creditors held either subordinate mortgages or unavoidable judgment liens on its real estate. During the initial stages of the Chapter 11 case many of these creditors: (1) were unsure of where they might fall on

the line between being secured and unsecured (where the "bubble" was) because the fair market value of Bristol's somewhat unique assets was unclear; and (2) did not file proofs of claim committing themselves to being treated as unsecured creditors. Therefore, although the Office of the United States Trustee (the "U.S. Trustee") was able to solicit and appoint a Committee of Unsecured Creditors (the "Committee"), the Committee did not include these "Bubble Creditors", it never retained counsel and it never was otherwise active in the case. However, many of the Bubble Creditors were active in the case, individually and through the involvement and participation of their attorneys.

Canandaigua National, on the other hand, immediately opposed the use of any cash collateral by Bristol and moved for relief from the automatic stay (the "Stay Motion") to be allowed to hold a foreclosure sale. Canandaigua National asserted that it and the other creditors had given Bristol every reasonable opportunity to reorganize itself by obtaining replacement financing, additional investors or a buyer for all or portions of its assets. Canandaigua National argued that there was no reason to believe that Bristol was now going to be able to accomplish in Chapter 11 what it could not previously accomplish.

Bristol, which asserted that there was great potential value in its golf course, marina and other real and personal property, opposed the Stay Motion and quickly filed a series of earn-out plans which were to be partially funded by some additional financing and investment. What became clear, however, was that the creditors, including Canandaigua National, had lost faith in Bristol's management, and would not support any reorganization plan, other than an outright sale plan, which involved that current management.

One of the Bubble Creditors in the case was Otto Layer and his related company, Layer Development Corp., (collectively "Layer") which together held unavoidable judgments against Bristol for an amount in excess of $700,000.00. Layer and its attorneys, Harter, Secrest and Emery ("Harter, Secrest"), called a meeting of the Bubble Creditors to discuss their options in the case, at which time it was agreed, or at least not opposed, that Harter, Secrest would prepare an alternative plan of reorganization (a "Creditors Plan"). This Plan was to provide that, in lieu of a foreclosure sale to be conducted by Canandaigua National, there would be an orderly liquidation sale of the component assets owned by Bristol, with bids to be made both "in bulk and in parcels," which was to be conducted by the Bankruptcy Court.

After negotiations among Canandaigua National, Bristol, Layer, several of the other Bubble Creditors and the attorneys for the respective parties, the Court entering a stipulated Order which provided for the automatic stay to be terminated to allow Canandaigua National to conduct its foreclosure sale on February 25, 1997, unless a plan was confirmed by the Court prior to February 1, 1997.

Harter, Secrest thereafter drafted and filed the Creditors Plan, an Amended Creditors Plan and various related pleadings and documents, including Confirmation Checklists. It also negotiated for acceptances of the Plans and performed all of the related services for a plan proponent. In addition, Harter, Secrest was instrumental in organizing a fee conference with the Court for the review of existing and projected administrative expenses, a conference which the Court requires in all Chapter 11 cases where it is anticipated that professional fees will exceed $25,000.00.

In the end, a buyer came forward and, with the involvement of Bristol, the secured creditors,

Layer, Harter, Secrest and the other Bubble Creditors, a consensual plan was negotiated and confirmed by the Court.

Layer and Harter, Secrest filed an Application for Approval of an Administrative Expense (the "Application") pursuant to Section 503(b)(3)(D) and (b)(4)[1]. The Application asserted that a

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[1] Section 503 provides in pertinent part:

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—
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> > (3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—
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> > > (D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;
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> > (4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant.

substantial contribution was made in the Chapter 11 case which would warrant the payment of such an administrative expense.[2]

The U.S. Trustee took no position on the Application because the unsecured creditors have been active in the Bristol Chapter 11 case and have taken a position on the Application. Bristol, the Reorganized Debtor, and one of the Bubble Creditors filed formal opposition to the Application. The remaining Bubble Creditors have taken what can only be termed a "neutral" position with respect to the Application. They have not formally opposed the Application, but they have not been willing to affirmatively state that they even believe that a substantial contribution has been made.

DISCUSSION

From the substantial contribution cases which have been decided under Section 503, including *In re Granite Partners, L.P.*, 213 B.R. 440 (S.D.N.Y. 1997) which sets forth a thorough discussion of the cases and the relevant policies and findings to be considered and made by the Court, we know that: (1) substantial contribution awards are designed to promote meaningful participation in the reorganization process, while at the same time discouraging the mushrooming of administrative expenses; (2) the statutory provisions regarding substantial contribution are to be narrowly construed, and do not change the basic rule that attorneys must look to their own clients for payment; (3) extensive participation by a creditor in a reorganization case is alone not sufficient; (4) substantial contribution awards are limited to those extraordinary situations where creditors

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[2] The Application requested an allowance for the legal fees for the services of Harter, Secrest in the amount of $20,777.00 and $249.48 for its disbursements.

actions lead to an actual and demonstrable benefit to the debtor's estate, to creditors, or, where relevant, to stockholders; (5) compensable services are those which foster and enhance, rather than retard and interrupt, the progress of a reorganization; (6) services for which no compensation is generally awarded are those which do not actually increase the size of a Chapter 11 estate or which deplete the assets of the estate without providing any corresponding greater benefit; (7) the court may consider whether the applicant's activities have increased administrative costs to the estate and whether the legal services were calculated to primarily benefit the attorney's client, even if they confer an indirect benefit to the estate; (8) the burden of proof regarding substantial contribution is by a preponderance of the evidence; (9) while the substantial contribution test is applied in hindsight, and scrutinizes actual benefit of the applicant's services to the bankruptcy case, the test for compensating court authorized counsel considers which services such counsel performed as being reasonably likely to benefit the estate, and does not rely on hindsight; and (10) to be entitled to a substantial contribution award, a creditor must demonstrate some actual or concrete benefit, such as the facilitation of a debtor's successful reorganization or added value to the estate.

It is noteworthy that none of the interested parties in this Chapter 11 case has denied that Layer and Harter, Secrest made a contribution to the case. However, none of them have been persuaded by their participation in the case or by the Application that the contribution was so substantial or of such a clear benefit to the estate or the unsecured creditors that it warrants the estate paying for the contribution.[3]

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[3] Actually, because of the provisions of the Confirmed Plan, any allowance would be paid by the Reorganized Debtor and would not affect the payment to unsecured creditors.

The interested parties which have objected to the Application have focused, quite properly, on the difference between an award of compensation pursuant to Section 330, where the test is whether the services were reasonably likely to benefit the debtor's estate at the time performed, *see In re Ames Dep't Stores, Inc.*, 76 F.3d 66 (2d Cir. 1996); *In re JLM, Inc.,* 210 B.R. 19 (2d Cir. BAP 1997), and Sections 503(b)(3)(D) and (b)(4), where the identical services may not be compensable because they did not actually benefit the estate.

This Chapter 11 case presented a somewhat unusual factual situation for this Court. If, after the meeting of Bubble Creditors, Layer had filed an unsecured claim and been added as a member of the Committee, and Harter, Secrest had been appointed as attorneys for the Committee before it performed the services covered by its Application, most if not all of those services would likely be compensable under Section 330. However, the interested parties which have opposed an allowance for those services have pointed out that other Bubble Creditors and their attorneys also performed important services in connection with the Chapter 11 case which contributed to the reorganization of Bristol. They have further pointed out that given the way the Chapter 11 case finally played itself out and the reorganization was achieved, at best, the services performed by Harter, Secrest, viewed as required in "hindsight," did not actually provide such a greater or more substantial contribution, or such a greater benefit to the estate, that would warrant the allowance of an administrative expense.

After reviewing all of the facts and circumstances of this somewhat unusual Chapter 11 case, including the Court's own observations as the case proceeded, I believe that an award of an administrative expense pursuant to Section 503 to Harter, Secrest is warranted. I feel that: (1)

Harter, Secrest, when it performed the services in question, believed that it was acting in a quasi-fiduciary capacity on behalf of all of the unsecured creditors, most specifically those Bubble Creditors who attended the November, 1997 meeting; (2) the services performed by Harter, Secrest were of benefit to the estate in that they: (a) did highlight the substantial interests of the unsecured creditors in the case and the potential value of Bristol's assets; (b) resulted in a fee conference with the Court; and (c) to some degree encouraged the buyer to come forward in the Chapter 11 case rather than at a bankruptcy or foreclosure sale; (3) since the Committee was never active in the case, Harter, Secrest's services were not duplicative of services that may very well have been rendered for the Committee, so an extra layer of administrative expenses was not created; (4) Harter, Secrest did make it known to the Bubble Creditors at the meeting in November, 1997 and to the Court at the fee conference that it expected to make a request pursuant to Section 503[4] to be compensated from the estate for its services; and (5) it is important in appropriate cases, especially in unusual factual situations, to insure that there is active, significant and appropriate creditor participation in the reorganization process and that such participation is not chilled by an unreasonable approach to appropriate applications for allowances under Sections 503(b)(3)(D) and (b)(4).

Nevertheless, I believe that such awards will remain rare and most likely will be granted only in unusual factual situations as was the case here.

After reviewing the services provided by Harter, Secrest in detail, and the effect of those

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[4] However, that expectation should have resulted in Harter, Secrest being focused on the importance of ensuring that its services in fact provided an identifiable benefit to the estate and to the reorganization, a test different from that employed pursuant to Section 330.

services on and their benefit to the reorganization process, I believe that an appropriate award under Sections 503(b)(3)(D) and (b)(4) for both legal fees and disbursements is $6,500.00.

IT IS SO ORDERED.

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HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: March 31, 1998