UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Hoffman Associates, Inc., d/b/a Hoffman Drywall, Inc. and Hoffman Associates, Inc.,

Debtor.

C/A No. 90-02419-W

JUDGMENT

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Application for Interim Fees and Expenses initially filed by Robinson, Bradshaw & Hinson, P.A. on or about April 17, 1996 and subsequently amended, is granted, and Robinson, Bradshaw & Hinson, P.A., shall be entitled to reimbursement of $9,394.22 held open from its first fee interim application and to reimbursement of $44,878.63 for fees and $6,055.21 for expenses incurred for services rendered for the period from September 17, 1992 through April 15, 1996.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
September 10, 1996.

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ORDER

Chapter 7

This matter is before the Court on the Fee Application filed by Robinson, Bradshaw & Hinson, P.A. ("RBH"), special counsel to the Chapter 7 Trustee, W. Ryan Hovis (the "Trustee"), and on the objections to the fee application filed by Wilbur Powers and Powers Construction Company, Inc. (sometimes referred to herein collectively as "Powers"). At the hearing in this matter, RBH amended its fee application to reduce the amount sought from $61,879.36 to $60,328.06 and to set forth more clearly its compensation arrangement with Carlson Corporation-Southeast and its successor company SAE Americon Carolinas, Inc., (sometimes referred to herein collectively as "Carlson"), a client of RBH and a creditor in this case.

Based upon the parties' filings with respect to this fee application, on the record in this case, and on the evidence and arguments presented at the hearing, the Court finds as follows:

I. FINDINGS OF FACT

1. Wilbur Powers is the sole shareholder of Powers Construction and he was a 50% shareholder of the Debtor corporation. When this bankruptcy case was filed, it was initially considered a "no asset" case because of a blanket lien on all of Hoffman's assets that had been taken by Powers.

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2. The Trustee asked RBH to act as his special counsel to pursue claims against Powers.

3. RBH was appointed on February 28, 1991 as special counsel to represent the Trustee for a limited purpose: Litigation of the Trustee's claims against the Debtor's insiders, Wilbur Powers and Powers Construction, and against South Carolina National Bank.

4. In connection with the Trustee's application to appoint RBH as special counsel, RBH, through Garland S. Cassada ("Mr. Cassada"), filed an affidavit dated January 18, 1991 which provided in part as follows:

> I represented the creditors who filed the involuntary petition resulting in this case. In addition, prior to this case, I represented the Carlson Corporation-Southeast, the defendant in a civil action brought by the debtor on August 3, 1989. In the complaint, the debtor alleged it was owed about $104,000 by Carlson for the defendant's alleged breach of a construction contract between the debtor and Carlson. Carlson denied liability and asserted a counterclaim against the debtor for its breach of the construction contract. The trustee dismissed the civil action without prejudice on October 11, 1990. Carlson has filed a proof of claim for about $21,000 in the present case. The Trustee has reserved his right to object to Carlson's proof of claim and pursue a claim against Carlson for its alleged breach of the construction contract. In such event, I have advised the Trustee that I will represent Carlson. With this understanding, the Trustee has asked me to represent him solely for the purpose of challenging the liens against property of the estate claimed by certain insiders of the debtor and prosecuting certain of the Trustee's claims against such insiders.

5. Further, in the February 22, 1991 Application by Trustee for Authority To Employ and Appoint Attorney, the Trustee stated that "Mr. Cassada has represented and continues to represent a creditor of the estate."

6. Since RBH's engagement, neither the Trustee, Powers, nor Powers Construction has ever filed an action against Carlson.

7. During the five years of its engagement, RBH on behalf of the Trustee, successfully pursued claims against Powers. First, RBH represented the Trustee in obtaining a judgment declaring as void Powers Construction's blanket lien on all property of the estate and obtained affirmance of this judgment by both the District Court and the United States Court of Appeals for the Fourth Circuit. Second, RBH filed and tried a complaint against Wilbur Powers and Powers Construction to recover, among other things, preferential and fraudulent transfers and unlawful dividends, and to secure orders subordinating the claims of Powers Construction and to pierce the corporate veil of the Debtor Hoffman to require Powers and Powers Construction to pay all claims against the estate. As a result thereof, on April 25, 1995, the Trustee obtained a judgment on all such claims which has been affirmed in an appeal maintained by Powers and Powers Construction to the District Court. If collected, the judgment, which is now on appeal to the Fourth Circuit Court of Appeals, will provide sufficient cash to pay all non-insider claims against the Debtor's estate including interest.

8. In November 1992 and January 1993, during the course of defending the Trustee's claims against them, Powers and Powers Construction objected to RBH's first fee application and moved to disqualify RBH. Prior to doing so, they filed an objection to Carlson's proof of claim. The motion to disqualify and the objection to the fee application attacked RBH's simultaneous representation of Carlson and Carlson's advancing RBH's fees for work performed for the Trustee, as well as the sufficiency of RBH's disclosure of these matters. This Court, by the Honorable William T. Bishop, denied the motion to disqualify and overruled the objections to RBH's fee application.

These rulings were not appealed and became final orders of the court. After these rulings, Powers withdrew the objection to Carlson's proof of claim.

9. On or about April 17, 1996, RBH filed its second interim fee application, and Powers and Powers Construction have objected to it.

10. Powers and Powers Construction have stipulated that RBH has provided services to the Trustee with a value to the estate equal to the amount requested. Their objections, as set forth in their written objection to the fee application and elaborated upon at the hearing, are based on three primary areas: 1) the failure of RBH to fully disclose all relationships between RBH and Carlson, 2) the failure of RBH to warn the Trustee that a statute of limitations with respect to the Trustee's potential claims against Carlson might expire, and 3) the advancing of fees and expenses to RBH for services to the estate.

11. At the hearing in this matter, the Trustee indicated his support for the allowance of RBH's request for fees and expenses in full. No party in interest other than Powers has objected to RBH's fee application. Additionally, in light of certain modifications RBH made to the fee application, the United States Trustee withdrew its objection to the fee application prior to the hearing.

II. CONCLUSIONS OF LAW

For the following reasons, the Court finds that RBH's services are necessary and have provided a benefit to the estate. Additionally, based upon prior determinations by the Court and the circumstances of this case under which the objecting party has had sufficient knowledge of RBH's representations and billing arrangements, the Court finds that any failure to fully disclose by RBH is not prejudicial or material as to the second fee application, and therefore RBH will be

awarded the full amount of fees and expenses it seeks.

A. RBH's representation of Carlson.

Powers objects to RBH's receiving payment from the estate for the services it has provided to the Trustee because RBH acted as special counsel to the Trustee while continuing to represent Carlson. The Court rejects this objection to the fee application.

First, the Court notes that the Trustee has not made any complaint about RBH's alleged conflict of interest, nor has he, the United States Trustee, or any other party in interest suggested that RBH's pursuit of claims against Powers on the estate's behalf was anything other than zealous and unaffected by any representation of Carlson.

Additionally, Judge Bishop has previously overruled this argument by Powers and there has been no new evidence presented to this Court to reflect that those findings need to be revisited. In objecting to RBH's first fee application, Powers asserted that RBH "continue[s] to represent the interests of Carlson in this proceeding." Similarly, Powers made this issue part of the basis of a motion to disqualify RBH from representing the Trustee, moving to disqualify RBH because "said law firm has and continues to have a conflict of interest between its representation of the Trustee and its representation of [Carlson]."

Finally, there appears to be no actual conflict of interest regarding RBH's representation of Carlson and its representation of the Trustee for the specific limited purpose for which it was employed. This Court appointed RBH to act as special counsel to the Trustee for the limited purpose of pursuing adversary proceedings against Powers. RBH's representation of the Trustee has been limited to this purpose. "Many courts have held that there is no conflict of interest where counsel represents a creditor of the debtor, but is employed only as special counsel for the

estate." In re RPC Corp., 114 B.R. 116 (M.D.N.C. 1990); See also In re Fondiller, 15 B.R. 890, 892 (B.A.P. 9th Cir. 1981)("the provision of 11 U.S.C. § 327(c)[1] that an attorney 'may not, while employed by the trustee, represent, in connection with the case, a creditor does not apply ... [where, as here,] the attorneys represent the trustee in a special limited capacity that presents no conflict of interests between the trustee and the creditor clients of the attorneys"); Matter of Lorandos, 58 B.R. 519 (Bkrtcy. S.D. Ohio 1986)(creditor's attorney serving as special counsel to trustee to recover preferences). When presented with the conflict of interest issue earlier in this case, Judge Bishop rejected the arguments of Powers that there was anything per se improper about RBH's representation of Carlson and denied the motion to disqualify and granted in part RBH's fee application by separate orders dated April 23, 1993.[2]

A more recent case with facts similar to the ones within, In re Adam Furniture Industries, Inc., 191 B.R. 249, 260 (Bkrtcy.S.D.Ga. 1996), has provided helpful guidance to the Court on this issue. Like the Trustee here, the Adam Furniture trustee brought claims against insiders of the debtor to recover fraudulent, preferential and post-petition transfers and to pierce the debtor's corporate veil and sought to retain as his counsel for the adversary proceeding the attorneys for the debtor's largest creditor, Lignacon, and another major creditor, Sidex. The insider defendants objected to the retention of these attorneys; however, the court overruled the objections finding that these lawyers were not disqualified.

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[1]Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.* shall be by section number only and further references to the Federal Rules of Bankruptcy Procedure shall be by rule number only.

[2]It is assumed that the reason that a portion of the fees were held back is because it was an application for allowance of interim and not final fees.

> Retention of [the two lawyers] is expressly for the purpose of acting as special counsel to the trustee for this particular adversary proceeding. ... I do not find a conflict between [their] representation of ... creditors in this matter and their being named special counsel for the trustee to pursue alleged improper transfers which would enhance the estate for all creditors.

In re Adam Furniture Industries, Inc., 191 B.R. at 258-59, citing Stoumbos v. Kilimnik, 988 F.2d 949, 964 (9th Cir.), cert. denied, 114 S.Ct. 190 (1993) (rejecting disqualification challenge to attorney who formerly represented creditor's counsel and who served as special counsel to trustee; "with respect to the ... preference action, the interests of [the creditor] and the trustee coincide: if money is recovered for the estate, [the creditor's] pro rata recovery will ultimately be greater"). The Adam Furniture court explicitly considered ABA Rule 1.7 (also cited by the expert witness called by Powers in this case) and rejected it as a basis of disqualification, ruling that Rule 1.7 imposes the same standard as 11 U.S.C. § 327(c), which only requires disqualification in case of "an actual conflict of interest" such as is not present when the interests of a trustee and his special counsel's creditor-client in seeing the size of the estate increased are "parallel." In re Adam Furniture Industries, Inc., 191 B.R. at 259-60.

B. Statute of Limitations against Carlson.

Powers also objects to RBH's receiving payment for the services it has provided to the Trustee because RBH did not warn the Trustee that a statute of limitations with respect to the Trustee's potential claims against Carlson might expire and because Mr. Cassada's affidavit did not disclose "the possibility that during [RBH's] representation of the Trustee a statute of limitations defense may arise in favor of its former client with respect to [the Trustee's potential] claim for breach of construction contract [against RBH's client]."

Initially, the Court again notes that the Trustee does not support the objection filed by Powers on these grounds. Also, in its affidavit, RBH disclosed an understanding with the Trustee that RBH would represent Carlson should the Trustee decide to assert a claim against it. Accordingly, RBH was clearly engaged to represent the Trustee in claims only against Powers, not against Carlson. The Trustee, an experienced practicing bankruptcy attorney in this district, presumably understood that 11 U.S.C. § 108(a) may set a limitations period to file a complaint against Carlson, and that he should be wary of waiting too long to pursue such a claim if he believed it should be pursued. There is no express requirement in Rule 2014 that required Mr. Cassada's affidavit to disclose to all parties that Carlson and the Trustee had or had not reached an agreement which would toll any applicable statute of limitations. Judicial interpretations of Rule 2014 confirm such a reliance on its plain meaning. See, e.g., In re Adam Furniture Industries, Inc., 191 B.R. at 260 (rejecting argument that special counsel had duty to disclose potential claim allegedly held by bankruptcy estate against his creditor-client in Rule 2014 affidavit). Even if there were such a requirement, no reasonable reading of the affidavit could have misled anyone into believing that such a tolling agreement existed.

Not only is there no evidence before the Court that the Trustee had any misunderstanding regarding RBH's representation or duty to disclose any matter associated with the claim against Carlson, but there is no evidence that the Trustee had any intention or duty to renew or prosecute the action against Carlson.

Accordingly, based upon the circumstances presented in this case, including a recognition of the experience of the Trustee as a practicing bankruptcy attorney before this Court and his pre-existing express knowledge of potential claims against Carlson, the issue raised regarding the

statute of limitations is not a sufficient ground for denying compensation to RBH.

C. Disclosure

Powers additionally objects to RBH's application because Carlson advanced fees and expenses to RBH for services related to its representation of the estate and because both the initial affidavit dated January 18, 1991 and the pending fee application (as initially filed) failed to disclose the amount and source of payments received by RBH from Carlson pursuant to either Bankruptcy Rule 2014 or Rule 2016.

Rule 2014(a) of the Federal Rules of Bankruptcy Procedure provides for the full disclosure by professionals of any and all arrangements for compensation and all relationships with other parties in interest.

> **(a) Application for an Order of Employment.** An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

Rule 2014(a) of the Federal Rules of Bankruptcy Procedure (emphasis added).

Rule 2016 of the Federal Rules of Bankruptcy Procedure provides as follows:

> **(a) Application for Compensation or Reimbursement.** An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.

Rule 2016(a) of the Federal Rules of Bankruptcy Procedure (emphasis added).

This Court has previously held that "third party agreements to pay the fees for a debtor in possession must be disclosed. In re Revels, 147 B.R. 28, 130 (Bankr. E.D.Va 1992), In re Hathaway Ranch Partnership, 116 B.R. at 219, In re National Distributors Warehouse Co., Inc., 148 B.R. 558, 561 (Bankr. E.D.Ark. 1992)." In re Ryan Investments Company, Inc., 94-72021-B (Bankr. D.S.C. May 7, 1996). Also, this Court, in the context of a Rule 2016(b) disclosure involving the attorney for a debtor, has stressed the importance of filing and supplementing Rule 2016 disclosures.

> By its plain language § 329 specifically requires that a statement disclosing compensation paid, or to be paid, and the source of the compensation, be filed with the Court by the attorney for the Debtor. Rule 2016(b) provides that the statement include whether the attorney has shared or agreed to share the compensation with any other entity but the statement is not limited to that information. Rule 9001 provides that the rules of construction set forth in § 102 govern the interpretation of the rules, and § 102(3) plainly provides that the words "includes" or "including" are not limiting.

In re TJN, Inc., 194 B.R. 400 (Bkrtcy.D.S.C. 1996). According to the plain language of § 327 and Rules 2014 and 2016(a), these same disclosure requirements also apply to attorneys employed by a Chapter 7 trustee.

In this case, RBH did not expressly disclose the concurrent payment of its fees and expenses by Carlson in the body of either the first or second fee applications. While it did attach invoices which initially showed the billing was sent to Carlson and then its successor SAE Americon Carolinas, Inc. and then in July, 1994 to the Chapter 7 Trustee, W. Ryan Hovis, such is not adequate disclosure or compliance with Rule 2016. This Court has recently held that "[t]he United States Trustee, other parties in interest and the Court should not be required to ferret out facts which the Rules require that the Law Firm plainly, openly and timely disclose... In re Quality Respiratory Care, Inc., 157 B.R. 180 (Bankr.D.Me.1993)." In re TJN, Inc., 194 B.R. at 403. In In re TJN, Inc., this Court also found as follows:

> Furthermore, the precise function of the 2016 Statement is to provide creditors with exactly this specific information, i.e. compensation paid or agreed to be paid to a debtor's attorney. Creditors and this Court should not be forced to scrutinize the biweekly operating reports for information which is required to be provided in a clear and straightforward manner on another statement. 157 B.R. at 181. See also In re Brandenburger, 145 B.R. 624 (Bankr.D.S.D. 1992) ("whenever an attorney's fee arrangement with a debtor changes or whenever he receives a

> retainer or other form of compensation not previously disclosed, the attorney must file a supplemental disclosure of compensation. A fee application is not a substitute for this disclosure"), In re Arthur and Joan Larsen, 28 B.C.D. 509, 190 B.R. 713 (Bankr.D.Me.1996) ("This court has previously observed that full disclosure of counsel's fee arrangements with the debtor is 'essential to effective exercise of the court's power to pass on fee applications.' ") and In re Saturley, 131 B.R. 509 (Bankr.D.Me.1991) ("Anything less that the full measure of disclosure leaves counsel at risk that all compensation may be denied ... whatever the explanation for disclosure inadequacies, it reflects poorly on responsible counsel.").

In re TJN, Inc., 194 B.R. at 403. It is clear to the Court that RBH's disclosure of its receipt of funds from Carlson by its attachment of invoices alone, would not meet the standards of full compliance.

However, within the context of consideration of this second fee application, the Court cannot ignore that Powers, the sole objecting party, has had full knowledge that Carlson was advancing fees and expenses to RBH for several years. In its objection to the first fee application and in affirmatively asserting a motion to disqualify RBH, Powers itself brought these same issues to Judge Bishop's attention in earlier hearings in this case. In seeking to disqualify RBH, Powers argued that "[a] close examination of the invoices for services performed ... discloses that the invoices were directed to Carlson and have been periodically paid." Similarly, in objecting to RBH's first fee application, Powers asserted that "Carlson has paid [RBH] for all, or substantially all, of the services rendered and expenses incurred for which the applicant now seeks reimbursement from the estate." With respect to the fact that Carlson advanced fees to RBH, Judge Bishop's rulings concluded that under the circumstances of this case the arrangement was not improper so as to serve as a basis for disqualification or a denial of fees at that time. For the

purposes of considering the second fee application and Powers objection, it is just as clear that Powers, at least from the time of its earlier objection to fees and motion to disqualify, has had full knowledge of RBH's receipt of funds from Carlson.

In considering this second fee application, the fact that this Court has previously rejected Powers' argument after a contested hearing is particularly compelling. Judge Bishop dealt with Powers' arguments regarding RBH's fee arrangement in early 1993, and by rejecting Power's arguments, it is asserted by RBII, that it was encouraged to continue representing the Trustee as special counsel. Since that time, RBH has performed significant work on behalf of the Trustee for the benefit of Hoffman's creditors. Despite a change in Judges in this case, this Court will not now change its position.

III. CONCLUSION

During the hearing in this matter, Powers also asserted that Carlson has used Hoffman's bankruptcy as a "defensive mechanism" to protect itself against Hoffman's claim against it and should therefore their attorneys, RBH, should be denied compensation. However, Powers has cited no evidence and no authority in support of its argument. Carlson joined as a petitioner in the involuntary bankruptcy petition, and this Court approved Carlson's actions by entering an Order for Relief on August 8, 1990. Carlson opposed Powers' motion for relief from stay and sought the avoidance of Powers' security interest in all Hoffman's assets, and was entirely successful. Carlson's cooperation in the Trustee's pursuit of Powers in an adversary proceeding has yielded a judgment in favor of the Trustee that will likely provide a recovery sufficient to pay all non-insider claims against Hoffman's Chapter 7 estate with interest. For all of these reasons, the Court finds that none of the arguments advanced by Powers weighs in favor of reducing or

denying RBH's compensation and it is therefore,

ORDERED, that the Application for Interim Fees and Expenses initially filed on or about April 17, 1996 and subsequently amended is granted, and Robinson, Bradshaw & Hinson, P.A., shall be entitled to reimbursement of $9,394.22 held open from its first fee interim application and to reimbursement of $44,878.63 for fees and $6,055.21 for expenses incurred for services rendered for the period from September 17, 1992 through April 15, 1996.

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
September 10, 1996.