

**UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF KENTUCKY**

IN RE:)
)
BUSINESS INTELLIGENT SYSTEMS, LLC)
) CASE NO. 02-36646(1)(11)
Debtor)
_____)

MEMORANDUM-OPINION

This matter is before the Court on the Application of Middleton Reutlinger for Fees and Expenses for the period January 7, 2004 through September 30, 2005 and the Objection of Steven A. Turner (“Turner”), Douglas Wise (“Wise”), Ken Day (“Day”) and Business Intelligent Systems (“Debtor”) to Fee Application by Middleton Reutlinger. The Court considered the submissions of the parties and the arguments of counsel at the hearing held December 12, 2005. For the following reasons, the Court **DENIES** approval of the Application.

FACTS

Middleton Reutlinger (“Middleton”) was employed by the Debtor as co-counsel with Debtor’s attorney, Jonathan Gay of Walther, Roark, Gay & Todd, PLC (“WRG&T”), to represent Debtor in a civil action pending in the United States District Court for the Western District of Kentucky in an action styled, Thomas W. Frentz, et al. v. E-Pulsetrak.Com, LLC (“the Civil Action”). The Order authorizing Middleton’s employment was entered on January 28, 2004. The Order stated that WRG&T would serve as lead counsel and that the two law firms would “split equally the contingency fee recovery based upon the pro-rata fees of each firm in the case.” It further provided that Middleton would pay all expenses, but to the extent the Estate had funds in

excess of the funds necessary to pay administrative fees and expenses, then Middleton's expenses were to be reimbursed from Estate funds. After expenses, the law firms would be "entitled to 33-1/3% of the recovery in the Civil Action at or prior to trial, and 40% if settled or paid after appeal."

A prior Order entered November 3, 2003 authorizing the employment of WRG&T, stated that WRG&T "may seek the expertise of an intellectual property attorney, [who] will be paid no more than \$200 an hour, which fees are also subject to the maximum fees of \$40,000 for all attorney fees and expenses prior to an actual recovery." WRG&T was also "authorized to represent the estate in the Civil Action under the following terms: (a) partner rate of \$200.00 an hour; (b) associate and 'of counsel' attorney rate of \$150.00 an hour; (c) paralegal rate of \$85.00 an hour; (d) all expenses shall be paid out of the estate assets, which fees shall not exceed \$40,000 prior to an actual recovery for the estate; and (e) WRG&T shall be entitled to 33-1/3% of the recovery (however, the total fees shall not exceed 33-1/3% if settled prior to trial or prior to an appeal, and 40% if settled or paid after appeal). In spite of this language in the November 3, 2003 Order, these terms were not included in the Order of January 28, 2004 authorizing Middleton's employment.

On May 16, 2005, this Court entered an Order approving Middleton's Motion to Withdraw as co-counsel in the Civil Action. Middleton claimed it was no longer able to represent the Debtor due to a conflict between Wise and Turner. The withdrawal occurred prior to any recovery in the civil action.

LEGAL ANALYSIS

Middleton seeks an award of fees in the amount of \$43,183 and expenses of \$5,085.86. Middleton bases its Application on the Orders entered November 3, 2003 and January 28, 2004. Debtor, Turner, Wise and Day object to any recovery because Middleton did not represent Debtor until the end of the case and withdrew before there was any recovery. The Court finds that Middleton is not entitled to recovery of an hourly rate for its services.

The Order of January 28, 2004 authorizing Middleton's employment makes no reference whatsoever to payment of an hourly rate. It mentions only that Middleton shall be entitled to split the 33-1/3% of any recovery at or prior to trial and 40% if settled or paid after appeal. This split was to be determined on the pro rata fees of each firm. The Order makes reference to the fact that counsel shall keep track of their respective hours and rates "to determine the fairness of the fees." The Order is clear and unambiguous. It does not provide that Middleton is entitled to an hourly fee if there is no recovery in the case.

Middleton contends that its right to an hourly fee is supported by the Court's Order of November 3, 2003. That Order, however, only authorizes the employment of WRG&T on behalf of the Debtor. While it does authorize WRG&T to hire an intellectual property law firm to act as co-counsel on the case, that Order cannot be used by Middleton to justify its compensation at an hourly rate when the more specific Order of January 28, 2004 on its employment does not authorize such compensation. Only the Court through its Order approving employment can grant compensation to counsel.

The Order does provide that Middleton may recover its expenses, but only "to the extent the estate has funds in excess of funds necessary to pay Chapter 11 administrative fees and expenses.

...” Once the amount of administrative fees and expenses are determined, Middleton may reapply for approval of its expenses. The Court cautions, however, that only those expenses found to be “necessary” pursuant to 11 U.S.C. §330 are compensable. Items such as \$194 for “Christmas 03 gifts to clients,” are not “necessary” pursuant to §330.

CONCLUSION

For those reasons set forth above, the Application of Middleton Reutlinger for fees and expenses is **DENIED**. Middleton is, however, entitled to seek reimbursement of its necessary expenses in accordance with this Memorandum-Opinion.

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ORDER

Pursuant to the Memorandum-Opinion entered this date and incorporated herein by reference,

IT IS ORDERED, ADJUDGED AND DECREED that the Application of Middleton Reutlinger for fees and expenses, be and hereby is, **DENIED** as to fees. Middleton is permitted to file an Application for necessary expenses once the amount of administrative fees and expenses are determined.