UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
	:	
MICHAEL G. TYSON, et al.	:	Case No. 03-41900(ALG)
	:	
	:	
Debtor.	:	
	:	

MEMORANDUM OF OPINION

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ALLAN L. GROPPER
UNITED STATES BANKRUPTCY JUDGE

Before the Court are the following three matters representing unresolved compensation issues in the cases of Michael G. Tyson ("Tyson") and his personal holding company, Mike Tyson Enterprises ("MTE" and together with Tyson, the "Debtors"): (i) a settlement agreement (the "Pachulski Settlement") resolving the objections of Tyson, the Official Creditors Committee and the United States Trustee to the final fee application of Pachulski, Stang, Ziehl, Young, Jones & Weintraub P.C., ("Pachulski"), counsel to the Debtors; (ii) the fee application of Greenberg, Glusker, Fields, Claman, Machtinger & Kinsella LLP ("Greenberg"), special counsel to Tyson in a litigation; Greenberg's fees are still contested by Tyson, the Creditors Committee and the United States Trustee; and (iii) a § 503(b) administrative claim filed by Robert Goldman. These matters are resolved as follows.

Background

Pachulski's Fee Application

Tyson is a professional boxer and former world heavyweight champion. On August 1, 2004, he filed voluntary petitions under Chapter 11 of the Bankruptcy Code together with his personal holding company, MTE. Shortly thereafter both Debtors

moved to appoint Pachulski as bankruptcy counsel pursuant to §§ 327 and 328 of the Bankruptcy Code. The application disclosed that the Debtors had agreed to pay Pachulski, in addition to its full hourly fees, a 100% fee enhancement. The purpose of the fee enhancement was assertedly to compensate the firm for a substantial risk of non-payment by the Debtors. During the initial hearing on Pachulski's retention, the Court and the United States Trustee expressed concern over the fee enhancement, and Pachulski does not dispute that the right to object to the fee enhancement was reserved. The firm's retention was expressly based on § 327 of the Bankruptcy Code, and there was nothing in the order for the firm's retention that authorized the fee enhancement as part of the "terms and conditions" of Pachulski's employment, as is permitted in some circumstances under § 328(a) of the Bankruptcy Code.[1]

The bankruptcy cases were, simply stated, a knockout success. While Tyson enjoyed a meteoric rise to the top of the boxing world, he had an equally impressive downfall. In his Chapter 11 proceeding, he and his professional advisors were able to rationalize a complex and chaotic financial situation that resulted from years of unrestrained spending coupled with poor record keeping.[2] During the course of the proceedings, Tyson made substantial progress in resolving enormous pre-petition tax debts, satisfied large claims by his ex-wife and settled long-pending litigation in his favor. The Debtors were able to confirm a plan of reorganization that resulted in a

[1] Section 328(a) provides that the Debtor may employ professionals "on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis." 11 U.S.C. § 328(a). If certain terms are approved in the order of retention, they can later be reexamined only under limited circumstances. See discussion below with respect to Greenberg's retention order.

[2] In addition to the Pachulski firm, the Debtors employed Neilson Elggren LLP as financial consultants. Neilson also negotiated a 100% fee enhancement, which Tyson, acting individually, objected to. Tyson subsequently withdrew his objection and Neilson withdrew its request for a fee enhancement. The Court approved Neilson's fees on February 14, 2005, and there is no question that Neilson also contributed substantially to the excellent result in these cases.

meaningful return to unsecured creditors, which could increase if Tyson is physically able to continue and prosper in his boxing career.

Creditor recoveries under the Plan are based on both the liquidation of the Debtors' non-exempt property and Tyson's personal contributions from future fight income. Tyson's former wife, Dr. Monica Turner, and the Internal Revenue Service have the largest priority claims, many of which are also non-dischargeable in Tyson's personal case. Dr. Turner, however, agreed as part of the plan to pay $2,000,000 for the benefit of the general unsecured creditors, who would then be assured of a distribution. Also, Tyson will pay 50% of his future fight income to the Plan administrator, who will distribute those funds first to Dr. Turner and the IRS and, if and when those claims are paid, to the general unsecured creditors. The Debtors' joint plan of reorganization was overwhelmingly supported by the vote of creditors and confirmation was unopposed.

Pachulski submitted its final fee application, seeking $1,723,331.90 in time charges and $233,504.46 in expenses. In its application the firm reduced its 100% fee enhancement to a bonus of $500,000. It later filed a supplemental fee application for a later fee period seeking an additional $23,417.50 in time charges and $3,086.84 in expenses. With respect to fee issues, Tyson retained, at his own expense, the firm of Goodwin Proctor LLP, which reviewed all applications and objected to certain of them. With respect to the Pachulski application, Tyson objected to the fee enhancement and also attacked, generally, the reasonableness of the fees, claiming that the case was overstaffed and that Pachulski unnecessarily utilized expensive, senior attorneys. The United States Trustee joined in the objection, as did the Creditors Committee. The Court held a hearing on all the outstanding fee requests at which it took the question of

Pachulski's fees under advisement. Thereafter, all of the parties settled the objections to Pachulski's fees and submitted a stipulation of settlement for the Court's approval. The stipulation does not distinguish between the amounts paid in conjunction with time charges and those paid as a fee enhancement. It provides that Pachulski is to be paid $2,033,340.60, which calculates to be the full amount of time charges and expenses and a $50,000 fee enhancement.

Greenberg's Fees

Tyson placed Don King and certain entities controlled by King (collectively "the King Entities") in charge of his business and professional affairs at the height of his career. Later he dismissed the King Entities and hired a new management team.

In 1998, Tyson consulted with Kinsella, Boesch, Fujikawa & Towle ("KBFT") as to possible claims against the King Entities. KBFT agreed to represent Tyson against the King Entities on the basis of hourly charges and a contingency fee based on the results obtained in litigation; it was further agreed that the amount of the contingency would be negotiated, at the time of settlement or judgment, by KBFT and one of Tyson's trusted advisors. On the basis of this fee arrangement, KBFT filed suit, on behalf of Tyson, against the King Entities in the Southern District of New York (the "King Litigation"). After a principal KBFT attorney changed firms, Greenberg took over the King Litigation with Tyson's consent. At the time of the Debtors' bankruptcy petitions, both Tyson and the King Entities had filed dispositive motions in the Litigation and were awaiting a decision from the District Court.

After the bankruptcy filing, the Debtors employed Greenberg as special litigation counsel to continue prosecuting the King Litigation. In the order of retention, Greenberg

was employed under §§ 327(e) and 328(a) of the Bankruptcy Code. The order provided that Greenberg would charge its regular hourly rates and fixed the contingency portion of the fee at either (x) 5% of the settlement if the King Litigation were settled prior to a court ruling on the dispositive motions or (y) 10% of the settlement or judgment if the King Litigation were settled after a ruling on the dispositive motions. The order of retention specifically referenced § 328(a) of the Bankruptcy Code, and there was no reservation of rights to challenge the contingency arrangement.

The King Litigation settled prior to a ruling by the trial court on the dispositive motions. Pursuant to the settlement, the King Entities agreed to pay $14,000,000 to a plan trust established for the benefit of creditors of the Debtor's estates. This Court approved the settlement, and Greenberg thereafter submitted its fee application, requesting payment of $69,418.00 in time charges and expenses plus a $700,000 contingency fee (5% of the $14,000,000 settlement). Both the United States Trustee and Tyson objected to the fee enhancement.

Goldman's Administrative Claim

Robert Goldman's application for an administrative claim under § 503(b) of the Bankruptcy Code arises in connection with Tyson's purchase in October, 2000, of 6760 Tomiyasu Lane, Las Vegas, Nevada (the "6760 Property"). The 6760 Property was purchased by Tyson in a sale in the Chapter 7 proceedings of Sparkle Properties Ltd. Partnership ("Sparkle"). Although the 6760 Property consists for title purposes of two separate parcels, the 010 Parcel and 011 Parcel, it has only one address and one entrance, located on the 011 Parcel. Sparkle had stated during the marketing process that the 6760 Property consisted of two parcels, and there is no dispute that all parties intended to sell

both parcels, but the order of the Nevada Bankruptcy Court authorizing the sale of the Property mentioned only the 010 Parcel.

The 6760 Property, one of Tyson's principal assets, was advertised for sale in connection with these Chapter 11 cases. It was listed with a real estate broker and marketed as one parcel, consistent with Tyson's understanding of the title status. On July 2, 2004 the Debtors, by notice of Motion, moved to sell the entire property to one Cynthia Kirby for $750,000 and to approve specific bidding procedures for the sale.

In connection with that sale, which was subject to higher and better offers, Goldman (apparently an adjacent landowner) submitted a competing bid for $775,000 and was acknowledged as a qualified bidder prior to the auction date. The auction was set for July 16, 2004, in this Court. On July 15, Tyson's counsel received a letter from Sparkle's lawyers stating that it appeared that Sparkle might have effectively sold only part of the 6760 Property to Tyson and that the Tyson auction should only include the Northern half of the property. On that same night Tyson's counsel faxed a copy of the letter from Sparkle's counsel to Goldman. Tyson subsequently postponed the auction in order to clarify the state of title to the 6760 Property.

The parties are in some disagreement as to certain of the remaining facts. Goldman alleges that his attorneys and Tyson's attorneys worked together to clear up the title dispute. According to Goldman, his attorneys were in constant contact with Tyson's attorneys, and through this contact he learned that Tyson's attorneys were having difficulty reopening the Sparkle bankruptcy in order to clarify the title issue. Goldman further alleges that it was his attorney's personal relationship with Sparkle's Chapter 7 trustee that caused the latter to relent and agree to reopen the Sparkle bankruptcy case to

attempt to clear title. Tyson's attorneys assert that they generally handled the situation themselves, arguing that the Chapter 7 trustee was only doing his duty by reopening the Sparkle case. Although the extent and importance of Goldman's role is disputed, there is no question that his attorney spent considerable time attempting to clear up the title issue and that Goldman's participation was at the invitation of Debtors' counsel.

In any event, the Sparkle bankruptcy was reopened, and the Nevada Court issued an order clarifying that the sale had covered both parcels that make up the 6760 Property. Tyson thereafter proceeded to sell the entire Property, as well as an adjacent parcel, to one bidder, in a sale approved by this Court. Goldman engaged in the bidding but was not the successful purchaser.

Discussion

Fee Enhancements

The Bankruptcy Code provides that the court may award a "professional person employed under section 327 . . . reasonable compensation for actual, necessary services rendered . . . ." 11 U.S.C. § 327(a)(1)(A). The Code is silent as to the measure of reasonable compensation. The Supreme Court has held that the proper measure of "reasonable fees" is ordinarily the "lodestar." See *Blum v. Stenson*, 465 U.S. 886 (1984). Using the lodestar method, reasonable attorney's fees are *prima facie* "the product of reasonable hours times a reasonable rate." *Blum*, 465 U.S. at 897. The lodestar approach is applicable in calculating attorney's fees in bankruptcy. See L. King, et al., *Collier on Bankruptcy* at ¶ 328.03[6] (15th ed. 1996).

In *Blum*, the Supreme Court made it clear that while the lodestar method does not preclude an upward fee enhancement, such enhancements should be granted very

sparingly. The Court required "specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was exceptional." *Blum*, 465 U.S. at 899. The burden is on the applicant to prove such exceptional quality and results. *Id.* at 897; see also *Meriwether v. Coughlin*, 727 F. Supp. 823, 829 (S.D.N.Y. 1989).

The original Pachulski bonus finds no support in the applicable authorities. Pachulski initially attempted to justify it by claiming that the firm took a significant risk of non-payment in accepting this case. However, this factor, by itself, does not justify a fee enhancement. The Supreme Court has refused to include the possibility of nonpayment as a justification for enhancing a lodestar because that risk is itself one of the factors used in establishing a lodestar. See *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987); *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992). In addition, in a bankruptcy proceeding many debtors' counsel face a risk of non-payment. Moreover, in this case, the proposed enhancements -- to double all fees and, alternatively, to add on $500,000 -- were and are essentially arbitrary.

Although the enhancement cannot be justified as compensation for the risk of non-payment, awarding an appropriate fee enhancement is proper as compensation for a delay in payment. In *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989), the Supreme Court held that "An adjustment for delay in payment is . . . an appropriate factor in the determination of what constitutes a reasonable attorney's fee . . . ." See also, *Walker v. U.S. Dep't of Housing*, 99 F.3d 761, 773 (5th Cir. 1996) (a court may "calculate the lodestar using the rates applicable when the work was done and grant a delay enhancement."). The Second Circuit has held that it is appropriate to calculate a delay

enhancement by using the judgment interest rate, although the court may choose an alternative method where an interest factor does not fully compensate the attorney for the delay. *Grant v. Martinez*, 973 F.2d 96, 100 (2d Cir. 1992).

In the case at bar, Pachulski has not received any interim compensation, and the firm has waited almost two years between the commencement of the case and any payment. The enhancement now proposed represents 2.9% of the total time charges requested, which calculates to 1.45% annual interest.[3] This amount is less than the judgment interest rate pursuant to 28 U.S.C. § 1961 (currently 3.32%) and is reasonable in light of the delay. See *Walker*, 99 F.3d at 773 (holding that a district court award of a 6% enhancement that calculated to 2.96% annual interest was not an abuse of discretion).

Moreover, the enhancement will be paid exclusively from Tyson's post-Chapter 11 earnings and the recoveries of the unsecured Chapter 11 creditors of the Debtors' estates will not be affected, as their share of Tyson's future income has been separately fixed. The only parties whose positions will arguably be affected, other than Tyson, are the Internal Revenue Service and Dr. Turner, whose non-dischargeable claims will continue to be paid out of Tyson's future income. Each of these entities has been well and separately represented, and none has objected to the settlement.[4]

Accordingly, the Court will not disapprove the settlement on the ground that the final amount contains an enhancement of 2.9%. Moreover, the Court has independently

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[3] The Court has calculated the interest rate using the formula for rate of return: r=([fv/pv]-1)/n, where n equals two years. This formula, while not a precise measure, is fair as it does not increase the return by using compound interest or take into account that Pachulski earned more of its fee earlier in the period.

[4] Pachulski has also defended the fee enhancement on the ground that it was payable from Tyson's post-petition earnings and not from funds that would otherwise be available to unsecured creditors of the Debtor's estate. See 11 U.S.C. § 541(a)(6). While this is a point in favor of the fee enhancement, it does not cure the problems inherent in this type of arrangement. Where an individual debtor commits, at the outset of the case, to pay his attorneys from future earnings, the commitment inevitably puts counsel in competition with other parties. In this case, a main issue has always been the share, if any, that the unsecured creditors would have in Tyson's future income.

reviewed the Pachulski application for reasonableness. Tyson's contentions with respect to the reasonableness of Pachulski's fees, now withdrawn, have been vague and were principally based on the claim that work was performed by partners that could have been performed by more junior attorneys. Based on its review of the application and its familiarity with the case, the Court is satisfied that the matter was reasonably staffed. In particular, there appear to have been valid reasons for the participation of California counsel, and such involvement was reasonably limited by the involvement of experienced counsel in New York.

The real concern regarding Pachulski's fees, and all of the professional fees in the case, is that top dollar was paid for first-class counsel to handle a case that involved an individual with limited assets and estates that were unable to support a large distribution to general creditors. In certain circumstances it might be appropriate to reduce all fees accordingly. The principal factor justifying all of the awards here is that there might have been no distribution at all if less skilled counsel had been involved. The complexity of Tyson's chaotic finances and his lack of financial credibility at the time of the filing of the petitions could easily have prevented him from the fresh start that his Chapter 11 case has afforded him. The Court will not rule on the basis that Tyson should have hired less expensive but less skilled professionals to assist in a critical endeavor that will hopefully help him straighten out his life. The settlement with respect to Pachulski's fees will be approved.

Greenberg's Fees

Greenberg is seeking payment of a large contingency fee in connection with services performed in the King Litigation. The legal analysis underlying Greenberg's fee

enhancement is different from Pachulski's, as the retention of the Greenberg firm was explicitly based on § 328 of the Bankruptcy Code, and no party reserved the right to object to its contingency enhancement.

Section 328(a) of the Bankruptcy Code provides that the court may "authorize the employment of a professional person . . . on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis." 11 U.S.C. § 328(a); see also, L. King, et al., *Collier on Bankruptcy* at ¶ 328.02[1][f] (15th ed. Rev. 1996). Section 328(a) permits a court to reexamine "the terms and conditions" of compensation previously approved, but only if the terms prove "to have been improvident" in light of new developments that could not have been anticipated earlier. Section 328(a) provides:

> the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

11 U.S.C. § 328(a).

In the case at bar, no party has seriously attempted to satisfy the requirements of § 328(a) or to show that there were developments not capable of being anticipated at the time the fee arrangement was approved that would justify ignoring the enhancement. On the contrary, Greenberg's 5% enhancement was based on a resolution of the King Litigation before a decision of the District Court -- and that is just what occurred. The amount of the contingency may be larger than initially anticipated, but the Debtor's estates received 95% of the benefit and did not initially propose a sliding scale for the enhancement percentage.

Instead of satisfying the requirements of § 328(a), the objecting parties argue that the fee enhancement is unreasonable in light of the fact that Greenberg is being paid hourly fees as well as a contingency enhancement. Although nothing in § 328(a) permits the Court to reject an approved arrangement exclusively on general grounds of reasonableness, *In re Reimers*, 972 F.2d 1127 (9th Cir. 1992), three factors persuade the Court that the requested enhancement is, in any event, reasonable.

First, Greenberg's "fee enhancement" is akin to a traditional contingency arrangement. It is not unusual for attorneys representing parties in litigated matters to charge a contingency fee as well as a fee based on hourly rates. See 1 ROBERT L. ROSSI, ATTORNEYS' FEES § 1.25; App. A, Model Form 8 (3d ed. 2001); *cf. Walters v. City of Atlanta*, 803 F.2d 1135, 1152 (11th Cir. 1986). Unlike the initial Pachulski enhancement, which doubled fees with no consideration of benefit to the estate, the Greenberg firm negotiated a traditional percentage bonus that increased in size based not on the firm's ability to accrue time charges but on the firm's ability to obtain a settlement or judgment that directly benefited its client.[5]

Second, the fee arrangement was the continuation of an agreement negotiated long before the filing of the petitions. In 1998, when Greenberg's predecessor agreed to represent Tyson, the parties contemplated a contingency payment. Although the terms of the payment were to be negotiated at a later date, the arrangement agreed to at the commencement of the Chapter 11 cases merely confirmed and made concrete that which had been in place for many years. Section 329 of the Bankruptcy Code permits the Court

[5] There is no question that the enhancement – $700,000 – is large. Nevertheless, the settlement was large. Moreover, if Greenberg (and its predecessor firm) had been paid on a pure contingency basis, without any charge of hourly rates, it probably would have earned much more. It was paid a total of $2,038,096 in fees on the basis of its hourly rates ($1,968,678 pre-petition and $69,418 post-petition). A 25% contingency would have netted the firm $4,250,000.

to cancel any agreement between a debtor and an attorney, if the agreement was made within one year prior to the filing of a petition, was for services "in connection with the case," and if the compensation "exceeds the reasonable value of" the services. As noted, the Greenberg agreement was made four years prior to the petition, well before the suspect period of § 329 of the Bankruptcy Code.

Third, Greenberg was special counsel for a specific litigation. The policy that a court should closely review bankruptcy counsel's fees is based in part on the principle that a debtor about to file a bankruptcy petition is often not in a position to review the fees of his attorneys closely. See *In re Busy Beaver Bldg. Ctrs.*, 19 F.3d 833, 843 (3d Cir. 1994). This concern is less likely to be justified where the fees of non-bankruptcy counsel were negotiated at arm's length four years before the bankruptcy was filed.

Finally, there is no question that Greenberg's willingness to continue to represent Tyson in the litigation contributed to the excellent result.

For the reasons set forth above, the Court will overrule the objections to Greenberg's fee application.

Goldman's Administrative Claim

Goldman has filed an administrative claim under § 503(b)(1)(A) of the Bankruptcy Code for "actual, necessary costs and expenses of preserving the estate" in connection with researching the title problems of the 6760 Property and helping to negotiate a deal with the Sparkle Chapter 7 trustee. The Debtors' principal arguments against the application are that Goldman's unsuccessful bid on the 6760 Property did not constitute a "transaction" with the debtor in possession and that Goldman is not entitled apply for expenses under § 503(b)(1)(a) because he is not a creditor. The Debtors also

claim that Goldman did not provide any value to the estate because the Sparkle bankruptcy would have been reopened without his intervention.

Administrative Expenses Under The Bankruptcy Code

Section 503(a) of the Bankruptcy Code provides that "[a]n entity may timely file a request for payment of an administrative expense . . . ." Section 503(b)(1)(A) of the Bankruptcy Code provides, in turn, that "after notice and a hearing, there shall be allowed, administrative expenses . . . including . . . (A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case." Section 503(b)(1)(D) also permits certain entities to file a claim for making a "substantial contribution" in a case, but Goldman has not proceeded under this section.

Section 503(a) by its plain language answers the Debtors' argument that Goldman's administrative claim should be disallowed because he was not a creditor. It permits "any entity" to file a claim for an administrative expense and does not limit an application to "creditors." It is doubtless true that a § 503(b) application should be examined more carefully when a party such as Goldman acts to protect his potential interests as well as the estate's interest. Here Goldman was a potential bidder on the property whose title was in question. But the fact that a party may have an interest in the matter does not preclude a § 503(b) application. See *Calpine Corp. v. O'Brien Envtl. Energy, Inc*. 181 F.3d 527, 529-30 (3d Cir. 1999).

Goldman's claim is that he incurred "the actual, necessary costs and expenses of preserving the estate." As the Second Circuit explained in *Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98, 101 (2d Cir. 1986):

> An expense is administrative only if it arises out of a transaction between the creditor and the bankrupt's trustee or debtor in possession and 'only to the extent that the consideration supporting the claimant's right to payment was both supplied to and beneficial to the debtor-in-possession in the operation of the business.'

789 F.2d at 101, quoting *Cramer v. Mammoth Mart, Inc*. (*In re Mammoth Mart, Inc*.), 536 F.2d 950, 954 (1st Cir. 1976). The *McFarlin's* case applied the well-known "*Mammoth Mart* Test" in the Second Circuit. The *Mammoth Mart* Test is a two-prong test: the first prong asks whether the "transaction" arose between the creditor[6] and the estate; the second prong inquires as to whether the incurred expense benefited the estate in some demonstrable way. Both prongs must be satisfied.

(i) The Transaction

Goldman claims that he has satisfied the first prong of the *Mammoth Mart* Test because he entered into a transaction with Tyson by placing a bid for the purchase of the 6760 Property, and that in addition he incurred expenses while helping to solve a problem relating to the marketing of the property. The Debtors argue that Goldman is not entitled to an administrative claim because he was a volunteer and never entered into a "transaction" with the Debtors.

The Third Circuit case of *O'Brien Envtl. Energy, Inc*. 181 F.3d at 527, 529-30, is again on point. In *O'Brien*, Calpine, an unrelated entity with no pre-existing ties to the debtor agreed to purchase the bulk of the debtor's assets. Calpine requested that it be allowed a break-up fee in the Bankruptcy Court order scheduling a hearing on the purchase, but the Court refused. *Id.* at 529. The Court, however, invited Calpine to request a break-up fee at the conclusion of the sale process, if it were unsuccessful in

[6] It is clear that the use of the term creditor in the *Mammoth Mart* formulation refers to the administrative claimant and does not impose a requirement that a claimant otherwise be a "creditor."

bidding. *Id.* at 529-30. Calpine was outbid at the sale and requested a break-up fee. The Bankruptcy Court refused to award a fee, and Calpine appealed both the order denying its original request for a break-up fee and the order denying the award of the fee. The Third Circuit on appeal held that Calpine had no standing to appeal the original order because it was merely an unsuccessful purchaser and not a creditor. *Id.* at 531. The Circuit Court did, however, hold that an unsuccessful bidder had standing to appeal a denial of break-up fees and that such a bidder engaged in a transaction with the Debtor. The *O'Brien* Court then found that the allowance of a break-up fee should be analyzed in the same fashion as any other administrative expense, and that the issue is whether the fees preserved the value of the estate. *Id.* at 536.

Under *O'Brien*, Goldman would have standing to seek a fee in connection with the bidding process, as he engaged in a "transaction" with the debtor. Tyson argues that *O'Brien* is distinguishable because in that case a court order reserved the bidder's rights and "the court anticipated and intended to preserve consideration of a later request for fees filed by Calpine." *O'Brien* at 533. Here, Goldman sought no pre-approval or reservation of rights. But the thrust of the *O'Brien* holding is not based on a reservation of rights. Nor would a complete denial of standing to Goldman for work actually done be fair to Goldman. Thus, the Court should proceed to the second prong of the *Mammoth Mart* Test, whether Goldman's actions provided value to the estate.

(ii) Value to the Estate

The *O'Brien* decision is also helpful on the second prong of the *Mammoth Mart* Test. The Court there held that a fee could be awarded under § 503(b)(1)(A) only if the claimant's " participation . . . was necessary to accord the estate an actual benefit." *Id.* at

537. In *O'Brien*, the Court held that merely being the first bidder did not provide value to the estate, but that such a bid constituted an exercise in self interest. The unusual facts of this case are different. Goldman has not filed a claim because he bid on the property, and it will doubtless be a rare case where an unsuccessful bidder can properly file an administrative claim. Nevertheless, Goldman has adequately demonstrated that he assisted in the resolution of a title dispute, that his assistance was accepted by the Debtors and that he contributed to a result where the Tyson estate received more than it would have if it had sold only one part of the 6760 Property or had been further delayed in effecting the sale because of a continuing title dispute.

Goldman has requested the following in professional fees: $9,809 relating to resolving the title problem, $2,548 relating to attending hearings in this case, $9,376 related to researching and preparing his fee application, $1,421 related to resolution of the application including the drafting of a stipulation, $4,000 for preparation of the supplement to the application and $333 for disbursements, for a total of $27,531.00. Because Goldman's assistance helped resolve the title dispute, he should be compensated for his counsel's fees directly relating to that matter, or $9,809. All of the remainder did not primarily benefit the estate, except for a reasonable portion of his counsel's disbursements and expenses in making the application. The Court finds that $4,000 would be reasonable for preparing and filing an application for an administrative expense and attending a hearing, and that $300 is reasonable for disbursements. The application is allowed in the total amount of $14,109.

Conclusion

For the reasons set forth above, the Court will approve the Pachulski Settlement and the Greenberg Fee Application. Pachulski and Greenberg should each submit an appropriate order for payment of the fees and expenses approved herein. Goldman should submit a separate order providing for payment of an administrative claim of $14,109.

Dated: New York, New York
June 3, 2005

/s/ Allan L. Gropper
UNITED STATES BANKRUPTCY JUDGE