



SIGNED this 09th day of July, 2007.

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FRANK R. MONROE
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE: X
X CASE NO. 02-12093-FRM
APOLLO SOFTWARE, INC. X
X
DEBTOR X CHAPTER 7
X

MEMORANDUM OPINION

The Court held a hearing on May 15, 2007 on creditor, M.L. “Skip” Fulkerson’s Motion to Compel Compliance With Settlement Agreement (“Motion to Compel”) requesting payment of certain attorneys’ fees. At the conclusion of the proceedings, the Court took the matter under advisement and directed First Capital Group of Texas, II, L.P. to provide a detailed breakdown of its analysis of and objections to Fulkerson’s counsel’s fee request and directed Fulkerson’s counsel to respond to such accordingly. This Memorandum Opinion is being issued as written Findings of Fact and Conclusions of Law as required by Bankruptcy Rule 7052. This is a core proceeding under

28 U.S.C. §157(b)(2)(A) as it deals with the administration of this estate. As such it is a matter which arises under Title 11. Accordingly, this Court has jurisdiction to enter a final order on all issues under 28 U.S.C. §1334(a) and (b), 28 U.S.C. §151, 28 U.S.C. §157(a) and (b)(1) and the Standing Order of Reference from the United States District Court for the Western District of Texas.

Findings of Fact

Background

Apollo Software, Inc. (“Debtor”) filed a voluntary petition under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) on May 31, 2002. First Capital Group of Texas, II, L.P. (“First Capital”) and M.L. Fulkerson (“Fulkerson”) asserted competing secured creditor status against certain assets of the Debtor. On June 13, 2002 Debtor filed its Motion to Sell Assets Free and Clear of Liens and Claims and to Assume and Assign Leases. Debtor filed an Amendment to this Sale Motion on July 11, 2002. The Court entered an Order Authorizing and Approving Debtor’s Amended Motion to Sell Substantially All of the Assets of the Debtor Free and Clear of Liens on July 25, 2002. In exchange for the assets sold, the Debtor received a promissory note in the original principal amount of \$1,950,000.00 (the “Note”) payable by EDOC Technologies and ImageTek, Inc. (collectively referred to herein as “ImageTek”). Pursuant to the sale Order, all liens asserted against Debtor’s assets were transferred to the Note in order of lien priority which was to be determined by the Court at a later date.

The Court appointed a Chapter 11 Trustee upon Fulkerson’s Motion to Appoint Trustee on August 6, 2002. The Chapter 11 Trustee proposed a plan which was denied confirmation. The Court then entered an Order converting the case to a Chapter 7 on December 11, 2002. Marsha Milligan was appointed Chapter 7 Trustee.

ImageTek failed to make payments as required on the Note. The Court determined the Note to be in default at a status hearing held March 23, 2004. At such hearing, the Chapter 7 Trustee agreed to attempt to negotiate a work-out of the Note with ImageTek and Debtor's principal creditors, First Capital and Fulkerson.

The Chapter 7 Trustee, Fulkerson and First Capital attempted to negotiate a settlement with ImageTek in connection with the Note beginning in early June, 2004. Although Fulkerson and First Capital asserted secured claims against the Debtor with competing lien claims against certain assets, the parties attempted to work together to project a united front for purposes of securing payment of the Note.

However, it was not until December 8, 2005 that Fulkerson, First Capital and the Chapter 7 Trustee filed a Joint Motion for Approval of Compromise of Controversies (the "Global Settlement Agreement") seeking authorization for a compromise of all matters at issue between the three parties. The Court approved the Global Settlement Agreement by order entered December 21, 2005. Included within the Global Settlement Agreement was a process for collection or compromise of the Note, an allocation of Note payments between the parties and an agreement that Fulkerson and First Capital could seek reimbursement of "reasonable attorneys fees incurred by each in litigation to collect on the promissory note or to enforce any settlement with ImageTek and Edoc." Global Settlement Agreement ¶4.b.i.

Pursuant to the Global Settlement Agreement, the Chapter 7 Trustee, Fulkerson and First Capital made one final offer to work out a payment on the Note with ImageTek. ImageTek rejected the offer. Then as required by the Global Settlement Agreement, the Chapter 7 Trustee, Fulkerson and First Capital filed suit on the Note in an adversary proceeding in this Court, Adv. No. 06-1079.

ImageTek answered and asserted a counterclaim against the Debtor's estate and First Capital. Plaintiffs filed a motion for summary judgment. Immediately, prior to the hearing on this motion, ImageTek and Edoc filed petitions for reorganization under Chapter 11 of the Bankruptcy Code in Waco, Texas. Ultimately, the Chapter 7 Trustee, Fulkerson and First Capital settled their dispute with ImageTek and negotiated a compromise of the Note. On February 16, 2007, the Chapter 7 Trustee, Fulkerson, First Capital and ImageTek agreed to a modification of the Note. This transaction closed on April 13, 2007, and the Chapter 7 Trustee currently holds in excess of \$100,000.00 that the estate is entitled to receive under the Global Settlement Agreement. Fulkerson negotiated an additional \$20,000.00 payment from ImageTek outside the provisions of the Global Settlement Agreement.

The Dispute

Fulkerson's counsel has requested payment of his attorney's fees and costs in connection with this matter pursuant to ¶ 4.b.i of the Global Settlement Agreement as reasonable fees incurred by him in litigation to collect on the Note. First Capital claims that Fulkerson's counsel is only entitled to reimbursement with respect to actual fees expended in pursuing collection of the Note through the adversary proceeding that was filed in this Court. First Capital argues that any services Fulkerson's attorney rendered in ImageTek's bankruptcy and any fees incurred in settlement negotiations are not reimburseable as they are not fees incurred in litigation to collect on the Note.

Fulkerson's counsel initially requested payment of his fees based on 226.80 hours at an hourly rate of \$325.00 for a total fee requested of \$72,075.00. This amount actually includes 218.7 hours of attorney time at \$325.00 per hour, 7.8 hours of paralegal time at \$125.00 and .3 hours of paralegal time at \$75.00 per hour. Attached as Exhibit 2 to the Motion to Compel are Fulkerson's

counsel's time records which list the date, person working on file, hours, amount and description of work. The records, however, are not organized by specific work related matters, i.e. adversary proceeding, bankruptcy litigation, settlement negotiations.

In his Motion to Compel, Fulkerson's counsel reduced the amount of hours in his fee request by 24 hours of attorney time or \$7,800.00 (24 hours x \$325.00)¹ and noted the hours he deleted in his Exhibit 2 to the Motion to Compel. His new fee request was \$64,910.00. However, if you take the original request of \$72,075.00 less the \$7,800.00 it equals \$64,275.00. Instead, Fulkerson's counsel calculates \$64,910.00 in his Motion to Compel as the reduced fee requested.² It may be that counsel took the 202.8 hours and multiplied it by \$325.00. However, that amount would be \$65,910.00 not \$64,910.00 and such amount would not account for the lesser charges of the paralegals.

After the hearing, the Court requested that First Capital file a supplemental pleading designating the billable entries and amounts that it believed were reimburseable to Fulkerson's counsel in connection with the Global Settlement Agreement. Fulkerson's counsel would then have an opportunity to respond to this pleading as to why he was entitled to additional amounts.

First Capital filed its Supplemental Response to Fulkerson's Motion to Compel Compliance with Settlement Agreement ("Supplemental Response") which separates Fulkerson's counsel's time entries and billable amounts into three categories: "Suit on Note"—53.40 hours totalling \$17,355.00, "ImageTek Bankruptcy"—110.10 hours totalling \$34,147.50 and "Settlement"—63.30 hours totalling

¹It does not appear that this 24 hours included any paralegal fees and therefore would be calculated at Fulkerson's counsel's hourly rate of \$325.00.

²Fulkerson's counsel appears to have taken the 202.8 hours remaining after the 24 hour reduction and multiplied by \$325.00. This equals \$65,910.00 and not \$64,910.00. Anyway you look at it, the Court is not sure where the numbers come from.

\$20,572.60. Unfortunately, this Supplemental Response does not account for the 24 hour reduction made by Fulkerson's counsel in his Motion to Compel. It addresses the full 226.80 hours originally requested instead of the 202.8 hours.

In his Verified Response, Fulkerson's counsel reduced his fee request again to \$62,608.00 with costs expended of \$680.26. Fulkerson's counsel indicates that these reductions were all made from the 110.1 hours and corresponding amount of \$34,147.50 shown for "ImageTek Bankruptcy" in the Supplemental Response. From the 110.1 hours, Fulkerson's counsel deletes 8.1 hours of legal assistant time (8.1 x \$125.00 equals \$1,012.50) which was incorrectly calculated³ and 4.1 hours of attorney time (4.1 x \$325.00 equals \$1,332.50). These deductions reduce the amount in dispute on Exhibit. B of the Supplemental Response to 97.9 hours (110.1 - 12.2) and \$31,802.50 (\$34,147.50 - \$2,345.00). But if you take the \$2,345.00 and subtract it from the \$64,910.00 request in the Motion to Compel you have \$62,565.00 and not the \$62,608.00 now requested in Fulkerson's counsel's Verified Response.

Needless to say none of the calculations are accurate except the initial request of \$72,075.00. And, this Court does not have the time to recalculate attorney's fees on behalf of Fulkerson's counsel nor to determine where the 24 hours of reduction would be in the Exhibits to the Supplemental Response. As such, the Court will use the numbers set out in the Supplemental Response and Fulkerson's Verified Reply to calculate the attorneys' fees that are reimburseable pursuant to the Global Settlement Agreement.

³This is actually 7.8 hours of paralegal time at \$125.00 per hour and .3 hours of paralegal time at \$75.00 per hour which would add to \$997.50 and not \$1,012.50.

Of the \$62,608.00 fee request, First Capital concedes that \$17,355.00 was incurred in litigation with respect to collection of the Note. What remains in contest is what funds should be used to pay this \$17,355.00 and whether the remaining \$45,253.00 of Fulkerson's fee request should even be allowed. First Capital claims that should any fees be awarded they should be paid from the additional \$20,000.00 received by Fulkerson from ImageTek which amount was negotiated solely by Fulkerson and solely for his benefit outside the settlement agreement reached by First Capital, Fulkerson, the Chapter 7 Trustee and ImageTek.

First Capital asserts that Fulkerson's overall conduct throughout the Debtor's bankruptcy proceeding delayed the sale of Apollo's assets to ImageTek and at a minimum thwarted an expeditious resolution with ImageTek when ImageTek failed to pay on the Note. The settlement on the Note ultimately agreed to by Fulkerson, First Capital and the Chapter 7 Trustee in February, 2007 is actually for less consideration than some of the original offers made by ImageTek in 2004. First Capital again claims that there would be no fees to reimburse had Fulkerson been more willing to negotiate when the initial settlement negotiations were taking place.

First Capital also argues that a majority of the attorneys' fees were not incurred "in litigation to collect on the promissory note or to enforce any settlement with ImageTek," and therefore cannot be reimbursed from settlement proceeds pursuant to the Global Settlement Agreement. First Capital claims these fees were neither authorized nor reasonable. Fulkerson's counsel spent significant hours and incurred substantial fees in connection with Imagetek's bankruptcy proceeding. First Capital claims that Fulkerson's counsel was never authorized to appear on behalf of the estate in ImageTek's bankruptcy, and therefore, the fees must be denied. Fulkerson's counsel also seeks reimbursement for legal services in connection with settlement negotiations with ImageTek—time

First Capital claims served no creditor's interest but Fulkerson's.

First Capital request that the Court deny in full the attorneys' fees requested unless such are paid from the additional \$20,000.00 consideration extracted by Fulkerson outside the settlement agreement between the Chapter 7 Trustee, First Capital, Fulkerson and ImageTek.

Additionally, First Capital requests that the Court allow reimbursement of its attorneys' fees in the amount of \$9,148.60 and deny the reimbursement of IRS charges as required in the Global Settlement Agreement unless adequately proven by Fulkerson and Mr. Ferris.

Issue Presented

To what amount of attorneys' fees, if any, is Fulkerson's counsel entitled?

Conclusions of Law

Prior to entering the Global Settlement Agreement, the Chapter 7 Trustee, Fulkerson and First Capital attempted to negotiate a settlement on the Note with ImageTek. Whether there should have been a settlement at that time, this Court has no idea. What we do know is that during these settlement negotiations, the Chapter 7 Trustee, Fulkerson and First Capital entered into the Global Settlement Agreement to resolve disputes between them. The Global Settlement Agreement provided for certain payment allocations to be made between the parties in the event the Note was ultimately collected or settled. The Global Settlement Agreement also required that a final settlement offer be made to ImageTek/Edoc and if rejected, the parties were to proceed with an adversary proceeding in Debtor's bankruptcy to collect on the Note. See ¶3.b. and ¶3.c. The Global Settlement Agreement also required in ¶3.a that the Chapter 7 Trustee, Fulkerson and First Capital unanimously agree on any future settlement.

ImageTek rejected the settlement offer made in connection with the Global Settlement Agreement. Fulkerson's counsel was then asked to take the lead in the adversary proceeding to collect the Note. He was the primary author of the complaint. He also prepared a reply to ImageTek's counterclaim, motions to dismiss and for summary judgment. These are all actions taken in furtherance of collection of the Note and should be compensated.

First Capital agrees that \$17,355.00 spent in connection with the collection of the Note in the adversary proceeding is reimbursable. What First Capital argues is that it should be reimburseable from the additional \$20,000.00 Fulkerson received outside the actual settlement with ImageTek. The Court does not agree. First Capital executed a Global Settlement Agreement on December 6, 2005 wherein First Capital agreed that amounts collected on the Note would be used to pay the reasonable costs of suit advanced by each party and reasonable attorneys fees incurred by each in litigation to collect on the Note. The fact that Fulkerson's counsel negotiated an additional \$20,000.00 for his client outside the Global Settlement Agreement makes no difference. First Capital is bound by the contractual provisions of the Global Settlement Agreement, and Fulkerson's counsel is entitled to be reimbursed the \$17,355.00 spent in litigation over collection of the Note as First Capital agrees that this amount was spent in collection of the Note and such amount, based on the description of services provided, appears reasonable to the Court.

Further, Fulkerson's counsel is entitled to reimbursement for the reasonable amount of fees incurred in the ImageTek and Edoc bankruptcies. Prior to the hearing on the motion for summary judgment in the adversary proceeding attempting to collect on the Note, ImageTek and Edoc filed for Chapter 11 bankruptcy in the Waco Division of the United States Bankruptcy Court automatically staying such adversary proceeding in the Debtor's bankruptcy. First Capital claims

that Fulkerson's counsel was never authorized by the bankruptcy court in Waco to appear on behalf of the estate.

However, nothing in the Global Settlement Agreement prevented Fulkerson on behalf of all three parties from pursuing collection of the Note in the Waco bankruptcy court. The Global Settlement Agreement does not limit collection efforts to only the adversary proceeding instituted in the Austin bankruptcy court. It provides for "litigation to collect on the promissory note". Once ImageTek and Edoc filed for bankruptcy, it was absolutely necessary for someone to pursue and protect the interest of those who were to be paid by collection of the Note. There was no other way but for Fulkerson's counsel to appear in ImageTek's bankruptcy proceeding and to attempt to obtain payment. The Chapter 7 Trustee had a limited interest in actively pursuing collection on behalf of the Apollo bankruptcy estate as it was to receive only a small payment if the Note was collected.⁴

Fulkerson's counsel once again took the lead in overseeing ImageTek's Chapter 11. And, it appears there was initially no objection by First Capital. In fact, such action appears to be well within normal collections activities one would have expected Fulkerson's counsel to take. He, along with Mr. Roberts, the Chapter 7 Trustee counsel, reviewed ImageTek's Motion for Authority to Use Cash Collateral which required investigation and review of ImageTek's financials. The detailed review of the financials revealed several categories of overstated expenses on ImageTek's budget which were addressed and corrected pursuant to the Final Order on Cash Collateral. He attended the First Meeting of Creditors and questioned deficiencies in ImageTek's Schedules and SOFA's which led to necessary amendments of those documents. He reviewed operating records and prepared

⁴The Note remained in the Trustee's name but was subject to assignment upon request to First Capital (80%) and Fulkerson (20%). First Capital and Fulkerson filed claims in both bankruptcies.

tactical Motions to Substantively Consolidate the ImageTek and Edoc bankruptcies, as well as a Motion to Transfer Venue back to Austin, and a Motion to Appoint Trustee (which was not ultimately filed). In his Verified Reply, Fulkerson's counsel indicates that he reduced the 110.1 hours shown on Exhibit B to the Supplemental Response by 8.1 hours of legal assistant time (\$1,012.50) and 4.1 hours of attorney's time (\$1,332.50) making the total amount requested for the bankruptcy work \$31,802.50 ($\$34,147.50 - (\$1,012.50 + \$1,332.50)$).

The Court has reviewed these fees for reasonableness and believes some further reduction is necessary. Travel time is allowed at half time. Fulkerson's counsel made four round trips to Waco at approximately 3 hours per trip (12 hours at \$325.00 per hour or \$3,900.00). The fees will therefore be further reduced by one/half of \$3,900.00 or \$1,950.00.

The Court has also reviewed the detailed analysis prepared by Fulkerson's counsel in connection with Imagetek's financials and is satisfied that the time expended in his efforts with respect to the Motion to Use Cash Collateral were not only warranted but obtained positive results. Likewise, the time reviewing financials and other operating documents in preparation for the First Meeting of Creditors proved successful. The Court, however, questions the 21.8 hours spent preparing the Motions to Consolidate and Transfer Venue as this time seems excessive based on this Court's experience. Such time will be reduced by 25% or 5.45 hours totaling \$1,771.25. The Court will also disallow the fees incurred in preparation of the Motion to Appoint Trustee which was never filed. Therefore a final reduction of 2.9 hours at \$325.00 or \$942.50 will be made. These further reductions total \$4,663.75 ($\$3,900.00 + \$1,771.25 + \942.50).

There were no other substantive line item objections by First Capital to the actual reasonableness of these fees; therefore, \$27,138.75 ($\$31,802.50 - \$4,663.75$) is reimbursable from

the Note proceeds as reasonable attorneys fees incurred in the bankruptcy litigation to collect on the Note.

What is more difficult is Fulkerson's counsel's request for attorneys' fees in connection with the settlement on the Note. To the extent First Capital's objection is that attorney time spent on settlement negotiations are generally not reimburseable, there is no support for that. The Global Settlement Agreement contemplated a settlement effort by First Capital, Fulkerson and the Chapter 7 Trustee. The settlement discussions were an integral part of the litigation process and should be considered part of the collection process on the Note to the extent reasonable.

First Capital also claims these are not reimbursable because Fulkerson's counsel's time did not benefit anyone except Fulkerson. That, however, is not true. The parties agreed to provide a united front for settlement purposes. Counsel for Fulkerson was to some extent working on behalf of his client but it had also been agreed he "would take the laboring oar" for all the beneficiaries of the Note—and this he did. Fees incurred in settlement negotiations in the context of collection through a bankruptcy case so there will possibly be no more court litigation are reimbursable if they are reasonable.

Fulkerson's counsel in his Verified Reply acknowledges that of the 63.3 hours designated on Exhibit C of the Supplemental Response as settlement negotiations the actual time allocation is as follows:

- 1) 4.2 hours were related to drafting the Adversary Proceeding not to settlement.
- 2) 5.9 hours were related to negotiating and revising the December 6, 2005 Global Settlement Agreement to allow First Capital, Fulkerson and the Chapter 7 Trustee to jointly pursue litigation and or settlement with ImageTek.
- 3) 16.1 hours shown on Exhibit C have already been written off by Fulkerson's counsel

4) 6.4 hours on Exhibit C relate to the Waco bankruptcy cases.

5) 30.7 hours shown on Exhibit C are for negotiating the actual settlement with ImageTek

Fulkerson's counsel agrees that the fees for work done in the Adversary Proceeding are \$17,355.00. The fees for the bankruptcy litigation are \$27,138.75. Therefore, the court will make no further adjustments to these categories. Fulkerson wrote off 16.1 hours of settlement fees. The 4.2 adversary related hours and the 6.4 Waco bankruptcy related hours are already included elsewhere. Fulkerson's counsel is not entitled to reimbursement for the 5.9 hours for negotiating the Global Settlement Agreement as this is not considered litigation to collect on the Note.

We are therefore left with only 30.7 hours that were spent negotiating the actual settlement with ImageTek—10.8 of those hours being before and after the filing of the Adversary Proceeding and 19.9 hours for settlement discussions during ImageTek and Edoc's bankruptcy proceedings as acknowledged by Fulkerson's counsel. These settlement negotiations occurred over the period of a year beginning in January, 2006 until the settlement finalized in early 2007. The Court believes it reasonable to limit the settlement fees to 30.7 hours at \$325.00 per hour or \$9,977.50 since there were no specific objections by First Capital to the itemized entries provided by Fulkerson's counsel and the amount appears reasonable to the Court.

First Capital in its Response to the Motion to Compel and its Supplemental Response asks the Court to “deny reimbursement of IRS charges unless adequately proven by Fulkerson and Mr. Ferris.” Although this request apparently has something to do with a provision in the Global Settlement Agreement, it comes out of the blue. It is unrelated to this Motion to Compel, and there is no pending Motion by First Capital addressing this issue. Further, there was no discussion, evidence or argument with respect to this issue at the hearing. If First Capital desires relief in

connection with this matter, it must first file a motion indicating such and allow all parties an opportunity to address it.

First Capital also asks the Court in its Response to the Motion to Compel and its Supplemental Response to “award First Capital reimbursement of \$9,148.50 in attorneys’ fees.” This too is a request for relief unrelated to any pending motion by First Capital or anyone else. First Capital must first file a fee request and produce its attorneys’ time records and invoices to substantiate such request unless an agreement can be reached with the Chapter 7 Trustee and Fulkerson in connection with the Global Settlement Agreement.

Fulkerson’s counsel is entitled to reimbursement of \$54,471.25 (\$17,355.00 + \$27,138.75 + \$9,977.50) as reasonable attorneys’ fees incurred in litigation with respect to collection of the Note and costs of \$680.26. As all of these fees were contemplated by the Global Settlement Agreement as fees incurred by Fulkerson’s counsel in litigation to collect on the Note, these should be paid from the proceeds of the Note. The Court shall enter an Order of even date herewith.

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