



**SO ORDERED.**

**SIGNED this 20th day of December, 2013.**

*Dale L. Somers*

Dale L. Somers  
United States Bankruptcy Judge

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Designated for on-line use but not print publication  
**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**In re:**

**BROOKE CORPORATION, et al.,  
  
DEBTOR.**

**CASE NO. 08-22786  
(jointly administered)  
CHAPTER 7**

**MEMORANDUM OPINION ON  
THE FOURTEENTH AND FIFTEENTH INTERIM APPLICATIONS  
FOR ALLOWANCE OF COMPENSATION AND REIMBURSEMENT OF  
EXPENSES OF HUSCH BLACKWELL LLP AND  
THE TRUSTEE'S APPLICATION TO APPROVE A  
REVISED COMPENSATION STRUCTURE FOR HUSCH BLACKWELL LLP**

On December 5, 2013, trial was held on the fourteenth and fifteenth interim applications for allowance of fees and expenses of Husch Blackwell LLP<sup>1</sup> and the Trustee's application to approve a revised compensation structure for Husch Blackwell

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<sup>1</sup> Dkts. 4183 and 4727.

LLP (HB).<sup>2</sup> Counsel participating were Douglas J. Schmidt, Benjamin F. Mann, and John J. Cruciani of HB for Christopher J. Redmond, Chapter 7 Trustee, who was also present; and Joyce G. Owen and Leonora S. Long for the U.S. Trustee. Also appearing but not actively participating was Brian T. Fenimore of Lathrop & Gage LLP for creditors Enterprise Bank & Trust (Enterprise) and Edinburg East, LLC (Edinburg). The parties stipulated to the jurisdiction of the Bankruptcy Court and consented to the trial and entry of a final order by the Bankruptcy Court.

Pending before the Court are: (1) the “Fourteenth Interim Application for Allowance of Compensation and Reimbursement of Expenses of Husch Blackwell LLP as Attorneys for the Chapter 7 Trustee for the Period March 1, 2013 through June 30, 2013 and Request for Authority to Immediately Pay Approved Fees and Expenses” (the 14th Interim Fee App); (2) the “Fifteenth Interim Application for Allowance of Compensation and Reimbursement of Expenses of Husch Blackwell LLP as Attorneys for the Chapter 7 Trustee for the Period July 1, 2013 through September 30, 2013 and Request for Authority to Immediately Pay Approved Fees and Expenses” (the 15th Interim Fee App); and (3) the Trustee’s “Application to Approve Revised Compensation Structure Including Contingent Fee Agreement and Reimbursement of Expenses of Husch Blackwell LLP as Lead Attorneys for the Chapter 7 Trustee” (the Application). On November 25, 2013, the Trustee filed a Support Document (the Support Document)<sup>3</sup> with respect to the

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<sup>2</sup> Dkt. 4729.

<sup>3</sup> Dkt. 4772.

Application that included two attachments: Exhibit A, a listing of additional reporting items the Trustee has agreed to provide to the U.S. Trustee in conjunction with consideration of the Application, and Exhibit B, a “Second Revised Proposal for Contingency Fee Arrangement,” dated November 25, 2013 (the Second Revised Fee Proposal). The Trustee and HB seek approval of the 14th Interim Fee App, the 15th Interim Fee App, and the Application (as modified by the Support Document). The U.S. Trustee objects to the 14th Interim Fee App, the 15th Interim Fee App, and the Application. Enterprise and Edinburg filed their Response and Limited Objection to the Application. However, the Support Document resolved their concerns.

## **RELEVANT PROCEDURAL HISTORY.**

### **A. Summary of HB’s fees and expenses, and recoveries for the estates.**

HB’s fees and expenses that were approved on an interim basis prior to trial are \$9,713,000; of this amount, HB was required to retain \$463,000 in trust as a holdback. HB is asking for approval of additional fees of \$1,894,404 and expenses of \$29,725 in the 14th Interim Fee App and the 15th Interim Fee App. To date, the estates have received \$12,629,00 in non-litigation recoveries and \$11,308,850 in litigation recoveries.

### **B. Filing of cases, appointment of the Trustee, and appointment of counsel.**

Debtors Brooke Corporation and Brooke Capital filed voluntary Chapter 11 petitions on October 28, 2008, and Debtor Brooke Investments did so on November 3, 2008. Albert Riederer, who had been appointed as a Special Master of the Brooke entities by the United States District Court in prepetition litigation and had been granted

powers similar to those of a receiver, was appointed as the Chapter 11 Trustee for all three Debtors. On October 31, 2008, the Trustee filed his application for employment of HB as attorneys for the Trustee. The application stated that HB had agreed to represent the Trustee with fees charged on an hourly basis and reimbursement of expenses, other than those normally absorbed by HB as overhead.<sup>4</sup> The application was granted.<sup>5</sup>

On June 29, 2009, the Chapter 11 cases were converted to cases under Chapter 7, and Albert Riederer was appointed to be the Chapter 7 Trustee. On July 2, 2009, the Chapter 7 Trustee moved for the continued employment of HB on the same terms and conditions as in the Chapter 11 cases.<sup>6</sup> That motion was granted on September 4, 2009.<sup>7</sup> Unfortunately, Albert Riederer resigned because of health issues, necessitating the U.S. Trustee's appointment on November 3, 2011, of Christopher J. Redmond, a partner in HB, as the successor Chapter 7 Trustee for all three bankruptcy cases.

### **C. The estate and the Trustee's adversary proceedings.**

Anecdotally, this case is the most complex Chapter 7 case in the history of this judicial district. It has close to \$700 million in filed claims, millions of dollars in hard-to-collect intangible assets, a complex corporate structure, financial constructs similar to those that created havoc in the the financial world starting in 2008, and no stockholders,

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<sup>4</sup> Dkt. 41.

<sup>5</sup> Dkt. 207.

<sup>6</sup> Dkt. 715.

<sup>7</sup> Dkt. 790.

employees, officers, or directors capable of assisting the Trustee.

Debtor Brooke Corporation, a holding company listed on the NASDAQ Global Market, was a Kansas corporation headquartered in Kansas. Debtor Brooke Capital, a publicly traded company that was listed on the American Stock Exchange, was an insurance agency and finance company that distributed services through a network of franchises and company-owned businesses. Debtors and approximately thirty affiliated companies were engaged primarily in the business of selling insurance and related services through franchisees, to which Brooke agreed to provide ongoing services. The cost of the acquisition of agencies and franchises was typically financed through Brooke's lending subsidiary. The Trustee alleges that Brooke's business model was unsustainable and that Debtors were continuously insolvent from at least 2003 through their respective bankruptcy filing dates in 2008, but that Brooke's improper accounting practices resulted in a false appearance of solvency.

Albert Riederer was appointed as Chapter 11 Trustee immediately upon the filing of the cases, but Debtors never operated their business under the protection of Chapter 11. There were numerous contested matters, including those related to the relationships with financing banks and agents. A total of 93 adversary proceedings were filed, primarily in October 2010, against a total of 487 defendants. The majority of the complaints combined legally similar but factually unrelated claims against unrelated defendants. The filings included approximately 36 preference actions, 13 actions against agents for recovery on account, 18 complaints against insurance carriers without profit-sharing

claims, 13 actions against insurance carriers with profit-sharing claims, and miscellaneous actions, such as claims against prepetition counsel for malpractice, security underwriters, and former directors and officers. HB provided litigation services, except for the routine preference actions which were handled by an outside entity and cases in which HB had a conflict of interest. Several circumstances, including the unavailability of all the former managers of Debtors, a lack of organization of their information and records, and the existence of tremendous volumes of data in unsearchable electronic form, made such representation difficult.

At the time of trial, gross non-litigation recoveries, such as federal tax refunds, were \$12,629,000, to which the Trustee attributes HB fees of \$3,253,000 through September 30, 2013, and gross litigation recoveries were \$11,308,850, to which HB fees of \$3,048,000 are attributed.<sup>8</sup> The litigation recovery reflects the resolution of the majority of the adversary proceedings. The remaining claims will be discussed below.

**D. HB’s fee applications.**

Interim fee applications have been filed approximately quarterly in these cases. The following table summarizes the status of the applications:<sup>9</sup>

<u>Fee App</u>	<u>Fees Requested or Approved</u>	<u>Expenses Requested or Approved</u>	<u>Order/Status</u>
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<sup>8</sup> Exh. 10 and 11. Exhibit 11, “Analysis of Litigation Recoveries,” shows an additional \$240,000 for settlement of matters classified as unresolved under task code 5 and \$22,000 under code 15. Fees of \$3,444,000 are attributed to all unresolved matters, including those stated to have been settled.

<sup>9</sup> Dkt. 4729 at 11.

First	\$187,202.30	\$13,047.97	Doc. 965/Nov 17, 2009
Second	\$418,713.10	\$16,014.22	Doc. 1154/Feb 28, 2010
Third	\$446,408.70	\$13,392.18	Doc. 1316/Jun 9, 2010
Fourth	\$579,150.00	\$79,150.00	Doc. 1441/Sep 1, 2010
Fifth	\$840,537.00	\$21,809.32	Doc. 1656/Dec 22, 2010
Sixth	\$786,480.20	\$46,820.25	Doc. 1998/May 26, 2011
Seventh	\$855,329.50	\$28,666.93	Doc. 2056/Aug 11, 2011
Eighth	\$514,898.60	\$15,263.35	Doc. 2167/Nov 18, 2011
Ninth	\$364,249.60	\$5,733.48	Doc. 2178/Dec 16, 2011
Tenth	\$774,484.50	\$12,157.39	Doc. 2332/May 31, 2012
Eleventh	\$649,958.72 (\$162,489.68 held in trust)	\$18,636.02	Doc. 2589/Dec 27, 2012
Twelfth	\$562,726.00 (\$140,681.50 held in trust)	\$16,466.99	Doc. 2590/Dec 27, 2012
Thirteenth	\$638,258.88 (\$159,564.72 held in trust)	\$13,053.02	Doc. 3825/Apr 16, 2013
Fourteenth	\$1,185,795.00	\$16,820.44	<i>PENDING</i>
Fifteenth	\$708,609.00	\$12,978.16	<i>PENDING</i>

As a result of increasing concerns about mounting fees, commencing with the 11th interim fee application, the Court ordered that 20% of HB's fees be held in trust pending further order of the Court. Interim applications one through thirteen resulted in the interim allowance of fees and expenses of \$9,712,735.90, with a holdback of \$462,735.90 held in trust.

In late 2011, HB implemented a task code system for time and expense entries. For example, general matters relating to Brooke Corporation are assigned task code 1, general matters relating to Brooke Capital Corporation are assigned task code 2, adversaries to recover preferences are assigned task code 5, adversary actions relating to agents are assigned task code 6, directors and officers litigation is assigned task code 9, preparation of status reports is assigned task code 17, and work on legal issues relating to

priority claims is assigned task codes 18 and 19. These codes allow the Court and the U.S. Trustee to separate fees for litigation matters from those for general bankruptcy representation and to analyze the compensation requested for specific tasks. For purposes of facilitating review of HB's fee applications, HB and the Trustee analyzed billing statements prior to the institution of the task code system and retrospectively assigned codes to allow consideration of the approximate time and expenses attributed to specific matters for the duration of the cases.

Beginning in April 2013, the U.S. Trustee started a dialogue with the Chapter 7 Trustee and HB about the U.S. Trustee's view that it would be in the best interests of the estates for the outstanding litigation matters to be handled by HB on a contingent fee basis, rather than on an hourly basis. This view was based primarily on the fact that the amount of fees and expenses exceeded the amounts that had been paid to the unsecured creditors and it appeared that, unless a change were made, the unsecured creditors might not materially benefit from the litigation undertaken. The Trustee and HB agreed to consider the matter but did not make a proposal. The 14th Interim Fee App was filed on July 25, 2013; almost 90% of the compensation requested is for work on the litigation matters. The U.S. Trustee states that on September 12, 2013, the Trustee and HB were advised that an objection to any further fees being paid to HB would be filed, unless a proposal regarding contingency fees was made. The 15th Interim Fee App was filed on October 24, 2013. The services rendered were primarily for litigation matters.

**E. The Trustee's Application.**



On October 24, 2013, the Trustee filed the Application to approve a revised compensation structure, attached to which was a proposed agreement with HB dividing the basis for compensation for services after October 1, 2013, into two groups: non-litigation matters, for which compensation would remain on an hourly basis, and litigation matters, for which compensation would be based upon a percentage of recovery. The U.S. Trustee and others objected to specifics of the proposed agreement. Thereafter, the Trustee filed the Support Document, to which was attached the Second Revised Fee Proposal, which made significant revisions to the proposed fee structure.

The Second Revised Fee Proposal maintains the two-tier compensation method for all services rendered after October 1, 2013. As to nine task codes, including such matters as general representation of Debtors and the preparation of status reports, HB would be compensated on an hourly basis. Interim applications for the allowance of fees and expenses would be presented quarterly, with all hourly fees subject to a 15% holdback. As to the remaining task codes (the Contingent Fee Matters), HB would receive as compensation for its services an amount calculated using a sliding scale percentage of any amounts recovered by way of settlement or judgment on or after October 1, 2013. The sliding scale ranges from 22.5% (for matters concluded on or before February 15, 2014) to a high of 38% (for matters where \$5,000 or more of legal fees is incurred in collection efforts after a judgment has become final after a trial). The contingent fee is to be determined based on the gross amount recovered, less expenses incurred after October 1, 2013, and to be subject to Court approval. The other terms of the Second Revised Fee

Proposal include, as conditions to HB's offer to the Trustee to amend the compensation arrangement, the following: (1) the Court's approval of the 14th and 15th Interim Fee Apps on or before December 20, 2013; (2) the Court's approval of a holdback of \$1 million, comprised of the previously ordered holdbacks of \$463,000, less applicable bank fees, and an additional holdback from the 14th and 15th Interim Fee Apps of approximately \$541,800 (which is approximately 28.6% of the fees requested); and (3) reduction of the holdback percentage on hourly fees after October 1, 2013, from 20% to 15%.

**F. The 14th Interim Fee App.**

The 14th Interim Fee App covers the period from March 1, 2013, through June 30, 2013. It seeks \$1,185,795 as compensation for services, subject to a proposed holdback of \$339,133.62, and \$16,820 as reimbursement of expenses.<sup>10</sup> Of the fees, the U.S. Trustee calculates that \$101,816.00 is for services on matters which are included in the non-contingency tasks as defined in the Second Revised Fee Proposal.<sup>11</sup>

**G. The 15th Interim Fee App.**

The 15th Interim Fee App covers the period from July 1, 2013, through September 30, 2013. It seeks \$708,609.00 as compensation for services, subject to a proposed holdback of \$202,659.93, and \$12,978.16 as reimbursement of expenses.<sup>12</sup> Of the fees,

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<sup>10</sup> Exh. 20.

<sup>11</sup> Exh. A at 1.

<sup>12</sup> Exh. 20.

the U.S. Trustee calculates that \$39,371.10 is for services on matters which are included in the non-contingency tasks as defined in the Second Revised Fee Proposal.<sup>13</sup>

## **DISCUSSION OF THE SECOND REVISED FEE PROPOSAL AND THE 14TH AND 15TH INTERIM FEE APPS.**

### **A. Legal standard.**

A bankruptcy court has “‘wide discretion’ to authorize many types of fee arrangements” for professionals whose employment is approved under § 327.<sup>14</sup> Section 328 allows attorneys to obtain prior court approval of a compensation plan which provides for reasonable terms and conditions. It permits a trustee to employ counsel on an hourly basis and on a contingent fee basis. “[A] Bankruptcy Court need not approve or reject an application as presented but may approve an application with modified terms that the Court finds necessary to render the proposed employment reasonable.”<sup>15</sup>

Section 330(a)(1) provides that the court may award to a professional person employed under § 327 “(A) reasonable compensation for actual, necessary services rendered . . . and (B) reimbursement for actual, necessary expenses.” Under this section, the Court has “the ability to declare a fee unreasonable and to independently determine reasonable fees.”<sup>16</sup> “The burden is on the party requesting fees to establish that its request

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<sup>13</sup> Exh. A at 2.

<sup>14</sup> *Market Center East Retail Property, Inc., v. Lurie (In re Market Center East Retail Property, Inc.)*, 730 F.3d 1239, 1249 (10th Cir. 2013).

<sup>15</sup> *In re Federal Mogul-Global, Inc.*, 348 F.3d 390, 398 (3rd Cir. 2003).

<sup>16</sup> *Market Center East Retail Property*, 730 F.3d at 1246.

is reasonable.”<sup>17</sup> Section 331 allows the debtor’s attorney to apply for interim compensation, but such an award is discretionary. “Any amounts that were awarded as interim compensation are subject to reconsideration at any time prior to the final award, for any reason.”<sup>18</sup> In this district, when a professional obtains approval for 100% of the professional’s fees to be paid monthly, the professional must hold back not less than 10% of the fees in trust, pending approval of an interim or final fee application, unless the Court orders otherwise.<sup>19</sup>

The U.S. Trustee System is a “nationwide network intended to remove bankruptcy judges from close involvement in the supervision and administration of bankruptcy cases.”<sup>20</sup> To assist it in carrying out its statutory duties,<sup>21</sup> the U.S. Trustee is provided copies of pleadings filed in bankruptcy cases, including pleadings related to the employment of professional persons, and applications for compensation and reimbursement of expenses.<sup>22</sup>

In this case, the U.S. Trustee has provided much appreciated administrative

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<sup>17</sup> *Id.*

<sup>18</sup> 3 *Collier on Bankruptcy* ¶ 331.04[3] at 331-20 (Alan N. Resnick & Henry J. Sommer, eds.-in-chief, 16th ed. 2013).

<sup>19</sup> D. Kan. L. Bankr. R. 2016.1.(b) (2012).

<sup>20</sup> 2 William L. Norton, Jr., and William L. Norton III, *Norton Bankr. Law & Practice* 3d, § 26:2 at 26-7 (Thomson Reuters 2013).

<sup>21</sup> 28 U.S.C. § 586.

<sup>22</sup> Fed. R. Bankr. P. 9034.

assistance to the Court. It has regularly reviewed HB's fee applications before they were submitted to the Court, and from time to time, suggested revisions to the applications which were made before they were filed. The U.S. Trustee's review led to the suggestion and insistence on a change in the HB compensation structure to include compensation on a contingency basis for litigation matters seeking recoveries for the estate. Absent the U.S. Trustee's involvement, it is unlikely that the change would have been proposed or that the Court would have been provided with the detailed information regarding HB's professional services that is necessary to evaluate the proposed change or the reasonableness of the fees requested in the 14th and 15th Interim Fee Apps.

**B. The U.S. Trustee's objections.**

The U.S. Trustee's primary objection to the 14th and 15th Interim Fee Apps is that HB should be compensated on a contingency-fee basis commencing on March 1, 2013, rather than an hourly basis, for the services provided on the task codes included in the Contingent Fee Matters as defined by the Second Revised Fee Proposal.<sup>23</sup> The objections to the proposed HB compensation arrangement incorporating the Second Revised Fee Proposal are primarily to those components that relate to the 14th and 15th Interim Fee Apps.<sup>24</sup> The U.S. Trustee questions whether the holdback requested by the Trustee is

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<sup>23</sup> Dkt. 4743 and 4757. The U.S. Trustee also argued that it took too long to pay priority wage claims, that there were significant problems in a small sample of reviewed claims, and that the case has not been staffed as cost efficiently as possible, but failed to pursue these contentions at trial by offering argument or evidence. The Court therefore does not consider these objections.

<sup>24</sup> Dkt. 4774 at 4.

reasonable<sup>25</sup> and whether the Second Revised Fee Proposal gives sufficient credit for all fees and expenses that have been incurred by HB prior to October 1, 2013, for the Contingent Fee Matters.<sup>26</sup>

**C. The Court approves the basic elements of the change in the compensation structure.**

Before addressing the Trustee's objections and its own concerns about the compensation of HB, the Court pauses to address the Second Revised Fee Proposal in general. The Court finds that the hourly-based compensation agreement between HB and the Trustee previously approved by the Court is not appropriate for future services on litigation matters and that the revision of the compensation agreement with HB to a partial contingency fee agreement is required so that fees for future services will be reasonable. The estate and its creditors will benefit by the transfer of the litigation risk to HB. The U.S. Trustee's decision to pursue this amendment and the Trustee's cooperation are greatly appreciated.

As to the non-litigation matters, the Court finds that the continuation of time-based compensation is reasonable and that the evidence supports the division proposed between the non-litigation and litigation task codes. Although initially the Court had questioned whether task code 20, "Legal Issues — Unsecured Claims Objections," should be considered non-litigation, this concern was answered by the Trustee's testimony that he,

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<sup>25</sup> *Id.* at 6.

<sup>26</sup> *Id.*

not HB, is handling the claims objections, with the exception of minor legal issues for which he seeks assistance from HB. If this allocation of work between the Trustee and HB changes as these cases progress, the assignment of the task to non-litigation can be reviewed and, on final application, a portion of such fees can be disallowed.

The task codes for the litigation matters are assigned to the fourteen unresolved adversary proceedings and one case pending in a Jackson County, Missouri state court. The adversary proceedings include a wide variety of subject matters, including preference actions, claims against former officers and directors, a legal malpractice claim against Debtors' prepetition counsel, and claims against securities underwriters. Some of these claims are close to being resolved; for others, discovery is only beginning. Substantial recoveries of hundreds of millions of dollars are sought. These are the types of claims for which compensation based upon the amount ultimately recovered is appropriate. Absent a contingency arrangement, the risk to the estates would be substantial. The cost of professional services required to obtain recoveries for the estates is difficult to predict. There is a risk of outcomes adverse to the estates. In some cases, even if a money judgment is obtained, collection could be an issue. If the estates were to fund the litigation based upon hourly compensation, there is a possibility that professional fees would consume most of the estates' assets, to the detriment of creditors.

As stated above, the Second Revised Fee Proposal includes a sliding scale for calculating the contingency fee based upon the stage of the litigation in which the matter is concluded, ranging from 22.5% to 38%. Trial testimony convinces the Court that the

rates are reasonable. The Court finds credible the testimony of the Trustee and the HB attorney in charge of the litigation that contingency fees for this type of litigation in today's legal market would be 45% because of the nature of the commercial claims and the complexity of the electronic records discovery. HB is willing to take the cases on a reduced percentage basis based upon its analysis of the cases, the prospects of recovery, what remains to be done, and the fees billed on these litigation matters on an hourly basis prior to October 1, 2013. The Trustee contacted seven large litigation firms about representation, but none were willing to undertake the cases on terms more favorable to the estates than those offered by HB.

**D. The Court approves the requests for compensation for professional fees in the 14th and 15th Interim Fee Apps.**

The fees for which compensation is sought in the 14th and 15th Interim Fee Apps are reasonable. The Trustee's application is approved, and HB as attorneys for the Trustee is entitled to an interim payment for fees of \$1,185,795.00, subject to the holdback of \$339,133.62, for the period from March 1, 2013, through June 30, 2013, and fees of \$708,609.00 for the period from July 1, 2013, through September 30, 2013, subject to the holdback of \$202,659.93. As examined below, the expenses for which reimbursement is sought are not approved at this time.

The approved holdback is the amount proposed by the Trustee in the Second Revised Fee Proposal, which provides for a total holdback of \$1 million, comprised of the holdbacks already ordered for the 11th, 12th, and 13th interim fee applications, plus a



holdback of approximately 28.6% for the 14th and 15th Interim Fee Apps. The Court regards the primary, but not only, purpose of the holdback to be to provide a fund sufficient to accommodate required adjustments to make the final fee award on specific contingency fee matters reasonable, if the final recovery is less than the Trustee anticipates. When the litigation matters are concluded and final fee applications for each case are presented for approval, the compensation requested will be comprised of the fees requested in the 15 interim applications for services prior to October 1, 2013, based on hourly rates, plus a percentage of the net recovery, in accord with the sliding scale stated in the Second Revised Fee Proposal. At the Court's request, the Trustee provided testimony and exhibits under seal concerning the details of each of the Contingent Fee Matters, including the fees on an hourly basis through September 30, 2013, the amount of the claim, and the status of the litigation. Using this evidence, the Court conducted a detailed analysis, which convinced the Court that the holdback as proposed will provide the Court with sufficient flexibility when ruling on the final fee applications for the Contingent Fee Matters to assure on a case-by-case basis that the compensation for each contingent fee matter is reasonable.<sup>27</sup>

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<sup>27</sup> When beginning its analysis, the Court recognized the possibility that it might want to supply more detail about the holdback analysis, which would involve a discussion of the evidence submitted under seal. It therefore requested memoranda on the question whether a portion of the Court's ruling could be filed under seal, and the Trustee filed the requested brief, with which the U.S. Trustee agreed. The Court has now determined that additional findings under seal would not materially enhance the Court's ruling.

In making this ruling, the Court rejects the U.S. Trustee's proposal<sup>28</sup> that the fees approved on an interim basis be those to which HB would be entitled if it were paid for contingency fee work at the rate of 30% of \$992,982.18, the amount collected for the estate during the period covered by the 14th and 15th interim applications. To this amount, the U.S. Trustee would add fees requested on an hourly basis for non-contingency work and expenses, for a total approved interim fee of \$468,808.35. To the extent the U.S. Trustee is suggesting changing to a contingency basis for these two interim applications, the Court finds the proposal to be inconsistent with the Court's prior approval of the employment of HB based upon hourly compensation. To the extent the U.S. Trustee is using the calculation merely to support a rationale for drastically reducing the approved interim fees and expenses, the Court finds the amount of the suggested reduction to be unreasonable.

**E. The Court does not rule on the requests for reimbursement of expenses in the 14th and 15th Interim Fee Apps and will set a status conference on the matter.**

When reviewing the detail of the expenses in the 14th and 15th Interim Fee Apps, the Court found inconsistencies and had questions which were not addressed at trial. The Court will therefore delay ruling on the requests at this time and will promptly schedule a status conference on the matter.

**F. The Court does not approve some elements of the Second Revised Fee Proposal.**

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<sup>28</sup> Exh. A at 4.

**1. The Court does not approve the reduction in the Second Revised Fee Proposal of the holdback on fees for non-contingent fee matters.**

The Second Revised Fee Proposal provides that the payment of fees on non-contingency matters will be subject to a holdback of 15%, rather than the 20% which the Court has ordered applicable to the 11th and subsequent fee applications. The Court finds the reduction is not appropriate given the uncertainty about the complexity of potential claim evaluations which are included in the non-litigation matters. The payment of fees for services after October 1, 2013, on non-contingency matters will be subject to a 20% holdback.

**2. The Court does not approve the right reserved in footnote 7 of the Second Revised Fee Proposal for HB to elect, within ten days after the entry of an order approving the revised compensation agreement, to move the SpiritBank claim from the Contingent Fee Matters to the matters to be billed on an hourly basis.**

Footnote 7 of the Second Revised Fee Proposal reserves for HB the right to elect, within ten days after the entry of an order approving the Second Revised Fee Proposal, to move the SpiritBank Claim from the contingency matters to the matters to be billed on an hourly basis. The Trustee has the burden of proof to show the reasonableness of the proposed revised fee structure, but he did not provide evidence supporting the right to elect the category for the SpiritBank claim. The Court will not approve this portion of the proposed revised fee agreement.

**CONCLUSION.**

The Court approves on an interim basis the compensation for professional fees

requested in the 14th Interim Fee App of \$1,185,795, subject to a holdback of \$339,133.62, and in the 15th Interim Fee App of \$708,609, subject to a holdback of \$202,659.93. A separate order approving these applications is being filed simultaneously with this Opinion, and it shall be effective immediately, the 14-day stay that is generally applicable to orders will be waived, and HB will be authorized to immediately disburse such funds from the estates to HB.

The Court delays ruling on the expense reimbursements requested in the 14th and 15th Interim Fee Apps. A status conference will be scheduled on this matter.

The Court approves the Second Revised Fee Proposal, subject to an increase of the holdback on non-contingency matters to 20%, and the removal of the HB option to transfer the SpiritBank matter from contingency to non-contingency. Within 10 days of the entry of this Opinion and the accompanying Order, the Trustee shall file a revised Application, attached to which shall be a modified version of the Second Revised Fee Proposal containing changes consistent with this Opinion, and submit to the Court a proposed order approving the same.

The foregoing constitutes Findings of Fact and Conclusions of Law under Rules 7052 and 9014(c) of the Federal Rules of Bankruptcy Procedure, which make Rule 52(a) of the Federal Rules of Civil Procedure applicable to this matter.

**IT IS SO ORDERED.**

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