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

IN RE:	§	
	§	
WEBLINK WIRELESS, INC., et al.,	§	CASE NO. 01-34275-SAF-11
	§	(Jointly Administered)
DEBTORS.	§	

MEMORANDUM OPINION AND ORDER

The Bank of New York, as indenture trustee, and its attorneys, Baker & McKenzie, filed an application for compensation and reimbursement of fees and expenses pursuant to the debtors' second amended plan of reorganization, as confirmed, 11 U.S.C. § 503, and Bankruptcy Rule 2016. The bank requested payment of $115,471.50 for legal services, $1,490.54 for reimbursement of counsel's out of pocket expenses, and $34,578.00 for bank employee compensation.

The United States Trustee lodged an objection to a portion of the application. Section 2.01 of the plan limited the bank's fees and expenses to no more than $150,000, to be paid upon approval of the court on an application. As the bank's application totaled $151,540.04, the United States Trustee objected to the amount above the $150,000 plan limit. The bank conceded that it erred by requesting a total amount greater than $150,000. The United States Trustee also objected to reimbursing the bank for time reported by its salaried employees, totaling

$14,278. The court conducted a hearing on the application on November 7, 2002.

By order entered November 25, 2002, the court allowed the bank and its counsel compensation, fees and expenses of $137,265.04. The court provided the bank with an opportunity to request an evidentiary hearing on the remainder of the application.

The bank timely requested an evidentiary hearing concerning the $14,278 of hourly charges for the bank's salaried employees who worked on the bankruptcy case. By order entered December 23, 2002, the court set an evidentiary hearing on the request, but authorized testimony by video appearance to minimize expenses to the parties. The court conducted the hearing on February 21, 2003.

The allowance of an administrative expense to be paid pursuant to a confirmed plan of reorganization 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.

Under the indenture agreement, the bank charges an administrative fee for normal administration functions including the maintenance of administrative records, duties in connection with the security provisions of the indenture and the considera-

tion and decision with respect to various normal administrative questions. That fee is not at issue. The indenture also provides that the trustee may incur expenses or render services after the occurrence of a default under the indenture agreement. The indenture does not define the expenses or services and does not provide a fee schedule. The indenture makes a reference to "our normal hourly rates," but does not provide any hourly rate. The schedule of fees states that services not specifically covered would "be billed commensurate with the services rendered."

Loretta Lundberg, Vice President and Manager of Default Administration Group and Corporate Trust Department, testified that defaults under the indenture agreement require additional services by the indenture trustee not included in the administrative fee. A default often requires the retention of outside counsel to represent the indenture in reorganization efforts, including in proceedings under Chapter 11. Indeed, in this case, the bank employed Baker & McKenzie to perform those services. The court has approved the application for the payment of those fees by the estate.

Lundberg further testified that the services resulting from indenture defaults may include meetings and conference calls, communications with bondholders, review and negotiation of a Chapter 11 plan and disclosure statement, workout distributions

and Chapter 11 plan balloting administration. Lundberg testified that the bank charges the bondholders a fee for those services. She testified that the fee ranged from $300 to $400 per hour. However, the persons performing those services are full time salaried employees of the bank. Lundberg could not correlate the hourly charges to the salaries. She testified that the bank charged $400 per hour for her services on default indentures. With an MBA, she has 20 years experience working for indenture trustees, the last seven years at the bank. She also testified that the other employees who worked on this account were hired because of their experience servicing indenture agreements for indenture trustees. Lundberg testified that other indenture trustees in New York extract the same $300 to $400 hourly charges for default work from the bondholders while acting as a fiduciary. She did not testify that the employees were lawyers or accountants or other professional persons employed by the bank who might command those hourly rates in private practice or by virtue of specialized training and experience.

The evidence does not support a court finding that the rates are reasonable for the services rendered. The bank employees performing the default services are salaried employees, whose wages or other compensation does not change when performing default-related services. The court infers from this record that the bank's overhead expenses do not change when its employees

perform default-related services. There is no evidence that the bank employs additional staff to perform the default services. If the bank's expenses do not change, yet the bank obtains $300 to $400 per hour for default services, then, it appears, the additional income goes to the bank's bottom line. The picture, on this record, suggests that the fiduciary profits from the bond holders' loss.

That suggestion may not necessarily be the case. The administrative fee charged for indenture trustee work may not be designed to cover the bank's costs of performing all services relating to indenture trustee work. The bank may have structured its fee schedule to avoid factoring expenses for default work into the basic administrative fee for indenture trustee work. The bank may have attempted thereby to avoid charging all indentures with a share of the default expenses. Instead the bank may have attempted to shield non-defaulting indentures from paying any of the expenses related to default work. Unfortunately, on this record, the bank has left the court to speculate on how it structured its fee schedules and derived the additional fees requested. The court cannot determine reasonable expenses based on speculation.

The court assumes that time spent by employees rendering default-related services is time deferred from non-default services. Employee efficiency or productivity may thereby be

affected. But, again, the bank offered no evidence of increased operating expenses as a result. To the contrary, the evidence suggests that default work is part of the ordinary operations of an indenture trustee. Lundberg testified that the bank had three-hundred indentures in default proceedings or status, and one-hundred fifty of those were subjected to bankruptcy cases. Bond restructuring is an inherent feature of the bond markets. The court would assume, therefore, that an indenture trustee would factor that cost into its staffing functions and its basic fee structure, and specify the fees in its contract.

However, the court need not decide these issues to adjudicate the pending application. The record provides no basis for finding that $300 to $400 per hour are reasonable rates for the work actually performed in this case. Lundberg testified that default work supporting an extraordinary charge under the indenture agreement required a higher standard of care and generally included meeting and conference calls, communication with bond holders, preparing proofs of claims, review and negotiation of Chapter 11 plans and disclosure statement objections, amended plan results, workout distributions, and plan balloting administration. However, with minor exceptions, the descriptions of services rendered by the bank in this case do not include that kind of work.

The bank describes the majority of functions performed in this case as reading court notices, motions and orders. Indeed, reading court documents consisted of eighty percent of the work performed as default services. In this case, Lundberg testified that while three people were reading the court documents, the work did not reflect three people reading the same pleadings in this case. Rather, three different people read the court documents at different times, to determine the impact on the bond holders. Lundberg did testify that this work did not duplicate the work of counsel.

Yet, with regard to the reviewing of notices, motions and orders, the court has approved the compensation of the bank's counsel at hourly rates exceeding $500 to perform legal work regarding those very same notices, motions and orders. To the extent that bank employees had to review those matters after counsel's review, the bank's additional in-house expenses, if any, should have been minimal. The record does not support charging $300 to $400 per hour for that type of work.

As examples, the bank requests compensation of $300 per hour for: "call with J Samet," June 4, 5, and 7, 2001; "review fax," June 12, 2001; "review notice of reset hearings re employmebt [sic] aplicatoins [sic]," June 18, 2001; "review notice of continued hearing date orders approving Davis Polk/Winstead," June 20, 2001; "review Yahoo notice," June 27, 2001; and "review

first amended auth. secured financing/adequate protection/use of $," June 29, 2001; and "review objection of bankers trust employee retention program," June 29, 2001. Baker & McKenzie letter dated Dec. 3, 2002, Ex. 3. Further, examples of the extraordinary time account administration information read: "read and filed court motions," Nov. 28, 2001; "read court papers," Jan. 8,2002; "read court orders," Jan. 29, 2002; "read court notices," Feb. 4, 2002; "received email re proposed plan," Apr. 17, 2002; and "read emails from counsel re status of our objection to debtor's plan," May 23, 2002. Id. Indeed, from the account activity information submitted in support of the application, at $350 per hour, the bank submitted 39 entries for 14.1 hours for reading court-filed motions, papers, orders and notices, all of which would have been considered by counsel. On the other hand, at $350 per hour, the bank submitted 6 entries for 4.5 hours for discussing with counsel plan and disclosure statement and contract status and objections. The latter group suggests more than ministerial work for restructuring the bond obligations and implementing any restructuring.

Accordingly, for certain work described above there is no record to show that anything more than a minimal additional charge would be reasonable. The invoices and account activity information show how salaried employees were merely reviewing what lawyers had done or reflect how the employees were keeping

records of proceedings, phone calls, correspondence, and the like. For other work, more sophisticated services may have been required. That work includes entries for debtor employee compensation, post-petition financing, plan and disclosure statement work, and committee conferences.

Based on this analysis of the services actually performed in this case, a majority of the work does not support more than a minimal hourly rate. The remainder supports a higher level of hourly charges. But none of the services support $300 to $400 per hour. Those rates are not "commensurate with the services rendered" in this case. The court balances these factors by disallowing one-half of the requested compensation and thereby allowing the remaining one-half. The court therefore allows $7,139 of the contested charges.

Based on the foregoing,

IT IS ORDERED that the order entered November 25, 2002, is modified and that the Bank of New York, as indenture trustee, and its attorneys, Banker & McKenzie, are allowed compensation, fees and expenses of $144,404.04.

Signed this 12th day of March, 2003.

Steven A. Felsenthal
United States Bankruptcy Judge