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JUDGE: M. A. Mahoney

PARTIES: RAB Industries, Inc., 127564 Canada, Inc.

CHAPTER: 7

ATTORNEYS: L. B. Voit, W. A. Gray, Jr., T. M. Bedsole, Jr.

DATE: 11/20/95

KEY WORDS:

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF ALABAMA

In Re

RAB INDUSTRIES, INC.,

Case No. 94-12435-MAM-7

Debtor.

**ORDER**

This matter is before the Court on the continued hearing on the Motion of the Debtor to Employ 127564 Canada, Inc. ("127564"). The Court has jurisdiction to hear the matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The continued hearing related to the propriety of the fees and expenses paid to 127564 by the Debtor.<sup>1</sup> The hearing was held on October 10, 1995. On October 12, 1995, by facsimile transmission, the Court received a pro se objection from Andrew Horn, former CEO of RAB. Horn made unsubstantiated, but serious, claims which the Court cannot consider after the close of evidence.<sup>2</sup> For the reasons explained below, the Court approves the fees and expenses as paid.

**FACTS**

RAB Industries, Inc. filed a Chapter 11 bankruptcy case on November 21, 1994. RAB filed a nunc pro tunc employment application for 127564 Canada, Inc. to act as management consultant/CEO for the Debtor on May 4, 1995. The Court approved 127564's employment in an

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<sup>1</sup>The Trustee and 127564 Canada, Inc. were to submit any further documentation of 127564's expenses and payments by November 1, 1995. The Court waited until November 13, 1995 for any records. None have been submitted.

<sup>2</sup>All interested parties were served by the Court with the objection. If any party believes, based on the information offered by Horn, that a reconsideration is appropriate, the Court will set the matter for hearing.

order dated August 15, 1995. In that order the Court set for further hearing the issue of the approval of the compensation and expenses paid to 127564. The final approval of those fees and expenses is the matter pending before the Court. For purposes of this order, the Court incorporates by reference the facts and legal conclusions contained in the August 15, 1995 order.

Mickey Cohen, the sole employee and shareholder of 127564<sup>3</sup>, testified at the hearing on the compensation issues. He acted as CEO of RAB. Among the services he performed for RAB were:

1. Review of Financial Statements and Balance Sheet—Cohen wrote off \$40,000 of uncollectible receivables, cleared up a \$126,000 overstatement of inventory, and wrote down the value of royalty products on the balance sheet.

2. Employee Review and Cuts—After consultation with the staff, Cohen cut staff and payroll by 20% over a period of several weeks or months.

3. Sales Staff Review—Cohen identified 24 states without sales representation and attempted to fill the gaps, especially New York and New Jersey since they were big markets. He rehired the lapsed sales representatives in those 2 states immediately and filled the other slots after interviews at the trade show in Dallas.

4. Operating Expense Reduction—Cohen reduced utility and transport costs.

5. Product Lines—Cohen cut the approximately 80 item product line extensively since 75-80% of sales were of 3 products. He developed a promotional package to sell the terminated lines.

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<sup>3</sup>Since Mickey Cohen is the sole shareholder and employee of 127564 Canada, Inc., and the person who actually did the work for RAB, the Court will use both “127564” and “Cohen” interchangeably in this order. This is done solely as a convenient means of describing the facts and is not meant to imply any failure of 127564 Canada, Inc. to observe corporate formalities.

6. Royalty Agreements—He reviewed the royalty agreements, all of which were underperforming except one. He tried to renegotiate them and started holding up payments on them pending renegotiation.

7. Consulting Agreements—Cohen terminated the two consulting agreements that RAB had with Creditor Marketing and Gary Jordan and saved \$4,750.00 per month.

8. Lawsuits—Cohen settled the Dex Products suits which were very damaging to RAB.

9. Small Order Servicing—Cohen implemented a policy requiring minimum orders of \$50 or a service charge.

10. Asset Liquidation—Cohen sold a truck and cellular phones that the company did not need.

11. Subsidiaries—Shades of Jade, a subsidiary, was told that it would have to move to Selma or RAB could no longer support it. The operator closed the business as a result. The Round Crib Co., another subsidiary, was reworked to make it profitable. The company continued to lose money, so RAB cut its ties with it.

12. Export Markets—Cohen attempted to pursue orders in foreign markets (by phone mainly) but the business did not develop. He also went to the Far East and negotiated with suppliers. He obtained a soundbox for the Rock-a-bye Bear, the main product of RAB, at a substantially lower cost.

13. Chapter 11 Duties—Cohen performed the additional jobs required by Chapter 11 such as plan formulation and financing motions.

Mr. Cohen spent about 10 days each month in Selma. He worked on RAB business the rest of the month from his home in Montreal, Canada. No matter where he was, he estimates he

spent 60-70 hours per week on RAB business. 127564 Canada, Inc. did no work for any other entity while it was employed by RAB.

Cohen's predecessor, Andrew Horn, was paid \$162,000 in 1994. The RAB Vice President of Operations, Bud Spikings, was paid \$59,000 in 1994. Cohen agreed to take the job for a salary of \$78,000 per year or \$1,500 per week plus expenses. Although he and RAB's counsel, Jonathan Shepard, exchanged drafts of an employment agreement, no agreement was ever signed. However, both drafts indicated that the salary was \$1,500 per week plus expenses, and that is the amount he was paid from October 1994 through July 1995.

127564 was paid all of the salary monies owed it from the commencement of Cohen's employment through conversion of this case to Chapter 7. 127564 submitted expense requests and was paid as well. Cohen would submit the receipt for the bill to be reimbursed and the bookkeeper would pay him. He does not have records of these receipts himself (or at least he submitted none). He charged many items on a company credit card given to him for his use on company business. He testified that he never charged personal bills to RAB.

Cohen did not keep itemized time or expense records. He does not believe it is customary in his type of work. Even though RAB converted from a Chapter 11 case to a Chapter 7 case, Cohen believes his services were of value to RAB and its creditors since he attempted to make the company profitable, saleable, and reorganizable.

Cohen still has, at his home in Montreal, a printer, chain store guides, voice organizer and cellular phone belonging to RAB. He acknowledges that they belong to the company, but no one has requested their return yet. He will return them or buy them, if appropriate, when requested.

Cohen has been unemployed since RAB's conversion. He is presently in negotiations with Paul Michelin, FMC Group, and possibly others who were involved with RAB, as to other potential jobs.

### LAW

The fees and expenses of 127564 Canada, Inc. must be reviewed under either § 328 or § 330 of the Bankruptcy Code. Section 328 governs situations in which a contract arrangement with the professional is approved by the court. 127564 Canada, Inc. had an oral contract with the debtor in this case. RAB was to pay 127564 at the rate of \$1,500 per week together with expenses. This contract was not approved by the Court prior to its implementation during the bankruptcy case; therefore, Section 328 does not apply. *In re C&P Auto Transport, Inc.*, 94 B.R. 682 (Bankr. E.D. Ca. 1988); *In re Gillett Holdings, Inc.*, 143 B.R. 256 (Bankr. D. Colo. 1992) (unless court approves contractual arrangement when employment is approved, compensation is subject to court review under 11 U.S.C. § 330).

Section 330 of the Bankruptcy Code states:

(T)he court may award to a . . . professional person employed under section 1103 . . . reasonable compensation for actual, necessary services rendered by the . . . professional person.

The testimony of Mr. Cohen, which was unrebutted, was clear as to the types of work 127564 Canada, Inc. did for RAB. When the case was converted to a Chapter 7 case, some of the work was not able to be completed, but it still cut expenses, cleared up the Debtor's financial status, and attempted to increase sales. The work was necessary. *Grant v. George Schumann Tire & Battery Co. (In re Grant)*, 908 F.2d 874 (11th Cir. 1990).

Professional persons are normally required to keep track of their activities.<sup>4</sup> Mr. Cohen did not. However, for two reasons, the Court does not find this fatal in this instance. One, CEOs do not typically keep detailed records of their daily activities like attorneys, except perhaps an appointment, telephone or expense log. Since Mr. Cohen was acting as CEO, his actions were reasonable for such a person. Second, counsel for RAB at the commencement of the case did not inform 127564 Canada, Inc. that court approval of its employment was necessary. If that had been done, the Court order or a hearing on the matter might have clarified the requirements. This failure to obtain early court approval of its employment is not the fault of 127564 Canada, Inc.

The bankruptcy court is to consider the failure of the Debtor to reorganize in its determination of the value of an applicant's fees. However, the failure of the Debtor to reorganize is not to be the sole factor a Court looks at in examining fees. *In re Old South Transportation Co., Inc.*, 134 B.R. 660 (Bankr. M.D. Ala. 1991). In this case, Cohen performed well; the Debtor attempted to slim down and prepare for reorganization. That was work which was helpful to creditors, even when a conversion to Chapter 7 occurred. Lower operating costs meant lower administrative expenses.

The rate of compensation was \$1,500 per week. This was less than one half of the pay of the prior CEO. The Court is unaware of Mr. Horn's qualifications, but Cohen's salary in light of Horn's pay for the same work is reasonable. This satisfies the lodestar requirement under

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<sup>4</sup>Bankruptcy Rule 2016 requires "a detailed statement." However, the bankruptcy court has some discretion in this area. Mr. Cohen, in court, gave detailed testimony as to his activities. Although his application and additional justification lack the "ideal level of completeness," his statements and testimony and the court record are sufficient. *Matter of Lawler*, 807 F.2d 1207, 1212 (5th Cir. 1987); *Continental Illinois Nat'l Bank & Trust Co. v. Wooten (Matter of Evangeline Refining Co.)*, 890 F.2d 1312, 1326 (5th Cir. 1992).

Section 330(a)(1) that fees be “reasonable . . . based on . . . the cost of comparable services other than in a case under this title.” *Grant, supra* at 878.

The expenses were not fully documented for the Court. Mr. Cohen testified that he did not have many of the records, since they were in RAB’s possession, such as records of company credit cards. RAB would also have the receipts Mr. Cohen turned in for reimbursement. The Court will not withhold approval of his expenses when no proof that they were inappropriate was offered by the parties in control of the records. Cohen testified that he only requested payment of bills he incurred for business expenses. He did not travel first class (except through upgrades). There was no evidence establishing any improper billings.

Mr. Cohen did charge the Debtor for a trip to Selma, Alabama every month from Montreal, Canada. There is an issue as to whether the charges for this trip and living expenses in Selma are “necessary” as required by Section 330. The former CEO, Andrew Horn, lived in Tennessee and commuted to Selma. Mr. Cohen worked from offices in Florida prebankruptcy. Some of the work done by Cohen required travel abroad, to Texas, New York and other places as easily (and perhaps more cheaply) reachable from Montreal.

The Court finds that the costs of the monthly commute are compensable. The exact amounts are not known since the records held by the Trustee were not produced; however, in light of the travel requirements of the job, the past practices of the Debtor, and the likely savings on travel to destinations other than Selma, the reimbursement was reasonable.

127564 does still hold assets belonging to the estate of RAB, specifically a computer, printer, voice organizer, cellular phone and chain store guide books. Cohen agreed to return the items or negotiate an agreeable sale price. Although not done by separate turnover motion, Cohen did not object to hearing the matter in conjunction with the fee issues. Therefore, since

Cohen had a hearing on the issue the Court will order turnover of the assets within 15 days unless he and the Trustee agree otherwise.

THEREFORE, IT IS ORDERED that:

1. The fees and expenses paid to 127564 Canada, Inc. from November 21, 1994 to July 28, 1995 are finally allowed and approved.
2. 127564 Canada, Inc. shall turn over to the trustee the Okidata 3000 printer, the cellular phone, the Voice Organizer, the chain store guides, and any other property purchased by RAB Industries, Inc. in its possession within 15 days of the date of this order.

Dated: November 20, 1995

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MARGARET A. MAHONEY  
U.S. BANKRUPTCY JUDGE