ORDERED in the Southern District of Florida on April 14, 2021.

Erik P. Kimball, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

In re:

Chapter 11

PALM BEACH FINANCE PARTNERS, L.P., **Case No. 09-36379-EPK**
PALM BEACH FINANCE II, L.P., **Case No. 09-36396-EPK**
(Jointly Administered)

Debtors.
_____/

ORDER ON
MOTION OF MELAND BUDWICK, P.A. FOR ADDITIONAL FEE

This matter comes before the Court on the *Motion of Meland Budwick, P.A. for Additional Fee Pursuant to Court Approved 2010 Fee Agreement* [ECF No. 3778] (the "Motion"). In ruling on the Motion, the Court has also carefully reviewed the related responses, supplements, and reply. ECF Nos. 3792, 3796, 3797, 3798, 3800, and 3801. The Court held a hearing on the Motion on March 17, 2021. Although two of the foregoing documents were filed after the hearing, no party requested an additional hearing and the Court does not believe an additional hearing would be helpful.

This bankruptcy case stems from one of the largest Ponzi schemes in United States history. More than 20 years ago, Thomas Petters began soliciting investments to facilitate his purchase of overstock consumer products from manufacturers or suppliers and the sale of those products to major retailers. Mr. Petters claimed to need the financing to bridge the time between payment to the suppliers and receipt of payment from the purchasing retailers. Palm Beach Finance Partners, L.P. and Palm Beach Finance II, L.P., the debtors in these cases, were formed in 2002 and 2004, respectively, to facilitate investment with the Petters enterprise. Nearly all of the money raised by the debtors was used to purchase notes issued by Petters. Unfortunately, the entire Petters financing scheme was a fiction. There were no agreements to buy or sell merchandise. There was no merchandise. Instead, Mr. Petters and his conspirators ran a multi-billion dollar Ponzi scheme, taking in money from new investors, using some of it to pay prior investors, and absconding with the rest. The scheme came to an end in 2008 when the Federal Bureau of Investigation arrested Mr. Petters, who was later convicted of several federal crimes and sentenced to 50 years in prison.

Each of the debtors filed a voluntary chapter 11 petition more than 11 years ago on November 30, 2009. After extensive negotiation, the debtors confirmed their joint plan of liquidation on October 21, 2010. ECF No. 444. But that was only the start of considerable litigation in an effort to maximize creditor recovery. As of the date of this order, there are more than 3,800 items in the docket of the main bankruptcy case. In addition, the estate pursued more than 170 separate adversary proceedings, many of which involved protracted discovery and litigation. To say that these jointly administered cases have been complex and demanding on the parties, counsel, and the Court would be an understatement.

Prior to confirmation of the joint plan of liquidation, Barry E. Mukamal acted as chapter 11 trustee. After confirmation of the plan, Mr. Mukamal became the trustee of the debtors' liquidating trusts.

In July 2010, early in these jointly administered cases, the trustee sought to retain the firm now known as Meland Budwick, P.A. ("Counsel") as counsel for the trustee under a hybrid compensation arrangement. ECF No. 193. At that time, the debtors' estates had meager liquid assets, but the trustee was in need of assistance of counsel to pursue litigation on behalf of the debtors' estates as well as to prosecute the estates' claims in the bankruptcy of the Petters entities, pending in Minnesota. The trustee proposed to retain Counsel to represent the estates in litigation matters on a reduced hourly rate of 75% of their prevailing hourly rates, plus 10% of any affirmative recovery received by the debtors' estates. For all non-litigation matters, including representing the debtors' estates in connection with the Petters bankruptcy case, Counsel would charge at its usual hourly rates.

There was no written engagement agreement for Counsel's hybrid fee structure. The engagement is described only in the motion seeking its approval and the order granting that motion, and it is incorporated in the joint plan later confirmed in these cases. ECF Nos. 193, 223, and 245. In the original motion seeking approval of the hybrid fee structure, the fee for litigation matters is presented in paragraphs 16 through 19. ECF No. 193. The standard hourly fee for non-litigation matters, including work in connection with the Petters bankruptcy, is presented in paragraph 20, which reads as follows:

> [Counsel] shall charge 100% of its hourly rates for all non litigation matters and all services associated with the Petters Bankruptcy Cases or any related receivership, forfeiture or restitution proceedings. However, depending on the outcome and results achieved in connection with the Debtors' cases, including the results of and amounts of distributions from the Petters Bankruptcy Cases, [Counsel] shall be entitled to seek additional fees based on the results achieved, subject to application and approval by the Court.

The Court approved the hybrid fee arrangement by order entered August 24, 2010. ECF 223. The order reflects the structure of the motion. The Court approved the hybrid fee arrangement for litigation matters, and it confirmed that Counsel could seek approval for payment in connection with non-litigation matters at their usual hourly rates. In the

paragraph addressing non-litigation matters, the Court's order states: "Depending on the outcome and results achieved in connection with the Debtors' cases, including the results of and amounts of distributions from the Petters Bankruptcy Cases, [Counsel] shall be entitled to seek additional fees based on the results achieved, subject to application and approval by the Court." ECF No. 223, ¶ 4. It is this sentence in the motion and order that Counsel points to as the basis for a contractual right to fee enhancement in this case.

In addition to the hybrid arrangement approved by the Court, the Court also approved the trustee's retention of Counsel on a purely contingent fee basis in two specific litigation matters. ECF Nos. 802 and 815.

Hon. Paul G. Hyman, Jr. presided over these cases for much of their relevant history. Although the Motion suggests that Judge Hyman is retired, that is not the case. Judge Hyman is on recall by the Eleventh Circuit Court of Appeals and remains a member of this Court. The judge currently presiding over these cases has had the full benefit of consultation with Judge Hyman regarding the history of these cases including the retention of Counsel under the hybrid fee arrangement.

Counsel very ably represented the trustee and these bankruptcy estates, in connection with the Petters bankruptcy where the claims brought on behalf of the debtors' estates were eventually allowed in full, and in connection with more than 170 adversary proceedings, all of which resulted in a recovery exceeding $229 million. Much of the history of these cases is spelled out in the Motion.

The Court previously approved Counsel's fees and expenses consistent with the Court's prior orders approving the hybrid fee arrangement and the contingent fee arrangement in two specific cases. As a result, Counsel has been paid approximately $18.76 million in hourly fees and $19.5 million in contingency fees.

In the Motion, Counsel argues that the trustee's original motion seeking authority to implement the hybrid fee arrangement, and this Court's order approving that motion, constitute a contract under which Counsel is entitled to seek fees over and above those previously approved and paid. Counsel argues that their request for additional fees is not a "fee enhancement" under the relevant case law as they have a pre-approved contractual right to request additional fees based on the outcome in these cases. Even if considered a fee enhancement, rather than a contractual right, Counsel contends that they should be awarded additional fees under prevailing standards. Counsel seeks approval of additional fees in the amount of $5 million.

A bankruptcy estate may retain professionals, including attorneys, "on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis." 11 U.S.C. § 328(a). "Congress enacted § 328(a) to eliminate the previous uncertainty associated with professional compensation in bankruptcy proceedings, even at the risk of potentially underpaying, or, conversely, providing a windfall to, professionals retained by the estate under § 328(a)." *In re ASARCO, L.L.C.*, 702 F.3d 250, 258 (5th Cir. 2012). Before section[1] 328(a) was added to the Bankruptcy Code, many professionals hesitated to work for bankruptcy estates because their compensation was subject to the court's wide discretion when applying section 330(a). *In re Amberjack Ints., Inc.*, 326 B.R. 379, 386 (Bankr. S.D. Tex. 2005).

Debtors in possession and trustees often retain counsel on a general retainer, in which case the fee is subject to approval based on whether it is "reasonable compensation for actual, necessary services." 11 U.S.C. § 330(a)(1)(A). The determination of a reasonable fee starts with the lodestar method, meaning the number of hours worked by counsel multiplied by the

[1] Unless otherwise noted, the words "section" or "sections" refer to provisions of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq*.

prevailing hourly rates in the community for similarly skilled counsel. *Perdue v. Kenny A. Ex rel. Winn*, 559 U.S. 542, 551-52 (2010); *see also In re Atlas*, 202 B.R. 1019, 1022 (Bankr. S.D. Fla. 1996). When a professional is retained on a general retainer, there is a strong presumption that the fee determined by the lodestar method is appropriate. *Perdue*, 559 U.S. at 552; *In re Atlas*, 202 B.R. at 1022. Enhancement of the fee determined by the lodestar method is warranted only in rare and exceptional circumstances where superior performance by an attorney is not adequately addressed by the lodestar analysis. *Perdue*, 559 U.S. at 552.

Estate representatives may also retain professionals based on a pre-approved fee arrangement, such as a fixed fee or a contingent fee, pursuant to section 328(a). When the court authorizes engagement of counsel under a pre-approved fee arrangement, the fee is not later subject to analysis under section 330(a). *In re Tex. Secs., Inc.*, 218 F.3d 443, 445-46 (5th Cir. 2000) (citing *In the Matter of Nat'l Gypsum Co.*, 123 F.3d 861, 862 (5th Cir. 1997); *In re Reimers*, 972 F.2d 1127, 1128 (9th Cir. 1992)). The bankruptcy court may only adjust a pre-approved fee "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) (emphasis added); *Id.* Section 328(a) permits modification of a pre-approved fee only where at the time of the engagement the estate representative and counsel could not have imagined the outcome and that outcome merits a change in the pre-approved fee. When the court pre-approves a fee arrangement, such as a contingent fee, both the bankruptcy estate and the professional take a risk that the arrangement may result in a windfall to the other.

While the standards for considering fee enhancements in the context of general retainer and pre-approved fee engagements present differently in the case law, in practice they are both quite restrictive. A professional seeking enhancement in a matter covered by

section 328(a) must meet the high burden of showing a change in circumstances that could not have been contemplated when the professional was retained. In a matter covered by section 330(a), a cursory reading of the case law suggests that the standard is more forgiving. But when one analyzes the rulings in reported decisions addressing fee enhancement requests, these distinctions become blurred. Fee enhancement is appropriate only where counsel's performance so far exceeds expectations that the fee otherwise payable falls woefully short of recognizing the value of the services provided in light of the circumstances of the case.

In addition, although not limited to cases where creditors are paid in full, fee enhancements in bankruptcy cases are rarely approved when creditors have not been paid in full unless there is significant support from the creditor body whose distributions would be reduced by the increased fee. *See, e.g., In re Covad Commc'ns Grp., Inc.* 292 B.R. 31, 32 (D. Del. 2003) (awarding fee enhancement where creditors and shareholders received substantial recovery and only the United States Trustee objected); *In re Nucentrix Broadband Networks, Inc.*, 314, B.R. 574, 579 (Bankr. N.D. Tex. 2004) (awarding fee enhancement where creditors were paid in full and shareholders received a substantial return).

Counsel begins by arguing that the trustee's motion and this Court's order approving the hybrid fee amount to a contractual right to seek fees over and above the hybrid, contingent, and hourly arrangements that were specifically approved. But the single sentence pointed to by Counsel bears none of the hallmarks of a contract. The motion and order state only that Counsel may seek approval from this Court of additional fees. The alleged contract contains no standard for review of any such request. Nor did the Court consider the language in its order approving the hybrid fee to constitute approval of any contractual arrangement or pre-approved right to fees over and above those addressed in the order. The language pointed to by Counsel is only a reservation of the right to seek a fee

enhancement. The Court agrees with the thorough analysis of this issue addressed in the response. ECF No. 3800 at 4-7.

Instead, it is necessary for the Court to evaluate the Motion as a request for approval of a fee enhancement under relevant standards. The Court has carefully reviewed Counsel's thorough presentation in the Motion, has reviewed the entirety of the docket, and is aware of the history of these cases.

The hybrid fee arrangement under which Counsel undertook most of the estate's litigation includes a reduced hourly rate of 75% of existing rates plus a contingent fee equal to 10% of the estate's actual recoveries. The hybrid arrangement was presented to the Court as a method to reallocate to Counsel some of the risk in pursuing numerous litigation matters. Such shifting of risk and reward is a hallmark of a pre-approved fee arrangement under section 328(a). Although the order approving the hybrid fee specifically required the filing of fee applications and Court approval for the hourly component, the Court views the hybrid arrangement, as a unit, as a pre-approved fee under section 328(a). The trustee's separate engagement of Counsel under a contingent fee arrangement for two specific litigation matters obviously falls in this category as well.

While Counsel undertook and met numerous challenges during these cases, the history of these cases does not cause the Court to find that the pre-approved components of Counsel's fee were "improvident in light of developments not capable of being anticipated" when Counsel was engaged, as required by section 328(a). In fact, as the Motion itself well describes, the challenges met by Counsel were exactly the kinds of challenges that were expected when the trustee and Counsel fashioned the hybrid and contingent fee engagements in these cases. Counsel is not entitled to modification of the pre-approved components of their fee under section 328(a).

The Court has already approved all of Counsel's applications seeking approval of fees on an hourly basis. In approving those fees, the Court congratulated Counsel and the trustee on a well administered case and a significant distribution to creditors given the challenges of the case. The Court found that the hourly fees requested were reasonable under the circumstances of these cases, consistent with the lodestar analysis. This included both work done on a purely hourly basis and the hourly component of the hybrid fee arrangement for litigation work. Even if the hourly component of the hybrid fee is considered not part of a pre-approved fee under section 328(a), the Court has already considered and approved those fees under the lodestar analysis.

While Counsel's skill, diligence and dedication in these cases has certainly been laudable, their work does not meet the rare and exceptional circumstances standard required for enhancement under Supreme Court precedent. The Court's prior lodestar analysis of Counsel's hourly fees indicates that the fees actually approved and paid are adequate under the circumstances of these cases. Counsel is not entitled to enhancement of the hourly component of their fees in these cases.

In addition to the foregoing analyses, the Court notes that creditors in these cases will receive a distribution of less than 20% of the face amount of their claims, the largest creditor in these cases has objected to the Motion, and no creditor has come forward to support the Motion. The Court was unable to find any bankruptcy decision approving a fee enhancement under these circumstances.

For the foregoing reasons, the Court ORDERS that the *Motion of Meland Budwick, P.A. for Additional Fee Pursuant to Court Approved 2010 Fee Agreement* (ECF No. 3778) is DENIED.

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Copy to:

Michael S. Budwick, Esq.

Michael S. Budwick, Esq. shall serve a copy of this order on all parties in interest and file a certificate of service with the Clerk of Court.