UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

CAVAGES, INC. Case No. 94-11658 K
fdba Onion Patch, Ltd.
fdba Buffalo Enterprises, Inc.
fdba Segavac Music, Inc.,
dba Cavages Hallmark

Debtor

Debtor's counsel originally submitted a fee application in this case which included only postconversion services ($11,139.00). Regarding his Chapter 11 services, Debtor's counsel indicated that he did not submit an application because he would look for payment only to a $10,000 retainer from the Debtor. At the direction of the Court, Debtor's counsel submitted a fee application for Chapter 11 services. That application requested fees of $21,620.00. The United States Trustee filed an objection to counsel's fee applications requesting the denial of all post conversion fees and the limitation of Chapter 11 fees to the $10,000 retainer.

The United States Trustee's objection to applicant's Chapter 11 fees is sustained and her willingness to limit those fees to the $10,000 retainer is perhaps even too generous, but will be approved by the Court. The bulk of the time spent by the Debtor in opposition to the creditor's motion to convert is not allowable. As I informed both the applicant and the creditor's attorney (perhaps more than once and perhaps well in advance of the hearing), in a liquidating case that does not involve a surplus for stockholders, and where there were prepetition transfers to or for the benefit of principals so that all active unsecured creditors seek conversion so that a

disinterested trustee could investigate the transfers to or for the benefit of those principals or their affiliates, the Debtor would have an uphill battle in convincing the Court to leave the principals of the Debtor in control. This seems so axiomatic that this writer is having difficulty understanding how a sophisticated bankruptcy attorney of the stature of this applicant could possibly "sincerely believe" otherwise.

Of course, if something extraordinary is demonstrated and the Court concludes in fact that the Debtor, rather than the participating creditors, is correct as to where the "best interest of creditors and the estate" (11 U.S.C. § 1112(b)) lies, then the effort would be clearly compensable from the estate. Even work done to arrive at the conclusion not to oppose the motion may be compensable. But work done (with creditors' money) pursuing a pipe dream is not compensable from the estate. As this writer recalls this case, the crux of the Debtor's argument was rather ordinary -- the Debtor believed that it would do a more diligent and effective job with regard to certain claims against landlords than would a Chapter 7 trustee. That clearly would not place the case outside the axiom, and the subtle hint in the applicant's submission that this writer somehow prejudged the issue against his client and denied him the opportunity to present something that might have won the day is expressly and unqualifiedly denied by this writer.[1]

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[1]In fact, though not relevant to today's decision, this writer observes that his recollection of the hearing and of the events of that day could well have suggested that the Debtor came to the hearing prepared to consent to conversion but hid that fact until the principals took advantage of the forum to testify under oath as to why they believed that prepetition transfers to them or for the benefit of them or their affiliates were entirely proper and nonavoidable. Only after that

testimony was elicited, but before the attorney for the creditors could offer other evidence, the Debtor surprised both the Court and counsel for the creditors by consenting to conversion. The events of that day, thus, if this writer recalls them correctly, could only have benefitted the principals and not creditors and the estate. This writer clearly recalls being left with the impression (although, again, not relevant to this decision) that the timing of the consent was carefully designed to assure that any trustee subsequently appointed could read the self-serving statements of the principals before deciding whether to sue them for insider frauds.

If the United States Trustee's arithmetic is correct, approximately $14,000 of the $21,620 sought by the applicant was spent in opposing the creditor's motion to convert. That arguably reduced the allowable preconversion fees to only $7,000. However, even if the Debtor had elected at the outset not to oppose the motion to convert, the applicant surely would have been entitled to compensation for some time in reviewing the motion to convert, exploring options and consulting with his client before reaching the decision not to oppose. Thus, the allowance would be somewhat more than $7,000.

On the other hand, the Court is distressed by the fact that the applicant never made application to the Court for preconversion fees and for an Order approving the drawdown of the retainer. Now that the Court has directed the submission of an application and time sheets it has discovered that some of the time which applicant asserts justifies his retention of the retainer is, in the Court's view, not allowable. Furthermore, it is this writer's custom and practice to systematically impose at least a small reduction whenever a fee applicant puts the United States Trustee or other parties in interest to the burden of having to object simply to get the supporting information that they were entitled to from the applicant in the first place. Moreover, this entire process of obtaining a suitable application and time sheets from the applicant, exchanges of correspondence, and deliberation by the Court, has delayed distribution to creditors in this case, and that delay is attributable, at least in part, to the applicant's unorthodox approach of neither seeking approval of retention of the retainer nor providing the supporting information, until he was directed to do so by the Court.

Thus, as the Court commented at the outset of this decision, the willingness of the

United States Trustee to permit the applicant to retain the $10,000 retainer seems overly generous. Nonetheless, the Court will approve the retention of the $10,000 retainer as full compensation and reimbursement for preconversion services.

As to the postconversion services, this writer has often and consistently held that the attorney for the Chapter 7 debtor may be compensated from the estate for legal services necessary to assist and enable the debtor to perform its duties under the Code, such as to file an appropriate final report and account, attend the Chapter 7 meeting of creditors and to assist the debtor in turning assets over to the trustee and otherwise performing the debtor's duty of cooperation. Not compensable from the estate, however, are legal services that become necessary because of the debtor's own errors or omissions. Thus, legal services that become necessary because the debtor has not timely performed its duties would not be compensable from the estate. Furthermore, legal services necessary for the debtor to oppose the activities of the case trustee or to defend the debtor against actions undertaken by the United States Trustee against the debtor are clearly not compensable from the estate. Legal services performed to accomplish matters that are the duties of the Trustee also would not be compensable from the estate. And, of course, legal services necessary to protect individual officers or directors of the debtor from legal obligations that result from the debtor's demise (such as a duty to pay wages, or a duty to issue wage statements) are not compensable from the estate unless the debtor is performing the duty for, and with the approval of, the case trustee and (when necessary) the approval of the Court.

It appears to the Court that the vast majority of the time entries after conversion

are for these noncompensable functions. For example, there are time entries for opposing the United States Trustee's motion to hold the Debtor in contempt for failure to timely file a final report and account. There are entries for time spent reviewing actions being undertaken by the Trustee as to which a corporate Chapter 7 debtor could have no legitimate interest. Some entries are ambiguous; for example the entry of February 28, 1995 for .3 of an hour involved in a telephone conference with the Trustee regarding a creditor's motion to force the Trustee to administer certain assets raises the question of "who initiated the call?" If the Trustee was seeking assistance from the Debtor's attorney, that would be compensable from the estate. But if the Debtor's attorney was simply choosing to involve himself in the Trustee's function, that would not be compensable from the estate.

On May 24, 1995, applicant billed .4 of an hour to "research §§ 554(c) and 725." This is one illustration of an entry that appears to relate to a matter that could be of no possible legitimate concern to the estate of a corporate Chapter 7 debtor, though it could be of great importance to the principals.

A vast number of entries relate to certain tax matters. Again, why those would be concerns of anyone other than the principals of the defunct Debtor rather than the estate of the Debtor, escapes the Court.

There are numerous other entries that may bespeak services that are not compensable under the standards stated above, but the Court is unable to fairly rule upon them, for lack of sufficient explanation. Consequently, although the Court greatly regrets the need to further delay the distribution of assets in this case, the Court must direct the applicant to submit

an amended application within 10 days for fees for postconversion services that deletes all entries relating to services that are not compensable from the estate in accordance with this decision. Otherwise, fees for postconversion services will be denied *in toto* and applicant will be considered to have been fully paid by retention of the retainer.

SO ORDERED.

Dated: Buffalo, New York
January 5, 1998

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Michael J. Kaplan, U.S.B.J.