

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF CONNECTICUT

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In re:

Belo Horizonte Advisors, Inc.,  
Debtor.

Chapter 7  
Case No. 03-51612 (AHWS)

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***Appearances:***

Michael J. Daly, Esq.  
2911 Dixwell Avenue, Suite 201  
Hamden, CT

: Chapter 7 Trustee  
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:

Douglas S. Skalka, Esq.  
Neubert, Pepe, & Monteith, P.C.  
195 Church Street, 13th Floor  
New Haven, CT

: Attorney for Trustee  
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:

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The Gaiimo Federal Building  
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**Memorandum and Order on Amended Application to  
Modify Terms of Employment of Special Counsel  
and on Special Counsel's Application for  
Compensation and Reimbursement of Expenses**

Alan H. W. Shiff, United States Bankruptcy Judge.

Attorney Douglas S. Skalka, the chapter 7 trustee's counsel, has filed an application for compensation that, in addition to the contingent fee sought and allowed by a January 4, 2006 retention order, seeks an additional lump sum fee premised on

the additional and unanticipated benefit to the bankruptcy estate of the withdrawal of the defendants' proofs of claim. The trustee has filed an amended application to modify the retention order which supports that application.<sup>1</sup> The U.S. Trustee ("UST") objects. For the reasons that follow, the UST's objections are overruled and counsel's fee application is granted.

### **BACKGROUND**

On December 29, 2005, the trustee "petitioned" the court to employ "special counsel"<sup>2</sup> to pursue "any and all claims against the Debtor's professionals prior to the Petition Date . . . ." Trustee's Petition to Employ at ¶ 4(a). Pursuant to the proposed retention order prepared by the trustee, his counsel (hereafter "Counsel") would represent him "on a one-third contingency-fee basis . . . with final compensation and reimbursement of expenses to be awarded *after proper application and an order of this court pursuant to 11 U.S.C. § 330 . . .*" Retention Order at 1-2 (emphasis added). On December 30, 2005, the U.S. Trustee filed a "Statement of No Objection." On January 4, 2006, the court approved the trustee's retention of Counsel (hereinafter, the "Retention Order"). On December 7 and 8, 2005, Counsel commenced three adversary

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<sup>1</sup> The trustee's Amended Application is based on the same rationale as Counsel's Application for Compensation; therefore, it need not be addressed independently.

<sup>2</sup> The trustee's designation of "special counsel" does not conform to the strictures of § 327(e), which authorizes a trustee under defined circumstances to employ as special counsel an attorney who had represented the debtor. That is not so in this case.

proceedings against the debtor's former legal counsel<sup>3</sup> alleging legal malpractice and state law fraudulent conveyances (regarding partial payments of professional fees). All three adversary proceedings were referred to mediation which resulted in a proposed settlement. Under the proposal, the defendants agreed to pay \$50,000 to the bankruptcy estate and withdraw their proofs of claim totaling \$440,715.39. The trustee sought and, on September 30, 2008, obtained an order approving the settlement of the three adversary proceedings.

Counsel now seeks \$26,666.66 as reasonable compensation for professional services rendered plus the reimbursement of \$482.08 in expenses. The compensation sought is a compilation of a one-third contingency fee arrangement ( $\$50,000 \times 33 \frac{1}{3}\% = \$16,666.66$ ) and a \$10,000 flat fee "as compensation for the recovery of \$440,715.39 in claims reductions . . . ." Counsel's Fee Application at ¶5. Counsel states that his services consumed over 231 hours that if billed at his standard hourly rates would result in a fee request of over \$53,000.00. See *id.* at ¶¶ 6, 9.

In conjunction with Counsel's Application, the trustee filed an Amended Application to Modify Terms of Employment of Attorney "[p]ursuant to Sections 328(a) and 105(a) of the Bankruptcy Code" to allow Counsel to be compensated "based upon a recovery for the Debtor's estate resulting from the withdrawal of a proof of claim filed against the Debtor's estate." *Id.* at ¶5. In essence, because of "the change of circumstances" *id.* at ¶8, the trustee argues it is appropriate to amend the Retention Order to allow Counsel to be compensated. *Id.* Relying on *Riker, Danzig, Scherer,*

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<sup>3</sup> The adversary proceedings were: (1) Adv. Pro. No. 05-5096; (2) Adv. Pro. No. 05-5097; and (3) Adv. Pro. No. 05-5098.

*Hyland & Perretti v. Official Committee of Unsecured Creditors (In re Smart World Techs., LLC)*, 552 F.3d 228 (2d Cir. 2009), the UST objects, arguing that Counsel's fee must be prescribed by the literal terms of the original contingent fee arrangement. The UST's reliance on *Smart World* is misplaced.

### **DISCUSSION**

The following statutory provisions form the predicate for the analysis of this controversy:

11 U.S.C. § 328. Limitation on compensation of professional persons

- (a) The trustee . . . with the court's approval, may employ or authorize the employment of a professional person under section 327 . . . , 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. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, 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. § 330. Compensation of officers

- (a) (1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections . . . 328 . . . , the court may award to . . . a professional person employed under section 327 . . .

- (A) reasonable compensation for actual, necessary services rendered by . . . [an] attorney . . . ; and
- (B) reimbursement for actual, necessary expenses.

\* \* \*

In *Smart World, supra*, the debtor sought to retain counsel on a contingency fee basis and specifically referenced § 328 in its retention application. *See id.* at 230. Prior to a hearing on the application, various objections were raised resulting in a modification to the contingency fee arrangement. *See id.* After a hearing on the application, including the agreed modifications to the fee arrangement that were reported on the record, the bankruptcy court approved the retention of counsel. The retention order, while not specifically referencing § 328(a), stated that compensation would be in accordance with the terms of the modified contingency fee arrangement. *Id.* at 231.

Thereafter, however, when Smart World's special counsel sought compensation, the bankruptcy court departed from the retention order.<sup>4</sup> *See id.* at 232. The court explained that it was relying on § 328's authority to alter a pre-approved fee if its terms and conditions "prove[d] to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions," § 328(a). Thus, concluding that certain events were "incapable of being anticipated," *Smart World*

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<sup>4</sup> A different bankruptcy judge was assigned to the case at this time. *See Smart World*, 552 F.3d at 231.

at 231, the court reduced the requested compensation.<sup>5</sup> Special counsel appealed. *See id.*

The district court “agreed with the bankruptcy court that the fee agreement was pre-approved under section 328, but disagreed that there had been any developments incapable of being anticipated.” *Id.* at 232.<sup>6</sup> Rather, distinguishing between “‘unanticipated’ events and events ‘not capable of being anticipated’,” the district court held that only those events not capable of being anticipated justified setting aside a § 328 pre-approved fee. *See id.* Since no such event occurred, the district court reversed. On appeal by the official committee of unsecured creditors, the Second Circuit affirmed. *See id.* at 229-30.

Noting it was a case of first impression, the Second Circuit held:

Sections 328 and 330 establish a two-tiered system for judicial review and approval of the terms of the professional’s retention. Section 330 authorizes the bankruptcy court to award the retained professional “reasonable compensation” based on an after-the-fact consideration of “the nature, the extent, and the value of such services, taking into account all relevant factors.” 11

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<sup>5</sup> Specifically, the bankruptcy judge found four events incapable of being anticipated:

(1) the divergence of positions between Smart World and its creditors; (2) the fact that [Special Counsel] took instructions directly from the officers and majority shareholders of Smart World; (3) the unusually prolonged litigation; and (4) the fact that [Special Counsel] was an obstacle, not an asset, to the approval of the settlement [of the litigation].

*Id.* at 231-32.

<sup>6</sup> “There is wide agreement that unanticipated events are not grounds for revisiting a pre-approved fee award. The events must be ‘not capable of being anticipated.’” *In re Smart World Techs., LLC*, 383 B.R. 869, 877 (S.D.N.Y. 2008).

U.S.C. § 330(a). However, section 328(a) permits a bankruptcy court to forgo a full post-hoc reasonableness inquiry *if it pre-approves* the “employment of a professional person under section 327 . . . .” *Id.* § 328(a). Where the court pre-approves the terms and conditions of the retention under section 328(a), its power to amend those terms is severely constrained. It may only “allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, 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.” *Id.*

*Smart World*, 522 F.3d 232 (emphasis added). Under that analysis, courts must determine whether a retention order was entered under § 328(a), *see id.* at 233, and if so, whether the predicate for that order was an analysis of the merits the professional’s application, including the proposed fee arrangements, *see id.* In those circumstances, the retention order would be a pre-approval and only subject to modification upon the showing of events “not capable of being anticipated”. *See* § 328(a). If no such analysis was undertaken, the order would merely be preliminary.

The facts here are materially different from those in *Smart World*. Here, Counsel seeks additional compensation for work that was beyond the scope of his original retention. In *Smart World*, the bankruptcy court reduced special counsel’s pre-approved compensation essentially as a penalty for increasing administrative expenses. *See, e.g.,* Tr. of Final Fee Application Hr’g (Mar. 22, 2007, 15:17-18), *In re Smart World Techs., LLC*, No. 00-41645 (S.D.N.Y.). Further, the record here demonstrates that neither the trustee’s retention application nor the Retention Order referenced §328(a). Indeed, although both stated that Counsel would represent the trustee on a contingency

fee basis, the Retention Order explicitly stated that “final compensation and reimbursement of expenses to be awarded *after proper application and an order of this court pursuant to 11 U.S.C. § 330 . . .*” Moreover, in sharp contrast to the facts before the court in *Smart World*, there was no hearing on the application to retain and compensate Counsel, so there was no argument or discussion regarding the terms of compensation which might support a claim that the application sought a definitive *i.e.*, “pre-approv[ed]” retention order. *Cf. Smart World*, 552 F.3d at 234 (noting the bankruptcy court held a hearing at which there was explicit discussion of special counsel’s contingency fee arrangement and at which the bankruptcy judge “made several comments suggesting that his pre-approval was made under section 328(a)”). At best, having heard no objections, the entry of the Retention Order was merely a “preliminary” approval of the proposed contingency fee arrangement. *Cf. Smart World*, 552 F.3d at 233.(instructing that one factor a court should consider in determining whether a § 328 pre-approval has been made is “whether the court evaluated the propriety of the fee arrangement before granting final, and not merely preliminary, approval”). The culmination of these distinguishing factors persuades the court that this is not a case with a pre-approved § 328 retention order as in *Smart World*.

*Smart World* did not consider the appropriate analysis to use when a court determines that a retention application did not seek nor did the court enter a pre-approved retention order under § 328(a). For that reason, the court assesses Counsel’s fee application under § 330(a).



### CONCLUSION

Having considered the record, including the UST's position that compensation must be restricted to the original arrangement and the trustee's support for his Counsel's request, the court finds that: (a) the \$16,666.66 requested as compensation for the recovery of \$50,000 for the bankruptcy estate; (b) the additional \$10,000 requested as compensation for recovery of \$440,715.39 in claims reductions, and (c) the \$482.08 in compensable expenses are reasonable.

Accordingly, IT IS HEREBY ORDERED that Counsel's application for compensation in the amount of \$26,666.66 is GRANTED; and

IT IS FURTHER ORDERED that Counsel's request for reimbursement of expenses in the amount of \$482.08 is GRANTED.

IT IS FURTHER ORDERED that the trustee's Amended Application is GRANTED. *See, supra*, note 1.

Dated this 30<sup>th</sup> day of April 2009 at Bridgeport, Connecticut.

  
Alan H. W. Shiff  
United States Bankruptcy Judge