UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MERCER'S KWIK STOP FOOD STORES, INC. — CASE NO. 90-02046

Debtor — Chapter 11

APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

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

On March 3, l992, the Court heard argument on an Application For Allowance of Compensation and Reimbursement of Expenses ("Fee Application") filed herein by Charles F. Vihon, Esq. ("Vihon") on behalf of the firm of Much, Shelist, Freed, Denenberg & Ament, P.C. ("Much"), as attorneys for Convenient Food Mart, Inc. ("CFMI"), a member of the Official Creditors' Committee.

Debtor filed an Affirmation in opposition to the Fee Application, as did Shirley Sattler Mercer ("S.Mercer"). Both appeared at oral argument on the motion.

The Fee Application, which is grounded upon §503(b)(3) and (4) of the Bankruptcy Code (ll U.S.C. §§101-l330) ("Code") seeks a fee of $7,050.00 and reimbursement of expenses in the sum of $832.83 covering the period of November

l, l99l and January 27, l992.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this contested matter pursuant to 11 U.S.C. §§1334(b) and 157(a), (b)(l), (2)(A) and (B).

ARGUMENTS

Vihon, on behalf of Much, contends that it was retained by CFMI shortly after Debtor filed its voluntary petition pursuant to Chapter 11 of the Code, and that through its efforts, general unsecured creditors received a greater dividend than originally proposed by the Debtor in the Plan of Reorganization, and that the dividend has now been secured by the Debtor, thus assuring payment. While the Debtor concedes that Much may have admirably represented the interests of CFMI, it asserts that Much contributed nothing significant to the interests of the general unsecured creditors as a whole, since their interest was adequately represented by the attorneys for the Creditors' Committee.

Debtor argues that Much's efforts were "reactive" rather than "proactive" and that unless and until CFMI itself makes application for and receives an allowance pursuant to Code §503(b)(3), Much is without any legal basis to seek compensation pursuant to Code §503(b)(4).

S.Mercer echoes the Debtor's contention that Much represented primarily the interest of CFMI and that any benefit to unsecured creditors in general was merely incidental. She argues that any counsel who represented an individual member of the Creditors' Committee could make an argument identical to that being asserted by Much.

Finally, S. Mercer points out that almost one-half of the time for which Much seeks compensation involved air travel between Chicago and Utica/Syracuse, New York.

DISCUSSION

The Court invited all parties to submit memoranda of law regarding the legal issue raised by the Debtor, that an application by CFMI pursuant to Code §503(b)(3) was in effect a predicate to consideration of Much's Fee Application pursuant to Code §503(b)(4).

Debtor has simply reiterated its position that absent the allowance of an administrative expense to CFMI under Code §503(b)(3)(D), Much cannot be compensated from the Debtor's estate.

Debtor also points out that Much cannot "bootstrap" allowance of its claim by moving under both Code §§503(b)(3) and (4). The Court agrees that Much cannot seek compensation under Code §503(b)(3), as it clearly does not meet the definition of "creditor" found in that section. See Code §101(10).

Conversely, the Court cannot agree with the Debtor's contention that the actual allowance of an administrative expense to CFMI is somehow a condition precedent to consideration of Much's Code §503(b)(4) claim.

The Court focuses on the plain language of Code §503(b)(4) which provides that a bankruptcy court may award reasonable compensation to an attorney who has represented "an entity whose expense is allowable under paragraph (3) of this subsection". As Much argues in its Memorandum, if Congress had intended the allowance of a creditor claim under Code §503(b)(3) to act as a predicate for Code §503(b)(4) compensation, it would have used the past tense of the above quoted language and the words "has been" would have been substituted for "is".

Additionally, it is noted that CFMI has, in fact, previously applied for and received compensation for travel expenses as a member of the Official Creditors' Committee. See Order of this Court dated July 3l, l99l. Debtor argues that those travel expenses could not have been approved by this Court pursuant to Code §503(b)(3)(D), since that section specifically prohibits reimbursement of the expenses of an official creditors' committee appointed pursuant to Code §1102. The Court, however, rejects that argument in light of its prior decision in In re Northeast Dairy Co-Op. Federation, Inc., 76 B.R. 9l4 (Bankr. N.D.N.Y. l987).

Thus, based on the foregoing, the Court concludes that Much's Fee Application for compensation is authorized pursuant to Code §503(b)(4).

Turning to the merits of the Fee Application, the Court is guided by

the language of Code §503(b)(3)(D), that the services for which compensation is sought must have been rendered on behalf of a client who has made a "substantial contribution" to the case. As noted in In re Catalina Spa & R.V. Resort Ltd., 97 B.R. l3, l7 (Bankr. S.D.Cal. l989), "Substantial contribution has been defined as 'services ... which foster and enhance rather than retard or interrupt' the progress of reorganization or those services which are provided solely for the client-as-creditor, such as those services rendered in prosecuting a creditors claim, are not compensable. [Compensable services] are those which facilitated the progress of these cases ...". See also In re Mishkin, 85 B.R. l8 (Bankr. S.D.N.Y. l988); In re Michigan General Corp., l02 B.R. 554 (Bankr. N.D.Tex. l988); In re 1 Potato 2, Inc., 7l B.R. 6l5 (Bankr. D.Minn. l987); Matter of Patch Graphics, 58 B.R. 743 (Bankr. W.D.Wisc. l986).

In the Fee Application sub judice, Much asserts that its efforts on behalf of CFMI resulted in 1) a greater dividend to unsecured creditors and 2) securing of that dividend by the Debtor. Much does not provide, in its Fee Application however, any specifics as to the manner in which its efforts, as opposed to those of the Official Creditors' Committee's general counsel, brought about the stated result.[1]

As noted in In re Catalina Spa & R.V. Restor, Ltd., supra, 97 B.R. at l7, "an incidental benefit is not sufficient to grant an administrative priority." Herein, Debtor contends that "repayment terms and security for same were negotiated between the [Debtor] and the Creditors' Committee as a whole, generally, and with counsel to the Creditors' Committee specifically." (See Affirmation in Opposition to Application For Allowance of Compensation and Reimbursement of Expenses By Counsel to Convenient Food Mart, Inc. at para. 4).

A review of the contemporaneous time records filed by Much in support of its Fee Application, likewise provides little or no insight into Much's actual services from which one might logically arrive at the conclusions asserted in the Fee Application.

Debtor, in its Memorandum of Law, asserts that Much's time records

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[1] It is noted that the firm of Hancock & Estabrook, Esqs. was appointed general counsel to the Official Committee of Unsecured Creditors by order of this Court dated October 17, 1990 and has to date been compensated for services rendered on behalf of the Committee in the sum of $88,208.l5.

for which compensation is sought cover the period November 6, l99l through January 9, l992, while the Debtor's Plan, ultimately confirmed by Order of this Court dated March 13, 1992 was in fact dated July 3l, l99l, and filed with the Court on August 6, l99l, well before any of Much's services, which are the subject of this Fee Application, were rendered. (See Debtor's Memorandum of Law dated April 3, l992 at pg. 4).

Finally, Much's time records invoke two additional comments by the Court. First, Much's participating attorneys billed their time at $300 per hour, well in excess of the hourly rate charged by comparable bankruptcy counsel in the upstate New York area. While this Court is aware of case law which approves significantly higher hourly rates of non-local counsel, the Court fails to find any of the criteria cited by those cases which would support approval of such rates herein. See In re Public Service Co. of New Hampshire, 86 B.R. 7 (Bankr. D.N.H. l988); In re Yankton College, l0l B.R. l5l (Bankr.D.S.D. l989); In re Washington Mfg. Co., l0l B.R. 944 (Bankr. M.D.Tenn. l989). Accordingly, the Court will not approve an hourly rate herein in excess of $190.00.

Approximately ten hours of Much's Fee Application involves travel time between Chicago and Utica, New York. This Court has consistently allowed pure travel time to be compensated at one-half of the professional's allowable hourly rate. Thus, the ten hours herein would have to be adjusted accordingly.

Having completed its review of the Fee Application, as well as the contemporaneous time records attached thereto as Exhibit A, and the itemization of disbursements attached thereto as Exhibit B, this Court must conclude that the Application has failed to satisfactorily establish that Much's efforts on behalf of CFMI resulted in any substantial contribution to the Debtor's reorganization case such as to warrant compensation pursuant to Code §503b)(4). Much's Memorandum dated April 2, l992, in a footnote, suggests that it reserves its rights with regard to the issue of "substantial contribution" though it is not clear whether that reservation is intended to address legal or factual issues.

Based on the foregoing, the Court will deny Much's Fee Application in its entirety. The Court will, however, permit Much to file a supplemental fee application, on limited notice to the parties who previously appeared, which application shall respond to the findings of the Court herein. Said application

shall be filed within twenty days of the date of this Order.

The parties who have appeared shall be given an additional twenty days to file an appropriate response.

IT IS SO ORDERED.

Dated at Utica, New York
this day of June, l992

STEPHEN D. GERLING
U.S. Bankruptcy Judge