

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

ROSCOE WOODWORKING, INC.

CASE NO. 95-60119

Debtor

Chapter 11

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APPEARANCES:

PICHEL & LAMA, ESQS.  
Former Attorney for Debtor  
320 N. Aurora St.  
Ithaca, New York 14850

MICHAEL J. PICHEL, ESQ.  
Of Counsel

L. DAVID ZUBE, ESQ.  
Attorney for Debtor  
59 Court St., 5th Floor  
Binghamton, New York 13902

MICHAEL E. COLLINS, ESQ.  
Assistant U.S. Trustee  
10 Broad St.  
Utica, New York 13501

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

The Court considers herein the Fee Application of Michael J. Pichel, Esq. and Luciano L. Lama, Esq. ("P&L"), Debtor's former attorneys, filed with the Court on December 18, 1995.

The Fee Application which covers the period December 29, 1994 to July 24, 1995, seeks a fee of \$25,000. No request for reimbursement of expenses is sought. Objections to the Fee Application were filed by L. David Zube, Esq. ("Zube"), Debtor's current attorney, and the United States Trustee ("UST"). A hearing on the Fee Application was held before the Court on January 8, 1996 at Binghamton, New York and the matter was submitted for decision

on that date.

#### JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this contested matter pursuant to 28 U.S.C. §§1334(b), 157(a) and (b)(1) and (2)(B).

#### FACTS

The Debtor filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§101-1330)("Code") on January 13, 1995. On June 28, 1995, this Court Ordered the appointment of P&L as Debtor's counsel, said appointment to be effective on May 18, 1995. Debtor's application for appointment dated May 24, 1995, acknowledged payment of a pre-petition retainer to P&L in the sum of \$25,000.<sup>1</sup> The Fee Application itself reflects 79.3 hours consumed by P&L prior to the filing of Debtor's petition on January 13, 1995, 222.55 hours consumed between January 13, 1995 and May 18, 1995, the effective date of P&L's appointment, and 30.7 hours of services rendered between May 18, 1995 and July 24, 1995.

#### ARGUMENT AND DISCUSSION

Zube, as Debtor's substituted counsel, asserts that it was not until he filed a motion on November 8, 1995 seeking an

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<sup>1</sup> While the Fee Application seeks a fee of \$25,000, P&L indicates that based upon their contemporaneous time records they actually are entitled to fee of \$41,568.75.

examination of the pre-petition fees paid to P&L pursuant to Code §329, did P&L file the instant Fee Application. Zube contends that both substantively and procedurally the Fee Application fails to comply with the Federal Rules of Bankruptcy Procedure, the Local Bankruptcy Rules of this District and the "Guidelines For Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. §330" promulgated by the UST. In addition, Zube references alleged non-disclosures of potential conflicts of interest arising from the inclusion of an unsecured creditor in Debtor's petition identified as "Lama Insurance Co." and its possible relationship to P&L, as well as the status of a pre-petition debt owed to P&L scheduled in Debtor's petition at \$750, while being referenced in Pichel's verified statement seeking appointment as having "been paid or forgiven".

The UST's objection, while referencing the same procedural deficiencies as Zube, further focuses on that portion of the Fee Application which seeks pre-petition fees, referencing P&L's statement in its Application for Appointment that all pre-petition fees had either been paid or waived. Additionally, the UST objects to P&L receiving any fees for the so-called "per se" hours, time consumed between the filing of the petition and the date of P&L's appointment. The UST contends that P&L does not fit within any of the limited exceptions to the "per se" rule. Finally, the UST objects to what it characterizes as P&L's consumption of excessive hours devoted to "reviewing and organizing the file for transfer to Mr. Zube." (See Objection of U.S. Trustee dated January 5, 1996 at ¶ 5(c).) P&L has filed no written

response to the objections of Zube and the UST.<sup>2</sup>

The Court turns first to that portion of the Fee Application that seeks a fee for pre-petition services. Both Zube and the UST assert that P&L's position with regard to pre-petition services is inconsistent with a statement contained in its Application for Appointment, that any pre-petition fee due P&L was either paid or waived. The UST suggests that if P&L's position, as set out in its Application for Appointment is incorrect, then P&L could not be deemed to be disinterested.

This Court has held consistently that a professional who is also a pre-petition creditor of a debtor is ineligible for appointment pursuant to Code §327, unless its pre-petition claim is waived. (See S.W. Johnson Enterprises, Case No. 94-62346, December 19, 1994; B & K Grocery, Inc., Case No. 94-61355, December 22, 1994). While it does appear from the contemporaneous time records filed by P&L that the pre-petition services were rendered literally on the "eve" of bankruptcy and for which P&L received a \$25,000 retainer, P&L has failed to address the apparent inconsistency raised by Zube and the UST. As a consequence and without prejudice, the Court will make no fee award for the period 1/9/95 through 1/13/95, the date of filing.

Turning to the UST's objection relating to the "per se" rule, the Court must agree that P&L makes no allegation that would exempt it from the rigors of the rule. In fact, Zube alleges that it was not until he filed a motion in November 1995 seeking to

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<sup>2</sup> At oral argument on January 8, 1996, P&L, other than asserting that there was no conflict interest vis a vis Lama Insurance Co., generally relied on the Fee Application.

examine P&L's retainer did P&L even acknowledge the requirements of Code §330 and file the instant Fee Application. As pointed out by this Court in In re ICS Cybernetics, Inc., 97 B.R. 736, 738 (Bankr. N.D.N.Y. 1989) and most recently affirmed in In re Household Merit, Inc., Case #94-62969, April 14, 1995, the "per se" rule prohibits compensation to a professional whose appointment is mandated by Code §327 for services rendered post-petition and pre-appointment. Again, P&L has not even suggested that it somehow fits into the very limited exceptions carved out of the rule. Accordingly, the Court agrees with the UST that it must deny, with prejudice, compensation for the period 1/13/95 through 5/18/95 or the sum of \$27,818.75. Further, were the "per se" rule inapplicable, the Court does not suggest that it would approve some or all of that amount in the absence of an analysis pursuant to Code §330(a)(3)(A).

Finally, the Fee Application seeks compensation for post-petition, post-appointment hours totalling \$3,837.50, which would appear compensable were it not for the issue of adequate disclosure as to the existence of P&L's alleged pre-petition creditor status and the Court's inability to assess the value of P&L's services to this Debtor in light of the procedural deficiencies noted by both Zube and the UST.

Accordingly, the Court will direct that P&L, within fifteen (15) days of the date of this Order, pay over to Zube, as attorney for the Debtor, the entire sum of \$25,000 which sum shall be held by Zube subject to a further order of this Court. The turnover of said funds shall be without prejudice to P&L filing a

further application to address the fees sought for the pre-petition and post-petition post-appointment periods upon a proper showing of compliance with Code §330 as amended, Local Rule 216.1(a)(3) and the UST Guidelines.

IT IS SO ORDERED.

Dated at Utica, New York

this 28th day of February 1996

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge