SIGNED this 22 day of February, 2006.

FRANK R. MONROE
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:	X	CASE NO. 02-12741 FRM
	X	
GARY L. BRADLEY	X	
	X	CHAPTER 7
DEBTOR	X	
	X	

MEMORANDUM OPINION

The Court held a hearing on the First Interim Fee Application for Ikard & Golden, P.C. ("Ikard & Golden") on September 8, 2005 for Ikard & Golden's representation of the estate in connection with Adversary Proceeding 02-1183 currently on appeal to the Fifth Circuit. The Court originally scheduled this hearing for August 2, 2005. However, the Fee Application did not comply with the Local Rules in that it failed to summarize the categories of expenses incurred and no invoices were attached. Further, the Contingent Fee Contract which had purportedly been attached to the original Motion to Employ Ikard & Golden had not been attached to either the Motion to

Employ or the Order Approving Employment and the objecting parties had not seen (but they had also never requested) a copy of the Contingent Fee Contract executed between the Chapter 7 Trustee and Ikard & Golden. Ikard & Golden attempted to introduce into evidence at the hearing (without providing copies in advance of the hearing as required by the Local Rules) the Contingent Fee Contract and copies of the invoices. The Court sustained the objections to the admission of these exhibits and rescheduled the hearing to September 8, 2005 to allow for this information to be disseminated.

Ikard & Golden filed its First Interim Fee Application on June 16, 2005. The Fee Application is actually a request for reimbursement of costs and expenses only and will be referred to as the "Expense Application". The Expense Application as filed requests compensation for costs and expenses in the total amount of $281,544.61. By the time of the hearing, Ikard & Golden had increased its request to $289,765.18.

The Debtor, Gary Bradley, ("Bradley), Tommy Thompson, the Trustee of the Lazarus Exempt Trust ("Thompson") and the U.S. Trustee filed written objections to the Expense Application.[1] After announcing an agreement with the U.S. Trustee at the hearing, Ikard & Golden's final request for costs and expenses is $286,831.18.

Bradley and Thompson then pursued their objections. At the conclusion of the hearing, the Court instructed counsel for the parties to file briefs in connection with certain of these objections primarily as to 1) whether the Contingent Fee Contract ("Fee Contract") entered into between the Chapter 7 Trustee and Ikard & Golden was void due to the Chapter 7 Trustee's failure to have the

[1]The U.S. Trustee objected to several itemized expenses in connection with certain meetings/meals, expert fees and independent contractor payment. At the hearing on September 8, 2005, Ikard & Golden and the U.S. Trustee announced that this objection had been resolved and the fees reduced by $1,598.00 and $1,836.00.

Fee Contract approved within 30 days of its effective date as required by the actual contract itself; 2) whether the actual employment application of Ikard & Golden when filed violated "due process" considerations; 3) whether the accountants fees should be denied as their employment was never approved by the Court although Ikard & Golden hired the accountants as experts for the trial of Adversary Proceeding 02-1183 and 4) whether payment of Ikard & Golden's expenses, if any, is premature in this situation because the Chapter 7 Trustee's ownership of assets awarded in Adversary Proceeding 02-1183 are encumbered by debt which has not been paid and therefore the Chapter 7 Trustee does not yet hold net proceeds to disburse.[2] The Court then took this matter under advisement.

The Court had just begun to consider the parties briefs when on December 3, 2005 the parties filed a Motion to Approve Compromise and Settlement that included a settlement of the Expense Application issues. The Court then ceased its review. However, the settlement was withdrawn in late December requiring the Court to revisit the original objections of the parties, review the briefs submitted by Ikard & Golden and Bradley and address the issues listed in 1-4 above. This Memorandum Opinion shall constitute Findings of Fact and Conclusions of Law under Bankruptcy Rules 7052 and 9014. This is a core proceeding under 28 U.S.C. §157(b)(2). The Court has jurisdiction to enter final orders in this matter pursuant to 28 U.S.C. §1334(a) and (b), 28 U.S.C. §157(a) and (b)(1), 28 U.S.C. §151 and the Standing Order of Reference of all bankruptcy matters from the United States District Court for the Western District of Texas.

[2]Bradley and Thompson also objected to allowance of certain expenses. The Court will address these in its review as to whether such are reasonable and necessary.

Background Information

Ikard & Golden entered into the Fee Contract on December 3, 2002. The Fee Contract was neither attached to nor served along with the Application to Employ Ikard & Golden filed on December 3, 2002. There were, however, no objections to this Application to Employ and the Court executed the Order approving such on January 6, 2003 and the Clerk entered the Order on January 7, 2003. The Trustee hired Ikard & Golden to recover the trust estate of the Lazarus Exempt Trust (the "Trust") for payment of Bradley's creditors primarily based on the alleged invalidity and unenforceability of the spendthrift clause in the trust.[3] The adversary was tried beginning on April 19, 2004.

On October 28, 2004, the Court rendered judgment in favor of the Chapter 7 Trustee on certain of his claims. Specifically, the judgment awarded to the Chapter 7 Trustee the interests owned by the Trust in Phoenix Holdings, Ltd. ("Phoenix Holdings") and Slaughter Holdings L.P., ("Slaughter Holdings") as well as certain tracts of land and certain recharacterized promissory notes. All parties appealed this Court's decision to the District Court. The District Court affirmed this Court's decision, and the proceeding is now on appeal to the Fifth Circuit.

The adversary took two weeks to try in the bankruptcy court. The trial presented complex issues as the affairs of Bradley were intricately complicated and they involved many convoluted transactions not only with the Trust but with many business entities owned by the Trust. The documentary evidence was extensive and voluminous. The Court agrees that this was a difficult

[3]Bradley, the primary beneficiary of the Trust, had filed an adversary proceeding to declare the Trust a valid and enforceable spendthrift trust beyond the reach of his creditors in Adversary No. 02-1205. The Chapter 7 Trustee filed his answer. This adversary was then consolidated into Adversary No. 02-1183, the Chapter 7 Trustee's complaint to deny discharge, as the facts and circumstances surrounding the claims were similar.

case, however the trial was handled by Ikard & Golden rather awkwardly as the Chapter 7 Trustee's pleadings were unwieldy and difficult to understand and had been amended several times, the delivery at trial was disjointed and confusing and the testimony and other evidence often irrelevant and/or unnecessary. Although Ikard & Golden was successful in its representation of the Chapter 7 Trustee, the Court needs to independently scrutinize this reimbursement request to determine its reasonableness and necessity in addition to addressing Thompson and Bradley's other objections.

The Fee Contract itself sets forth the various contingent fee percentages the Firm will recover if successful in its representation. In addition the Fee Contract addresses the types of costs and expenses that will be reimbursed as follows:

> 3.3. Subject to the limitations on its obligations set forth in Paragraph 2.2 above, the Law Firm shall advance all expenses reasonably incurred for reports, travel expenses, long distance calls, investigation fees, expert and witness fees, medical examination fees, charts, photographs, deposition fees and costs, xerox and other document reproduction costs, postage charges, and other expenses reasonably incurred by them in the prosecution of the Lawsuit ("Litigation Expenses").
>
> 3.31 As a consequence of the Law Firm's payment of the Litigation Expenses, the Law Firm shall be entitled to reimbursement of all such Litigation Expenses from any Litigation Proceeds received prior to the application of any percentage fee described in this Agreement;
>
> 3.3.3 The term "Litigation Proceeds" shall refer to non cash benefits and a sum of money equal in amount to the fair market value of all property, relief, and consideration of every kind and in every form enjoyed, realized out of, or received (or to be enjoyed, realized out of, or received) by the Client as a proximate result of the Lawsuit including, but not limited to, compensatory damages, exemplary damages, attorney's fees (other than any Alternative Fee), prejudgment interest, and post judgment interest (whether through trial or settlement of the Lawsuit). The amount of Litigation Proceeds shall not be reduced by any income, gift or estate taxes incident to the recovered amount.

Additionally, the Fee Contract at paragraph 3.1 states:

> 3.1 This Agreement shall be null, void and of no force and effect unless it is approved by the United States Bankruptcy Court for the Western District of Texas, Austin Division within thirty days of its effective date.

The Court did not approve Ikard & Golden's original Fee Contract within thirty (30) days of its effective date. The parties signed the Fee Contract on December 3, 2002. An Order Approving

Ikard & Golden's appointment was signed on January 6, 2003 and entered by the Clerk on January 7, 2003.

Ikard & Golden subsequently entered into a First Amendment to Contingent Fee Contract and Power of Attorney with the Chapter 7 Trustee on February 15, 2005 where the original Fee Contract was amended to employ Ikard & Golden for additional litigation matters related to or arising out of the original adversary proceeding. This First Amendment also provided for the nullity of the agreement if not approved within thirty days. Additionally, the parties reaffirmed and ratified all the existing terms of the original Fee Contract. The Court approved this amendment within thirty days of filing on March 15, 2005.

On June 15, 2005, the Trustee's counsel applied to this Court for approval of a Second Amendment to Contingent Fee Contract to include two additional individuals to the list of parties against whom the related causes of action could be pursued. This Court approved the Second Amendment on July 11, 2005, more than sixty days after the effective date of the amended contract which was signed by the Chapter 7 Trustee on May 4, 2005. However, the Chapter 7 Trustee in this Second Amendment specifically requested that the Order approving be given retroactive effect to May 4, 2005. The Court's Order approving the Second Amendment provided that "the Second Amended Employment Agreement" described in the motion is approved and authorized and this order is effective retroactive to May 4, 2005. There were no objections filed to the Fee Contract or the amendments.

Standing/Void Contract

Thompson and Bradley both filed written objections to the Expense Application and then at the hearing made additional oral objections. Thompson and Bradley orally argued at the hearing

that the Fee Contract is void because it was not approved by this Court within thirty days of its effective date and because it is void, it may not be ratified or reaffirmed by its parties.

The general rule in Texas is that only the parties to a contract have the right to participate in a legal action based on the contract; and if such parties are satisfied with the disposition which has been made of it and all claims under it, a third person has no right to insist that it has been broken. *Cantrell v. Broadnax,* 306 S.W.2d 429, 422 (Tex. Civ. App.–Dallas, 1957, no writ). Other Texas courts have adopted this general rule: *Republic National Bank of Dallas v. National Bankers Life Insurance Co.,* 427 S.W.2d 76 (Tex. Civ. App–Dallas, 1968, writ ref'd n.r.e.)(It is an elementary rule of law that privity of contract is an essential element of recovery in an action based on contractual theory); *Niagra Fire Insurance Company v. Numismatic Company of Fort Worth,* 380 S.W.2d 830, 833-4 (Tex. Civ. App–Ft. Worth, June 26, 1964, writ ref'd n.r.e)(All of Niagara's authorities deal with instances in which either the buyer or seller is attempting to avoid the sale, thus bringing into question such matters as offer, acceptance and meeting of minds. Although these are matters which may be legally sufficient as between the parties to the sale, they are not matters that are open to question by a stranger such as Niagara).

Federal courts have specifically held that these rules prohibit a third party from bringing an action to "void" a contract. In the case of *Greater Iowa Corporation v. McLendon,* 378 F.2d 783 (8th Cir. 1967), the court, when considering whether or not a contract was void, held that "plaintiffs, as strangers to the contracts, have no standing to inject themselves between the contracting parties and assert the invalidity of transactions to which the contracting parties are apparently perfectly content to enter and observe." As observed in *Natkin v. Exchange National Bank of Chicago,* 342 F.2d 675, 676-677(7th Cir. 1965): "Although a violation such as here alleged operates to void the

contract rights of the party in violation, there is nothing in the Section. . .which operates to create any right or cause of action against the party in violation [in] favor of a stranger to the contract."

The Court finds that Thompson and Bradley do not have standing to object to the validity of the Fee Contract. Neither are parties to the Fee Contract or any of its amendments. And, neither objected to the original Fee Contract nor the amendments when they were filed. That was the time to object if either had a problem with Ikard & Golden's employment or the actual terms of his employment.

The only parties to the Fee Contract and the amendments were Ikard & Golden and the Chapter 7 Trustee. Neither the Chapter 7 Trustee nor Ikard & Golden are contesting the validity of any of the contracts entered into. In fact, both believe that the contracts are valid, binding and enforceable documents, and Ikard & Golden has performed legal services and expended funds in representing the Chapter 7 Trustee relying on these contracts.

The argument that these contracts do not define the rights and obligations of Ikard & Golden in the representation of the bankruptcy trustee is frivolous. The argument relies on the assertion that the Fee Contract is void because it was not approved within the requisite time. The Order Approving was signed on January 6, 2003 and then entered by the Clerk on the docket on January 7, 2003, so four or five days too late. The Court finds this argument tenuous and bordering on nonsensical. If Bradley and Thompson had any type of problem with Ikard & Golden's employment, they could and should have objected to the actual application for his employment and the amendments thereto. This they did not do.

Further, any difficulties created by this late approval were removed when Ikard & Golden performed pursuant to the Fee Contract and its amendments as approved by this Court. If there were

any doubts that the Fee Contract of December 3, 2002 defined the rights and obligations of Ikard & Golden, they were removed when that Fee Contract was twice amended in 2005 with explicit reference to the fact that the terms of the December 3rd Fee Contract were reaffirmed and ratified. If Thompson and Bradley had a problem with the Fee Contract, it was their responsibility to object to its approval either when first filed or when later amended, not at a hearing on the Expense Application.

Thompson and Bradley do not have any live pleadings in this cause alleging that the December 3rd Fee Contract was void because it was not approved within thirty days. That issue was brought up only orally at the hearing. But, even if they had correctly pled the issue, their objection is overruled.

Due Process

Thompson and Bradley also argue, nearly thirty-three months after this Court's initial approval of Ikard & Golden's employment, that the Chapter 7 Trustee's Application to Employ Ikard & Golden violates some "due process" considerations. This argument is premised solely on their contention that the underlying Fee Contract between the Chapter 7 Trustee and Ikard & Golden was not actually attached to the Application to Employ as filed and served. The Court agrees with the Chapter 7 Trustee in his brief that this argument "simply misses the mark".

The original Application to Employ Ikard & Golden was filed with this Court on December 3, 2002. Notice of that Application was provided to all required parties (including Thompson's predecessor & Bradley) under Section 327 of the Bankruptcy Code, Rule 2014 of the Federal Rules of Bankruptcy Procedure and Local Rule 2014. No objections to the Application to Employ were filed and the Court entered an Order approving Ikard & Golden's retention as requested on January

7, 2003. Additionally, this application process was repeated not once but two additional times in order to disclose and request this Court's approval of amendments to the initial Fee Contract. The first amendment was filed on February 15, 2005 and approved without objection by an order dated March 15, 2005. The second amendment was filed June 15, 2005 and approved July 12, 2005. No party objected nor did any party, at any time for that matter, request a copy of the Fee Contract.

The procedure for employment of special counsel to a trustee is governed by Rule 2014 of the Federal Rules of Bankruptcy Procedure and Local Rule 2014. There was, at the time these applications were filed, no express requirement in either the Bankruptcy Code, the Bankruptcy Rules or the Local Rules that would have required Ikard & Golden to serve a copy of the actual Fee Contract upon all the parties entitled to notice.[4]

The Fee Contract was not attached to the Application even though it stated it was. However, in compliance with Local Rule 2014, the terms of the contract, including agreed compensation, were summarized and disclosed in 1) the application, 2) the appendix required by Local Rule L-2014 and 3) the affidavits supporting the Application. Ikard & Golden's compliance with the applicable substantive and procedural rules, combined with the opportunity for a hearing to consider any objections, collectively and overwhelmingly, satisfies the due process required by the United States Constitution. *In re American Development Intern. Corp.,* 188 B.R. 925 (N.D. Texas 1995); *accord In re Glen Gregory Gayle*, 144 B.R. 415 (Bankr. E.D. Ark. 1992). Accordingly, any due process concerns were wholly resolved and cured by the Chapter 7 Trustee's notice of the Application and its amendments. *See In re Omni Video, Inc.,* 60 F.3d 230 (5th Cir. 1995) rehearing denied.

[4]The Local Rules, effective November 7, 2005 now require that a copy of the fee agreement be attached to the Application to Employ.

As a validly retained and approved professional for the Chapter 7 Trustee, Ikard & Golden is entitled to submit requests for payment of compensation pursuant to Section 330 of the Bankruptcy Code, Rule 2016 of the Federal Rules of Bankruptcy Procedure and Local Rule 2016.

Review of Actual Expenses

Thompson and Bradley specifically questioned the following expenses as unnecessary and unreasonable or, in certain instances, just not allowed per the terms of the Fee Contract or other documents:

1) Contract employment of Lauren Carlson	$53,191.00
2) Overttime of employee Lee Whitis	$ 3,681.92
3) Hunton & Williams Expenses	$ 5,215.40
4) Lain/Faulkner Expert Fees	$70,000.00

1) Contract Employment of Lauren Carlson

Ikard & Golden is requesting reimbursement for $53,191.00 paid to Lauren Carlson, a contract employee hired to work specifically with the document production, organization and analysis in the trust litigation. Ms. Carlson is Mr. Ikard's stepdaughter. She is not a paraglegal but was experienced in document research. He claimed she was paid an hourly rate but could not recall exactly the rate she received and there were no records introduced with respect to her employment or pay history. Mr. Ikard indicated his firm did withhold the requisite federal taxes but that no other benefits were paid to Ms. Carlson other than her parking. Ms. Carlson worked solely on the document project for the law suit. Mr. Ikard believed Ms. Carlson to be the single most valuable person on the team as she was the one who organized the documents and unraveled the myriad of transactions that helped prove that Bradley had self-settled portions of the Trust.

There is no doubt Ms. Carlson was a competent addition to Ikard & Golden's litigation team as it was the documents that actually proved the Chapter 7 Trustee's case. However, when one reads the Fee Contract to determine allowed costs and expenses, payments to contract employees is not specifically identified as an expense. Mr. Ikard testified that he believed this expense to be an "other expense reasonably incurred" in the prosecution of the case.

The Court views this as an overhead expense that is not reimbursable pursuant to the Fee Contract and will not be allowed. Further, there are no records for the Court to review to even determine exactly what Ms. Carlson did or the actual hours she spent in connection with the document preparation for trial. Request for reimbursement of this expense is denied.

2) Overttime of Employee Lee Whitis

Ikard & Golden is requesting reimbursement of $3,681.92 of overtime for its file clerk/runner. According to Mr. Ikard, Mr. Whitis was basically in charge of filing, xeroxing, binding notebooks and overseeing telecopies for the trust litigation. The Court again has no doubt that Mr. Whitis was a valuable employee and the additional time spent on his job duties necessary with respect to this case. However, the Fee Contract does not specifically allow overtime as a reimbursable expense and the Court is unable to see the reasonableness or necessity of allowing this either. Mr. Whitis is an actual employee of the firm and overtime is considered as overhead of the law firm and not as a reimbursable expense under the Fee Contract. This request is denied.

3) Hunton & Williams Expenses

Ikard & Golden requests $5,215.40 for expenses of the law firm of Hunton & Williams. The Chapter 7 Trustee filed an Application to Employ Hunton & Williams as Special Counsel to the Chapter 7 Trustee on February 26, 2004, a few weeks before the scheduled trial of the trust

litigation. The Trustee sought to employ Hunton & Williams as special bankruptcy litigation counsel to help with the trust litigation. In such Application the Chapter 7 Trustee indicates not once, not twice, but five times, that "all fees and costs incurred by H&W will be paid by Ikard & Golden and not the Debtor's estate". See paragraphs 13, 14, 15, 17 and 19. The Application specifically states that Ikard & Golden will pay the fees and costs incurred by Hunton & Williams. The Court can find no factual basis upon which Ikard & Golden may legitimately request the expenses incurred by Hunton & Williams be reimbursed pursuant to the Fee Contract. Clearly, this expense request is denied.

4) Lain/Faulkner Expert Fees $70,000.00

Ikard & Golden requests reimbursement for expert/consulting fees paid to Lain/Faulkner in the amount of $70,000. Mr. Ikard testified that Lain/Faulkner was hired as a consulting expert. Bradley and Thompson argued that this request should be denied as Lain/Faulkner's employment was never approved by this Court under 11 U.S.C. §327.

Section 327(a) of the Bankruptcy Code provides:

> Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested person, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. §327.

Ikard & Golden claim that Lain/Faulkner did not play a central role in the actual administration of the bankruptcy estate but merely provided expert services and testimony in litigation initiated by the Chapter 7 Trustee and therefore claim that Lain/Faulkner's services should be classified as expenses of litigation incurred by the Trustee's special litigation counsel,

not professional services for estate administration requiring court-approved employment. Case law supports this view. *In re Artra Group, Inc.,* 308 B.R. 858 (Bankr. N.D.Ill. 2003); *Elstead v. Nolden (In re That's Entm't Mktg. Group, Inc.),* 168 B.R. 226 (Bankr. N.D. Cal. 1994).

Whether employment of a "professional person" must be approved under 11 U.S.C. §327 turns on the role the professional played in the administration of the estate. The *Artra* court held that whether a particular person is a professional requiring court approval requires looking "beyond the labels. . . and looking at the role the party played in the administration of the bankruptcy estate." 308 B.R. 860 (quoting *Bicoastal Corp. v. Clear,* 149 B.R. 216, 218 (Bankr. M.D. Fla. 1993)).

An expert witness is not a professional person playing a central role in the administration of the bankruptcy estate. *Elstead* 168 B.R.at 230, *see also Artra Group,* 308 B.R. at 860. In *Elstead* the court-approved special litigation counsel to a Chapter 11 debtor retained an accountant solely to testify as an expert witness in intellectual property litigation on behalf of the estate. The special litigation counsel did not seek employment of the accountant under §327 but sought reimbursement of the accountant's fees as costs incident to the litigation. This is basically the same situation before this Court as Ikard & Golden is a court-approved special counsel to the Chapter 7 Trustee seeking reimbursement of fees paid to accounting experts as costs incident to litigation which marshaled assets to the bankruptcy estate.

Elstead held that although accountants are commonly considered professionals under the Bankruptcy Code and often require employment approval, it is the accountant's role in the bankruptcy, not his status as an accountant, that controls the necessity of such approval. *Elstead* at 230 n.3. In fact, the court held as follows:

> An expert witness is not in the position to formulate strategy or to manage the estate and the liabilities of the estate. While one could argue that the litigation involves an attempt to "acquire assets on behalf of the estate", the expert witness plays only a tangential role in this process, and thus under these circumstances the accountants were not "professionals" within the meaning of § 327. n.4
>
> 4. Although the litigation itself could be considered central to the administration of the estate, the attorney controls the litigation–the expert witness merely offers evidence in that case. Further, the attorneys are required to be approved by the court under §327. Such approval is required in part because the position carries with it responsibilities and discretion to effectively carry out necessary litigation. These responsibilities include engaging necessary expert witnesses for the litigation. It should also be noted that this discretion is limited by §330 of the Bankruptcy Code which provides that the bankruptcy court shall review (and may deny) all applications for expenses.

Another case, *In re Napolean,* 233 B.R. 910, 913 (Bankr. D.N.J. 1999), also addressed the issue, in which the court held that "most courts have come to the conclusion that there is no requirement of prior court authorization for retention of an expert witness because an expert is not a 'professional person' within the meaning of §327." Further, the Bankruptcy Code simply does not require prior authorization for litigation expenses incurred by attorneys whose employment was previously authorized by the court under 11 U.S.C §327. *Elstead*, 168 B.R. at 231.

On the other hand, Bradley claims that expert consultants and witnesses command sizeable compensation in bankruptcy proceedings and therefore it is incongruous with the plain meaning/reading of the statute as well as the legislative intent behind it to interpret §327 so as to not require the trustee or his litigation counsel to seek court approval and give notice to the parties in interest to hire an expert consultant. Such a reading removes the experts' fees and usefulness to the estate from the light of both judicial review as well as review of parties in interest. Bradley alleges that the trustee or attorney who hires the consulting expert becomes the sole arbiter over what is necessary and reasonable and that such a system would revive the very cronyism Congress sought so hard to dispel.

Counsel for Bradley argues that whether the trustee's counsel is paid at a fixed hourly rate or on a contingency, either the estate or counsel will be forced to swallow the expert's compensation–all without any oversight by the court. Likewise, Bradley argues that permitting a trustee's professionals to themselves retain professionals and experts without any oversight by the court and without any notice to creditors abdicates total discretion over the evaluation of the existence of adverse interests held by the expert to the discretion of the trustee's professional instead of reviewing such requirement under §327.

Further, Bradley argues that §330 only allows for payment of "a professional person employed under §327 or §1103" and therefore the court has no jurisdiction to deny the fees and expenses to be paid from assets of the estate to the expert retained by a trustee's professional. Thus, by holding that experts in litigation are free from the §327 process, the Court must cede control over both the retention of experts retained by the trustee's professionals as well as control over the estate's assets used to pay their fees and expenses to the exclusive discretion of the trustee's professional.

Bradley, however, cites no case law holding that an expert hired by special litigation counsel must also file an application for approval under §327 of the Bankruptcy Code. The cases appear clear that expert witnesses, even if in occupational fields commonly considered "professional," are not centrally involved in the administration of the bankruptcy estate, and therefore court approval of their employment in furtherance of litigation is not required under §327. The services provided by Lain/Faulkner are properly classified as a litigation expense incurred by Ikard & Golden, who was properly employed by the Trustee.

Although the Court is sympathetic to Bradley's concerns as to disinterestedness of experts/consultants, it does not agree that it would be prevented from reviewing an expert/consultant's expenses under §330. In fact, that is just what the *Elstead* court perceived to be the required outcome when special litigation counsel hires an expert-that such expenses would be reviewed for reasonableness and necessity and determined accordingly through special litigation counsel's fee applications. And, that is what this Court will do.

This Court has reviewed Lain/Faulkner's fees and denies these expenses in toto as they were not reasonable or necessary in connection with this Adversary Proceeding. Mr. Ikard testified that Lain/Faulkner was hired as a forensic accounting expert mainly for consulting purposes[5], but also obviously as experts for trial as Ikard attempted to qualify Mr. Thomas of Lain/Faulkner as such in the Adversary Proceeding. Defendants objected as Ikard & Golden had failed to designate Lain/Faulkner as a testifying expert under Bankruptcy Rule 7026 and further failed to provide the required expert report under such rule. As such, the Court struck Mr. Thomas' testimony as an expert and allowed him to testify merely as a fact witness. Mr. Thomas probably testified for 30 to 45 minutes at most and he only testified 1) that Mrs. Hulse, Bradley's sister, provided the initial $1,000 contribution to the Trust and 2) how that initial $1,000 was spent by the Trust– facts that were not even disputed at trial. Lain/Faulkner's testimony was virtually valueless. Further, they were not hired in this case to consult. They were hired a month and a half before trial. It is obvious from Lain/Faulkner's invoices that they were hired to mainly provide expert testimony regarding the various Trust transactions. Because they were not properly

[5]However, only hired March 1, 2004 (49 days before trial), it is difficult to envision how they consulted with any degree of effectiveness. And, Ikard & Golden introduced no evidence as to what they actually consulted on.

and timely identified by the Trustee's counsel, they were not allowed to testify. The Court can find no value from their employment. Therefore, this request for reimbursement is denied.

Ikard & Golden has requested reimbursement for costs and expenses totaling $286,831.18. The Court has denied Lauren Carlson's fees of $53,191.00, Lee Whitis' overtime of $3,681.92, Hunton & Williams expenses of $5,215.40 and Lain/Faulkner's expert fees of $70,000.00 for a total of $132,088.32. The expenses that are therefore allowed pursuant to Ikard & Golden's Expense Application are as follows:

Fees Requested	$286,831.18
Total Fees Denied	132,088.32
Total Fees Allowed	$154,742.86

Payment Premature

Bradley and Thompson contend that even if Ikard & Golden is entitled to reimbursement for its litigation expenses, this fee application is premature. Bradley argues that: 1) the Chapter 7 Trustee was awarded by the judgment the limited partnership interests in Phoenix Holdings and Slaughter Holdings by this Court; 2) Phoenix Holdings and Slaughter Holdings owe significant liabilities; and (3) until these entities satisfy their respective obligations they may not dividend funds to their owner and limited partner. Bradley does not cite any authority for this argument. And, it is doubtful that as a general rule a limited partnership must pay all of its debts prior to making a distribution to its limited partners. However, we do not know the financial picture of these entities. For all we know they may be insolvent. On the other hand, they may be the proverbial pot of gold. The point is that the record is silent on the issue.

The Chapter 7 Trustee did provide an Affidavit attached to his brief that shows he is currently holding various amounts from the following entities and/or settlements in Bradley's Chapter 7 estate:

1) Funds held in the name of Phoenix Holdings, Ltd. is $748,490.00 and subject to the appeal in Adversary Proceeding 02-1183

2) Funds held in the name of Spillar Pfluger is $7,831,300 and subject to the appeal in Adversary Proceeding 02-1183[6].

3) $1,339,055 representing the proceeds of the proof of claim filed by Alien, Inc. in the bankruptcy case of David and Hatsy Shaffer. These proceeds are held by the Chapter 7 Trustee pursuant to two settlements more particularly described in the Affidavit (the "Alien Settlements")[7]. This Court has approved both of the Alien Settlements. The funds incident to the Alien Settlements are not owned by any entity other than Bradley's bankruptcy estate.

The Chapter 7 Trustee in his Affidavit states that the proceeds from the Alien Settlements are subject to the Fee Contract as these settlements revolved around the promissory notes payable to Bradley by Alien, Inc. and awarded to the Chapter 7 Trustee pursuant to the judgment in Adversary Proceeding 02-1183. The Alien Settlements resolved all controversy in connection with the ownership of the notes and provided the proceeds available to pay the notes in question. The Chapter 7 Trustee considers these funds available for the payment of Ikard & Golden's fees.

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[6]Spillar/Pfluger is part of Phoenix Holdings.

[7]All of the $1,339,055 is held pursuant to a settlement in adversary 05-1035 with 1Meet 1H, L.P. and a settlement with Alien, Inc. and Lazarus Investments, L.P. in adversary 03-1179. Pursuant to the settlements 1Meet 1H, L.P. transferred all its interest in the Alien notes to Bradley's bankruptcy estate and Alien, Inc. transferred its interests in the Alien claim filed in the Schaffer Bankruptcy to Bradley's bankruptcy estate.

4) Funds of $450,408 in totally unrestricted funds (the "General Funds") also exist. The General Funds are not owned by any entity other than Bradley's bankruptcy estate and are not the subject of any appeal. The Chapter 7 Trustee considers these funds unrestricted and immediately available to pay administrative expenses if so ordered by the Court.[8]

Ikard & Golden, in its Fee Contract, agreed that all "Litigation Expenses" would be reimbursed from "Litigation Proceeds". Litigation Proceeds are defined to be "all non cash benefits and a sum of money equal in amount to the fair market value of all property, relief, consideration of every kind and in every form enjoyed, realized out of, or received by the Chapter 7 Trustee as a proximate result of the Lawsuit which includes, but is not limited to, compensatory damages, exemplary damages, attorney's fees, prejudgment interest and post judgment interest."

It is obvious that the Fee Contract limits, and rightly should, the funds which can satisfy the Expense Application. Fees and expenses resulting from judgments obtained under contingency contracts should be allocated to the proceeds received from such judgments. Consequently, any money held by the Chapter 7 Trustee in the unrestricted General Funds cannot be used to pay expenses incurred in Adversary Proceeding 02-1183. The Court notes that $225,000 in the General Fund was received pursuant to a settlement reached in connection with the First Amendment to the Fee Contract. However, Ikard & Golden produced no evidence at the hearing that these funds were obtained as a proximate result of Adversary 02-1183, and the Court cannot make such a determination from whole cloth. Further, the $225,000 proceeds are based on services provided under the First Amendment which was entered into February 15, 2005

[8]The General Fund includes $225,000 from a settlement with Jimmy Evans. Ikard & Golden pursued a claim against Evans on behalf of the Chapter 7 Trustee pursuant to the First Amendment to the Fee Contract.

which allowed Ikard to pursue certain causes of action against Jimmy Evans. Ikard & Golden filed the actual adversary complaint initiating the suit against Mr. Evans on May 2, 2005. Ikard & Golden's invoices for this Expense Application are dated June 23, 2002 through June 28, 2005. There is no evidence in the record to reflect whether any of these expenses were incurred under the First Amendment and therefore the Court is reticent to order payment from these funds.

Likewise, fees cannot be awarded from funds held by Phoenix Holdings or Spillar Pfluger as the Bankruptcy Court awarded the entity Phoenix Holdings, Ltd. to the Chapter 7 Trustee as property of the estate and not the actual assets of Phoenix Holdings, Ltd. And, the Trustee has taken no action to wind up the affairs of Phoenix Holdings, Ltd. so that its assets, after payment of its creditors (if any), can be placed into Bradley's estate.

However, the Court did award the Alien promissory notes to the Chapter 7 Trustee as part of its judgment in Adversary Proceeding 02-1183 and they are therefore subject to the Fee Contract. Adversary Proceeding 05-1035 resolved any controversy at to ownership of the Alien notes and transferred any such interests in the notes to Bradley's bankruptcy estate. Settlement of Adversary 03-1179 allowed the Chapter 7 Trustee to obtain the $1,339,056 proceeds of the Alien claim in consideration of his release of Alien, Inc.'s liability for payment on the Alien notes. As such Ikard & Golden's costs and expenses can be awarded from these particular funds as such can be considered proceeds of the Alien notes that were awarded in Adversary Proceeding 02-1183.

Conclusion

For the foregoing reasons stated above, Ikard & Golden is entitled to recover its costs and expenses in the amount of $154,742.86 from the proceeds of the Alien promissory notes. An Order of even date will be entered.