
UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:	Bk. No. 04-14151-JMD and
Robotic Vision Systems, Inc. (now known as Acuuity CiMatrix, Inc. and Auto Image ID, Inc., Debtors	Bk. No. 04-14152-JMD Jointly Administered Chapter 11

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MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

The Court has before it the First Interim Application of Dreier LLP For Allowance And Payment Of Fees And Reimbursement Of Expenses As Counsel For The Debtors (Doc. No. 1067) (the "Dreier Application"). Dreier LLP (the "Applicant") is seeking an interim fee allowance of $1,497,651.55 and reimbursement of expenses in the amount of $54,014.17 for the period November 19, 2004 through March 31, 2005. As a practical matter, the only source of payment currently available to the Debtors is a carve-out in the amount of $1,365,000.00

establish for all professionals employed by the Debtor under various cash collateral orders and a prepetition retainer in the amount of $95,000.00 paid by the Debtors to the Applicant.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. DISCUSSION

As discussed at the hearing on May 31, 2005, it is not possible at this stage to make any meaningful determination of the reasonableness or the necessity of most of the Applicant's services to the bankruptcy estate. However, the Applicant has expended considerable efforts in what has been a difficult and highly contested case. Accordingly, some interim compensation is appropriate. The long standing policy of this Court is that interim fees are allowed solely to alleviate hardship to an applicant, but that no fee paid is earned until it has been finally allowed.

A. Attorney's Fees

The only objection to an interim award of fees that was not resolved at the hearing on May 31, 2005 is the objection of the United States Trustee (the "Trustee") to the billing rates of the Applicant which are substantially higher than those charged by local attorneys. At the inception of this case the Court approved the Debtors' retention of the Applicant after disclosure of its hourly rates. See Exhibit B to the retention application (Doc. No. 5) and Order dated November 22, 2004 (Doc. No. 20). Although that Order was entered ex parte, the Trustee did not object to the hourly rated disclosed by the Applicant at the inception of its retention. It

would not be fair and equitable to either the Debtor or the Applicant to revisit this issue after substantial services have been rendered by the Applicant in reliance on the initial disclosure and order approving the retention.

In any event, a final fee application will be subject to the lodestar analysis applicable in the First Circuit. The cornerstones of the lodestar analysis are the reasonableness of the hours spent and the hourly rate sought. In re Spillane, 884 F.2d 642, 647 (1st Cir. 1989) (citing In re Casco Bay Lines, Inc., 25 B.R. 747, 758 (1st Cir. BAP 1982). However, even if the Court were inclined to revisit the issue of the Applicant's hourly rates as a starting point for any lodestar analysis, it would overrule the Trustee's objection based upon the reasoning in In re PSNH, 86 B.R. 7 (Bankr. D.N.H. 1988). Based upon the status of this case, the resources currently available to pay any interim fees, and to relieve hardship, the Court shall approved payment of seventy percent (70.0%) of the fees requested in the Application on account of a final fee award.[1]

B. Expenses

The Trustee objected to two categories of expenses at the hearing[2]. The first category was $10,925.00 for reimbursement of private car service in Manhattan for travel during the business day and travel to homes or public transportation stations for employees working after 9:00 p.m. The Trustee objects in part to the use of car service during the business day based upon a belief that private cars are more expensive than taxi cabs. In the Court's experience, the

[1] After application of the prepetition retainers held by Sheehan Phinney Bass + Green, PA and the Applicant to their interim fee and expense allowances they will be paid a total of $1,348,808.49 from the carve-out, leaving a balance of $16,191.51.

[2] At the hearing, the Applicant reduced the expense reimbursement request by $315.60 for expenses which were inadvertently duplicated in the Application. Those expense were $57.57 for meals on March 10, 2005 and $258.03 for hotel on January 19, 2005.

use of private cars, instead of taxi cabs, in Manhattan to travel within New York City and to and from airports is customary, efficient and economical. The Trustee presented no evidence to suggest otherwise. To the extent that the Trustee objects to such use, the objection is overruled.

The second part of the objection to the car service expense addressed charges for car service for employees working after 9:00 p.m. The Trustee argued that the Debtor or the estate should not be paying the commuting expenses of employees of the Applicant and that this expense should be absorbed by the law firm as overhead. The Applicant argued that its private car policy is based upon personal safety issues for employees who leave work late as well as the practical inability to travel home late due to train and subway schedules. The Applicant also contends that the use of private cars is not abused and is dictated by the needs of the case. The Applicant contends it would be unfair to the firm's other clients to absorb a portion of the car service expense if the demands of their case do not dictate late night work.

Although the use of private cars to transport employees home or to transportation stations after hours may be extraordinary in the this district, it is not extraordinary in the locale where the Applicant's office is located. Accordingly, the expense is not per se unreasonable.[3] The Trustee presented no evidence to the Court that the Applicant charged for car service at times when the demands of the case did not warrant extended working hours. If such evidence was presented,

[3] Section 330(a)(3)(E) directs the Court to consider "customary compensation charged by comparably skilled practitioners in cases other than cases under this title." Although car charges for late departing employees are framed as an expense, the Applicant's car service policy is a benefit for its employees. The fact that a particular policy has wide acceptance among comparable professionals informs the Court but does not control the outcome in any particular case. However, the Congressional mandate to examine comparable practices renders any argument for per se rejection of such charges problematic.

the expense may be unreasonable. However, the Trustee objection was not based on any such evidence or offer of proof.

The Trustee objected to a second category of expenses of $4,678.19 for meals. The meals charge involves expenses for the Applicant's employees both in travel status and meals delivered to their office when employees worked after 9:00 p.m. or during "working" meetings. The Trustee cites some examples, but the tenor of her argument is that such expenses outside of travel status are personal expenses which should not be charged to the estate. Again, the Court rejects any such per se argument. The Court believes that supplying sustenance to salaried employees who must work extended hours to meet the demands of the case may be beneficial to the estate, if utilized on a reasonable basis and at a reasonable extent. Once again, the question is whether the frequency, amount or pattern of such charges suggests that the amounts are unreasonable or unnecessary to the legal representation of the estate. At this point, no such evidence is before the Court.

It is the policy of this Court that expenses allowed in interim fee application may not be revisited in connection with final fee applications unless the issue is specifically reserved by the objecting party or the Court. This policy is to avoid unfairness to professionals who proceed to incur expenses in accordance with their usual and customary policy, only to be challenged at the end of the case. For the reasons discussed above, the Court shall reserve the Trustee's right to challenge the private car expenses and meal expenses in the Application, and future applications, based upon specific facts and circumstances showing that the expenses were unreasonable, unnecessary or not expended as part of representing the Debtor. All other objections to the expenses in the Application are overruled.

III. CONCLUSION

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. For the reasons set forth above, it is hereby ORDERED:

1. The Applicant is allowed interim fees in the amount of $1,048,356.09 and expenses in the amount of $53,698.57 for total compensation in the amount of $1,102,054.66.

2. Payment shall be made from the prepetition retainer in the amount of $95,000.00 and the balance, $1,007,054.66 from the Carve-out.

ENTERED at Manchester, New Hampshire.

Date: June 3, 2005

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge