

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Statesboro Division

IN RE:)	Chapter 12 Case
)	Number <u>91-60388</u>
HENRY J. CONDER)	
GRACE M. CONDER)	
)	
Debtors)	
_____)	
)	FILED
MERRILL, STONE & PARKS)	at 3 O'clock & 49 min. P.M.
)	Date: 3-30-94
Movant)	
)	
vs.)	
)	
E.B. MILES AND)	
PEMBROKE STATE BANK)	
)	
Objecting Creditors)	

ORDER

Merrill, Stone & Parks ("the law firm") seeks reconsideration of an order dated September 13, 1993 approving an award of interim compensation to the law firm as attorneys for the debtor in an amount less than requested in their application. The law firm's request is treated as a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e) made applicable to bankruptcy cases by Federal Rule of Bankruptcy Procedure 9023. Neither the objecting creditors to the law firm's fee application, E.B. Miles and Pembroke State Bank, nor the chapter

12 trustee responded to the law firm's request for reconsideration after notice. Having considered the evidence presented by the law firm, I enter the following order granting the law firm's motion.

The law firm's fee application at issue in these orders filed May 13, 1993 seeks an award of interim compensation and reimbursement of out-of-pocket expenses totaling Eleven Thousand Three Hundred Seventy-One and 39/100 (\$11,371.39) Dollars for representation of debtors in this chapter 12 case. The fee application requests payment of the award as an administrative expense from unencumbered funds in the possession of the chapter 12 trustee. The application asserts that the law firm has expended 81.4 hours in representing the debtors in connection with this chapter 12 proceeding and requested an award of compensation at the rate of One Hundred Twenty-Five and No/100 (\$125.00) Dollars per hour totalling Ten Thousand One Hundred and Seventy-Five and No/100 (\$10,175.00) Dollars. The application also itemizes a total of One Thousand One Hundred Ninety-Six and 39/100 (\$1,196.39) Dollars as out-of-pocket expenses incurred. Debtors have paid the law firm Seven Thousand Two Hundred Twenty-Five and No/100 (\$7,225.00) Dollars.

Pembroke State Bank and E.B. Miles, holders of allowed unsecured claims objected to the payment of these fees asserting that it was the understanding of all parties and the court that the Nine Thousand and No/100 (\$9,000.00) Dollar fund from which the

requested fees would be paid was to be disbursed pro-rata among holders of unsecured claims. The law firm sought to receive Four Thousand One Hundred Forty-Six and 39/100 (\$4,146.39) Dollars from this fund (\$11,371.39 - \$7,225.00 previously paid by debtors) as an administrative expense under 11 U.S.C. § 503(b)(2). The previous order established that there had been no understanding or agreement as asserted by objecting creditors and that any award given in excess of that already received by the law firm was entitled to administrative expense priority payable from the fund. These findings are not challenged in the law firm's present motion for reconsideration.

The law firm challenges my determination of the amount of the award. The Statement of Attorney Compensation filed pursuant to Federal Rule of Bankruptcy Procedure 2016(b) reveals that debtor agreed to pay Six Thousand and No/100 (\$6,000.00) Dollars for legal services rendered with Four Thousand Fifty and No/100 (\$4,050.00) Dollars paid prepetition and a balance due of One Thousand Nine Hundred Fifty and No/100 (\$1,950.00) Dollars. The application for employment of the law firm as attorney for the debtors states that the law firm was to be employed under general retainer. Neither the application nor the Bankruptcy Rule 2016(b) statement make any reference to an hourly rate to be charged by counsel. Based on these provisions I determined that the parties had entered into a flat fee agreement for all services to be rendered in the case. At

the time its application was filed, the law firm had previously received Seven Thousand Two Hundred Twenty-Five and No/100 (\$7,225.00) Dollars from the debtors. As the retainer fee of Six Thousand and No/100 (\$6,000.00) and reasonable out-of-pocket expenses of One Thousand One Hundred Ninety-Six and 39/100 (\$1,196.00) Dollars totalled Seven Thousand One Hundred Ninety-Six Dollars and 39/100 (\$7,196.39) and was within Thirty and No/100 (\$30.00) of the actual amount already paid, additional compensation to the law firm was disallowed.

The law firm contends, however, that it did not enter into a flat fee arrangement with debtor, but that it had been retained on an hourly basis with the retainer received prepetition acting as security for their representation, payment being taken against the retainer until depleted. According to the law firm, this is its standard practice in chapter 12 reorganizations where the amount of services to be rendered in the case cannot be accurately estimated. I have previously held that when retainers are received by a law firm prepetition, they will be deemed to secure at least partially the future payment of an unknown amount of services to be rendered to the debtor in the case (security retainer) and will not be deemed a flat fee arrangement absent a clear expression in the agreement to that effect. In re Georgian Arms Properties, Chapter 11 Case No. 89-10313, slip op. at 5, 7 (Bankr. S.D. Ga. March 1, 1990); See also In re Dees Logging, Inc., 158 B.R. 302, 306 (Bankr. S.D. Ga. 1993). In

the previous order, I determined, based on the evidence noted, that there was a clear expression of a flat fee arrangement and distinguished Georgian Arms and Dees Logging, Inc. on the basis that the agreements in those cases referenced an understanding that the attorney's services were to be charged on an hourly rate basis, which reference was lacking in this case. The law firm now seeks to have me consider that reference to an hourly billing rate was contained in a portion of debtor's schedules not examined in my previous order and has further submitted a document identified as an engagement letter and signed by debtors also referencing an hourly billing rate.

Debtor's answer to Question 20(c) of the Statement of Financial Affairs For Debtor Engaged in Business, submitted with debtor's petition, provides:

(c) During the year immediately preceding or since the filing of this Petition, Debtor has agreed to pay money or transfer property to an attorney at law, or to another person on the attorney's behalf, or to any other person rendering services to debtor in connection with this case, as follows:

Name: Merrill, Stone & Parks
Address: P.O. Box 129, Swainsboro, GA 30401
Amount of obligation: As disclosed
Terms: \$125.00 per hour plus expenses

Debtor has agreed to pay Attorney Charles B. Merrill, Jr. for the preparation of this petition, consultation regarding debtor's financial condition, rendering of advice and assistance, aiding in the preparation of the schedules, representation at the meeting of creditors under 11 USC § 341, preparation of a

plan of reorganization and general reorganization services.

The fee for the aforementioned services is \$6,000.00 plus \$200.00 filing fees. The Trustee's fee of \$250.00 has been paid. (emphasis supplied).

The previously undisclosed engagement letter, as highlighted by the law firm, provides in pertinent part:

We have struck a deal with regard to fees, and of course, we have adequately disclosed our fee arrangement to the Bankruptcy Court. . . . The fee you have paid is a retainer and is non-contingent. Although we estimate our retainer at what we think will be sufficient to cover the anticipated work, we can never be certain of the total cost. We bill our hourly rate and expenses against the retainer before we ever send a bill to you. If for any reason you feel that this disclosure was inadequate or inaccurate, please call us immediately. It is our goal to tell the Bankruptcy Court the truth in all documents that we file, and if you believe that there is truth lacking in any document, it is your responsibility to advise us of it so we can get it straightened out immediately.

Although the answer to Question 20(c) does state an hourly billing rate of One Hundred Twenty-Five and No/100 (\$125.00) Dollars, it also again references an agreement to pay a total fee of Six Thousand and No/100 (\$6,000.00) Dollars for services in the case. The engagement letter, while suggesting a security retainer arrangement, is also consistent with a flat fee arrangement as the prepetition retainer paid by debtor, \$4,050.00 did not cover the entire \$6,000.00 fee agreed upon for services in the case. However, as previously noted, where retainers are received by an attorney

prepetition, the retainer is deemed to secure the future payment of legal services to be rendered to the debtor in the case and are not a payment of a flat fee for all services absent a clear expression to that effect. In Re Dees Logging, Inc. supra. From all the evidence now considered there was no clear expression of the terms of representation of the debtor by the law firm.

Proper disclosure of fee arrangements between a debtor and counsel is mandated by Bankruptcy Code §329(a) and Bankruptcy Rule 2016(a). This proper disclosure should be made as a part of the Bankruptcy Rule 2016(b) statement. Without a candid disclosure, the court is unable to properly assess the propriety of a fee request and unable to fulfill its oversight responsibility. In this case, the 2016(b) statement appears to be in direct conflict with the statement of financial affairs of the debtor and the engagement letter. Taken into consideration the engagement letter and the terms of the engagement letter and the statement of financial affairs of the debtor the "retainer" paid was given to secure at least partially the future payment of an unknown amount of services to be rendered to the debtor in the case and not a flat fee arrangement. In the previous order, I determined that the law firm did in fact expend the time requested in its fee application. Additionally, a review of the application reveals that the time expended was reasonable in light of the services provided and necessary. Additionally, the hourly rate requested is within an

hourly rate charged by attorneys in nonbankruptcy matters requiring the same or similar levels of competency in resolving issue of similar complexity. Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292 (11th Cir. 1988); 11 U.S.C. §330.

In determining the reasonableness of counsel's request for compensation and directing the trustee to pay the additional compensation as requested, I note that the considerable delay in awarding compensation to counsel and providing for the distribution of the balance of the fund held by the Chapter 12 trustee is a direct result of counsel's failure to candidly disclose the terms of the representation of the debtor in this case.

It is therefore ORDERED that Merrill, Stone and Parks are awarded interim compensation and reimbursement of out-of-pocket expenses totaling \$11,371.39.

The law firm having disclosed the receipt of \$7,225.00, pursuant to 11 U.S.C. §503(b) (2) the Chapter 12 trustee is ORDERED to disburse to Merrill, Stone and Parks \$4,146.39 as an administrative expense claim for reasonable compensation awarded pursuant to 11 U.S.C. §330(a).

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 30th day of March, 1994.

