

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

IN RE: LAMBERT OIL COMPANY, INC.,)
)
) **CASE NO. 03-01183**
Debtor.) **CHAPTER 7**
)

MEMORANDUM OPINION

The matter before the Court is the Third Interim Application for Compensation and Reimbursement of Expenses of Trustee’s Attorney seeking approval of the Court of fees totaling \$83,666.50 and reimbursement of expenses in the amount of \$2,076.04. For the reasons noted below, the Court will deny such Application.

FINDINGS OF FACT

The services covered by this Application are for the period beginning April 5, 2005 and ending on September 30, 2007 and relate to litigation brought by the Trustee against Mountain Empire Oil Company, Inc. and Quality Properties, L.P. The Trustee’s Attorney is the law firm of LeClair Ryan, a major statewide law firm in the Commonwealth of Virginia of which the Trustee, Mr. William E. Callahan, Jr., is an officer. He has personally provided \$14,976 worth of the legal services included in the Application. More than 75% of the legal services itemized in the Application have been provided by Lori D. Thompson, Esq., whose charges amount to \$63,540. The other services include \$4,430 from two other attorneys in the firm and \$720.50 for the services of two paralegals employed by the firm. The Court declined to approve the Application in advance absent the filing of any timely objection thereto after notice, and ordered that it be set for a hearing.

On November 3, 2003 the Trustee filed an application dated October 22, 2003 seeking this Court's approval to employ LeClair Ryan for the following purposes:

- a. legal research, review of documents, preparation of pleadings, appearances in court, and other activities related to the filing and prosecution of (1) an objection to a motion for relief filed by GMAC Commercial; (2) a motion to extend the time to assume unexpired leases and executory contracts; and (3) one or more motions to sell property of the estate;
- b. legal research, review of documents, preparation of pleadings, appearances in court, and other activities related to the filing and prosecution of objections to claims based on legal grounds; and
- c. such other incidental and/or routine legal services during the administration of the estate as may be reasonably required by its proper administration.

In that application the Trustee estimated that the fees and expenses to be incurred for these services would be \$15,000 and \$1,000, respectively. This application was granted by this Court's Order entered on November 17, 2003. Upon this basis of this application and order the Trustee and LeClair Ryan have filed two prior interim fee applications which have been approved by this Court in the aggregate amounts of \$16,822 for fees and \$698.11 for expenses.

On November 30, 2004 the Trustee filed his complaint against Mountain Empire Oil and Quality Properties and the time entries in the pending Application relate to this litigation, although the initial services prior to April 5, 2005 were included in the amount of \$2,142 in LeClair Ryan's Second Interim Fee Application, which was approved. On March 8, 2005 the Trustee filed an additional application to employ LeClair Ryan on a contingency basis of 27.5% to pursue the

following claims on behalf of the bankruptcy estate:

- a. legal research, review of documents, preparation of pleadings, appearances in court, and other activities related to the filing and prosecution of complaints to recover preferential transfers against Petro Stopping Center, LLC, Roanoke Restaurant Supply, Inc., Smith Wholesale, Inc., JanPak Bristol, Inc., PFH Hale, Inc., JXN Transport, Inc., Pepsi Bottling Co., Coca-Cola Bottling, Inc., and McLure Oil, Inc., with a total demand of approximately \$588,250.00; and
- b. legal research, review of documents, preparation of pleadings, appearances in court, and other activities related to the filing and prosecution of complaints to recover notes payable against Nick Lambert and Evergreen Properties, Inc., with a total demand of \$1,270,230.00.

Although the United States Trustee filed an initial objection to this application, after discussions with the Trustee and the filing of an Amended Verified Statement of Proposed Professional for Trustee's Application for Appointment of Attorney on March 25, 2005, his counsel endorsed a consent order entered on May 4, 2005 granting such application. Upon this second application and order LeClair Ryan has been paid to date a total of \$89,560.50 in fees and \$2,280.19 in expense reimbursement from recoveries obtained for the bankruptcy estate. As far as the Court has been able to determine from a review of the docket entries and orders in this case, the Trustee has not sought or obtained any express specific approval of the Court for the retention of LeClair Ryan for the conduct of the Mountain Empire Oil litigation, although such fact is not noted in the pending Application.

The day before the hearing on the pending Application the undersigned judge saw the Trustee following hearings in other cases in Big Stone Gap and apprised him of some of his concerns about the Application and why it had been set for a hearing. On the date of the hearing, November 7, 2007, the Trustee appeared at the hearing, but no other member of the firm did so; neither did any other party in interest appear or file any objection to the Application. On the record the undersigned judge expressed his reservations concerning the Application and after considering Mr. Callahan's oral responses thereto, invited him to review such matters in greater detail and respond in writing to them. Mr. Callahan did so by a letter dated November 13, 2007, after which the Court expressed in more detail its concerns by letter dated November 15, 2007, which again invited the Trustee's further review of the matter and response, to which Mr. Callahan responded by his letter to the Court dated November 19, 2007. A fair summary of such letters is that while Mr. Callahan in his capacity as an officer of LeClair Ryan responds in some detail to the Court's observations, he disagrees that any adjustment of the Application is warranted.

All of the legal services and expenses included in this Application relate to the previously mentioned litigation with Mountain Empire Oil Company, Inc. and two affiliated companies (one of which was added as a party after the initial complaint was filed) over rent for two convenience stores owned by the Debtor located in Bristol, Virginia and Jonesborough, Tennessee which were occupied and operated by Mountain Empire Oil prior to the agreed sale and conveyance of such stores by the Trustee to the affiliated companies. The Trustee has been nearly totally successful in such litigation to this point, having obtained a judgment against Mountain Empire in this Court in the amount of \$551,993.55 (inclusive of pre-judgment interest)

plus post-judgment interest and his taxable court costs. The District Court has affirmed that judgment, which is now on appeal to the Court of Appeals. While Mountain Empire and its affiliated companies have offered no evidence or even argument that they understood at the time that their purchase of such stores would extinguish any claim against them for pre-conveyance rent, their principal defense has been that the Trustee's complaint is barred by the Trustee's failure to include a reservation of such claims from the bundle of legal rights conveyed by the fee simple deeds for such stores to Mountain Empire Oil's affiliates. While such defense has not been accepted either by this Court or the District Court, the Court of Appeals has yet to rule. The deeds in question were prepared by LeClair Ryan under the Trustee's direction. While this Court does not expect that the Court of Appeals will take a different view of the contest, if that were to occur and such Court were to enter final judgment in favor of the Defendants, the end result would be that the services covered by the Application before the Court would be of no ultimate tangible benefit to the bankruptcy estate.

To complicate matters a little farther, this Court has approved the Trustee's Motion for an Order Approving a Settlement, to which no party in interest objected, settling the entitlement to the litigation proceeds of the Mountain Empire Oil litigation with the secured party, which held deeds of trust and security agreements upon the assets constituting the Bristol and Jonesborough stores, on the basis that the Trustee would receive 12% of such proceeds off the top plus reimbursement of all litigation expenses, with the secured party to receive the remaining net proceeds. The order prepared by Trustee's counsel approving such settlement recites that the secured party had a perfected security interest in the rents and profits of both convenience stores. The settlement agreement requires the Trustee to provide an accounting to

the secured party of the legal services for which reimbursement is claimed. The practical effect of such settlement is that the Trustee's litigation expenses will be absorbed completely by the secured party, assuming that the Trustee is ultimately successful and collects from Mountain Empire, but that any allowed compensation for such services will be paid from the bankruptcy estate generally should his efforts prove unavailing.

CONCLUSIONS OF LAW

This Court has jurisdiction of this proceeding by virtue of the provisions of 28 U.S.C. §§ 1334(a) and 157(a) and the delegation made to this Court by Order from the District Court on July 24, 1984. An application for compensation to be paid from the bankruptcy estate is a matter involving the allowance or disallowance "of a claim against the estate" and is therefore a "core" bankruptcy matter pursuant to 28 U.S.C. § 157(b)(2)(B). It would also appear to be a matter "concerning the administration of the estate" pursuant to 28 U.S.C. § 157(b)(2)(A).

LeClair Ryan's employment as attorney for the Trustee pursuant to 11 U.S.C. § 327(a) has been authorized expressly by the Court on two separate occasions by its orders entered on November 17, 2003 and May 4, 2005, although such authorizations have been for services other than the Mountain Empire Oil litigation. Section 327(d) expressly authorizes legal services to be rendered by the Trustee for the estate if that is "in the best interest of the estate." Compensation for such legal services is authorized by 11 U.S.C. § 329(a) and the Court is directed to "consider the nature, the extent, and the value of such services, taking in to account all relevant factors." § 329(a)(3). The Court is expressly authorized "on its own motion . . . [to]

award compensation that is less than the amount of compensation that is requested.” § 329(a)(2). Furthermore, the Court “may allow” interim compensation and reimbursement of expenses pursuant to 11 U.S.C. § 321.

Accordingly, it is within this Court’s sound discretion to award compensation at this time or to decline to do so until all relevant circumstances and “factors” affecting the determination of fair and reasonable compensation for the Trustee’s Attorney are known. Under the circumstances presented here, the Court concludes that the latter course is more appropriate for the reasons which follow. If, as this Court believes most likely, the Trustee is ultimately successful and collects from Mountain Empire Oil, the only two real parties in interest as to the proper amount of compensation for the Trustee’s professional will be that professional and the secured party, which has been actively represented by counsel with respect to the very litigation for which compensation is sought in the pending Application. Unless there is some dispute between them as what such compensation ought to be, there is no real reason for this Court to undertake its own independent assessment of that issue. If there were to be a dispute, it would be far better for the Court to rule upon the arguments advanced by the parties in interest rather than itself raising questions upon which such parties in interest might have no disagreement. On the other hand, if the Court of Appeals were to be persuaded by the arguments advanced by the Defendants, particularly if it were to enter final judgment in their favor, the Trustee, the firm and the Court would all be placed in an awkward position in reaching a fair and reasonable determination as to what compensation ought to be paid to the Trustee’s Attorney. The Court recognizes that even if the firm’s efforts were ultimately unsuccessful in this litigation, that would not necessarily mean that such services were not “necessary to the administration of, or

beneficial at the time at which the service was rendered toward the completion of” the Lambert Oil bankruptcy case. 11 U.S.C. § 329(a)(3)(C). Such a ruling, though, would seem unavoidably to raise a question as to whether the preparation of the deeds of conveyance by the Attorney was in some manner deficient, and if so, what consequences that ought to have, if any, with respect to compensation for the ensuing litigation. The Court concludes, therefore, that under the factual circumstances presented at this time, it does not have all relevant factors before it upon which a fully informed and satisfactory judgment can be made. Moreover, if the Court of Appeals were to reverse this Court’s ruling and remand the adversary proceeding for a new trial, a detailed dissection at this stage of the legal services rendered in the original trial at which the Trustee was the prevailing party would seem very likely to offer grist for someone’s mill to shape a litigation strategy for the re-trial which would be attuned to any issues raised by the Court’s substantive ruling now upon the Application. In short, a ruling at this time has the potential to be an advisory ruling based upon incomplete information and to have possible consequences not presented in most applications for interim compensation.

The Court’s initial intention was to allow substantial interim compensation subject to its power to re-visit the issue upon a final application for services rendered, including the power to require disgorgement of interim compensation previously allowed. The undersigned judge is not so far removed from the private practice of law that he has forgotten its financial realities that professionals need cash flow, not just receivables, the same as any other business enterprise. After considering the position taken by the firm with respect to the issues mentioned by the Court, however, and then giving further consideration to the possible alternative scenarios which might ensue following the determination by the Court of Appeals of

the pending appeal in the Mountain Empire Oil litigation, it concludes that attempting to make a ruling now entails some possible adverse consequences as discussed above which make such a ruling problematic and persuade the Court that it ought not to determine compensation prior to being satisfied that it has all material factors before it upon which such compensation ought to be determined.

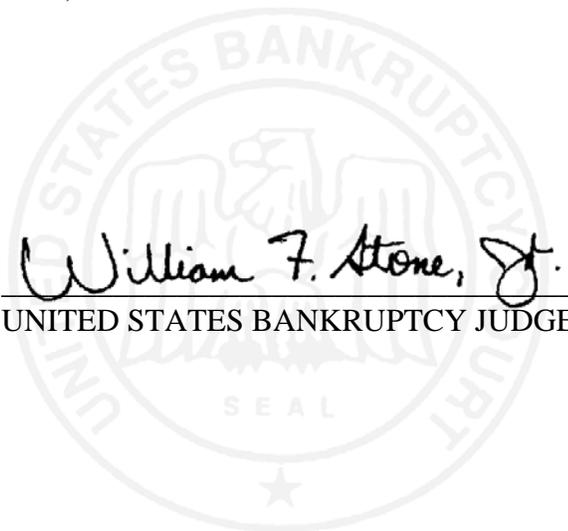
Furthermore, the firm's entitlement at this point to any compensation for the Mountain Empire Oil litigation seems to be in question¹ in light of the apparent failure to obtain approval of the Court for the firm's retention to provide such services, which have been considerable as a result of the tenacious defense made to the complaint. While such approval is always required of course to provide an appropriate basis for the award of professional compensation from the estate and much preferably is obtained before the fact rather than afterwards, it was particularly important here in light of the secured party's conceded perfected security interest in the rents pursued in this litigation, although the Trustee disputed such secured party's security interest in the pre-judgment interest awarded upon such rents. I say that such advance approval was particularly important here because the principal direct or immediate beneficiary of the litigation was the secured party, not the bankruptcy estate, but if the litigation were unsuccessful, the expenses of same, if the pending Application were granted, would be borne by the unsecured creditors generally out of the general bankruptcy estate.

¹ See 3 *Collier on Bankruptcy* ¶¶ 327.03[2][b], 327.03[3] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev.); *In re Legend Radio Group, Inc.*, No. 7-94-01461 (Bankr. W.D. Va. Jan. 16, 2001).

CONCLUSION

For the reasons discussed above, the Court will deny the Application without prejudice to the filing of a supplemental application for Court approval after the fact of the employment of LeClair Ryan for the services covered by the pending Application, and if such supplemental application is approved, a new application for fees and reimbursement of expenses upon the conclusion of the Mountain Empire Oil litigation. An order to such effect will be entered contemporaneously with the signing of this opinion.

This 28th day of November, 2007.

The seal of the United States Bankruptcy Court is visible in the background, featuring an eagle with spread wings, a star, and the text "UNITED STATES BANKRUPTCY COURT" and "SEAL".
William F. Stone, Jr.
UNITED STATES BANKRUPTCY JUDGE