

**IN THE UNITED STATES BANKRUPTCY COURT**  
**FOR THE DISTRICT OF IDAHO**

<b>IN RE</b>	)	
	)	
<b>ALEX R. SMITH,</b>	)	<b>Case No. 03-21502</b>
	)	
<b>Debtor.</b>	)	<b>MEMORANDUM OF</b>
	)	<b>DECISION RE:</b>
	)	<b>COMPENSATION (GREWAL)</b>
_____	)	

**BACKGROUND AND FACTS**

On November 26, 2003, attorney Savi Grewal (“Counsel”) replaced attorney Lou Garbrecht as attorney for the debtor, Alex Smith (“Debtor”). At the time, Debtor’s case was a chapter 13. On December 23, 2003, the case was converted to a chapter 7.

Counsel has filed a request for allowance of compensation and reimbursement of expenses. *See* Doc. Nos. 107, 108 (together the “Application”). Counsel asks for compensation of \$2,986.91 (fees of \$2,853.38 and costs of \$133.53) in the chapter 13 period, and compensation of \$5,597.83 (fees of \$5,488.40 and costs of \$109.43) in the period following conversion of the case to chapter 7 on December 23, 2003 through March 9, 2005.

Counsel's Application was noticed to Debtor and to the primary creditors and parties in interest in this case<sup>1</sup> and presented at a hearing on April 26, 2005. No objections were filed to the Application, and no parties appearing at hearing voiced any opposition to it.

The Court independently reviewed the Application before hearing, and advised Counsel at hearing that it had no concern over the itemization of time spent, amounts charged, or compensation claimed. The Court also indicated, however, that the proposed order of Counsel would have to be reviewed, along with the entirety of the record in this unusual case, before any allowance was granted or payment authorized. That caveat was discussed briefly with Counsel.

The Court has concluded its analysis and determines that the request for chapter 13 compensation may be granted, but that the request in relation to chapter 7 services may not.

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<sup>1</sup> It does not appear that there was a general notice to all creditors, as Fed. R. Bankr. P. 2002(a)(6) contemplates and requires. *See* Doc. No. 109. Ordinarily, this would prove to be a real and material impediment to considering the merits of Counsel's request. However, this is a highly unusual case. As indicated below, the case is not just solvent; it will generate a substantial amount to be returned to Debtor under § 726(a)(6). Thus whether Counsel receives allowance of the fees sought will have no impact on any distributions to any creditors not receiving notice. The Court will excuse the defect in notice, and waive the requirement of further notice, noting that Fed. R. Bankr. P. 2002(m) and Fed. R. Bankr. P. 9007 give it general authority to address matters of notice, and further noting that Fed. R. Bankr. P. 9006(c)(1) allows the Court to, with or without request, order the period of time for certain notices reduced. (The notice under Rule 2002(a)(6) is not one of the notices that the Court is prohibited from reducing under Rule 9006(c)(2)).

## DISCUSSION AND DISPOSITION

Debtor's estate will be easily capable of paying all administrative expenses, in the chapter 7 and in the preceding chapter 13, and of paying all creditor claims in full with interest. *See generally* § 726(a)(1) through § 726(a)(6). This is a result of a compromise approved by the Court at the April 26 hearing.<sup>2</sup> Even after such payment of administrative expenses and claims, a substantial amount would be returned to Debtor under § 726(a)(6) by the chapter 7 trustee.<sup>3</sup>

Counsel recognizes that the conversion of the case to a chapter 7 liquidation in December, 2003, makes a difference in the treatment of her compensation. *See* Doc. No. 107 at 2. She asks that the chapter 13 fees and costs be paid as an administrative expense from property of the estate. She further requests that the fees and costs after conversion be "approved" and ordered paid "directly" from the "surplus funds of the estate," a reference to the money that would go to Debtor under § 726(a)(6). Alternatively, Counsel asks that these post-conversion fees and

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<sup>2</sup> An order on the approval of compromise has not yet been entered but is anticipated shortly. There were no objections to approval of the underlying compromise and settlement, though there was an objection raised to the compensation request of special counsel, which is addressed in a separate Memorandum of Decision.

<sup>3</sup> *See* Doc. No. 113. In rough terms, the compromise brings \$1.4 million in cash into the estate, and provides another \$1.4 million to Debtor under an irrevocable trust established by the settling parties payable with interest over 12 years. The agreement provides for other relief to Debtor, including employment and rent assistance, and for a waiver and withdrawal of claims against the estate by settling parties and related parties totaling over \$288,000.00. No party in interest disputes that the initial cash component of the settlement of \$1.4 million will be sufficient to pay all expenses and claims in full and with interest where required, and still return substantial amounts to Debtor.

costs be allowed as a chapter 7 administrative expense and paid from the funds in the Trustee's hands before Trustee distributes them to Debtor. *Id.*

**A. Chapter 13 compensation**

Counsel's request for \$2,986.91 in the chapter 13 stage of Debtor's case is substantial, especially given the short period of time in which she served as Debtor's chapter 13 attorney, and given the work performed previously by attorney Lou Garbrecht as Debtor's counsel. Nevertheless, the request generated no objection.

Even in the absence of an objection, the Court has an independent duty to evaluate the Application. It has done so, and finds that the request meets the standards and requirements for allowance under § 330(a)(4)(B). The Application will be granted.

Allowed § 330 compensation is entitled to treatment as an administrative expense. *See* § 503(b)(2). Here, because there was a conversion, the administrative expenses in the chapter 13 are subordinated in payment to the administrative expenses in the chapter 7. *See* § 726(b). The chapter 7 trustee will be authorized to make payment to Counsel on the allowed compensation at the time of final accounting, or earlier if he is in a position to properly do so.

**B. Chapter 7 request**

Counsel's request for allowance of compensation in the chapter 7 stage

must be treated differently. Under *Lamie v. United States Trustee*, 540 U.S. 526 (2004), debtors’ attorneys may not be allowed § 330 compensation in chapter 7 cases unless they are employed by the estate under § 327. Counsel here was not so employed. The Court has no ability to allow her request for compensation.

Nor, the Court concludes, does it have the ability to “approve” these fees and costs and order them paid out of the “surplus” the chapter 7 trustee will distribute to Debtor. Counsel provided no citation to authority establishing that such power exists, nor any helpful suggestion as to how the attorney compensation provisions so carefully interpreted in *Lamie* can be read to support an “allowance” of this sort.

Section 726(a) establishes how “property of the estate shall be distributed.” See § 726(a). The surplus or balance that flows to a debtor in a solvent estate is, inescapably, “property of the estate.” See § 726(a)(6). *Lamie* held that a chapter 7 debtor’s attorney, not otherwise employed by a trustee under § 327, could not be paid from or by the estate. *Ipsa jure*, the Court cannot order the fees paid from the surplus property of the estate before it reaches Debtor.

Further, Counsel has identified no other provision of § 503(b) that would countenance her fees and costs being treated as an administrative expense – one of her proposed “alternative” approaches. See *In re Cent. Idaho Forest Prods.*, 04.4 I.B.C.R. 159, 161 (Bankr. D. Idaho 2004) (noting that the burden is on an

applicant to prove an entitlement to administrative expense treatment under § 503).

Thus, the Court must deny Counsel's request for allowance of the chapter 7 fees and costs of \$5,597.83 as set forth in the Application. Perhaps Counsel can take some comfort in the fact that no creditor or party in interest, including Debtor, objected to her Application or contested the reasonableness of the charges.<sup>4</sup>

## CONCLUSION

Counsel's Application, Doc. No. 107, is granted to the extent of allowing \$2,986.91 under § 330(a)(4)(B) in the superceded chapter 13 case, the same to be treated as an administrative expense under § 503(b)(2), and paid by the Trustee under § 726(a)(1) and § 726(b). The balance of the requested relief will be denied. The Court will enter an order accordingly.

DATED: May 12, 2005



A handwritten signature in black ink, appearing to read "Terry L. Myers".

TERRY L. MYERS  
CHIEF U. S. BANKRUPTCY JUDGE

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<sup>4</sup> Additional comfort might come from certain authorities. *See, e.g., Gordon v. Hines (In re Hines)*, 147 F.3d 1185 (9th Cir. 1998). Though *Hines* is not universally embraced, *see, e.g., Bethea v. Robert J. Adams & Assocs.*, 352 F.3d 1125 (7th Cir. 2003), it appears to remain good law in this Circuit. *See In re Sanchez*, 241 F.3d 1148 (9th Cir. 2001).

CERTIFICATE RE: SERVICE

A “notice of entry” of this Decision, Order and/or Judgment has been served on Registered Participants as reflected by the Notice of Electronic Filing. A copy of the Decision, Order and/or Judgment has also been provided to non-registered participants by first class mail addressed to:

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Case No. 03-21502-TLM (Alex R. Smith)

Dated: May 12, 2005

/s/Jo Ann B. Canderan  
Judicial Assistant to Chief Judge Myers