SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: June 7, 2017

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

COMMUNITY HOME FINANCIAL SERVICES, INC.	**CASE NO. 12-01703-NPO**
DEBTOR.	**CHAPTER 11**

ORDER APPROVING APPLICATION OF KRISTINA M. JOHNSON TO EMPLOY ARIAS, FÁBREGA & FÁBREGA

There came before the Court for hearing on May 17, 2017 (the "Hearing"), the Application of Kristina M. Johnson, Trustee, to Employ Arias, Fábrega & Fábrega as Special Counsel *Nunc Pro Tunc* to March 27, 2017, and Disclosure of Compensation with Supporting Affidavit (the "Application") (Bankr. Dkt. 1774), filed by Kristina M. Johnson, the chapter 11 trustee (the "Trustee") of the estate of Community Home Financial Services, Inc. ("CHFS"), and the Edwards Family Partnership, LP and Beher Holdings Trust's Objection to Application of Kristina M. Johnson, Trustee, to Employ Arias, Fábrega & Fábrega as Special Counsel *Nunc Pro Tunc* to March 27, 2017, and Disclosure of Compensation with Supporting Affidavit (Dkt. #1774) (the "Objection") (Bankr. Dkt. 1797), filed by Edwards Family Partnership, LP and Beher Holdings

Trust (collectively, the "Edwards Entities") in the above-referenced bankruptcy case (the "Bankruptcy Case"). At the Hearing, Jeffrey Ryan Barber represented the Trustee, and Stephanie M. Rippee represented the Edwards Entities.

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of the Bankruptcy Case pursuant to 28 U.S.C. § 1334. These are core proceedings pursuant to 28 U.S.C. § 157(b)(2)(A), (B), and (O). Notice of the Application was proper under the circumstances.

Facts

1. On May 23, 2012, CHFS filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the "Petition") (Bankr. Dkt. 1).

2. On December 20, 2013, then counsel for CHFS filed the Disclosure of Transfer of Funds and Other Matters (the "Disclosure") (Bankr. Dkt. 426), notifying the prior bankruptcy judge[1] that CHFS had moved its principal place of business from Jackson, Mississippi, to Panama, had transferred funds from the debtor-in-possession operating account to accounts at banks located in Panama, and had set up business offices in Panama and Costa Rica. In response to the Disclosure, the U.S. Trustee filed the United States Trustee's Emergency Motion for Order for the Appointment of a Chapter 11 Trustee (Bankr. Dkt. 427). On December 23, 2013, an Order Granting United States Trustee's Emergency Motion for Order for the Appointment of a Chapter 11 Trustee (Bankr. Dkt. 429) was entered directing the appointment of a trustee in this case. The prior bankruptcy judge approved the U.S. Trustee's appointment of the Trustee in an order dated January 21, 2014. (Bankr. Dkt. 473).

[1] An order was entered on February 1, 2017, reassigning the Bankruptcy Case from Judge Edward Ellington to Chief Judge Neil P. Olack (Dkt. 1609).

3. On April 13, 2017, the Trustee filed the Application, seeking permission to employ Arias, Fábrega & Fábrega ("ARIFA") *nunc pro tunc* to represent her in Panama as special counsel pursuant to 11 U.S.C. § 327(e) and FED. R. BANKR. P. 2014. If approved as special counsel, ARIFA would represent the Trustee "with regards to (among other things) the locating and repatriating assets [CHFS] may have in Panama, enforcement of orders and judgments in Panama, and otherwise advising as to issues of Panamanian law." (App. ¶ 7).

4. In the Application, the Trustee explained that she selected ARIFA because it is "one of the largest and most prestigious law firms in Panama" and its lawyers "have a wide range of experience in asset recover[y] for international clients." (App. ¶ 8). At the Hearing, the Trustee testified to an additional reason why she selected ARIFA: both the Trustee's law firm (Jones Walker LLP) and ARIFA belong to Lex Mundi, a network of independent law firms located in numerous countries throughout the world. The Trustee explained that members of Lex Mundi are vetted for high membership standards.

5. Attached to the Application are the Declaration of Roy C. Durling T. (the "Durling Affidavit") (Bankr. Dkt. 1774, Ex. A) and the Engagement Letter (the "Engagement Letter") (Bankr. Dkt. 1774 , Ex. B) entered into by the Trustee and ARIFA.

6. In the Durling Affidavit, Roy C. Durling T. ("Durling") stated that he is licensed to practice law in Panama and is a partner in ARIFA. Durling further stated that ARIFA agreed to represent the Trustee in the legal matters described in the Application and that to the best of his knowledge, information and belief, neither he nor ARIFA has any "connections with [CHFS], its creditors, any other party interest or their respective attorneys and accountants, or with the office of the United States Trustee, or any person employed in the office of the United States Trustee: (i)

which are prohibited; or (ii) which would interfere or hinder the performance of ARIFA'[s] duties herein." (Durling Aff. ¶ 8).

7. According to the Engagement Letter, ARIFA proposes to staff its representation of the Trustee with one partner (Durling) at an hourly billing rate of $320.00, one junior partner at an hourly billing rate of $265.00, one associate at an hourly billing rate of $235.00, and one junior associate at an hourly billing rate of $190.00. (Eng. Letter at 2). ARIFA requires an initial retainer of $10,000.00 but agrees not to draw against the retainer until authorized by this Court to do so. (Eng. Letter at 3).

8. The Trustee asks the Court to authorize her to employ ARIFA effective *nunc pro tunc* to March 27, 2017, the date on which she and ARIFA agreed on the terms of the legal representation. The Trustee also asks the Court to allow her to pay ARIFA a $10,000.00 retainer.

9. In the Objection, the Edwards Entities oppose the Trustee's retention of ARIFA for two reasons. First, the Edwards Entities contend that the Application is "improperly open-ended." The Edwards Entities ask that any order approving the Trustee's retention of ARIFA "be very specific in identifying the specific work the Court has approved [ARIFA] to perform." (Obj. ¶ 5). The second reason why the Edwards Entities oppose the retention of ARIFA is because ARIFA is "one of Panama's largest, most expensive firms" and, according to the Edwards Entities, the bankruptcy estate cannot afford to pay the price tag that comes along with a law firm of the size and prestige of ARIFA. (Obj. ¶ 6). The Edwards Entities alleged in the Objection that Dr. Charles C. Edwards ("Dr. Edwards"), the purported equity owner of the Edwards Entities, had hired two Panamanian law firms this year that charged hourly billing rates of $200.00 to $250.00 for partners, $125.00 to $150.00 for junior partners, and $50.00 to $75.00 for associates. (Obj. ¶ 7).

Accordingly, the Edwards Entities argued that the hourly billing rates paid by Dr. Edwards were substantially lower than those the Trustee proposes to pay ARIFA. (*Id.*).

10. At the Hearing, the Trustee testified in support of the Application. The Edwards Entities presented no documentary evidence or testimony in support of the Objection at the Hearing, other than the cross-examination of the Trustee.

Discussion

Section 327 of the Bankruptcy Code provides for the employment of professionals by a trustee or debtor in possession. Here, the Trustee seeks to employ ARIFA pursuant to § 327(e).[2] Subsection (e) of § 327 provides that "the trustee, with the court's approval, may employ, for a specified special purpose, . . . *an attorney that has represented the debtor*, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed." 11 U.S.C. § 327(e) (emphasis added). Consistent with a literal interpretation of the statute, § 327(e) is relevant only when the proposed representation involves counsel who has previously represented the debtor. 3 COLLIER ON BANKRUPTCY ¶ 327.04[9][b] (16th ed. 2016). The Application does not allege that ARIFA represented CHFS before the Petition was filed or before the Trustee's engagement of ARIFA on March 27, 2017. The Durling Affidavit substantiates the absence of any previous connection between ARIFA and CHFS. (Durling Aff. ¶¶ 8-9). The prior representation requirement in § 327(e) was not mentioned at the Hearing and does not appear to have been met here. Section 327(e), however, is not the sole provision under which the Trustee may employ counsel.

[2] Hereinafter, all code sections refer to the Bankruptcy Code found at title 11 of the U.S. Code unless indicated otherwise.

Section § 327(a) contains the general authority to employ general bankruptcy counsel. It provides that a trustee "may employ one or more attorneys . . . that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title." 11 U.S.C. § 327(a). Generally, a trustee is given broad business discretion to select her own counsel. *In re Contractor Tech., Ltd.*, No. Civ. A. H-05-3212, 2006 WL 1492250, at *5 (S.D. Tex. May 30, 2006). Under both § 327(a) and § 327(e), however, the trustee may not employ an attorney who represents an interest adverse to the estate. A key difference between § 327(a) and § 327(e) is that § 327(a) imposes a requirement that counsel be disinterested whereas § 327(e) does not.[3] Although the Trustee cites § 327(e) in the Application, she alleges that ARIFA is a "disinterested person," suggesting that she intended to rely on § 327(a), the subsection of the statute where the "disinterested persons" language appears. Given that the Edwards Entities did not object to the Application on the ground that a different standard should apply or that the Trustee relied on an incorrect subsection of § 327, the Court will evaluate the Application under § 327(a). In that regard, the Trustee has the ultimate burden of proving that ARIFA has met the requirements of § 327(a). *In re Bigler, LP*, 422 B.R. 638, 643 (Bankr. S.D. Tex. 2010).

A. § 327(a)

As a threshold matter, it is noteworthy that the Edwards Entities do not dispute that there is an actual need for the Trustee to retain the services of counsel in Panama and that such employment is in the best interest of the estate. The Trustee testified at the Hearing that William

[3] The purpose of § 327(e) is to "allow counsel who cannot meet the disinterestedness requirement of § 327(a) [to] nevertheless render valuable services to the debtor in matters where counsel has no adverse interest." *In re Tidewater Mem'l Hosp., Inc.*, 110 B.R. 221, 227 (Bankr. E.D. Va. 1989).

D. Dickson ("Dickson"), the chief executive officer of CHFS until early 2014, has refused to cooperate with her in locating and recovering property of the estate in Panama. In June, 2014, she initiated an adversary proceeding, Adv. Proc. 14-00030-NPO, against Dickson and certain related companies and insiders, seeking to recover prepetition and postpetition transfers under the avoidance powers granted her pursuant to § 544. If a judgment is rendered in her favor in that adversary proceeding, the Trustee will require Panamanian counsel to enforce that judgment in Panama.

The Edwards Entities do not dispute that ARIFA has the knowledge, expertise, and background to assist the Trustee. The Edwards Entities also do not dispute that ARIFA is a "disinterested person" as defined in § 101(14) and does not hold or represent an interest adverse to the estate. Accordingly, the Court finds that the Durling Affidavit and Trustee's testimony at the Hearing establish that there is a need for Panamanian counsel, the employment of Panamanian counsel is in the best interest of the estate, and ARIFA is a disinterested person and does not hold or represent an interest adverse to the estate. The only remaining issue under § 327(a) is whether the employment of ARIFA as Panamanian counsel is in the best interest of the estate.

The Edwards Entities oppose the Application on the grounds that the description of services that ARIFA will provide is "improperly open-ended" and the hourly billing rates proposed to be paid ARIFA in the Engagement Letter are too high. The requirement in § 327(e) that an attorney be hired for a "specified special purpose" serves the "important policy of avoiding an unnecessary duplication of services at the expense of the estate." *In re NRG Resources, Inc*., 64 B.R. 643, 647 (W.D. La. 1986) (citing *Neville v. Eufaula Bank & Trust Co. (In re U.S. Gold Club Corp.),* 639 F.2d 1197, 1201-02 (5th Cir. 1981)). That requirement does not apply to employment of counsel under § 327(a). Rule 2014 of the Federal Rules of Bankruptcy Procedure only required the Trustee

to describe the "professional services to be rendered" by ARIFA. The Application states that ARIFA would represent the Trustee "with regards to (among other things) the locating and repatriating assets [CHFS] may have in Panama, enforcement of orders and judgments in Panama, and otherwise advising as to issues of Panamanian law." (App. ¶ 7). The Edwards Entities find fault with this description because of the prepositional phrase "among other things." To the extent that phrase created any ambiguity, the Trustee's testimony at the Hearing clarified that the services ARIFA will provide are all matters involving the estate and Panamanian law. Although the requirement is not relevant to an evaluation of the Application under § 327(a), the Court finds that the Trustee adequately described the services to be provided by ARIFA in the Application, as clarified by her testimony at the Hearing, to allay any concern of unnecessary duplication of services. Moreover, that concern is also addressed in § 330(a)(4)(A)(i), which protects the estate from paying compensation for the unnecessary duplication of services.

The second issue raised in the Objection is best summed up by counsel's description of ARIFA as the "Mercedes-Benz of law firms in Panama." (Hr'g 11:57:47-11:58:37).[4] She argued that ARIFA's hourly billing rates are too high when compared to those of "two different competent Panamanian law firms" retained by Dr. Edwards this year to assist him with certain "business transactions." These allegations in the Objection and statements by counsel for the Edwards Entities do not constitute evidence. Dr. Edwards did not testify at the Hearing and, indeed, the Edwards Entities presented no testimony from any witness supporting its contention that ARIFA is unreasonably expensive compared to other Panamanian firms. In contrast, the Trustee testified at the Hearing that she selected ARIFA, in part, because it belongs to Lex Mundi, a network of

[4] Because the Hearing was not transcribed, this reference is to the timestamp of the audio recording.

independent law firms vetted for high membership standards. She also testified that her law partner, Mark Alan Mintz, had researched the prevailing market rates in Panama before recommending ARIFA.

Even if the Edwards Entities had presented proper evidence of the billing rates of other law firms in Panama, there is a fundamental fallacy in its argument. The lodestar analysis for determining the reasonableness of attorney's fees consists of two components: the hourly billing rate and the number of hours expended by an attorney. *Perdue v. Kenny,* 559 U.S. 542, 551 (2010); *Black v. SettlePou, P.C.*, 732 F.3d 492, 502 (5th Cir. 2013). The reasonableness of an attorney's hourly billing rate depends on the prevailing market rate in the relevant community. *Blum v. Stenson*, 465 U.S. 886, 875 (1984). Absent adjustment based on application of the twelve *Johnson*[5] factors, the lodestar amount is presumed to represent a reasonable fee. *SettlePou*, 732 F.3d at 502. Factor nine of the *Johnson* factors considers the "experience, reputation, and ability of the attorneys." *Johnson*, 488 F.2d at 718-19. The total fees of an attorney who charges a higher hourly billing rate based on his "experience, reputation, and ability" may be less than those of an attorney who charges a lower hourly billing rate but with more hours. *Id.* at 719. The Edwards Entities' second argument suggests a misunderstanding of how the lodestar amount is calculated and the impact of the *Johnson* factors.

Regardless, the Edwards Entities' discussion about hourly billing rates is premature at this stage where the only matter before the Court is whether the Trustee's employment of ARIFA is proper. The Court's approval of the Trustee's employment of ARIFA under § 327(a) will not establish that ARIFA will be compensated from estate funds at the hourly billing rates proposed in the Engagement Letter. The Court will reserve examination of whether the fees generated by

[5] *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

ARIFA are reasonable when it reviews ARIFA's interim and final fee applications under the provisions of § 330(a)(3)-(4), the *Johnson* factors, and *Barron & Newburger, P.C. v. Tex. Skyline, Ltd. (In re Woerner)*, 783 F.3d 266 (5th Cir. 2016). Accordingly, the Court finds that the Objection lacks merit and should be overruled. The Court further finds that the retention of ARIFA is in the best interest of the estate, and, therefore, the Application should be approved.

B. Evidence

The Court is concerned that a pattern has developed in the Bankruptcy Case where the Edwards Entities file a response in opposition to a motion or application filed by the Trustee but at the hearing, presents no witness and no admissible documentary evidence to support the factual allegations. *See In re Smith*, 17 B.R. 111 (Bankr. N.D. Ohio 1994); FED. R. EVID. 1101(b) ("These rules apply in civil cases and proceedings, including bankruptcy . . . ."); FED. R. BANKR. P. 9017 ("The Federal Rules of Evidence . . . apply in cases under the Code."). Here, for example, the Edwards Entities relied solely on the allegations in the Objection and the statements of its counsel to support its contentions regarding the hourly billing rates of other Panamanian law firms. It goes without saying that attorney statements in a pleading or during a hearing are not evidence unless they constitute judicial admissions or are admitted by stipulation. Barry Russell, 2 BANKR. EVIDENCE MANUAL ¶ 101:1 (2016-2017 ed.) In the past, the Edwards Entities have relied on demonstrative exhibits prepared by counsel for the Edwards Entities that were unsupported by a proper foundation. Recent examples are the color-coded fee statements discussed in the Amended Memorandum Opinion and Order on Applications for Compensation for the Period of January 2, 2014, Through February 29, 2016, and Reimbursement of Expenses by the Law Firm of Jones Walker LLP as Counsel to Kristina M. Johnson, Trustee of the Estate of Community Home

Financial Services, Inc. (the "Jones Walker Fee Order") (Bankr. Dkt. 1787 at 30) issued on May 3, 2017.

Thus, the Edwards Entities' opposition to the Trustee's pleadings are usually based solely on the expectation that its counsel will garner sufficient facts on cross-examination of the Trustee and/or her witnesses to support its allegations. The advantage to this approach is that it minimizes the Edwards Entities' own attorneys' fees and expenses and relieves Dr. Edwards of the inconvenience and expense of attending a hearing. The Edwards Entities may believe that no admissible evidence is necessary when the Trustee bears the ultimate burden of persuasion on a matter. The Trustee's burden of proof, however, does not relieve the Edwards Entities from the burden of producing admissible evidence that supports the factual allegations in its opposition to the relief requested by the Trustee. By admissible evidence, the Court does not mean the unsworn statements of counsel for the Edwards Entities or documents prepared or altered by counsel for the Edwards Entities.

In almost every response or other pleading, the Edwards Entities complain that the administrative expenses incurred in this Bankruptcy Case are high, that the value of the assets of the estate are declining, and/or that the Edwards Entities is the largest creditor of the estate.[6]

[6] Since the Bankruptcy Case was reassigned to this Bankruptcy Judge on February 1, 2017 (Bankr. Dkt. 1609), the Edwards Entities have filed in the Bankruptcy Case a response, objection, and reply containing one or more of these complaints. *See* Edwards Family Partnership, LP and Beher Holdings Trust's Response to Trustee's Request for Expedited Hearing on Trustee's Applications to Employ Arias, Fábrega & Fábrega as Special Counsel and Horne LLP as Forensic Accountants (Dkt. #1806) (Bankr. Dkt. 1808 at 2) ("The Edwards Entities object[,] not specifically to the retention of Panamanian counsel but to the retention of what appears to be an extremely expensive firm in an estate where they hold 99% of the creditor claims and administrative expenses are already extremely high."); Edwards Family Partnership, LP and Beher Holdings Trust's Objection to Application of Kristina J. Johnson, Trustee, to Employ Horne LLP as Forensic Accountants *Nunc Pro Tunc* to March 27, 2017, and Disclosure of Compensation with Supporting Affidavit (Dkt. #1775) (Bankr. Dkt. 1796 at 6) ("In a situation where administrative expenses are high and the claims of one creditor constitute more than 99% of all claims, such alternative

Ironically, every response that the Edwards Entities file in the Bankruptcy Case in opposition, regardless of the merit, increases the professional fees and expenses of the Trustee. The Court recognizes that the Edwards Entities have raised valid objections, for example, in the Edwards Family Partnership, LP and Beher Holdings Trust's Objection to Motion for Allowance of Administrative Expenses and Fees Pursuant to 11 U.S.C. § 503(b)(4) (Dkt. #1577) (Bankr. Dkt. 1599) and the Edwards Family Partnership, LP and Beher Holdings Trust's Objection to Debtor's Second Application for Fees, Costs, and Expenses of Robert A. Cunningham, CPA (Doc # 461) (Bankr. Dkt. 497), which the Court sustained (Dkt. 1784, Dkt. 1786). On balance, however, the litigation in the Bankruptcy Case has been far too contentious by all counsel.

The argument alone that every dollar spent in administrative expenses is a dollar out of the Edwards Entities' pocket is not, by itself, a reasonable basis for opposing the Trustee's applications and motions. There are consequences to the commencement of the Bankruptcy Case, Dickson's theft of funds from the debtor-in-possession operating account, and the appointment of a chapter 11 trustee. Furthermore, it was Dr. Edwards' decision to do business with Dickson.

C. Interim Compensation Procedures

For interim fee applications filed by ARIFA, the Court adopts the same interim compensation procedures that the Court set forth in the Jones Walker Fee Order. ARIFA shall file and serve interim fee applications within sixty (60) days after the end of each four (4)-month

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methods of tracing funds should be considered."); Edwards Family Partnership, LP and Beher Holdings Trust's Reply to Post-Trial Memorandum in Support of Jones Walker LLP's Third Fee Application and in Opposition to Objection to Same (Dkt. #1588) (Bankr. Dkt. 1621 at 1) ("The total fees charged by Jones Walker are now approaching $3,000,000.00. The Edwards Entities have legitimate concerns over the extent of such fees in that it is the primary creditor in what is really a two-party dispute. . . . Every dollar spent on administrative expenses is a dollar that cannot be replaced.").

interval. For example, ARIFA shall file its first interim fee application for the period from March 27, 2017, through July 31, 2017, by September 29, 2017.

Parties will have twenty-one (21) days after service of an interim fee application to file an objection. In any objection, the party must specify the precise amount of interim fees and expenses to which it objects and the precise amount of interim fees and expenses to which it does not object. Upon expiration of the objection deadline, the Trustee is authorized to pay ARIFA eighty percent (80%) of the fees and one hundred percent (100%) of the expenses that are not subject to any objection. Any exhibits that either party proposes to introduce into evidence at any fee hearing, including any summaries or color-coded fee statements, must be exchanged at least two (2) weeks before the date of the fee hearing. All fees and expenses paid to ARIFA under these compensation procedures are subject to approval of the Court after a hearing is held and an order issued on any interim fee application. These compensation procedures will not authorize payment of such expenses to the extent that such authorization does not exist under the Bankruptcy Code, the Bankruptcy Rules, the Local Rules or other applicable law.

IT IS, THEREFORE, ORDERED that the Application employing ARIFA as bankruptcy counsel for the Trustee is hereby approved.

IT IS FURTHER ORDERED that in connection with the Application, the Court authorizes the Trustee to pay ARIFA a retainer of $10,000.00, but that ARIFA shall be entitled to draw down the retainer only after notice and a hearing as contemplated by § 330 and FED. R. BANKR. P. 2016.

IT IS FURTHER ORDERED that the following interim compensation procedures shall apply to all future applications filed by ARIFA:

1. ARIFA shall file its first interim fee application for the period from March 27, 2017, through July 31, 2017, by September 29, 2017. Thereafter, ARIFA shall file and serve interim fee applications within sixty (60) days after the end of each four (4)-month interval.

2. Parties will have twenty-one (21) days after service of an interim fee application to file an objection. In any objection, the party must specify the precise amount of interim fees and expenses to which it objects and the precise amount of interim fees and expenses to which it does not object.

3. Upon expiration of the objection deadline, the Trustee is authorized to pay ARIFA eighty percent (80%) of the fees and one hundred percent (100%) of the expenses that are not subject to any objection.

4. Any exhibits that either party proposes to introduce into evidence at any fee hearing, including any summaries or color-coded fee statements, must be exchanged at least two (2) weeks before the date of the fee hearing.

5. All fees and expenses paid to ARIFA under these compensation procedures are subject to approval by the Court after a hearing is held and an order issued on any interim fee application.

##END OF ORDER##