IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 98-31917

DOUGLAS K. TRIPLETT
d/b/a WEST HILLS EXXON
ROBIN B. TRIPLETT

Debtors

MEMORANDUM ON APPLICATION OF NATIONAL RECOVERY SERVICE, INC. FOR ADMINISTRATIVE EXPENSE

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This contested matter is before the court on the Application of National Recovery Service, Inc. for Administrative Expense (Application for Administrative Expense) filed on January 8, 2008, by National Recovery Service, Inc. (NRS), requesting an order allowing it an administrative expense claim pursuant to 11 U.S.C.A. § 503(b)(1) (West 2004)[1] in the amount of $59,039.71. This sum represents one-third (1/3) of $177,119.12 recovered by the Trustee for the benefit of the estate as a claimant in a class action lawsuit involving Exxon Corporation. Objections were filed by the United States Trustee on January 9, 2008, and by William T. Hendon, Chapter 7 Trustee, on January 31, 2008.

An evidentiary hearing on the Application for Administrative Expense was held on May 13, 2008. The record before the court consists of Stipulations of undisputed facts filed by the parties on May 6, 2008, nine exhibits stipulated into evidence, and the testimony of the Chapter 7 Trustee, William T. Hendon, and Paul Houck, President of NRS.[2]

This is a core proceeding. 28 U.S.C. § 157(b)(2)(A), (O) (2008).

I

The Debtors filed the Voluntary Petition commencing their bankruptcy case under Chapter 7 on April 28, 1998, and William T. Hendon was duly appointed trustee. The Debtors were granted their discharge on August 14, 1998, and Mr. Hendon filed his Report of No Distribution and Report

[1] This case is governed by the Bankruptcy Code as enacted prior to the October 17, 2005 effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

[2] The court also takes judicial notice, pursuant to Rule 201 of the Federal Rules of Evidence, of material undisputed facts of record in the Debtors' bankruptcy case file.

of Abandoned Property on June 2, 1999, certifying that he had fully administered the Debtors' bankruptcy estate. Thereafter, on August 11, 1999, the court entered the Final Decree discharging Mr. Hendon as trustee and closing the estate.

In 2004, NRS, a company that monitors class action lawsuits, contacted Mr. Hendon, informing him that, because the Debtor Douglas K. Triplett had operated an Exxon gas station known as West Hills Exxon prior to filing his bankruptcy case, the estate was a potential member of a class entitled to recover damages in a class action lawsuit styled *Allapattah Services, Inc. v. Exxon Corporation* pending in the United States District Court for the Southern District of Florida (Exxon Lawsuit). On December 1, 2004, Mr. Hendon, as "Trustee," signed a Recovery Services Agreement with NRS providing, *inter alia*, that in exchange for notifying the estate of the potential claim and assisting with the filing of a claim, NRS would be paid a contingency fee of one-third (1/3) of any recovery received from the Exxon Lawsuit. TRIAL EX. 1. The Recovery Services Agreement also contains handwritten notations by Mr. Hendon that "[t]his is contingent upon approval by the US Bankruptcy court, further consideration by the Trustee and reopening the Bankruptcy Case." TRIAL EX. 1. In accordance with the Recovery Services Agreement, NRS prepared and filed a proof of claim in the Exxon Lawsuit, listing West Hills Exxon as the Dealer and identifying "William Hendon" as the Claimant in his capacity as the Chapter 7 Trustee for the Debtors' bankruptcy estate. TRIAL EX. 10.

The Exxon Lawsuit was subsequently settled for $1.075 billion, from which Mr. Hendon, for the benefit of the estate, received $177,119.12.[3] *See* COLL. TRIAL EX. 7. On January 18, 2006, Mr. Hendon filed a Motion to Reopen Case, and the Debtors' case was reopened pursuant to an Order entered on February 24, 2006, which also directed the United States Trustee to appoint a trustee to administer the assets of the reopened estate.[4]

Notwithstanding that the United States Trustee did not re-appoint Mr. Hendon as trustee to administer the reopened estate until March 20, 2007, a Notice of Assets and Request for Notice to Creditors was sent to all creditors on December 1, 2006, upon the request of Mr. Hendon. He also filed an Application by Trustee to Employ National Recovery Service as Collection Agent and Pay Commission as Administrative Expense (Application to Employ) on November 7, 2007, which he subsequently withdrew on December 10, 2007. TRIAL EX. 2; TRIAL EX. 3.

After Mr. Hendon's claim in the Exxon Lawsuit was allowed and paid,[5] NRS filed its Application for Administrative Expense on January 8, 2008, seeking payment, pursuant to the

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[3] This amount is net attorneys' fees and costs allowed the class action counsel in the Exxon Lawsuit. The court cannot readily establish from the record the exact date the settlement proceeds were paid into the bankruptcy estate. The record does, however, establish that the funds were received by Mr. Hendon after March 30, 2007. *See* COLL. TRIAL EX. 7, March 30, 2007 Letter from Stearns Weaver Miller Weisler Alhadeff & Sitterson, P.A., to William T. Hendon, Trustee.

[4] The closing and reopening of a bankruptcy case is governed by 11 U.S.C.A. § 550 (West 2004). Pursuant to Rule 5010 of the Federal Rules of Bankruptcy Procedure, "[a] case may be reopened on motion of the debtor or other party in interest" and

> [i]n a Chapter 7 . . . case a trustee shall not be appointed by the United States Trustee unless the court determines that a trustee is necessary to protect the interests of creditors and the debtor or to assure efficient administration of the case.

[5] *See supra* n. 3.

Recovery Services Agreement, of $59,039.71, representing one-third of the $177,119.12 realized by Mr. Hendon.

As set forth in the Joint Statement of Issues filed by the parties on February 25, 2008, the issues the court is called upon to resolve are as follows:

> 1. Whether William T. Hendon had authority to bind the Estate to the Recovery Services Agreement entered into on December 1, 2004.
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> 2. If Hendon did not have authority to bind the Estate to the Recovery Services Agreement on December 1, 2004, whether the Trustee and the Estate are bound by the Recovery Services Agreement based upon ratification or adoption by the Trustee or similar doctrine.
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> 3. Whether the Trustee and the Estate are prohibited from denying NRS' entitlement to the commission set forth in the Recovery Services Agreement based on the doctrine of judicial estoppel.
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> 4. If the Trustee and the Estate are bound by the Recovery Services Agreement, whether the Estate and the Trustee are *a fortiori* bound by the specific terms in the Recovery Services Agreement, including but not limited to the commission agreement of 1/3 of the recovery contained in the Recovery Services Agreement.
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> 5. If the Trustee and the Estate are not bound by the Recovery Services Agreement, through [sic] whether NRS is nevertheless entitled to a commission based upon the reasonable value of its services (or *quantum meruit*).
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> 6. Whether NRS is a professional within the meaning of 11 U.S.C. §§ 327 and 330 such that Court approval of the Trustee's engagement of NRS is a prerequisite to recovery by NRS of a commission, either contractually or otherwise.
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> 7. Whether NRS's [sic] services for which it seeks compensation constituted the unauthorized practice of law such that any contract with the estate is rendered void.

II

The first issue to be addressed is whether NRS is a "professional person" within the scope of 11 U.S.C.A. § 327 (West 2004) thus necessitating employment by the Trustee as a prerequisite to the allowance of compensation. Section 330(a)(1) of the Bankruptcy Code authorizes the court to award "reasonable compensation for actual, necessary services [and] reimbursement for actual, necessary expenses" rendered by a professional person employed under § 327. 11 U.S.C.A. § 330(a)(1) (West 2004). Section 327 provides, in material part:

> (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C.A. § 327(a). *See Lamie v. United States*, 124 S. Ct. 1023, 1036 (2004) ("If the attorney [or professional person] is to be paid from estate funds under § 330(a)(1) in a Chapter 7 case, he must be employed by the trustee and approved by the court.").

The question of whether NRS is a professional person under the Code has been addressed by the bankruptcy court for the District of Delaware, which held that the following factors mitigated against a determination that NRS is a professional:

> Courts have used two different, but overlapping, approaches for defining a "professional" within the meaning of section 327. *In re First Merchants Acceptance Corp.*, 1997 Bankr. LEXIS 2245, 1997 WL 873551, at *2 (D. Del. 1997). Some courts limit the definition "to those occupations that play a central role in the administration" of the bankruptcy proceeding. *Id.* Other courts define a "professional" as those who are given "discretion or autonomy in some part of administration of the debtor's estate." *Id.* In making the determination of whether an entity or person is a "professional," courts have stated the following factors should be considered:

> (1) whether the employee controls, manages, administers, invests, purchases or sells assets that are significant to the debtor's reorganization, (2) whether the employee is involved in negotiating the terms of a Plan of Reorganization, (3) whether the employment is directly related to the type of work carried out by the debtor or to the routine maintenance of the debtor's business operations; (4) whether the employee is given discretion or autonomy to exercise his or her own professional judgment in some part of the administration of the debtor's estate . . . , (5) the extent of the employee's involvement in the administration of the debtor's estate, . . . and (6) whether the employee's services involve some degree of special knowledge or skill, such that the employee can be considered a "professional" within the ordinary meaning of the term.
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> 1997 Bankr. LEXIS 2245, [WL] at *3 (internal citations omitted).
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> In the end, the inquiry requires an examination of the type of duties to be performed by the employee and whether any special skills or training are necessary to carry out these duties.

In re Am. Tissue, Inc., 331 B.R. 169, 173-74 (Bankr. D. Del. 2005).

As established at trial through the undisputed testimony of Mr. Houck, NRS does not meet any of the factors set forth in *American Tissue*. NRS does not have any control or dealings with assets that are significant to the Debtors' reorganization. It did not have any authorization or discretion with respect to the Debtors' case, nor has it been otherwise involved in the Debtors' bankruptcy case in any other manner. NRS does not perform the same type of work as the Debtors, and the services it renders does not require its employees to possess any special knowledge or skills such that they would ordinarily be considered professionals. NRS simply monitors class action lawsuits through newspaper and/or electronic informational systems, puts together a list of potential claimants, contacts those claimants, and, if so requested, fills out and files a standard proof of claim

form in the respective cases. It uses contract labor to fulfill these duties, but does not require those employees to possess certain educational requirements or backgrounds.

Based upon these facts, NRS is not a professional person under § 327(a), and court-authorized employment by the Trustee is not a prerequisite to payment of compensation. Rather, NRS asserts an administrative expense for "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case." 11 U.S.C.A. § 503(b)(1)(A) (West 2004). In the Sixth Circuit, whether a claim should be treated as an administrative expense is determined "by applying the well-accepted 'benefit to the estate' test, which states that a debt qualifies as an 'actual, necessary' administrative expense only if (1) it arose from a transaction with the bankruptcy estate and (2) directly and substantially benefitted the estate." *Pension Guar. Benefit Corp. v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.)*, 126 F.3d 811, 816 (6th Cir. 1997). "A claimant has the burden of proving entitlement to an administrative expense by a preponderance of the evidence. Further, 'the claimant must demonstrate that the benefit is more than a speculative or potential benefit.'" *In re HNRC Dissolution Co.*, 343 B.R. 839, 843 (Bankr. E.D. Ky. 2006) (quoting *In re Kmart Corp.*, 290 B.R. 614, 621 (Bankr. N.D. Ill. 2003)).

Here, it is undisputed that the Debtors' claim in the Exxon Lawsuit arose prior to the commencement of their bankruptcy case on April 28, 1998, that Mr. Hendon's dealings with NRS occurred postpetition, and that NRS seeks compensation for services performed postpetition. The Debtors filed their bankruptcy case in 1998, and following its administration and the filing of a No Asset Report by Mr. Hendon, the case was closed in 1999. Mr. Hendon had no knowledge of the

Exxon Lawsuit until he was contacted by NRS in 2004, at which time he executed the Recovery Services Agreement on December 1, 2004.[6] NRS thereafter filed the Proof of Claim in the Exxon Lawsuit on behalf of Mr. Hendon, as Chapter 7 Trustee, which ultimately resulted in the payment of the $177,119.12 to the Trustee for the benefit of the Debtors' estate.

Clearly, the services of NRS provided a direct and significant benefit to the bankruptcy estate. The case, having been closed as a "No Asset" case, now has funds that should not only pay a 100% dividend to nonpriority unsecured creditors whose claims are allowed, but should also result in the payment of surplus funds back to the Debtors.[7]

Were it not for the efforts of NRS, Mr. Hendon would not have discovered the existence of the Exxon Lawsuit and this case would have remained closed with its administration by the Trustee having produced no dividend for distribution to unsecured creditors. Although Mr. Hendon testified that he had reason to believe that he would have been notified by class counsel or another party had NRS not contacted him, there is no evidence in the record to support this testimony, and it is pure conjecture with no evidentiary value.

The United States Trustee has raised the issue of Mr. Hendon's authority to bind the estate by executing the Recovery Services Agreement with NRS since he had been discharged of his duties

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[6] The contact with Mr. Hendon was the culmination of a significant amount of time spent by NRS monitoring the Exxon Lawsuit and investigating potential claimants prior to the original claims deadline of December 1, 2004, as noted on the claim form.

[7] The Claims Register establishes that 10 claims were filed prior to the March 1, 2007 claims bar date totaling $112,111.62. Of these, $51,179.59 are filed as nonpriority unsecured claims; $58,979.48 are filed as secured; $41.36 are filed as unsecured claims entitled to a priority of payment; and $1,911.19 are filed in an unknown status. *See* TRIAL EX. 11. After payment of administrative expenses, only allowed unsecured claims will be entitled to a dividend with any surplus being paid to the Debtors. *See* 11 U.S.C.A. § 726 (West 2004).

as Chapter 7 Trustee. While it is true that once he was discharged of his duties as trustee, Mr. Hendon was no longer the legal representative of the Debtors' bankruptcy estate, it is also true that, following administration and closing of the case, Mr. Hendon, nonetheless, performed several actions in the role of Chapter 7 Trustee,[8] and continued to hold himself out as such. Furthermore, at the time he executed the Recovery Services Agreement, although the bankruptcy estate had been closed, Mr. Hendon, as the former Chapter 7 Trustee, was the estate's representative in the eye of the public, as evidenced by the fact that NRS contacted him regarding the Exxon Lawsuit and the estate's potential claim therefrom. Based upon the perceived small window of opportunity, since at the time, NRS and Mr. Hendon believed that the deadline for filing claims was December 1, 2004, Mr. Hendon was required to take whatever steps were essential to preserving the potential asset for the benefit of the estate. This subsequent discovery of assets also required that the case be reopened, and it was Mr. Hendon, as "Chapter 7 Trustee," who filed the Motion to Reopen Case on January 18, 2006, which was granted by an Order entered on February 24, 2006, under the terms of which the United States Trustee was directed to "appoint a trustee to administer the assets of the reopened estate[.]" Additionally, it was Mr. Hendon who requested that a notice of assets be sent out to creditors, which was done by the clerk's office on December 1, 2006, even though Mr. Hendon was not reappointed as Chapter 7 Trustee until March 20, 2007.

[8] When he was appointed as Trustee, Mr. Hendon became the representative of the estate, succeeding to all of the Debtors' interests in property of the estate and inheriting the responsibility to use estate property in the best interests of creditors, including the collection of, reduction to money of, and accountability for the estate property. *See* 11 U.S.C.A. § 323(a) (West 2004); 11 U.S.C.A. § 704(1), (2) (West 2004). When the Debtors' case was closed on August 11, 1999, the Final Decree stated that the case was fully administered and Mr. Hendon was discharged of his duties as Chapter 7 Trustee.

Irrespective of whether, under the circumstances of this case, Mr. Hendon possessed the authority to bind the estate at the time he executed the Recovery Services Agreement on December 1, 2004, the actions of the United States Trustee in reappointing him and Mr. Hendon's own actions after officially resuming his representative role for the estate ratify the Recovery Services Agreement. "Ratification of a contract occurs when one approves, adopts, or confirms a contract previously executed 'by another[,] in his stead and for his benefit, but without his authority.'" *Webber v. State Farm Mut. Auto Ins. Co.*, 49 S.W.3d 265, 270 (Tenn. 2001) (quoting *James v. Klar & Winterman*, 118 S.W.2d 625, 627 (Tex. Ct. App. 1938)).[9] When he was reappointed as Chapter 7 Trustee on March 20, 2007, Mr. Hendon was re-vested with the authority to make decisions on behalf of the bankruptcy estate. On November 7, 2007, he sought to honor the Recovery Services Agreement with NRS by the filing of the Application to Employ, in which he expressly referenced, and attached as an exhibit thereto, the Recovery Services Agreement. By the Application to Employ, the Trustee sought to employ NRS as a collection agent so that it could receive its one-third commission as an administrative expense. Although he withdrew the Application to Employ on December 10, 2007, the Trustee's actions evidence his ratification of the terms of the Recovery Services Agreement at a time when he was undoubtedly authorized to enter into an agreement on behalf of the estate.

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[9] The court cites to Tennessee Law on the ratification issue because Tennessee authority is relied upon by counsel for NRS in his Trial Brief of National Recovery Service, Inc. (Trial Brief) filed on May 6, 2008. *See* TRIAL BRIEF at 5-6. NRS makes no reference to, nor does it rely upon, paragraph 4 of the Recovery Services Agreement which provides that Oregon Law controls any dispute arising out of the agreement. Nevertheless, the result is the same. Under Oregon law, "[w]henever a principal accepts the benefits of his agent's unauthorized acts with knowledge of all the material facts, he ratified the same. Silent acquiescence with full knowledge of the material facts may amount of a ratification if continued for an unreasonable length of time[, and it] is elementary that when a corporation with full knowledge of the facts, accepts and retains the benefits of an unauthorized contract, it will be bound thereby[.]" *Alldrin v. Lucas*, 490 P.2d 141, 145 (Ore. 1977) (citations omitted). Neither the United States Trustee nor the Trustee discussed ratification in their pretrial briefs.

Because all of Mr. Hendon's actions, including execution of the Recovery Services Agreement, were ratified upon his reappointment by his subsequent actions, the estate is bound by the specific terms therein, including the one-third (1/3) contingency fee. Although it could have easily resulted in no recovery at all, for which NRS would have received no commission, the Debtors' estate has received a significant benefit as a result of its relationship with NRS, and it would be inequitable to deny NRS the fruits of providing the estate with that benefit.[10] Accordingly, the Application for Administrative Expense shall be granted. NRS is entitled to receive its agreed upon contingency fee of $59,039.71 from the funds being held by the estate.

An order consistent with this Memorandum will be entered.

FILED: May 20, 2008

BY THE COURT

/s/ RICHARD STAIR, JR.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

[10] Although initially raised as an issue, there was no evidence introduced at trial to establish in any way that NRS engaged in the unauthorized practice of law.

SO ORDERED.

SIGNED this 20 day of May, 2008.

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

Richard Stair Jr.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 98-31917

DOUGLAS K. TRIPLETT
d/b/a WEST HILLS EXXON
ROBIN B. TRIPLETT

Debtors

O R D E R

For the reasons set forth in the Memorandum on Application of National Recovery Service, Inc. For Administrative Expense filed this date, the court directs the following:

1. The Application of National Recovery Service, Inc. For Administrative Expense filed by National Recovery Service, Inc., on January 8, 2008, is GRANTED.

2. National Recovery Service, Inc., is allowed an administrative expense claim under 11 U.S.C.A. § 503(b)(1) (West 2004) in the amount of $59,039.71, which is entitled to a priority of payment under 11 U.S.C.A. § 507(a)(1) (West 2004). The Trustee shall immediately pay this claim.

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