

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION**

SECURITIES AND EXCHANGE COMMISSION	§
	§
Plaintiff,	§
v.	§
	§
MILLENNIUM BANK,	§
UNITED TRUST OF SWITZERLAND S.A.,	§
UT of S, LLC,	§
MILLENNIUM FINANCIAL GROUP,	§
WILLIAM J. WISE,	§
d/b/a STERLING ADMINISTRATION,	§
d/b/a STERLING INVESTMENT SERVICES	§
d/b/a MILLENNIUM AVIATION,	§
KRISTI M. HOEGEL, a/k/a KRISTI M. CHRISTOPHER	§
a/k/a BESSY LU,	§
JACQUELINE S. HOEGEL, a/k/a JACQUELINE S. HOEGEL,	§
a/k/a JACKIE S. HOEGEL,	§
PHILIPPE ANGELONI, and BRIJESH CHOPRA,	§
	§
Defendants,	§
And	§
	§
UNITED T OF S, LLC, STERLING I.S., LLC,	§
MATRIX ADMINISTRATION, LLC,	§
JASMINE ADMINISTRATION, LLC,	§
LYNN P. WISE, DARYL C. HOEGEL, RYAN D. HOEGEL,	§
	§
and LAURIE H. WALTON,	§
Relief Defendants.	§

Case No. 7:09-CV-050-O

ORDER

Before the Court is the Motion for Approval of Interim Fee Application and Procedures for Future Compensation of Fees and Expenses and accompanying Brief in Support filed by the Receiver (Doc. # 116) as required by the Court’s Amended Order Appointing Receiver (Doc. # 47 at ¶ 5 (m)) and the Order Appointing Receiver (Doc. # 10 at ¶ 5 (m)). The Receiver seeks payment for services rendered on behalf of the Receivership for attorneys’ fees, other

professional service fees and costs incurred in the execution of his responsibilities in this matter. No response has been filed to the motion.¹ Having reviewed the motion, the appendices attached thereto, and the un-redacted billing statements provided for *in camera* review, the Court finds as follows.

Background

Earlier this year the Court entered its Amended Order Appointing Receiver (Doc. # 47) and its original Order Appointing Receiver (Doc. # 10). These orders directed and authorized the Receiver to enter into agreements with professionals that were necessary for the Receiver to execute his responsibilities. *See* Doc. Nos. 10, 47 at ¶ 5 (h). Such professionals were to be compensated from the Receivership Assets, subject to approval by the Court. *Id.* In furtherance of his mandate to marshal assets for the Receivership, the Receiver enlisted the professional services of attorneys, forensic accountants and others to locate and seize assets and real and tangible property of the Ponzi defendants, and to help in the liquidation thereof. *See generally*, Motion; Status Report, Doc. # 115. The Receiver now seeks approval for interim payment of fees incurred as a result of these efforts.

Before proceeding to an analysis of the present motion, the Court finds a word of context is necessary. As detailed by the Receiver, the marshaling of assets in this case has required expertise in a wide range of legal subjects. Motion at 20. Moreover, this marshaling of assets spans the globe, ranging from the seizure and sale of properties in California to North Carolina, as well as attempts to locate the ill-gotten funds of the Ponzi defendants in Europe and the

¹ While no formal response was filed to the motion, the Court received various communications from several persons claiming to be investors in the underlying Ponzi scheme. In reviewing the motion, as is the case in all proceedings in this matter, the Court is mindful of the concerns expressed by these victims.

Caribbean. *See generally*, Motion and Status Report. Additionally, many of the Receiver's attempts to marshal assets have been challenged by relief defendants in this case, requiring funds to be expended. For example, the sale of real property in North Carolina - which resulted in a significant deposit to the Receivership - was unsuccessfully challenged by the relief defendant Lynn Wise who sought to keep the proceeds of the sale of a home valued at close to \$1 million. *See* Doc. Nos. 50, 53, 57. The Receiver's success in selling the North Carolina property, through simultaneously placing money in the Receivership and preventing the recipients of the Ponzi scheme's ill-gotten funds from benefitting further, was not without necessary expense and significant work by the Receiver and the Thompson & Knight attorneys.

Simply put, those tasked with the responsibility of finding assets and funds necessary for the recovery of money from which the unfortunate investors will be paid has been demanding. Indeed, the Receivership appears to be the fulcrum of two near impossible tasks. On one side of the balance is the difficult task of tracking the assets of fraudulently gained and wrongfully spent monies of the Ponzi defendants. On the other side lies the vituperative, and sometimes threatening,² sentiments of those for whom the Receivership has been tasked with recovering monies. With both the demands inherent in marshaling assets in this case and the intense sentiments of the investors in mind, the Court analyzes the present motion.

Receiver's Fee Application

The Receiver seeks approval of his total fees incurred in this case in the amount of \$52,752.00 for the period from March 22, 2009, through July 31, 2009. He also seeks

² In one communique sent to the Court, which appears to have been initially written to the Receiver, a purported investor in the underlying Ponzi scheme expressed his anger thus, "I am hopeful that one of the irate Ponzi victims will go after your fat ass and do you permanent harm. This is wishful thinking on my part; however, if it happens, would be delighted."

authorization for payment in the amount of \$519,250.22 (consisting of \$482,952.80 for attorneys fees and \$36,297.42 in expenses) to Thompson & Knight, LLP, the law firm representing the Receiver during the same time period. Motion at 22. Additionally, the Receiver requests approval for payment of various professional services necessary for the execution of the Receivership. These are summarized as follows:

<u>TABLE 1</u>	
Payment To:	Amount:
Stroz Friedberg, LLC (Forensic Accounting)	\$52,110.51
LSS&M, LLP (Accounting/insolvency consultants) (Invoice not submitted)	\$0.00
Kroll, Inc. (Global Investigations)	\$12,597.34
Brinkman Appraisal (Real Property in California)	\$375.00
Nelson, Mullins, Riley, LLP, (NC Attorneys)	\$3,222.00
Mark Gologdetz (wine liquidation)	\$6,215.00
TOTAL	\$74,519.85

Adding up the requested payment for the Receiver, the attorneys fees and costs from Thompson & Knight, and the other professionals services compensation, the motion requests authority to disperse a total of \$646,522.07.³

The Receiver provided an extensive list of services rendered to justify the claim for compensation based upon the wide-ranging difficulties associated with marshaling assets in this matter.

Applicable Law

³The Court notes that the motion requests a total of \$646,247.07. However, based upon the total requested payments for the various services, the Court finds the request should be \$646,522.07.

The application for fees and expenses in this matter are governed by the lodestar method of calculation. See *SEC v. EFS, LLC*, No. 3:06-CV-1097-M, 2007 U.S. Dist. LEXIS 19281, * 13 (N.D. Tex. 2007) citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319 (5th Cir. 1995); *SEC v. Megafund Corp.*, No. 3:05-CV-1328-L, 2006 U.S. Dist. LEXIS 529, 2006 WL 42367 (N.D. Tex. Jan 9, 2006) (Lindsay, J.); *Sec. & Exch. Comm 'n v. Tyler*, No. 3:02-CV-282-P, 2003 WL 21517879 (N.D. Tex. June 30, 2003) (Solis, J.). Under the lodestar method, “a party seeking an award of attorney’s fees has the burden of proving the reasonableness of the hours expended and the rate charged, and the district court must be able to determine the reasonable number of hours expended and the reasonable hourly rate for each participating attorney.” *Megafund*, 2006 U.S. Dist. LEXIS at 4. Thus, the Court must determine the reasonable number of hours expended then determine the reasonable hourly rates of the applicants. *Kellstrom*, 50 F.3d at 324.

In evaluating the reasonableness of the number of hours expended, the Court determines “whether the total hours claimed are reasonable [and] also whether particular hours claimed were reasonably expended.” *Kellstrom*. at 325. The burden of proving reasonableness of the billed hours is on the applicant. *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 528 (5th Cir. 2001). Therefore, the applicant must prove he exercised billing judgment in calculating the hours expended. *SEC v. AmeriFirst Funding, Inc.*, No. 3:07-CV-1188-D, 2008 U.S. Dist. LEXIS 42166, *7 (N.D. Tex. 2008) (J. Fitzwater) citing *Saizan v. Delta Concrete Prods. Co.*, 448 F.3d 795, 799 (5th Cir. 2006). “Billing judgment requires documentation of the hours charged and of the hours written off as unproductive, excessive, or redundant.” *Id.*, quoting *Saizan*, 448 F.3d at 799. Where no evidence of billing judgment has been submitted, it is appropriate to reduce the

fee award by a percentage intended to substitute for the exercise of billing judgment. *Saizan*, 448 F.3d at 799; *Walker v. U.S. Dep't of Housing & Urban Dev.*, 99 F.3d 761, 770 (5th Cir. 1996); *Walker v. City of Mesquite, TX*, 313 F.3d 246, 251 (5th Cir. 2002).

Upon ascertaining the compensable time, the Court determines the appropriate hourly rate based upon the prevailing community standards for attorneys of similar experience in similar cases. *Kellstrom* at 328. The party seeking payment of fees has the burden of establishing the market rate. *Riley v. City of Jackson, Miss.*, 99 F.3d 757, 760 (5th Cir. 1996). This requires evidence establishing the reasonableness of the proposed rate, typically through affidavits of other attorneys practicing in the community. *Id.*; *Tollett v. City of Kemah*, 285 F.3d 357, 368-69 (5th Cir. 2002). Absent such evidence, the Court may rely upon its expertise and judgment to independently assess the valuation of the asserted rate. *Davis v. Bd. of Sch. Comm'rs of Mobile County*, 526 F.2d 865, 868 (5th Cir. 1976).

After the court determines the multiplied product of the reasonable compensable hours and reasonable hourly rate, the Court may adjust the result--the lodestar--upward or downward as it sees fit based on consideration of the twelve factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)⁴. *Kellstrom*, 50 F.3d at 329.

Additionally, although no responses were filed in opposition to the present motion, the Court may, nonetheless, "adjust the fee request *sua sponte*" in order to ensure that only

⁴The *Johnson* factors are:

(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

reasonable attorney's fees are awarded. *AmeriFirst Funding*, 2008 U.S. Dist. LEXIS at 4 citing *Wright v. Blythe-Nelson*, 2004 U.S. Dist. LEXIS 25181, (N.D. Tex. 2004) (citing *Curtis v. Bill Hanna Ford, Inc.*, 822 F.2d 549, 551 (5th Cir. 1987) (permitting court to adjust fee where requested amount was unopposed, because court is obligated to award only "reasonable attorney's fees"))).

With these operative standards, the Court now considers the Receiver's request for payment of fees and costs.

Analysis

A. Receiver and Thompson & Knight Fees

The Court first determines the lodestar for the requested attorneys' fees submitted by the Receiver for himself and the attorneys at Thompson & Knight.

i. Reasonable Hours Expended

A review of the Receiver and Thompson & Knight's billing records demonstrates that the majority of the billing entries are adequately documented with the date of entry and a "short but thorough description of the services rendered." *Walker*, 313 F.3d at 252. The Receiver submitted a summary of hours expended totaling 125.6 hours. The total hours expended for attorneys and legal assistants with Thompson & Knight reached 1,732 hours. After a thorough review of their billing records, the Court has found a basis to conclude that some of the worked performed by the attorneys appears to have been, at the very least, redundant. "It is well established that duplicative or unnecessary work should not be included in a fee award. . . . If more than one attorney is involved, the possibility of duplication of effort along with proper utilization of time should be scrutinized." *Fathergill v. Rouleau*, 2003 U.S. Dist. LEXIS 18310, * 27 n. 28 (N.D.

Tex. 2003)(J.Fitzwater) citing *Johnson*, 488 F.2d at 717. Moreover, the Court finds no evidence that the billing invoice for the Receiver and the Thompson & Knight professionals demonstrated billing judgment. In *Fathergill*, Chief Judge Fitzwater determined, after finding other courts reduced awards by 15% for failing to show billing judgment, that a reduction of fee award by 15% was appropriate. *Fathergill*, 2003 U.S. Dist. LEXIS at * 27, *Cf.*, *Alyssa Wright v. Blythe-Nelson*, 2004 U.S. Dist. LEXIS 25181, *22 (N.D. Tex. 2004)(J. Fitzwater)(finding that 20% reduction of fees appropriate for failure to demonstrate billing judgment).

Here, the Court notes that the Receiver has not included in its fee application certain billing hours which it might have been entitled to include. The Court finds that for purposes of the lodestar, the total hours billed for the Receiver and the Thompson & Knight professionals will remain as requested. As will be discussed later, the failure to demonstrate billing judgment will be meted by reducing the fee award by a percentage to be determined.

ii. Reasonable Hourly Rates

Next the Court determines the reasonableness of the attorney billing rates. The Thompson & Knight attorneys enlisted in marshaling assets and assisting in this case was considerable. Thirteen separate attorneys participated to varying degrees and at various stages of the effort. Additionally, the seven other axillary legal assistants were utilized in the furtherance of the Receivership. The attorneys who represented the Receiver billed at an hourly rate of between \$575 and \$215.⁵ As stated previously, applicants for payment of fees typically submit evidence - through affidavits of other attorneys practicing in the community - establishing the reasonableness of the proposed rate. *Tollett*, 285 F.3d at 368-69. Here, the Receiver has not

⁵ The Receiver states that these billing rates reflect a 20% discount.

submitted such evidence. The Court, however, determines that, based on the background of the attorneys and the Court's understanding of the legal market for this judicial district, these billing rates are reasonable. *Davis v. Bd. of Sch. Comm'rs of Mobile County*, 526 F.2d 865, 868 (5th Cir. 1976).

iii. Reduction of Fees

After thorough evaluation of the billing records, the obligations on the Receiver to prove the exercise of billing judgment, and the appropriateness of the reduction in award as a means of correcting for this failure, the Court finds that a 10% reduction in the award sought for the Thompson & Knight attorneys is appropriate.⁶ This reduction shall be applied to the Thompson & Knight net fee request amount of \$482,952.80.

B. Appropriateness of the Thompson & Knight Costs and Professional Expenditures

The Court has extensively reviewed the Receiver's request for the payment of professional services hired for the execution of his responsibilities. As such, the Court finds that these expenditures were essential to the obligations of the Receiver and should be paid. The Court also reviewed the bill of expenses submitted by the Thompson & Knight attorneys and the

⁶ See *Fathergill*, 2003 U.S. Dist. LEXIS at 29, n 28. The Court adopts the reasoning of *Fathergill*, and follows the guidance of Chief Judge Fitzwater in observing that because the court has not adjusted the billing rate, reducing the total fees has the same effect as adjusting the hours before multiplying by the billing rate: fees x (.85 x hours) = .85 x (fees x hours). The Court finds that this is an appropriate means of correcting the Receivers failure to demonstrate billing judgment. Furthermore, the Court reaches this percentage after considering the so-called *Johnson* factors. In particular, the Court notes that the attorneys involved in this case have dealt with a wide range of legal issues in varying jurisdictions. Additionally, the Court notes that cases like the present matter often require intensive time commitments, often at the expense of work from other clients. Finally, the Court finds that the percentage reductions of other courts as cited above would not be appropriate for given the experience, reputation and ability of the attorneys involved in this matter.

Receiver. The Court finds that these expenses reflect the efforts of the various attorneys to marshal assets and to further the collection of funds for the Receivership. Given the essential nature of these costs, the Court finds payment to be appropriate.

C. Receiver's Request to Implement Procedures for Future Payment

Finally, the present motion requests that the Court adopt procedures for the payment of future expenses. Having reviewed the proposed procedures, the Court finds that they fail to indicate expected estimates of costs for services to be performed. In order to ensure that future payments remain reasonable and in the best interests of the investors, the Court finds that supplemental information be provided.

Conclusion

In sum, the Court GRANTS the Receiver's Motion for Approval of Fees IN PART, as modified, with the award of fees to Thompson & Knight being at the reduced rate.⁷ As such, the Receiver is entitled to payment totaling \$52,752.00, and Thompson & Knight attorneys are entitled to payment totaling \$434,657.52. The Court further approves the payment of the remaining professional service expenses totaling \$74,519.85, and directs the Receiver to pay the services as detailed in TABLE 1. Finally, the Court approves the payment of the requested costs by Thompson & Knight totaling \$36,297.42. For the reasons stated above, the Court DENIES the Motion insofar as it requests the implementation of procedures for the future payments and ORDERS that the Receiver shall provide estimates of expected expenses, to the extent possible prior to the implementation of such procedures.

⁷ The 10% reduction as applied to the requested total of \$482,952.80 results in an actual reduction by a figure of \$48,295.28. Accordingly the resulting total payment is \$434,657.52

SO ORDERED this 31st day of December, 2009.


Reed O'Connor
UNITED STATES DISTRICT JUDGE