

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:)
)
ENERGY ADVISORS, LLC) Case No. 00-12574-SSM
) Chapter 11
Debtor)

MEMORANDUM OPINION AND ORDER

A hearing was held in open court on March 5, 2002, on the second and final application filed by Whiteford, Taylor & Preston, L.L.P., on February 1, 2002, for approval and payment of professional compensation and reimbursement of expenses as counsel for the debtor-in-possession (now the reorganized debtor) in the amount of \$7,050.00 for the period since March 23, 2001. This sum, added to the amount previously approved for payment, would result in a total payment to the applicant of \$33,926.76. Approval of the requested amount is opposed by both the United States Trustee and by the Internal Revenue Service.

This case was commenced on June 12, 2000, by the filing of voluntary chapter 11 petition. The debtor was an Internet-based business that had provided information about energy providers in deregulated states. Management expected that the sale of the debtor's web site would bring a substantial amount of money, but this did not occur, and at the end of the day the debtor netted only approximately \$25,000.00 from the sale of its computers and office equipment. It proposed a plan of liquidation, to be funded from the sales proceeds and the recovery of preferences. The debtor's vice-president and general counsel testified at the confirmation hearing that she had identified \$300,000.00 in potential preference claims and

expected that the debtor would likely recover \$60,000 to \$80,000. Although it was not clear that the debtor would be able to pay even its priority claims in full, the court nevertheless confirmed the plan with certain modifications. In connection with confirmation, the court approved interim compensation to debtor's counsel of \$32,358.00 and reimbursement of expenses in the amount of \$4,184.95 for services rendered through March 31, 2001; however payment was allowed only to the extent of the retainer (\$26,876.76) held by counsel, with payment of the balance being deferred pending submission of a final report and account.

The debtor thereafter commenced a number of preference actions, but was only able to recover \$15,000.00. The debtor has filed a final report and account and a motion for entry of a final decree, together with the final fee application that is currently before the court. If the requested fees and expenses are approved, creditors will receive a total of \$27,963.25 – or approximately 40% – of the \$69,918.63 distribution in this case, with the balance going to professionals.

The standards for approval of professional compensation are set forth in § 330, Bankruptcy Code. Specifically, the court is required to consider “the nature, the extent, and the value of such services, taking into account all relevant factors, including—

- (A) the time spent on such services;
- (B) the rates charged for such services;
- (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
- (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

(E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

§ 330(a)(3), Bankruptcy Code. The application reflects that the law firm expended 105.3 hours in its representation of the debtor in possession at a blended hourly rate of \$207.95 and incurred expenses in the amount of \$3,426.25. The services all appear to have been competently and economically performed. The applicant has effectively written off \$27,669.94¹ in compensation in recognition that the funds in the bankruptcy estate are insufficient to allow full payment.

The objections by the United States Trustee and the Internal Revenue Service do not question the applicant's professional ability, its hourly rates, or the quality of its work product. Rather, they object because the decision – into which counsel, they suspect, had considerable input – to liquidate under chapter 11 rather than under chapter 7 resulted in substantially higher professional fees than would otherwise have been the case, and they object to rewarding counsel for having pursued a course that increased compensation to counsel at the expense of a meaningful distribution to unsecured creditors.²

The applicant correctly notes that estate professionals are not guarantors of the success of a reorganization (or of litigation to recover assets in a liquidation), and that the statutory standard is not one of hind-sight but rather whether the services “were necessary to the administration of, or beneficial *at the time at which the service was rendered* toward the

¹ \$18,273.75 from the current application plus \$9,396.19 remaining unpaid from the first application.

² The only unsecured creditors receiving payment are priority tax creditors.

completion of, a case.” § 330(a)(3)(C), Bankruptcy Code (emphasis added). At the same time, the court has a responsibility to preserve public confidence in the bankruptcy system. That confidence is severely eroded, to say the least, when the bulk of funds in a reorganization or liquidation case goes to estate professionals rather than creditors.

In the nature of things, there can be no hard and fast rule limiting professional compensation to a specific percentage of assets available for distribution. There are simply too many variables. At the same time, it does not seem unfair to require that estate professionals share some of the risk that a case will turn out badly; otherwise, there will simply be no incentive for professionals to counsel the most cost-effective approach. Having carefully considered all the circumstances, the court concludes that the aggregate compensation and reimbursement of expenses to debtor’s counsel in this case should not exceed \$31,500.00. This is no adverse reflection on the professional quality of the applicant’s work. Indeed, the quality of the applicant’s legal work in this case has been exceptionally high. However, the court also has an obligation to maintain public confidence that the bankruptcy system will be run in such a way as to maximize returns to creditors.

Accordingly, the court will approve final compensation and reimbursement of expenses in the amount of \$31,500.00, less sums previously paid as interim compensation. The applicant has already received payment (by application of its retainer) in the amount of \$26,876.76. Thus, the court will approve the payment of an additional \$4,623.24 from the funds reserved at confirmation to pay the expenses of the preference litigation. With this change, the final report and account will be approved, and the court will enter a final decree closing this case.

IT IS SO ORDERED.

Date: March 8, 2002

Alexandria, Virginia

/s/ Stephen S. Mitchell

Stephen S. Mitchell

United States Bankruptcy Judge

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