

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

IN RE: §  
§  
NOVUS CORPORATION, § CASE NO. 00-37455-SAF-11  
§  
DEBTOR(S) . §

**MEMORANDUM OPINION AND ORDER**

Novus Corporation, the debtor-in-possession, moves the court to order Scott Seideman to disgorge attorney's fees pursuant to 11 U.S.C. §329. The court conducted an evidentiary hearing on the motion on February 14, 2001.

The allowance of compensation for attorneys representing the debtor in connection with a bankruptcy case constitutes a core matter over which this court has jurisdiction to enter a final order. 28 U.S.C. §§157(b)(2)(A) and 1334. This memorandum opinion contains the court's findings of fact and conclusions of law. Bankruptcy Rules 7052 and 9014.

In October 2000 Novus paid attorney Scott Seideman a \$7,500 flat fee to represent Novus before the I.R.S. on issues concerning employment taxes for six quarters. Novus filed its chapter 11 petition on November 20, 2000. Novus anticipates that its plan of reorganization will address the employment tax

issues. On December 6, 2000, Novus requested an accounting of the services by Seideman, for presentation to the court. Seideman responded with a letter by his counsel that described, in general terms, the services rendered but did not provide an accounting. Thereafter, Novus filed the instant motion, seeking disgorgement of the \$7,500 fee based on non-disclosure and excessiveness. Novus principally contends that Seideman's services duplicate the services to be provided to the debtor by its bankruptcy counsel.

Section 329 of the Bankruptcy Code provides:

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent necessary, to-

(1) the estate, if the property transferred-

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

11 U.S.C. §329. Section 329 authorizes bankruptcy courts to

review fees paid to a debtor's attorney within one year prior to the filing of a case to the extent that the fees are for services provided "in contemplation of or in connection with the case." 11 U.S.C. §329. A subjective test applies in determining whether payments were made in contemplation of bankruptcy. See Wootton v. Ravkind (In re Dixon), 143 B.R. 671, 675-76 n.3 (Bankr. N.D. Tex. 1992); 3 Collier on Bankruptcy ¶329.03 at p. 329-10 to 329-11 (15th ed. 1999). "The controlling question is the state of mind of the debtor, i.e., whether, in making the transfer, the debtor is influenced by the possibility or imminence of a bankruptcy proceeding." Dixon, 143 B.R. at 675-76 n.3; Collier at ¶329.03 at 329-11. Services devoted to preventing bankruptcy may also fall within the scope of §329. See Arens v. Boughton (In re Prudhomme), 43 F.3d 1000, 1004 (5th Cir. 1995) (payment by debtors in "desperate financial straits" to attorney for representation in resolving their dispute with their largest creditor were paid in contemplation of or in connection with their bankruptcy case).

Accordingly, the court must determine if Novus retained Seideman in contemplation of bankruptcy. If so, then the fees paid to Seideman are subject to review by the court, notwithstanding the terms of any fee arrangement between the attorney and the debtor. Dixon, 143 B.R. at 675.

George Niemirowski, the president of the debtor, testified

that the debtor had tax problems resulting from a business problem that disrupted the debtor's revenue stream. The adverse business condition impacted six quarterly tax periods. After watching a television advertisement for Seideman's services as a tax specialist, Niemirowski met with Seideman on October 24, 2000, the day before a scheduled appointment he had with the I.R.S. They discussed the debtor's tax problems, focusing on employment withholding taxes due. Niemirowski and Seideman agreed that Seideman would represent the debtor on the employment tax matter for a flat fee of \$7,500.

Niemirowski testified that when he met with Seideman the debtor had not been considering filing a petition under Chapter 11. Seideman testified that he thought the employment tax issues could be resolved expeditiously in meetings and negotiations with the I.R.S. He did not mention the possibility of resolving the tax issues through a bankruptcy case. Niemirowski did not discuss any other creditor problems with Seideman.

After Seideman talked to a revenue officer, Seideman learned that Novus had not filed corporate income tax returns for five years. Seideman called Niemirowski. Niemirowski explained that a business problem had been corrected resulting in an anticipated revenue stream that would allow Novus to resolve its tax obligations.

Without telling Seideman, Novus filed its bankruptcy petition on November 20, 2000. In his letter to Seideman on December 6, 2000, debtor's counsel acknowledges that "these tax difficulties did not precipitate the chapter 11 filing [.]"

Applying the subjective test, this evidence does not establish that Novus retained Seideman in contemplation of bankruptcy. Although retained within one month of the bankruptcy filing, Novus hired Seideman on the eve of a meeting with the I.R.S. Novus was not anticipating or planning a bankruptcy filing when it retained Seideman. Other than the I.R.S., Niemirowski and Seideman did not discuss creditor problems. They did not discuss bankruptcy. Niemirowski believed the anticipated revenue stream of Novus would allow Novus to resolve its tax obligations. Retention of counsel to negotiate with one of the debtor's major creditors may be considered as evidence of services rendered in contemplation of bankruptcy. Prudhomme, 43 F.3d at 1004. Here the retention of a tax specialist with the full focus of the debtor on resolving its tax obligations, without any indication of other creditor problems or business problems and without any discussion of bankruptcy, was not in contemplation of bankruptcy.

As a result, the court does not review the attorney's fees under §329.

The court notes, however, that if the court found under the

subjective test that Novus did retain Seideman in contemplation of bankruptcy, Seideman's fees would be subject to review even though Novus paid him a flat fee of \$7,500. As this court explained in Dixon, 143 B.R. at 675-677, under §329, attorney's fees are subject to review by the court notwithstanding the terms of any fee arrangement between an attorney and a debtor. This includes a pre-petition flat fee. The court must determine the reasonableness of a fee, applying the lodestar analysis, irrespective of the contract between the debtor and the attorney. After engaging in that analysis, if the court determines that the pre-petition payments received by an attorney are excessive, the court may order the excess to be paid to the bankruptcy estate.

Thus, in the instant situation, the court would analyze the reasonable number of hours spent by Seideman on the work performed pre-petition and assign a reasonable hourly rate to that work. Seideman testified that his hourly rate is \$260 per hour, if he were to charge by the hour. He has three years of experience as an attorney. The record does not establish that \$260 an hour is the prevailing rate in the community for a tax specialist with three years of experience.

Seideman and his assistant spent 34 hours on the assignment pre-petition, resulting in an average hourly charge of \$220.50. But he acknowledges that he did not fully earn his flat fee

because he did not complete his representation of Novus on the tax issues, the bankruptcy petition having intervened and the debtor-in-possession not having retained Seideman.

On a flat fee retainer, counsel would not reflect on whether the time spent on a project would be billable on an hourly basis. Consequently, Seideman spent a considerable amount of time researching issues for which a tax specialist might not actually bill a client, about 8 hours. He also spent a considerable amount of time outlining and organizing his presentations, about another 8 hours, that might have been helpful to him, but not fully billable, in the exercise of reasonable billing judgment, to a client.

Had §329 applied, the court would have engaged in this kind of a lodestar analysis. The court makes these observations for instructional purposes only.

Based on the foregoing,

**IT IS ORDERED** that the motion to disgorge under 11 U.S.C. §329 is **DENIED**.

Signed this \_\_\_\_\_ day of March, 2001.

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Steven A. Felsenthal  
United States Bankruptcy Judge

