UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In Re:	)	
	)	
Carolina Premier Medical Group, P.A.	)	**Case No. 00-82322C-7D**
	)	
Debtor.	)	
	)	

ORDER

THIS MATTER came on for hearing before the undersigned bankruptcy judge in Durham, North Carolina upon the Applications by Trustee for Final Compensation and Reimbursement of Expenses of Special Counsel incurred during the Chapter 11 and the Chapter 7 cases and the Motion by Trustee to terminate 401(k) Plan. Appearing before the Court was Sara Conti, Trustee, Craig Wheaton, Special Counsel for the Trustee, Michael D. West, Bankruptcy Administrator and Peggy Hanks, former employee of the Debtor. The Court, after receiving the testimony and the exhibits and reviewing the file, makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure:

BACKGROUND

On September 8, 2000, the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. On November 15, 2000, an Order was entered authorizing the Debtor to retain Craig Wheaton and various other members of Kilpatrick Stockton LLP ("Special Counsel") to provide legal advice and representation with respect to general ERISA compliance, terminating a defined benefit plan, determining whether the 401(k) plan should be terminated, and welfare benefit plans. At the time that the Order was entered, Special Counsel represented that the estimated fees that were expected to be incurred would be $35,000. Special Counsel

further indicated that it was possible that a portion of the fees could be paid from the plan assets, although certain "settlor" expenses could only be paid by the estate. On April 11, 2001, the Debtor filed the Application for final compensation for the Special Counsel for fees incurred during the Chapter 11 in the amount of $30,044.50 and expenses in the amount of $153.24.

The case converted to a case under Chapter 7 on March 7, 2001, and Sara Conti was appointed to act as Trustee. On June 18, 2001, a second Order was entered authorizing the Debtor to retain Craig Wheaton and various other members of Kilpatrick Stockton LLP ("Special Counsel") to provide legal advice and representation with respect to the termination and other aspects related to the termination of the Debtor's employee benefit plans and other ERISA related issues, laws and regulations. At the time that the June 18, 2001 Order was entered, Special Counsel represented that the estimated fees expected to be incurred would be $40,000. On October 10, 2002, the Trustee filed the Application for final compensation for the Special Counsel for fees incurred during the Chapter 7 in the amount of $37,159.50 and expenses in the amount of $1,033.08.

On November 13, 2002, the Bankruptcy Administrator filed an Objection with regard to the hourly rates requested in the Application and to the amount requested for fees to be incurred in the future. Subsequent to the filing of the Bankruptcy Administrator's Objection, the Bankruptcy Administrator obtained from the Trustee a copy of "The Corporate Plan for Retirement, Fidelity Basic Plan Document No. 07" and the specific "Profit Sharing/401(k) Plan" (collectively referred to as the "Plan"). The Bankruptcy Administator filed an Amended Objection to the Application for Compensation based upon language in the Plan which provides that legal fees and expenses shall be paid first from any forfeitures, and then from the remaining

trust fund and charged against the accounts of the Plan participants, unless such expenses have been paid by the employer (Debtor). The Bankruptcy Administrator contends that Special Counsel performed legal services relating to Plan issues which should properly be paid from the Plan's forfeitures or trust fund and not as costs of administration of the Debtor's estate. All parties agree that the Plan's trust fund is not property of the estate.

The Trustee has also filed a motion for authority to pay 401(k) expenses. The Trustee argues that in light of her fiduciary duty to Plan participants, it is fair and equitable to pay the expenses of termination from the estate; however, as the Chapter 7 Trustee, she has a conflicting duty to the estate. Therefore, the Trustee has asked the court for guidance regarding whether the Plan's trust fund or the estate should bear the cost of Special Counsel and accounting fees for services related to the Plan, including its administration and termination.

DISCUSSION

The Plan clearly contemplates and authorizes payment of attorney fees and expenses as part of the cost of administration of the Plan. Specifically, the relevant portions of the Plan provide:

> 19.05. Costs of Administration. Unless some or all are paid by the Employer, all reasonable costs and expenses (including legal, accounting, and employee communication fees) incurred by the Administrator and the Trustee in administering the Plan and Trust shall be paid first from the forfeitures (if any) . . . then from the remaining Trust Fund.
>
> 20.14 Compensation and Expenses of Trustee. The Trustee's fee . . . and any and all expenses, including without limitation legal fees and expenses of administrative and judicial proceedings reasonably incurred by the Trustee in connection with its duties and responsibilities hereunder shall, unless some or all have been paid by said Employer, be paid first from forfeitures . . . then from the remaining Trust Fund.

The language of the Plan does not impose any contractual duty or obligation upon the estate to

pay for the expenses incurred by the Plan. While the plan does provide that the employer *may* pay such costs, the Trust Fund clearly bears the ultimate responsibility for payment of the costs of administration incurred by the Plan Adminstrator.

Under ERISA, the "plan administrator" is the fiduciary charged with administering a plan. The plan administrator is "the person specifically so designated by the terms of the instrument under which the plan is operated." 29 U.S.C. § 1002(16)(A)(ii). The plan administrator must be distinguished from the "plan sponsor," which is defined as "the employer in the case of an employee benefit plan established or maintained by a single employer." 29 U.S.C. § 1002(16)(B). In this case, the Plan provides that the Plan Administrator is the employer, Carolina Premier, unless otherwise designated. There is no evidence that a separate Plan Administrator was appointed by the Carolina Premier. Therefore, it appears that the employer, Carolina Premier, was both the Plan Administrator and the Plan Sponsor. Pursuant to the Bankruptcy Code, a bankruptcy trustee assumes the position of the debtor and the debtor's obligations. 11 U.S.C. § 541. Accordingly, when the Trustee was appointed in this case, she assumed the responsibilities of the Plan Sponsor and Plan Administrator.

While the Plan provides for payment of the costs of administration incurred by the Plan Administrator out of the plan assets, those costs must be reasonable and in the interest of plan participants and beneficiaries. ERISA § 403(c)(1) provides that, with limited statutory exceptions, "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1103(c)(1). The reasonable expenses of administering a plan include direct expenses properly and actually

incurred by a fiduciary in the performance of duties to the plan, such as those performed by a bankruptcy trustee as plan administrator, and may be properly paid from the Plan Trust Fund. For instance, the services required to actually implement the settlor's decision to terminate a plan are generally fiduciary in nature and may be treated as plan expenses. See 29 U.S.C. § 1341 (Section 1341 of ERISA allows for termination of an ERISA plan only by the Plan Administrator); see also Matter of Esco Mfg. Co., 50 F.3d 315, 316 (5th Cir. 1995).

In contrast, fees and expenses incurred by the Trustee for services provided to the Plan Sponsor, or "settlor expenses," may not be paid out of the Plan Trust Fund. Decisions and activities related to the management of the plan, including the establishment, design and termination of the plan, are generally considered "settlor" functions. These expenses are properly paid by the bankruptcy estate pursuant to 11 U.S.C. § 503(b). See In re Merry-Go-Round Enterprises, Inc., 180 F.2d 149 (4th Cir. 1999) ("For a claim to qualify as an actual and necessary administrative expense, (1) the claim must arise out of a post petition transaction between the creditor and the debtor in possession (or trustee); and (2) the payment must be supplied to and beneficial to the debtor in possession in the operation of the business.")

The First Application

The first Application for compensation, dated April 11, 2001, is for services performed during the Chapter 11 proceeding including legal advice and representation with respect to general ERISA compliance, the completion of the termination of a defined benefit plan, determining whether the 401(k) plan should be terminated and preparation for termination of the plan.

The court has carefully reviewed the itemization of time provided by Special Counsel.

The court finds that 80% of the fees and expenses may be properly paid from the Plan Trust Fund. This amount represents the proportion of the fees and expenses that were incurred for costs of administration. The court further finds that these fees and expenses are reasonable and in the interest of plan participants and beneficiaries. The fees paid from the Plan Trust Fund are allowed at the rates as requested by the Applicant. The Applicant shall be paid $27,327.60 in fees and $826.46 in expenses from the Plan Trust Fund.

The court finds that 20% of the fees and expenses are related to decisions and activities related to the management of the plan and are properly borne by the estate. As to the portion of the fees paid by the estate, the court approves the following rates as recommended by the Bankruptcy Administrator. Therefore, The Applicant shall be paid $4,756.00 in fees and $206.62 in expenses from estate funds.

The Second Application

The second Application, dated October 10, 2002, is for services performed during the Chapter 7 proceeding including legal advice and representation with respect to the termination of the Plan and related issues. Pursuant to the June 18, 2001 Order, Kilpatrick Stockton, LLP has requested compensation for these services in the amount of $37,159.50 and expenses in the amount of $1,033.08.

The itemization of time attached to the Application reveals that a large portion of the services were specifically related to implementing the plan termination, including annual reporting, termination documentation, notice to interested parties and distributions. In terminating the plan, the Trustee was properly performing one of her responsibilities as the Plan Administrator. Therefore, these fees and expenses are part of the cost of administering a 401(k)

plan in the performance of the Trustee's duties to the plan. Furthermore, these fees and expenses were not incurred by the Trustee for the benefit of the Debtor or the Debtor's estate and may be properly paid from the Plan Trust Fund.

In addition, a portion of the services were related to the cost of maintaining tax-qualified status and a determination from the Internal Revenue Service concerning the status of a plan in connection with termination. Specifically, certain prohibited transactions between related plans by plan participants created concerns regarding the Plan's tax-qualified status. Ensuring the tax-qualified status of a plan conferred a benefit to both the estate and the plan participants; however, this expense is not a "settlor" expense simply because the plan sponsor derived an incidental benefit to the tax-qualification. In this instance, resolution of issues related to the tax-qualified status of the plan was necessary to implement the decision to terminate the plan and distribute the benefits to the participants. As such, this portion of fees and expenses may be paid from plan assets.

After careful review of the itemization of time provided in support of the second Application for compensation, the court finds again that 80% of the fees and expenses may be properly paid from the Plan Trust Fund. The court further finds that this portion of the fees and expenses is reasonable and in the interest of plan participants and beneficiaries. The fees paid from the Plan Trust Fund are allowed at the requested rates. The Applicant shall be paid $24,035.60 in fees and $122.59 in expenses from the Plan Trust Fund.

The court finds that 20% of the fees and expenses are related to decisions and activities related to the management of the plan and are properly borne by the estate. As to the portion of the fees paid by the estate, the court approves the rates as recommended by the Bankruptcy

Administrator. Therefore, the Applicant shall be paid $4,559.80 in fees and $30.65 in expenses from estate funds.

IT IS SO ORDERED.

This the 31st day of March 2003.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge