UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 00-09767-W
Hocker Pizza, Inc.	**JUDGMENT**
Debtor	Chapter 11

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Court reduces the fees and expenses allowed to Elliott Davis & Company, LLP ("Elliott Davis") by $3,981.25. Elliott Davis's Application is approved in the amount of $13,484.50. After deducting $3,981.25 previously received, Elliott Davis may assert a Chapter 11 administrative claim for payment of $9,503.25.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
March 29, 2002.

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CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States Bankruptcy Court for the District of South Carolina hereby certifies that a copy of the document on which this stamp appears was mailed on the date listed below to:

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SHEREE R. PHIPPS

Deputy Clerk

✓(UST)
✓(Hocker)
✓(Gray)

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 00-09767-W
Hocker Pizza, Inc.	**ORDER**
Debtor.	Chapter 11

THIS MATTER comes before the Court upon Carl W. Hocker's ("Hocker") Objection to Application for Professional Fees and Expenses submitted by the accounting firm Elliott Davis & Company, LLP ("Elliott Davis"). In the Application for Interim Compensation filed with this Court on December 31, 2001, Elliott Davis indicates that it provided accounting services to Hocker Pizza, Inc. ("Debtor") in the amount of $17,465.75 and that Debtor already paid postpetition $3,981.25 of this amount. Hocker objects to Elliott Davis's application on the following grounds: (1) Daniel Hook ("Hook"), a certified public accountant who is a partner of Elliott Davis, represented that the accounting firm was familiar with a particular software program used in Debtor's business, MAS 90, when actually, its employees had no experience with the program and repeatedly sought assistance from Debtor, its employees, and its previous accounting firm and thus causing expense to Debtor ; (2) Hook demanded and Debtor paid $3,981.25 to Elliott Davis in January 2001 although the accounting firm neither sought nor received court approval for this compensation or its payment at that time; (3) Elliott Davis caused Debtor to file documents tardily; (4) Elliott Davis charged an unreasonable rate for work performed; and (5) Elliott Davis's work was so inaccurate, Debtor hired a bookkeeper to reconstruct financial statements. In response, Elliott Davis claims that the fees charged are reasonable in this case as it had to devote a considerable amount of time in producing financial

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reports for Debtor because Debtor failed to maintain quality records and Debtor previously used inappropriate accounting methods. After considering the pleadings in the matter, the parties' arguments, and the evidence presented, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Federal Rule 52 of Civil Procedure, made applicable in bankruptcy proceedings by Federal Rule 7052 of Bankruptcy Procedure.[1]

FINDINGS OF FACT

1. On December 13, 2000, this Court entered an Order authorizing Debtor to employ Hook and his firm, Elliott Davis, as Debtor's accountant. The Order provides that Elliott Davis's compensation shall be set by the Court pursuant to 11 U.S.C. §330.[2]

2. Elliott Davis performed accounting work for Debtor from November 21, 2000 through February 9, 2001. The work included posting Debtor's general ledger and preparing financial statements from June 1, 2000 through October 30, 2000, posting Debtor's general ledger and preparing financial statements for postpetition periods ending November 30, 2000 and December 31, 2000, preparing filings for the Court for the periods ending November 30, 2000 and December 31, 2000, and consulting with Debtor regarding accounting matters.

3. In January 2001, Hook demanded that Debtor pay $3,981.25 to Elliott Davis; otherwise, the accounting firm would withhold monthly statements Debtor was required to file with the Court.

4. Upon that demand, Debtor paid $3,981.25 to Elliott Davis in January 2001 without this

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[1] The Court notes that, to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and, to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

[2] Further references to the Bankruptcy Code shall be by section number only.

Court's approval or review.

5. Elliott Davis had not submitted an application for compensation to the Court for its approval of the $3,981.25 of professional fees and expenses at that time.

6. Since February 9, 2001, Elliott Davis has provided no accounting services to Debtor.

7. Debtor's bankruptcy case converted from Chapter 11 to Chapter 7 on June 21, 2001. The Court is informed that funds are available to pay Chapter 11 administrative expenses. Elliott Davis has filed this Application seeking approval of $17,465.75 as its fees and expenses as a Chapter 11 administrative expense.

CONCLUSIONS OF LAW

Although this issue was presented to the Court in terms of whether Elliott Davis's fees are reasonable, the Court believes its focus should center on a more fundamental and initial step. This step is the procedure professionals who are hired by debtors in Chapter 11 bankruptcy cases must follow in order to receive payment of compensation and expenses.

Generally, professionals retained pursuant to §327 must file an application for compensation prior to the allowance and payment of their fees. See Pennsylvania Dept. of Labor & Indus. v. Cunningham & Chernicoff, P.C. (In re Pannebaker Custom Cabinet Corp.), 198 B.R. 453, 462 (Bankr. M.D. Pa. 1996). Section 330(a)(1) and Federal Rule 2016 of Bankruptcy Procedure provide a procedure professionals must adhere to in order to receive compensation.[3]

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[3] The Court notes that professionals can seek compensation on an interim basis pursuant to §331. These interim applications may be made no more than once every 120 days unless the Court permits applications to be filed more often. In the case before it, the Court concludes that Elliott Davis, pursuant to §330, seeks a single, final application for all services performed in the case as it has provided no accounting services to Debtor since February 2001 and has not previously applied for interim approval.

Further, Local Rule 2016-1 allows more frequent applications by attorneys in

Section 330(a)(1) provides that a court may award reasonable compensation and expenses to a professional person after notice to the parties in interest and the United States Trustee and a hearing. See In re Rivers, 167 B.R. 288, 304 (Bankr. N.D. Ga. 1994) ("It is elementary that a professional may not solicit or accept compensation from a fiduciary without prior court approval and that compensation may be awarded only after notice to parties in interest and a hearing"). Rule 2016 provides that professionals must submit an application setting forth a detailed statement of services rendered, time expended, expenses incurred, and the amount of compensation requested. In other words, professionals seeking to accept postpetition disbursements from a debtor-in-possession must (1) file a motion specifically requesting approval of such disbursement, (2) provide proper notice to creditors and other parties in interest of such motion so as to allow an appropriate opportunity for a hearing, and (3) obtain actual court approval of the desired disbursement prior to acceptance. See Pannebaker Custom Cabinet, 198 B.R. at 466.

The reasons why courts must approve compensation for professionals are because debtors in bankruptcy are often under considerable financial stress, and, consequently, they can be in unequal bargaining positions with professionals. In addition, if a debtor's business is insolvent, money paid for professional fees comes, not from a debtor's shareholders, but from the estate. The result is that professionals are paid from funds that would otherwise be directed toward paying creditors. Because of these inherent tensions as well as the fundamental principle in bankruptcy of full disclosure, the Court has a duty to review the applications for compensation

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Chapter 11 cases but not other professionals, and clearly indicates that, even in cases of a prepetition retainer, the professional must receive court approval before drawing against the retainer postpetition.

and to determine whether the compensation sought is reasonable and fair before compensation is allowed. See In re Tri-State Plant Food, Inc., 273 B.R. 250, 256 (Bankr. M.D. Ala. 2002); see also In re Phillips, 219 B.R. 1001, 1009 (Bankr. W.D. Tenn. 1998) (treating the procedure of a notice and a hearing opportunity pursuant to §330(a) as crucial because it provides courts, creditors, and debtors an opportunity to review the amount of time expended to complete each task performed on the debtor's behalf, the hourly rates of the professional, and the expenses incurred); Pannebaker Custom Cabinet, 198 B.R. at 463, fn 6 (noting that the bankruptcy court's role in determining the allowability of an award of interim compensation is not merely perfunctory but involves careful scrutiny of professionals involved in a debtor's reorganization efforts).

In the case before the Court, Hook demanded a partial payment from Debtor for accounting services rendered; however, Elliott Davis did not previously comply with the appropriate procedure of applying for the Court's approval of the amount and payment of compensation. Elliott Davis did not submit a motion to the Court requesting approval of Debtor's disbursing $3,981.25 to it, and the disbursement of the funds was not noticed to creditors or other parties in interest. In his testimony, Hook explains his actions by stating that he was unaware of how professional fees were paid while a debtor is in bankruptcy. Ignorance, however, cannot justify violating the Bankruptcy Code and its Rules. Indeed, In re Tri-State Plant Food is instructive on this point. In Tri-State Plant Food, attorneys who were not bankruptcy law specialists were employed as special counsel to represent the debtor-in-possession in a class action lawsuit. While the bankruptcy case was pending, these attorneys received sixteen payments totaling $85,146.21 from the debtor-in-possession; however, the

attorneys did not submit applications for compensation in advance of the payments, and the attorneys did not disclose the receipt of the payments. As a defense, the attorneys argued that they were not bankruptcy law specialists and that they relied on a bankruptcy attorney for guidance in bankruptcy matters. The court rejected this argument and refused to absolve the professionals for failing to comply with the law. See Tri-State Plant Food, 273 B.R. at 265. The court reasoned,

> [T]he rules apply to all professionals equally. This Court expects that all professionals who are retained under its authority will comply with all pertinent provisions of the Bankruptcy Code and all applicable Bankruptcy Rules. Each professional has an independent and nondelegable duty to ascertain for himself or herself, the pertinent requirements of the rules governing his or her employment as a professional. Any professional who violates these rules are subject to sanctions." Id. at 265-66.

This Court agrees with the reasoning of the Tri-State Plant Food Court and does not excuse Elliott Davis's conduct in demanding and receiving payment from Debtor without first submitting an application for compensation, noticing the request, and obtaining this Court's approval. The fact that Hook is an accountant and not an attorney is insufficient to condone his actions. As the Tri-State Plant Food Court noted, it is incumbent upon professionals whom the Court authorizes to work on behalf of a debtor to understand their role in a bankruptcy context and the Bankruptcy Code that governs them. Moreover, accountants have previously been punished for failing to adhere to these rules. See Pannebaker Custom Cabinet, 198 B.R. at 466 (ordering an accountant who disclosed a retainer agreement in his application for employment but who did not submit an application for disbursement to disgorge $2,000.00 he received in fees from the debtor). Further, the Court notes that the evidence indicated that, in order to receive

immediate payment, Elliott Davis threatened to discontinue work necessary for Debtor to meet its requirements of making a financial reporting to the Court and the United States Trustee. This refusal placed Debtor at an immediate risk of having its case dismissed or converted. Hocker characterized such actions as "blackmail." This Court does not condone a professional's refusal to work under circumstances where it improperly demands payment.

Because Elliott Davis clearly violated §330(a) and Rule 2016 and caused Debtor to pay fees improperly, the Court orders a reduction in the total amount of Elliott Davis's bill by the amount represented by the January 2001 payment of $3,981.25. See Vergos v. Mendes & Gonzales, PLLC (In re McCrary & Dunlap Constr. Co. LLC), 263 B.R. 574, 584 (M.D. Tenn. 2001) (finding that the bankruptcy court abused its discretion by not ordering professionals to disgorge all fees received postpetition when the professionals willfully failed to apply for court approval before receiving compensation); Tri-State Food Plant, 273 B.R. at 266 (ordering all compensation improperly paid to be returned to the court); Phillips, 219 B.R. at 1013 (providing a Chapter 13 attorney who charged an hourly fee for services performed after confirmation but who did not disclose these additional fees the option of either filing a written application for these undisclosed fees or disgorging the undisclosed fees that were paid); Pannebaker Custom Cabinet, 198 B.R. at 466 (finding that some degree of disgorgement was warranted where an accountant failed to follow the procedural requirements for obtaining compensation). Accordingly, the Court reduces the fees and expenses allowed to Elliott Davis by $3,981.25. Therefore, Elliott Davis's Application is otherwise allowed in the amount of $13,484.50, which carries a balance of $9,503.25 after crediting the prior payment of $3,981.25.

In closing, the Court also notes that, at the hearing, Hocker argued that Elliott Davis's

fees should be reduced for other reasons; however, Hocker only generally quantified the reduction thereby making it difficult for the Court to consider a precise reduction on these grounds. Because of these circumstances, the Court believes that its decision to reduce Elliott Davis's fees and expenses as stated above adequately resolves Hocker's objection.

CONCLUSION

From the arguments discussed above, it is therefore

ORDERED that the fees and expenses allowed to Elliott Davis are reduced by $3,981.25. Elliott Davis's Application is approved in the amount of $13,484.50.

IT IS FURTHER ORDERED that Elliott Davis, after deducting $3,981.25 previously received, may assert a Chapter 11 administrative claim for payment of $9,503.25.

AND IT IS SO ORDERED.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
March 29, 2002.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States Bankruptcy Court for the District of South Carolina hereby certifies that a copy of the document on which this stamp appears was mailed on the date listed below to:

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✓ ✓ (Barber) ✓ (RFA)

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

SHEREE R. [illegible]

Deputy Clerk

✓ (WST)

✓ (Hacker)

✓ (May)