

By order entered December 5, 2003, the court confirmed the committee's Chapter 11 plan of reorganization. The plan created the NSSI Liquidating Trust. Pursuant to the order entered November 25, 2003, Brown could serve and file a notice stating that the interim award would become a final award unless a party filed an objection within fifteen days of service. On February 6, 2004, Brown served and filed his notice requesting the final allowance of fees and expenses. On February 20, 2004, the trust filed its objection to the final allowance of compensation.

The court conducted a hearing on the final application on May 27, 2004. The allowance of compensation for a trustee 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.

Brown requests compensation of \$76,706 plus expenses, pursuant to 11 U.S.C. § 326. In his application filed on October 29, 2003, Brown had agreed to accept total compensation and reimbursement of expenses of \$60,000. However, because the trust has elected to contest his application, Brown requests that he be awarded compensation based on § 326.

Section 326 provides:

(a) In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to

exceed 25 percent on the first \$5,000 or less, 10 percent on any amount in excess of \$5,000 but not in excess of \$50,000, 5 percent on any amount in excess of \$50,000 but not in excess of \$1,000,000, and reasonable compensation not to exceed 3 percent of such moneys in excess of \$1,000,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.

11 U.S.C. § 326(a).

Section 326 sets the maximum compensation for a trustee. In re England, 153 F.3d 232, 235 (5th Cir. 1998). The court must however determine reasonable compensation not to exceed that limit. 11 U.S.C. § 330(a); In re England, 153 F.3d at 234-235.

In his application filed on October 29, 2003, Brown reported that he had handled deposits of \$1,781,860.00. He had paid administrative expenses in the case, and held approximately \$890,000.00. After collection of note payments and payment of remaining administrative expenses, under the confirmed plan, the balance of the funds would be transferred to the trust. Under the plan, the trust may pursue claims against third persons. But creditors may opt out of the litigation, which would entitle them to receive their portion of the net cash held by the trust before litigation expenses. No creditor has opted out of the litigation provisions of the plan.

In his application, Brown had agreed to accept compensation in an amount less than the § 326 commission. But, considering the results obtained in the case, and the fact that Brown has

been forced by the trust to incur litigation time and expenses defending his services, Brown requests the full commission.

The trust, for its part, suggests that Brown's total compensation and reimbursement of expenses should be \$51,000.00. The trust contends that at the time of his appointment, Brown agreed to accept compensation based on his hourly charges, and further agreed to limit his hourly rate to \$240 per hour. The trust further contends that Brown did not fully perform his duties and, therefore, should not receive the full commission under § 326.

This is not a case that warrants the award of the full commission under § 326. While the court empathizes with Brown's frustration with incurring the time and expense of defending his final application without additional compensation, the court likewise empathizes with the frustration expressed by the trust, through its witness Doug Dyer, the former chairman of the committee. The committee itself has had a tortured experience in this case, as evidenced by the unusual situation of having had three different sets of attorneys. Dyer, for his part, testified that he believed Brown had committed himself to a \$240 hourly rate with his compensation to be his hourly fees or the commission, whichever was lower. While empathizing with the frustrations of the parties, the court must award compensation based on reasonableness. In re England, 153 F.3d at 235.

Brown served as the trustee from January 3, 2003, through confirmation of the committee's plan to December 16, 2003. Brown testified that a chief executive officer of the debtor, working full time, would have been compensated at approximately \$130,000 per year. Dyer, whose company is in a similar business to the debtor, testified that in 2003 a chief executive officer in that business would be paid at approximately \$100,000 per year.

In the application, Brown and his staff reported 179.2 hours of trustee services through October 19, 2003, but the invoices attached to the application add up to a total of 176.15 hours of trustee services through October 19, 2003. In his application, Brown had estimated forty hours of additional work through December 5, 2003, the confirmation hearing date. However, at the hearing, Brown provided the court with his time records through March 2004. Those time records show a total of 19.9 hours of trustee work, rather than forty hours, from October 20, 2003, until December 16, 2003. Accordingly, Brown and his staff spent about 196.05 hours working as the trustee. Brown testified that the nature of his duties as a Chapter 11 trustee did not permit full documentation of all the time spent on the case. He estimated an additional ten to twenty percent of his time went unrecorded. The trust criticized Brown for not keeping complete time records but did not contest that assessment. The court therefore considers another 29.4 hours of unrecorded time (15% of

196.05), bringing Brown's total time to 225.45 hours.

Assuming a full-time salaried chief executive officer would work a 2,080 hour year (forty hours per week for fifty-two weeks), Brown spent approximately twelve percent of a year working as the trustee. Assuming a chief executive officer salary of \$115,000 (halfway between the salaries estimated by Brown and Dyer), the trustee would have earned approximately \$13,800, considerably below the § 326 commission ceiling. The court therefore declines to award the § 326 commission.

Brown originally requested total compensation and reimbursement of expenses of \$60,000. According to his application, he had out-of-pocket expenses of about \$3,647. That nets approximately \$56,353 for fees. Considering the estimated 225.45 hours work by Brown and his staff as trustee, Brown's blended hourly rate based on a fee request of approximately \$56,353 is \$249.96.

Brown is an attorney, licensed to practice before this court. Consequently, having rejected the § 326 commission, the court determines reasonable compensation by applying the lodestar calculation. 11 U.S.C. § 330(a). The court generally utilizes a lodestar analysis in its determination of reasonable compensation, especially for a trustee who is a licensed attorney. To determine reasonable compensation, the court must determine the "nature and extent of the services supplied by" the

attorneys. 11 U.S.C. § 330(a)(3); In re First Colonial Corp., 544 F.2d 1291, 1299 (5th Cir. 1977). The court must also assess the value of those services in relation to the customary fee and the quality of the work. These two factors comprise the components for the lodestar calculation. See Cobb v. Miller, 818 F.2d 1227, 1231 (5th Cir. 1987). Generally, the lodestar is calculated by multiplying the number of hours reasonably expended by reasonable hourly rates. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). The court may then adjust the compensation based on the factors of § 330(a)(3) and (4) and Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974); Blanchard v. Bergeron, 489 U.S. 87, 91-92, 94-95 (1989). The Johnson factors may be relevant for adjusting the lodestar calculation but no one factor can substitute for the lodestar. Id. Rather, the lodestar shall be presumed to establish a reasonable fee with adjustments made when required by specific evidence. Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 478 U.S. 546, 563-65 (1986).

Dyer testified that he talked to Brown on January 2, 2003, before the United States Trustee appointed Brown as the Chapter 11 trustee. Dyer testified that Brown agreed to bill the estate at the rate of \$240 per hour and to request compensation based on that hourly rate or the § 326 commission, whichever was less. Brown testified that he told Dyer that his then current hourly

rate was \$240 per hour, but that he never agreed to limit his hourly rate to that amount. Brown did not file a pleading limiting his hourly rate. The committee did not file a pleading requesting that the court limit Brown's compensation. The court finds that Brown did not agree to limit his hourly rate.

From January 3, 2003, to January 9, 2003, Brown charged \$240 per hour. Beginning on January 9, 2003, Brown charged \$275 per hour. Brown testified that his hourly rate was increased pursuant to his law firm's practice. Brown testified that, from that time, he charged his clients at \$275 per hour. Given Dyer's concern as expressed to Brown on their conversation on January 2, 2003, Brown should have informed Dyer and the committee that Brown's hourly rate would increase to \$275 per hour. But that does not result in a basis for the court to reduce Brown's hourly rate.

Under the lodestar calculation, the court must determine whether Brown's actual hourly rate is consistent with the prevailing rates for similarly experienced attorneys performing similar tasks in the community. Missouri v. Jenkins, 491 U.S. 274, 286 (1989). The court takes judicial notice of the hourly rates recently approved by this court for attorneys who also serve as Chapter 7 panel trustees and for attorneys performing Chapter 11 work. In the past year, the court has awarded attorneys who also serve as Chapter 7 panel trustees compensation

ranging from \$270.61 per hour to \$275.00 per hour. The court has awarded attorneys blended hourly rates ranging from \$159.37 to \$352.44 for Chapter 11 work. Brown's hourly rates of \$240 and \$275 are reasonable. Brown and his staff's blended rate of \$249.96, based on a fee request of \$56,353.00 and 225.45 hours of work, is reasonable. And the court will use this blended hourly rate to award compensation.

The trust suggests that Brown has not explained why he took the actions he did nor why the case unfolded as it did. However, Brown's hourly time descriptions reveal that Brown regularly consulted with Dyer or the committee or committee counsel. See, for examples, time entries on January 3, 2003, January 6, 2003, January 7, 2003, January 8, 2003, January 9, 2003, January 13, 2003, January 23, 2003, January 29, 2003, January 30, 2003, February 4, 2003, February 5, 2003, February 17, 2003, February 26, 2003, March 13, 2003, March 18, 2003, June 10, 2003, August 29, 2003, September 4, 2003, and September 15, 2003.

Brown performed trustee services in case administration, business operations, sale of assets, and plan of reorganization. All those categories of work required the trustee's attention. The court especially notes the difficulty in monitoring the debtor's business and selling the debtor's assets. In addition to typical functions monitoring the debtor's business, the trustee had to communicate with and address defense department

security issues. The involvement of the debtor's insiders complicated the sale of the debtor's assets. The trustee had to advance the sale of the debtor's assets in the context of the inherent conflict between the insiders and the committee in this case. As mentioned above, the trustee's work had also been complicated by the organizational problems within the committee.

The trust complains that Brown failed to complete four tasks. Until Brown completes those tasks, the trust contends that Brown should not receive compensation. The trust asserts that Brown did not file operating reports from September through December 2003. Brown filed operating reports through August 2003. Brown asserts that there was virtually no activity after September 1, 2003, to justify the administrative expense of retaining an accountant to compile the operating reports. Brown says he will supply the trust with draft operating reports, with supporting banking information.

The trust complains that Brown failed to file tax returns. Brown responds that he filed the "final 941 returns on April 31 [sic], 2003." Trustee's Reply to the NSSI Liquidating Trust's Objection to Final Allowance of Chapter 11 Trustee's Compensation at 3, filed March 16, 2004. Final wages were paid March 24, 2003. Brown contends that the Internal Revenue Service then terminated the debtor's filing requirements. Subsequently, after the trustee entered an agreement with the IRS, Brown filed the

second and third quarter 941 reports. The IRS returned those reports. Brown asserts that following confirmation of the plan, the trust assumed responsibility for the filing of any tax returns.

The trust complains that Brown failed to deliver his records to the trust. Brown responds that he has delivered his records or, where he has not delivered records, made them available to the trust's counsel for review and copying.

The trust complains that Brown failed to transmit W-2 statements to employees for early 2003. Brown replies that the plan imposes that responsibility on the trust; nevertheless, Brown states that he delivered the W-2 statements to employees for 2003.

The court finds that the trust has not established that Brown has failed to perform a fiduciary function.

Finally, the trust complains that Brown should have maintained records of all the time he spent performing trustee functions. The trust asserts that the integrity of the process compels a trustee to maintain his time records. Brown maintained hourly records through March 2004. In his application, Brown only submitted time records through October 16, 2003 and, anticipating confirmation of the creditor's plan, which occurred on December 5, 2003, Brown estimated his remaining time on the case. At the hearing held on May 27, 2004, Brown provided time

records through March 2004. The court agrees with the trust that Brown should have maintained complete time records. Nevertheless, the court has calculated the time spent on the case by Brown and his staff based on the compensation requested, the supplemental time records and the application filed. The court has found that Brown and his staff spent approximately 225.45 hours performing the functions of the trustee in this case. That amount of time was reasonable and necessary.

The court finds that the lodestar approach to determining reasonable compensation should be applied in this case. Applying that calculation, based on the above findings, the court awards Brown compensation under the lodestar approach of \$56,353.00. The court awards Brown reimbursement of expenses of \$3,647.00. The court, therefore, awards Brown total compensation and reimbursement of expenses of \$60,000.00.

Order

Based on the foregoing,

IT IS ORDERED that Shawn K. Brown, the Chapter 11 trustee of the bankruptcy estate of Network Staffing Services, Inc., the debtor, is awarded final compensation and reimbursement of expenses of \$60,000.00

###END OF ORDER###