IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
	§	
ONDOVA LIMITED COMPANY	§	
	§	
	§	**CASE NO. 09-34784-SGJ-11**
	§	**Chapter 11**
Debtor.	§	

JEFFREY BARON'S OBJECTION TO AMENDED APPLICATION OF PRONSKE & PATEL, P.C., FOR PAYMENT OF FEES AS AN ADMINISTRATIVE EXPENSE FOR A SUBSTANTIAL CONTRIBUTION TO THE ESTATE

TO: THE HONORABLE STACY JERNIGAN
UNITED STATES BANKRUPTCY JUDGE:

Jeffrey Baron, by and through counsel, submits this objection (the "Objection") to the Amended Application of Pronske & Patel, P.C. ("Pronske") for Payment of fees as an Administrative Expense for a Substantial Contribution to the Estate. Pronske seeks reimbursement of fees and expenses incurred in the amounts of $177,352.70 and $52,121.17. In support of the Objection, Baron represents as follows:

I. Summary Statement

Pronske made the same claim before the district court before Judge Furgeson. A Final Order was issued in favor of Pronske in the amount of $177,352.70 by the District Court [Dist. 575], primarily for assisting in negotiating the Global Settlement Agreement. Pronske seeks an additional $52,121,17 for additional fees and expenses allegedly incurred during the Amended Application period.

Jeff Baron objects on the following grounds:

- The Bankruptcy Court should not entertain a fee application based on a proceeding and order entered by the District Court.

- To the extent that Pronske seeks an order for fees under the Bankruptcy Code, he has not met his burden of proof under 11 U.S.C. §§ 503(b)(3)(D) to show that Baron made a substantial contribution to the Debtor's estate as is required by the Bankruptcy Code and applicable case law.

- Even assuming that the Court were to determine that a substantial contribution was made by Jeffrey Baron in the Bankruptcy Case, the fees and expenses are unreasonable as they are duplicative of the efforts spent by the Trustee to negotiate and consummate the Global Settlement Agreement.

- Pronske violated his fiduciary duty to Jeffrey Baron and is therefore, not entitled to fees as a matter of law. Burrows v. Arce, 997 S.W. 2d 229 (Tex. 1999).

II. The District Court Already Granted Fees to Pronske.

Pronske seeks an order granting the same relief that has already been granted by District Court on different legal grounds in the Receivership action. He now seeks an award of fees under a theory of substantial contribution under the Bankruptcy Code. As set out below, an award of fees in the receivership action does not satisfy Pronske's burden of proof under the Bankruptcy Code, which imposes a much higher standard than the standard apparently utilized by the District Court. Thus, Pronske's apparent reliance on the award of fees from the District Court is irrelevant to a determination of whether Pronske made a "substantial contribution" under Section 503(b) of the Code. Moreover, as Pronske has already been awarded fees, his current motion seeks a duplicate award.

III. The Standard for Proving Substantial Contribution Under the Code.

The court may award the actual, necessary expenses incurred by a creditor, including his attorney's fees, if the creditor has made a "substantial contribution" in a case under Chapter 11 of the Bankruptcy Code. 11 U.S.C. § § 503(b)(3)(D, 503(b)(4). *Consolidated Bancshares, Inc. v. Creel & Atwood*, 785 F.2d 1249 (5th Cir. 1986). The goal is to "promote meaningful creditor

participation in the reorganization process." Id. at 1253. Services that substantially contribute to a case are "those which foster and enhance, rather than retard or interrupt the progress of reorganization, *In re White Motor Credit Corp*., 50 B.R.885, 892 (Bankr. N.D. Ohio 1985). Compensation must be denied where the services rendered by the creditor were only "remotely related to the reorganization" on the theory that "a creditor's attorney must ordinarily look to its own client for payment, unless the creditor's attorney rendered services on behalf of the reorganization, not merely on behalf of his client's interest, and conferred a significant and demonstrable benefit to the debtor's estate and the creditors." *In re General Oil Distributors*, 51 B.r. 794, 806 (E.D.N.Y. 1985) (emphasis supplied).

The burden of proof is on the applicant to establishing their entitlement to an award under 11 U.S.C. § 503(b), and the applicant must demonstrate by a preponderance of the evidence that a substantial contribution was made. *In re American 3001 Telecommunications, Inc.,* 79 B.R. 271, 273 (Bankr.N.D.Tex. 1987); *see* In the *Matter of Baldwin-United Corp.,* 79 B.R. 321, 336 (Bankr.S.D.Ohio 1987); *In re 1 Potato 2, Inc.,* 71 B.R. 615, 618 (Bankr.D.Minn.1987).

A. Substantial Contribution Claims are Narrowly Construed.

Claims for substantial contribution are narrowly construed and are subject to strict scrutiny. *In re Luisa, L.L.C.* , 354 B.R. 345, 348 (Bankr. S.D.N.Y. 2006) *See In re Asarco LLC*, 2010 WL 3812642, *8 (Bankr. S.D. Tex. Sept. 28, 2010) ("Substantial contribution claims may only be granted in 'unusual and rare circumstances…Narrowly construing the allowance of substantial contribution claims to rare and unusual circumstances is 'consistent with the general doctrine that priority statues , such as section 503(b) should be strictly construed to preserve the estate for the benefit of creditors''") (citations omitted). *In re U.S. Lines, Inc.* 103 B.R. 430 (Bankr. S.D.N.Y. 1989).

The factors considered by courts to determine whether an applicant has made a substantial contribution include: (i) "whether the services were provided to benefit the estate itself or all of the parties in the bankruptcy case"; (ii) "whether the services conferred a direct, significant and demonstrably positive benefit upon the estate"; and (iii) "whether the services were duplicative of services performed by others." *In re Best Prods. Co*., 173 B.R. 862, 865 (Bankr. S.D.N.Y. 1994), *In re Jensen-Farley Picures Inc*., 47 B.R. 557, 569) (Bnkr. D. Utah 1985).

The burden of proof is extremely high because a litigant is presumed to act in its own interest. *In re Villa Luisa,* L.L.C., 354 B.R. at 348. To satisfy the substantial contribution test, Pronske must demonstrate that Jeffrey Baron contributed to "the proper administration of the case as a whole." *See In re Bayou Group*, LLC, 431 B.R. 549, 561 (Bankr. S.D.N.Y. 2010). To this end, "[t]hird parties, who generally represent only their clients' interests and only indirectly contribute to the case's administration, therefore normally would not be compensated by the estate on an administrative priority basis." Id. Rather, courts typically allow substantial contribution claims only when a creditor has "played a leadership role that normally would be expected of an estate-compensated professional but was not so performed." (emphasis supplied) *Id.* at 562.

B. Substantial Contribution Cannot be Granted If the Applicant's Efforts Are Duplicative of the Trustee's Efforts.

It is well established that an applicant is not entitled to an award of attorneys' fees based on "substantial contribution" where, as in this case, the applicant's efforts were duplicative of those of a statutory fiduciary. *In* ***re*** *Mirant,* 354 B.R. 354 B.R. 113, 132-35 (Bankr.N.D.Tex.2006) (J.Lynn) *citing* *In* ***re*** *Consol. Bancshares, Inc.,* 785 F.2d at 1249. Mere participation in negotiation of Chapter 11 plans, negotiating contracts or settlements is insufficient to establish substantial

contribution as the activities are presumed to have been undertaken to represent the creditor and not the Estate. *See In re Granite Partners*, 213 B.R. 440, 449 (Bankr. S.D.NY. 1997) ("Mere participation in the negotiation, drafting and confirmation of the plan is no sufficient…Here, the applicants objections to the disclosure statement did not alert the character of the document, and did not, therefore, rise to the level of substantial contribution." *Asarco,* 2010 WL 381262, at *8. ("Activities of a creditor or their counsel that are ordinary, expected, routine, or duplicative do not constitute a substantial contribution to a debtor's estate.") *Accord In re Sentinel Mgmt.*, 404 B.R. 488, 496 (Bankr. N.D. Ill. 2009) (noting that expected and routine activity that does not give rise to a substantial contribution to the estate). Mere conclusory statements regarding the provision of services that substantially contribute to the Estate are insufficient to establish that a substantial contribution has been made. *In re American Plumbing & Mechanical, Inc.* 327 B.R. 273, 279 (W.D. Tex. 2005); *In re U.S. Lines, Inc*, 103 B.R. at 430.

C. Substantial Contribution Claims Cannot be Granted Unless Pronske Demonstrates an <u>Actual, Tangible Benefit to the Estate.</u>

The substantial contribution test is <u>results-oriented</u> because it requires the creditor to establish that he provided an actual, <u>tangible</u> benefit to a debtor's estate. *See In re Bayou Group*, 431 B.R. at 561 (observing that substantial contribution applicants must provide "a substantial net benefit" to a debtor's estate); *In re Best Prods.*, 173 B.R. at 866 ("The integrity of [section] 503(b) can only be maintained by strictly limiting compensation to <u>extraordinary</u> creditor actions which lead directly to <u>tangible</u> benefits to the creditors, debtor or estate.") (emphasis supplied); As a result, substantial contribution claims are awarded at the end of a case so that courts have the ability to assess, with the benefit of hindsight, whether a creditor has provided an actual benefit to the debtor's estate and facilitated the administration of the bankruptcy cases. *See In re Bayou Group*, 431 B.R. at 566 n.18 (observing that the substantial contribution test is applied

with the benefit of hindsight); *In re Granite Partners*, 213 B.R. at 447 ("The substantial contribution test is applied in hindsight, and scrutinizes the actual benefit to the case.").

D. Pronske Cannot Establish that But For his Contribution, the Parties Would Not have Reached a Global Settlement Agreement.

Demonstration of a direct causal connection between the actions of the claimant and the benefit received by the bankruptcy estate is required in order to prove a substantial contribution. *DP Partners,* 106 F.3d at 673; *In re Asarco*, 2010 WL 3812642 at *8 *citing U.S. Lines, Inc.* 103 B.R. at 430. As noted in *American Plumbing*,

> The substantial-contribution applicant must show that his services have some causal relationship to the alleged substantial contribution. *See DP Partners,* 106 F.3d at 673. Some courts have used a but-for test to determine whether that causal relationship exists. *See In re D.W.G.K. Restaurants, Inc.*, 84 B.R. 684, 690 (Bankr.S.D.Cal.1988) (using the phrase "but for"); *Alert Holdings,* 157 B.R. at 759 (denying the substantial-contribution application when "even without the benefit of the LPOC's objection, most of the changes to the disclosure statement would have been made anyway"); *In re New Power Co.,* 311 B.R. 118, 124 (Bankr.N.D.Ga.2004) (denying the substantial-contribution application because "the Court must conclude that the Examiner would have been appointed ... absent [the applicant's alleged contribution]"). However, satisfying the but-for requirement by itself is not enough to establish the causal relationship.

American Plumbing at 680.

Simply stated, Pronske cannot demonstrate that Jeffrey Baron made a "net" substantial contribution to the Estate. Merely attending and participating in settlement negotiations on behalf of a client does not constitute the kind of evidence that satisfies Pronske's burden of proof under Section 503(b). *In the Matter DP Partners Ltd. Partnership*, 106 F.3d (5th Cir. 1997), the Court held that bankruptcy courts should weigh the costs of the claimed fees and expenses against the benefits conferred upon the estate which directly from those actions. To aid the district and appellate courts in the review process, bankruptcy judges are to make specific and detailed findings on the substantial contribution issue.

At best, it appears that Pronske merely duplicated the services provided by the Trustee, who was responsible for, and did negotiate the Global Settlement Agreement on behalf of the bankruptcy estate. Under Section 503(b), and the controlling case law, Pronske must look to his client for payment for his services. The Estate should not have to pay Pronske for the same services performed by the Trustee, and for which the Trustee's counsel was paid.

IV. Pronske Violated Fiduciary Duties to Jeff Baron and is Not Entitled to Fees.

A lawyer who violates his fiduciary duty to a client must disgorge fees, irrespective of whether the breach caused the client damages. *Burrow v. Arce*, 997 SW 2d 229 (Tex. 1999) Lawyers seeking compensation from the Court based on "substantial contribution" cannot maintain such a claim where, as here, the lawyer disseminated false, inaccurate or misleading information to about his client. In the instant case, Pronske accused Mr. Baron of transferring assets off shore to evade process and used this argument as a basis for seeking withdrawal from representation of Jeff Baron. There is nothing more damaging in a bankruptcy than an allegation that a party, in this case, one's client, is transferring assets to remove them from the jurisdiction of the Court. Indeed, acts to transfer assets outside the Court's jurisdiction potentially constitute a bankruptcy crime.

In fact, Jeff Baron did not transfer assets off-shore, as alleged by Pronske. Before an attorney makes such an allegation against a client, he must conduct great care and exercise due diligence to check his facts before seeking withdrawal to minimize any potential harm to the client. The facts and circumstances surrounding counsel's motion to withdraw do not indicate any effort to verify his allegations before filing his motion. Under the circumstances, Mr. Pronske violated his fiduciary duty to Jeff Baron and should be denied all compensation by this Court.

V. Conclusion

WHEREFORE, Jeffrey Baron respectfully submits that the Court should deny the Application or grant such relief as is just.

Very respectfully,

/s/ Stephen R. Cochell
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CERTIFICATE OF SERVICE

This is to certify that, October 8, 2012, a copy of this Motion was served counsel for the Trustee, the Receiver, John Macpete and Pronske & Patel, P.C. by email. Because counsel for Jeffrey Baron is not yet registered to efile on the Bankruptcy Court's ECF system, all other counsel will be served on October 9, 2012 through the Court's ECF system.

/s/ Stephen R. Cochell
Stephen R. Cochell