United States Bankruptcy Court
Northern District of Texas
1100 Commerce Street, Room 1254
Dallas, Texas 75242-1496

Chambers of
Barbara J. Houser
United States Bankruptcy Judge

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June 10, 2003

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Re: *In re Network Cancer Care, L.P.*, Case No. 02-39409-11-BJH

Dear Counsel:

Pursuant to an Agreed Order entered by this Court on April 24, 2003, Network Cancer Care, L.P. (the "Debtor") and Colonial Bank (the "Bank") ask this Court to inspect, *in camera*, the fees and expenses incurred by the Bank from and after October 1, 2002 in connection with the enforcement of its Note and Deed of Trust and in connection with the Debtor's bankruptcy case, and determine what amount of fees and expenses the Bank should recover from the Debtor in accordance with section 506(b) of the Bankruptcy Code. In its submission, the Bank seeks to recover $60,099.00 in fees and $12,920.37 in expenses incurred during the relevant time period. The Debtor objects to the reasonableness of these fees and expenses and asks the Court to reduce the amount which the Bank can recover from the Debtor.

The parties agree that the Court should resolve this dispute on the papers submitted. No hearing is requested by either party. Thus, the Court has reviewed, in detail, the Bank's fee and expense request along with the various letters the parties have written addressing the legal and factual issues they believe relevant to assessing the reasonableness of the Bank's request for fees and expenses. The Court's analysis of the relevant issues is set forth below. This letter contains the Court's findings of fact and conclusions of law.

The Legal Standard

As relevant here, section 506(b) of the Bankruptcy Code provides that the Bank is entitled to recover, as part of its allowed secured claim, "any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." 11 U.S.C. § 506(b). In turn, in the Bank's Deed of Trust, the Debtor agreed to pay "all reasonable costs and expenses incurred by [the Bank] . . . includ[ing] . . . all appraisal fees, cost engineering and inspection fees, legal fees . . . ." Deed of Trust, section 3.23. Thus, the Court must determine whether the amount of fees and expenses sought by the Bank is reasonable.

In assessing the reasonableness of the Bank's requested fees and expenses, the Court must consider a number of factors. The parties agree that the Court, sitting through the Honorable D. Michael Lynn, correctly identified the relevant factors in *In re Cummins Utility, L.P.*, 279 B.R. 195 (Bankr. N.D. Tex. 2002). Thus, this Court will test the reasonableness of the Bank's requested fees and expenses "by the same standards as those applied to counsel employed under 11 U.S.C. § 327 or § 1103." *Id.* at 204. Moreover, the Court will consider "'the nature of the case and manner of its administration,'" and "whether the services performed were duplicative or unnecessary." *Id.* (quoting *Chase Manhattan Bank, N.A. v. Wonder Corp. of America (In re Wonder Corp. of America),* 82 B.R. 186, 190 (D. Conn. 1988)).

Application of the Legal Standard to the Facts

The Bank has divided the time spent on its behalf by the law firm it retained into seven (7) phases. Thus, the Court will analyze the reasonableness of the requested fees by phase.

Phase I includes the time spent in connection with the Bank's pre-bankruptcy efforts to foreclose and its pre- and post-bankruptcy efforts to sell its Note and Deed of Trust lien. Lawyers and a legal assistant spent a total of 19.6 hours for a total requested fee of $4,235.00 (a blended rate of $216.07 per hour).

Phase II includes the time spent in connection with the preparation and filing of a motion for relief from the automatic stay through the preliminary hearing on such motion, and attending the section 341 meeting of creditors and the interim cash collateral hearing. Lawyers spent a total of 36.3 hours for a total requested fee of $8,809.50 (a blended rate of $242.69 per hour).

Phase III includes the time spent pursuing claims against the guarantor and in assisting the Bank in responding to a grand jury subpoena. Lawyers spent a total of 4.85 hours for a requested fee of approximately $715.00 (a blended rate of $147.42 per hour).

Phase IV includes the time spent in preparing for a final hearing on the Bank's motion for relief from the automatic stay and in opposing the Debtor's requested use of PNB's cash collateral.

Lawyers and a legal assistant spent a total of 91.8 hours for a requested fee of approximately $22,782.50 (a blended rate of $248.18 per hour).

Phase V includes the time spent in connection with the preparation and filing of a motion for the appointment of an examiner and in connection with a criminal referral related to the Debtor. Lawyers spent a total of 44.8 hours for a requested fee of approximately $9,810.00 (a blended rate of $218.97 per hour).

Phase VI includes the time spent in settlement of various motions filed by the Bank including the stay motion and the examiner motion. A lawyer spent a total of 30.65 hours at $250 per hour for a requested fee of $7,662.50.

Phase VII includes various miscellaneous matters that do not fit into the other phases. A lawyer spent a total of 25.15 hours at $250 per hour for a requested fee of $6,287.50.

The Debtor's objection is focused on the time spent in connection with Phases IV, V and VI. From the Debtor's perspective, the Bank should have filed a motion for relief from the automatic stay, settled it conditioned upon adequate protection payments being made to the Bank at a preliminary lift stay hearing, and then waited to see what would happen with respect to the Debtor's efforts to reorganize. From the Debtor's perspective, the adequate protection payments it would have agreed to make would have insured no diminution to the Bank's collateral coverage during the pendency of the Debtor's bankruptcy case and, if the Debtor failed to make the required payments, the stay would have lifted without further order of the Court and the Bank could have foreclosed upon its collateral.[1] Because the value of the Bank's collateral exceeds the amounts owing to the Bank, less legal fees would have been incurred and the Bank would have been fully protected even if it had to foreclose after a default on such an adequate protection order.

Before turning to the Bank's response, the Court will address the reasonableness of the fees incurred in connection with Phases I, II, III, and VII. As noted previously, the Debtor made no specific objection to the reasonableness of these fees. After reviewing the detailed statements provided by the Bank, the Court finds that the actions taken by the Bank's lawyers were reasonably necessary to insure that the Bank's interests were protected. The hourly rates of the lawyers are reasonable.[2] The amount of time spent on given tasks appears reasonable. Thus, the total fees requested in connection with these phases of work are reasonable and are allowable as part of the Bank's allowed secured claim.

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[1]Of course, there was no such agreement so the Debtor's argument describes a hypothetical agreed order conditioning the automatic stay.

[2]The lead lawyer on behalf of the Bank, Timothy Vineyard, is a very experienced bankruptcy attorney. Mr. Vineyard's rate of $250.00 per hour is quite low for a lawyer of his experience in the Dallas legal market.

Turning to the disputed fees incurred in connection with Phases IV, V, and VI, the Bank describes a different case scenario than that portrayed by the Debtor. The Bank describes a Chapter 11 bankruptcy case in disarray. The Bank describes a bankruptcy case in which the Debtor's own lawyer has sought to be "disengaged" twice allegedly due to the Debtor's failure to do what it had agreed to do; late-filed, inaccurate operating reports that the Debtor's president could not begin to explain; significant problems with the Debtor's billing records including an ongoing Medicare fraud investigation by federal authorities, and no official committee of unsecured creditors (charged with the duty to investigate the Debtor) appointed in the case. Against this backdrop, the Bank explains its actions as being necessary to insure that the Debtor had a "prospect" of successfully reorganizing and repaying the Bank within a reasonable period of time.

After considering the arguments advanced by both the Debtor and the Bank, on balance, the Court agrees with the Bank. This case got off to a very poor start. Counsel for the Debtor has sought to be "disengaged" twice due to difficulties with the Debtor. Those issues have apparently been resolved and counsel is now working diligently to attempt to insure that the Debtor has the opportunity to reorganize. However, the difficulties in the case do not stop there. While the Debtor has begun to file its monthly operating reports, many of the reports were filed late and were inaccurate and incomplete when originally filed. At a contested hearing on the use of cash collateral (prompted by the Bank's objection, not the objection of the secured creditor (PNB) with an interest in cash collateral), these problems were brought to the Court's attention. While the Court ultimately authorized the use of cash collateral, it did so with conditions – *i.e.*, that the Debtor hire an accountant to assist it in the filing of proper, timely, operating reports during the pendency of this bankruptcy case so that the Court and creditors could have confidence in the information provided in those monthly operating reports. Moreover, due, at least in part, to the Bank's objections, the Debtor has retained a third party billing service to assist it in the billing and collection of its medical account receivables. While Debtor's counsel had apparently recommended the hiring of these third parties, the Debtor was not moving with any dispatch to do so. By virtue of the Bank's request for the appointment of an examiner, the Bank's discovery in preparing for hearings on the contested examiner and stay motions, and the contested cash collateral hearing, the problems in the case became apparent to the Court and the Court took the steps it believed necessary to protect both the Debtor and the Debtor's creditors. Once the accountant and the third party billing firm were employed, the Bank regained enough confidence in the reorganization process that it negotiated a consensual resolution of the examiner and stay motions and a time line for a consensual plan with the Debtor.

In addition, and of some significance to the Court, if an official unsecured creditor's committee had been appointed in the case, it would have employed counsel and would have been charged with the duty to investigate the Debtor and the Debtor's prospects for a successful reorganization. While the Debtor has a significant amount of unsecured debt to address in its plan of reorganization, no creditors were willing to serve on a committee. Thus, no committee was formed in the case. If a committee had been formed, its counsel would have done work very similar

to that done by the Bank's counsel and would have been paid for that work as an expense of administration. Moreover, if the contested examiner motion had gone to hearing and an examiner had been appointed in the case, the examiner would have employed counsel to assist him in the investigation for which he was appointed and such examiner and his counsel would have been paid for that investigation as an expense of administration.

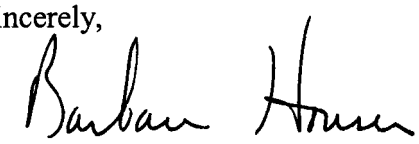
Here, in part because the Court inquired, when first advised of the filing of the examiner motion, why the Bank could not itself undertake the investigation, the Bank did conduct an investigation of the Debtor's business affairs and prospects for a successful reorganization. The results of that investigation brought several problems to the Court's attention early in the case so that they could be addressed. The Debtor's ability to reorganize has been helped, not hindered, by the Bank's activities in this case.

For these reasons, the Court finds that the actions taken by the Bank were reasonable under the circumstances of this case. Again, the hourly rates charged were reasonable. The amount of time spent on given tasks appears reasonable. Thus, the total fees requested in connection with these phases of work are reasonable and are allowable as part of the Bank's allowed secured claim.

Finally, the Court turns to the expenses for which the Bank seeks allowance. Of the $12,919.87 in expenses, $7,681.88 were for an appraisal of the Bank's collateral and for consulting and testifying expert fees, $3,972.90 were for court reporter fees (for depositions taken in connection with contested hearings in the case), and $1,265.09 were for miscellaneous charges including those for photocopies, telecopies, certified copies, delivery services, online legal research, and postage. The miscellaneous charges appear to be in conformity with our local guidelines. Moreover, the aggregate amount of the expenses incurred by the Bank are reasonable under the circumstances of this case. Thus, the aggregate expenses requested by the Bank are allowable as part of the Bank's allowed secured claim.

For the reasons set forth above, the Bank's allowed secured claim in the case shall include the requested fees of $60,099.00 and the requested expenses of $12,723.87. A copy of the Court's Order allowing these amounts as part of the Bank's allowed secured claim is enclosed. This letter ruling and the Order were forwarded to the Clerk's office today for filing.

Sincerely,



Barbara J. Houser
United States Bankruptcy Judge

Enclosures