

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

Case No. 08-5348 (ADM/JSM)

Plaintiff,

v.

**RITCHIE'S OBJECTION TO
RECEIVER'S MOTION TO APPROVE
FEE APPLICATION**

Thomas J. Petters, et al.,

Defendants.

Ritchie Special Credit Investments, Ltd., Rhone Holdings II. Ltd., Yorkville Investment I, L.L.C., Ritchie Capital Structure Arbitrage Trading, Ltd., and Ritchie Capital Management L.L.C. (hereinafter "Ritchie") respectfully object to the Motion to Approve Payments for Receiver.¹

The Motion to Approve Payments for Receiver, filed April 17, 2009, requests payments in the amount of \$252,249.43 for work performed by the Receiver's law firm, Kelley & Wolter, P. A., between November 1 and November 30, 2008. The itemized

¹ Ritchie, as a creditor of PGW, has standing to object to the payment of fees because of its legitimate interest in the pool of assets from which the fees will be paid. *See, e.g., S.E.C. v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 329 (5th Cir. 2001) ("[A] non-party creditor who objected to a proposed receivership distribution plan had standing because he had a legitimate interest in the proceedings, and had participated adequately in the proceedings by timely filing his claim, filing objections, and attending the hearing on the claim.") (citing *Commodity Futures Trading Cmm'n v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1113 (9th Cir. 1999)).

statement was not made public, but was submitted to the Court *in camera*. The only detail provided publicly was a summary of the billing by defendant – criteria with no relevance to an assessment of whether the services performed were necessary and justified, beneficial to the estate, or reasonable as to the time billed, billing rate, etc.

Ritchie objects generally to the current request because of its size and the absence of public disclosure of fundamental information such as (i) Kelley’s hourly rate, (ii) the hourly rates of other timekeepers in his office, and (iii) the total time expended by each timekeeper. A bill for over a quarter million dollars for *one month of legal services by the Receiver’s law firm alone* raises questions on its face, especially on top of the million dollars paid out for fees in October 2008.²

I. Ritchie has the right to review and object to the Receiver’s fee request on a line-item basis.

Parties with stakes in the receivership fund are not required to take the Receiver’s word for it that the requested fees are reasonable. *See, e.g., Jensen v. Clarke*, 94 F.3d 1191, 1203 (8th Cir. 1996) (in civil rights fees case there were certain instances where the

² Kelley’s first request for fees, submitted December 23, 2008, requested payment of \$1,181,624.80, for services performed by several firms – including the law firms representing the individual defendants in their ongoing civil and criminal litigation, whose fees were presumably paid only out of the separate accounts maintained for each of the defendant’s restrained assets. Although no one objected to the first fee request, those itemizations should be publicly filed as well, to allow comparison with the latest itemization to ensure that services are not double billed, etc.

documentation was simply not sufficient to make an intelligent determination as to whether the hours expended were in fact reasonable.) (citation omitted).

The court in *In re Alpha Telecom, Inc.*, 2006 WL 3085616 (D. Or. Oct. 27, 2006) held that the documentation supporting the fee request which was submitted to those with interests in the receivership estate “was not reasonably calculated to provide lay recipients with the information necessary to evaluate the fee application and comment upon it.” *Id.* at *1.

As a matter of due process, the various creditors and victims deserve notice, including public disclosure of the attorneys’ fees itemizations and other supporting documentation submitted to the court ex parte--properly redacted so truly attorney-client and work product is not disclosed--so that they can meaningfully make the request before any fees are paid from the receivership fund.

Ritchie is not asking the Court to demand Kelley go to the extraordinary lengths of disclosing attorney-client privileged information or work product details from the fee application. Simply ordering the Receiver to file redacted itemizations which allow interested creditors to access it and file challenges should be sufficient due process to allow effective evaluation and comment on the fee application.

The Seventh Circuit has cautioned strongly against the practice of submitting fee applications in camera but has recognized that redaction may be used to protect privileged information. *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 286 (7th Cir. 2002).

The major problem in *Reynolds* was that the entire fee applications, including the total amounts that counsel were seeking to recover from the total class recovery, were kept away from parties who were entitled to object. *Id.*

Without access to the detailed itemizations and other lodestar evidence which was submitted in camera, creditors cannot meaningfully scrutinize the compensability of the services performed, the reasonableness of the time expended, or of the attorneys' billing rates.

A party seeking an award of attorneys' fees must submit evidence detailing the hours worked and the matters involved in that work, and justifying the reasonableness and compensability of the hours expended, and the rates claimed. *See e.g., Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The lodestar formulation and other principles enunciated in *Hensley* apply to fee petitions for 1345 receivers. *United States v. Guess*, 2005 WL 1819382 (June 28, 2005 S.D. Cal.) (receivership under 18 U.S.C. § 1345); *In re Port Royal Land & Timber Co.*, 105 B.R. 72, 77-78 (Bankr. S.D. Ala. 1989) (comparing fee calculations between bankruptcy and non-bankruptcy cases) (vacated, remanded on other grounds by *Port Royal Land & Timber Co. v. Berkowitz, Lefkovits, Isom & Kushner*, 924 F.2d 208, 208-209 (11th Cir.1991)).

II. The Receiver is entitled to “reasonable fees” for necessary work.

“[I]t is, and should be, the policy of the courts that receivers and attorneys, in litigation affecting the administration of property and estates, should not be granted

excessive compensation.” *Mercantile-Commerce Bank & Trust Co. v. Southeast Arkansas Levee Dist.*, 106 F.2d 966, 972-973 (8th Cir. 1939). “This is particularly true when, as in the present case, the receivership estate will not recover sufficient assets to pay full restitution to the victims of the fraud alleged in the complaint.” *S.E.C. v. Aquacell Batteries, Inc.*, 2008 WL 276026, at *3 (M.D. Fla. Jan. 31, 2008).

We do not dispute that Kelley and his firm have expended an enormous amount of effort in regard to his duties, nor do we contend that the tasks entrusted to him by the Court are simple and can be done expeditiously. But the numbers here, quite frankly, do not add up. Assuming a blended hourly rate of \$300, and further assuming that only \$210,000 of the November 2008 total is billable hours--the rest being disbursements--the bill represents 700 hours of time in a single month. If Kelley was assisted by two other lawyers from his firm, each lawyer would have billed 233 hours in November. Anyone who has ever billed that amount of time in a single month knows what a gargantuan task it is.

Conclusion

Without access to the attorneys’ billing rates and other evidence justifying their claimed fees, affected parties cannot mount a meaningful challenge to any excessiveness or improper charges.

Therefore, Ritchie demands that the fee itemizations which were submitted in camera be publicly disclosed with attorney-client privileged information and work product

redacted, and that affected parties be given sufficient time to review the documents and file objections in relation to the current fee request before any amounts are ordered paid from the general receivership estate.

Dated: April 22, 2009.

KELLY & BERENS, P.A.

By: s/Jennifer S. Wilson

Timothy D. Kelly (#54926)

Jennifer S. Wilson (#0281037)

Max H. Kieley (#0389363)

3720 IDS Center

80 South Eighth Street

Minneapolis, Minnesota 55402

(612) 349-6171

Brenda Grantland, Esq.

Admitted *Pro Hac Vice*

20 Sunnyside Suite A-204

Mill Valley, CA 94941

(415) 380-9108

(415) 381-6105 fax

***Attorneys for Ritchie Special Credit
Investments, Ltd., Rhone Holdings II. Ltd.,
Yorkville Investments I, L.L.C., Ritchie Capital
Structure Arbitrage Trading, Ltd., and Ritchie
Capital Management, L.L.C.***