

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION**

IN RE:

ULRICH FELIX ANTON ENGLER and
PRIVATE COMMERCIAL OFFICE, INC.,

Debtors.

Case No. 9:08-bk-04360-MGW

Case No. 9:08-bk-04365-MGW

Jointly Administered

MOTION FOR SUMMARY JUDGMENT

Klaus Wolfschmidt, Reinhard Muller, and Anneliese Schmitt (the “Petitioning Creditors” or “Movants”), hereby move this Court for entry of an order granting summary judgment in their favor and against Chapter 7 Trustee Robert E. Tardif, Jr. (the “Trustee”) on the Application for Administrative Expense Claim Pursuant to 11 U.S.C. §§ 503(b)(3)(A), 503(b)(3)(B), and 503(b)(4) by Klaus Wolfschmidt, Reinhard Muller, and Anneliese Schmitt (Doc. 864) (the “Administrative Expense Application”). In support of this motion, the Petitioning Creditors state:

I. INTRODUCTION

The Petitioning Creditors uncovered the large scale of the Debtors’ international Ponzi scheme, researched the Debtors’ assets and creditors, and investigated the fugitive Engler’s location. The Petitioning Creditors created and executed an involuntary petition filing strategy, and therefore were instrumental in avoiding in excess of \$40 million in judgments to ensure a more equal distribution to creditors. Petitioning Creditors then educated the Trustee as to their findings and aided him in many facets of the bankruptcy cases. There is no doubt that the Petitioning Creditors are the “but-for” cause of recovery

of substantial assets of the Estates. Based upon the foregoing, the Petitioning Creditors assert that they are entitled to the remainder of their administrative expense claim for preserving the estate.

On October 15, 2012, Petitioning Creditors filed the Administrative Expense Application seeking the reimbursement of actual and necessary expenses of a creditor that files a petition under section 303 of this title and unenumerated administrative expenses, pursuant to 11 U.S.C. § 503(b). The Trustee objected to the Administrative Expense Application. The Trustee and counsel to the Petitioning Creditors limited the issues in dispute, and this Court entered an agreed order partially approving the Administrative Expense Application. As a result of the entry of the February 11, 2013 order allowing cross-motions for summary judgment in lieu of a final evidentiary hearing, Petitioning Creditors hereby seek final summary judgment with respect to the remainder of the Administrative Expense Application.

II. EVIDENTIARY SUPPORT FOR SUMMARY JUDGMENT

1. Movants rely upon the following as evidentiary support for their motion:
 - a. Declaration of Kirsten I. Baier, Esquire in Support of Motion for Summary Judgment (the “Declaration”)¹, attached hereto as **Exhibit A**.
 - b. Suzy Tate’s Affidavit as to Reasonableness of Attorneys’ Fees (the “Affidavit of Reasonableness”), attached hereto as **Exhibit B**.

¹ In her Declaration, Ms. Baier declares that the facts contained in the Administrative Expense Application are true and correct. Declaration ¶ 15.

III. UNDISPUTED FACTS

2. On October 4, 2007, the Petitioning Creditors retained Fowler White Burnett, P.A. (“Fowler White”) to represent them with respect to Ulrich Felix Anton Engler a/k/a Ulrich Engler a/k/a Richard Engler a/k/a Richie Engler (“Engler”) and Private Commercial Office, Inc. (“PCO”) (collectively, the “Debtors”). Fowler White investigated the Debtors and determined that Engler and PCO were running a large-scale, international Ponzi scheme. Administrative Expense Application ¶ 1, Declaration ¶ 6.

3. Engler and PCO ran a unique investment scam. They solicited German speaking investors from Germany, Austria and Switzerland, and other countries, to invest in their “day trading” investment model. They promised very high rates of return. Anyone who agreed to join the “investment program” was given, in exchange for the investment, a document which purported to be a Promissory Note, in English, rather than German, and such Promissory Note purported to be governed by Florida law. The notes memorialized the promised investment return at a rate which, under Florida law, is clearly usurious. Administrative Expense Application ¶ 2, Declaration ¶ 7.

4. Engler and PCO’s pattern of behavior was that if any disgruntled customer sued to recover the invested money (other than customers represented by one particular Florida law firm which had previously represented an affiliate of PCO, PCO Client Management, Inc., which was subsequently consolidated with the Debtors herein by order of this Court), then Engler and PCO would aggressively defend and claim among other defenses that the debt was void as a matter of law, due to the customers’ charging Engler and PCO criminally usurious interest rates. Administrative Expense Application ¶

3, Declaration ¶ 8.

5. Having investigated and uncovered the widespread nature of the fraud, and established that several default judgments had been obtained on behalf of customers represented by the above-mentioned Florida law firm in December 2007 and in January 2008, the Petitioning Creditors and Fowler White resolved to bring it to an end at a time when the described judgments totaling approximately \$43 million dollars and several writs of garnishment could be challenged as avoidable transfers by timely filing involuntary bankruptcy petitions against Engler and PCO. Administrative Expense Application ¶ 4, Declaration ¶ 9.

6. On March 31, 2008 (the "Petition Date"), with the assistance of Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, P.A. ("Trenam Kemker"), Petitioning Creditors filed two involuntary petitions for relief under Chapter 7 of the Bankruptcy Code against the Debtors (Doc. 1, Doc. 1 in 9:08-bk-04365-MGW). Declaration ¶ 10.

7. On April 16, 2008, the Court entered an order admitting Ronald G. Neiwirth and Fowler White to appear as counsel to the Petitioning Creditors (Doc. 5).

8. On April 29, 2008, the Court entered an Order for Relief against the Debtors (Doc. 9).

9. On April 30, 2008, Robert E. Tardif, Jr. was appointed as the Chapter 7 Trustee for the Debtors' bankruptcy estates ("Estates") on an interim basis, and subsequently named the permanent trustee (*See* unnumbered docket entry on April 30, 2008).

10. From April through October of 2008 (the "Gap Period"), Petitioning

Creditors, through their counsel, assisted the Trustee to progress the case as detailed in the Declaration. Administrative Expense Application ¶ 5, Declaration ¶ 11.

11. On June 24, 2008, the Debtors' cases were consolidated under Case. No. 9:08-bk-4360-ALP, *In re: Ulrich Felix Anton Engler* (Doc. 51).

12. Fowler White's retention as Special Counsel to the Trustee and Bernd H. Klose's retention as German Counsel were approved by Order dated October 8, 2008 (Doc. 85).

13. In the Administrative Expense Application filed on October 15, 2012, Petitioning Creditors seek an administrative claim in the remaining amount of \$95,753.06 for their investigation and prosecution of the Debtors' involuntary cases, and the direct assistance provided to the Trustee in the initial stages of the Debtors' cases. Administrative Expense Application, Declaration ¶ 5 and 15. The Petitioning Creditors seek payment of the following:

- a. Fowler White's administrative expense claim in the amount of \$36,261.81 for actual and necessary expenses of a creditor that files a petition under 11 U.S.C. § 303;
- b. Fowler White's administrative expense claim for unenumerated administrative expenses in the amount of \$1,749.72 for post-petition services performed prior to the appointment of the Trustee for the benefit of the estates (March 31, 2008 through April 29, 2008);
- c. Fowler White's administrative expense claim for unenumerated administrative expenses in the amount of \$55,916.53 for post-petition

services performed prior to the retention of Fowler White as special counsel to the Trustee, but acting in that capacity for the benefit of the Estates (the Gap Period); and

- d. Fowler White's administrative expense claim for time spent preparing the Administrative Expense Application in the amount of \$1,825.00.

(the "Amount Sought").

14. On October 17, 2012, this Court entered an order deferring ruling on the Administrative Expense Application (Doc. 866).

15. On November 5, 2012, the Petitioning Creditors filed a Motion for Reconsideration of the October 17, 2012 Order and Request for Payment of Administrative Expense Claim (the "Motion for Reconsideration") (Doc. 873).

16. The Motion for Reconsideration and Fee Application² were heard on December 5, 2012 (Doc. 875).

17. The dispute regarding the Fee Application was addressed by the entry of the Order Partially Approving Application for Compensation and Setting Final Evidentiary Hearing (Doc. 885) and ultimately, the motion to compromise controversy filed on January 31, 2013 (Doc. 902).

18. The Trustee and Petitioning Creditors agreed to the terms of the December 11, 2012 Order (I) Granting Motion for Reconsideration, (II) Partially Approving Application for Administrative Expense Claim, and (III) Setting Final Evidentiary

² On October 15, 2012, the First and Final Application of (A) Fowler White Burnett, P.A. and (B) Bernd H. Klose, Esq. for Allowance of Fees and Reimbursement of Costs as Special Counsel to the Trustee for the Period October 8, 2008 Through January 31, 2012 (Doc. 865) (the "Fee Application") was filed along with the Administrative Expense Application.

Hearing (Doc. 884). The order approved \$10,997.16 of the administrative claim and set the remainder of \$95,753.06 for final evidentiary hearing on February 13, 2013.

19. On December 21, 2012, the Trustee filed his objection to the Administrative Expense Application (Doc. 889) (the “Objection”).

20. The Trustee and counsel to the Petitioning Creditors determined that a final evidentiary hearing is not necessary and that the Court can consider the Administrative Expense Application on cross-motions for summary judgment. Accordingly, on February 11, 2013 this Court ordered that cross-motions for summary judgment be filed within 30 days (Doc. 906).

III. LEGAL ARGUMENT

Petitioning Creditors are entitled to judgment as a matter of law in their favor and against the Trustee regarding the Administrative Expense Application in the Amount Sought. The Amount Sought in the Administrative Expense Application is allowable under applicable bankruptcy law, specifically Section 503(b). The undisputed facts demonstrate that the Amount Sought is reasonable, and benefitted the Estates. As an overarching issue, the Amount Sought should be allowed as a matter of equity and public policy.

A. Amount Sought Is Allowable Under Applicable Bankruptcy Law

Section 503 provides in pertinent part, that “[a]fter notice and a hearing, there shall be allowed administrative expenses” for entities falling into certain categories. 11 U.S.C. § 503(b). One such category is the actual and necessary expenses of a creditor that files a petition under section 303 of this title. 11 U.S.C. § 503(b)(3)(A). This

provision authorizes the payment of certain pre-petition expenses associated with an involuntary petition. Second, administrative expense claims are allowable under 11 U.S.C. § 503(b)(3)(B) for:

the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—a creditor that recovers, after the court’s approval, for the benefit of the estate any property transferred or concealed by the debtor;

U.S.C. § 503(b)(3)(B). Third, administrative expense claims are allowable under 11 U.S.C. § 503(b)(4) for:

reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

11 U.S.C. § 503(b)(4). Fourth, the Bankruptcy Code allows for unenumerated administrative expenses. As the Eleventh Circuit has recognized, the enumerated administrative expense list in 11 U.S.C. § 503 is not exclusive:

It is clear from the face of the statute, however that expenses not explicitly listed in section 503(b) can receive administrative-expense status in one of two ways, either as a nonlisted “actual, necessary” expense of preserving the estate under 503(b)(1)(A) or as a nonlisted administrative expense under 503(b) in general. Either way, there is room in the statute for courts to accord administrative-expense priority to postpetition expenses, and courts have given this status to certain categories of postpetition claims that are not explicitly listed in the statute.

Alabama Surface Mining Commission v. N.P. Mining Co. (In re N.P. Mining Co.), 963 F.2d 1449, 1452 (11th Cir. 1992).

Creditors in an involuntary case are entitled to all expenses incurred in bringing a debtor into court, not just fees and costs incurred in connection with the filing of the petition. *In re On Tour, LLC*, 276 B.R. 407 (Bankr. D. Md. 2002). The purpose of allowing petitioning creditors to recover their attorneys' fees and costs in connection with preparation, filing, and adjudication of an involuntary petition is to encourage them to successfully bring the debtor into the bankruptcy court to accomplish an equitable marshaling and distribution of estate assets before the debtor squanders the assets. *In re Hanson Industries, Inc.*, 90 B.R. 405, 410 (Bankr. D. Minn. 1988); *In re J.V. Knitting Service, Inc.*, 22 B.R. 543, 545 (Bankr. S.D. Fla. 1982) (emphasis supplied). Awards of administrative expenses under 11 U.S.C. § 503(b)(3)(A), (b)(3)(B), and (b)(4) are determined with an eye toward whether such an award will render the creditor whole in the sense of the expense it incurred in successfully bringing the debtor into bankruptcy court. *In re Adams Furniture Industries, Inc.*, 1993 WL 13004589, *3 (Bankr. S.D. Ga. Dec. 10, 1993).

In his 2008 decision of *In re Key Auto Liquidation Center, Inc.*, Judge Killian found that preparation for the filing of an involuntary petition properly included attorney research of the legal and factual propriety of initiating and pursuing the entry of an order for relief under section 303, as well as soliciting and organizing petitioning creditors. 384 B.R. 599, 605 (Bankr. N.D. Fla. 2008). Judge Killian reasoned that the nature of such expenses are of the type that section 503(b)(3)(A) and (b)(4) were intended to compensate as they constitute a valuable service for creditors and the estate. *Id.*

Of the Amount Sought, \$38,011.53³ is attributable to pre-petition work of the nature described in Judge Killian's decision. Because of the massive, international scale of the Debtor's Ponzi scheme/fraud, such an investigation was more involved than typical. The detail of items involved in the Petitioning Creditors' investigation and efforts that culminated in the filing of the involuntary petitions is outlined in the Administrative Expense Application exhibits. This amount is clearly allowable under section 503(b)(3)(A) and (b)(4).

Of the Amount Sought, \$55,916.53 is attributable to work performed during the Gap Period. During the Gap Period, the Trustee requested the Petitioning Creditors' assistance, and the assistance provided by the Petitioning Creditors (through Fowler White) resulted in the recovery of assets for the Estates and the prosecution of Engler. Declaration ¶ 11, and Declaration Composite Exhibit A. During the Gap Period, the Petitioning Creditors provided direct assistance to the Trustee in the initial stages of the Debtors' cases, including but not limited to:

- a. providing the Trustee with substantial information obtained by the Petitioning Creditors prior to the Petition Date;
- b. assisting the Trustee in obtaining necessary basic information for the preparation of Schedules, such as the identities and addresses (to the extent known at the time) of the hundreds of victims in Germany, Switzerland and Austria, and in other countries;
- c. preparing and (with local co-counsel and upon authority of the

³ This amount includes \$36,261.81 for services described in ¶ 13(a), and \$1,749.72 for services described in

- Trustee and this Court) filing an application for recognition of the U.S. bankruptcy proceedings in the competent German Court and publishing required Notices in Germany, Switzerland, and Austria;
- d. providing documents relating to the recovery of assets and the prior judgments to be challenged;
 - e. providing other relevant information including, without limitation, information on the Debtors' associates, transfers of assets, and bank records and their analysis for several accounts of the Debtors and of PCO Client Management, Inc. at SunTrust Bank and Wachovia Bank, all for the benefit of the Estates; and
 - f. researching Debtors' assets which were subsequently recovered by the Trustee for the Estates.

See Administrative Expense Application ¶ 5, Declaration ¶ 11. This amount should be allowed under 11 U.S.C. § 503(b)(3)(B) and (b)(4).

B. Amount Sought Benefitted the Estate and Is Reasonable

The extensive information obtained pre-petition by the Petitioning Creditors was distilled and provided to the Trustee, facilitating his advancement of the cases. There is no doubt that the Petitioning Creditors are the “but-for” cause of recovery of substantial estate assets. It is self-evident that the work performed by Fowler White, and paid for by the Petitioning Creditors, clearly benefitted the Estates, and immensely assisted the Trustee in his ability to progress the case and recover avoidable transfers, bringing real

¶ 13(b).

money into the Estates.

As demonstrated by the Affidavit of Reasonableness, the amount sought is reasonable under the circumstances. Notably, the Amount Sought in the Administrative Expense Application was already voluntarily reduced by a third or \$54,374.89, representing 170.05 hours of labor and \$1,216.14 in expenses. Administrative Expense Application ¶ 21, Declaration ¶ 15. As a result, the Petitioning Creditors seek only a claim in the remaining amount of \$95,753.06, as detailed herein.⁴ This substantial reduction assures that all fees and expenses for which payment is requested were narrowly focused on the interests of the Estates, and not the interests of the Petitioning Creditors.

C. Amount Sought Should Be Allowed as a Matter of Public Policy and Equity

The purpose of allowing petitioning creditors to recover their attorneys' fees and costs in connection with an involuntary petition is to encourage them to successfully bring the debtor into the bankruptcy court to accomplish an equitable marshaling and distribution of estate assets before the debtor squanders the assets. *In re Hanson Industries, Inc.*, 90 B.R. 405, 410 (Bankr. D. Minn. 1988). The rationale is that "petitioning creditor's actions benefitted the estate and other creditors." 4 Collier on Bankruptcy ¶ 503.10[3] (Alan N. Resnick & Henry J. Somme eds. 16th ed.). If petitioning creditors are not reimbursed for the work they do, at their own expense, in bringing a debtor to bankruptcy court, there will be little incentive for the practice to

continue. Indeed, failure to reimburse petitioning creditors for their efforts to benefit all creditors may have a chilling effect on other potential petitioning creditors.

D. Amount Sought Should Be Allowed Over Trustee's Objection

The Trustee's Objection alleges that some of Fowler White's services were "unnecessary and/or duplicative" and "appear to fall into the category of pre-bankruptcy litigation, which are not compensable under the Code." Objection ¶¶ 10 and 11. The Trustee further objects to the claim for reimbursement of Fowler White's fees and costs for services performed between the date of entry of the Order for Relief and the date of Fowler White's retention as special counsel (April 30, 2008 to October 7, 2008). Objection ¶¶ 12 and 13.

As outlined above, it was Petitioning Creditors' research and actions that uncovered the Debtors' elaborate, international scheme and secured numerous avoidance actions. Because of their unique knowledge, Petitioning Creditors were able to distill and provide the Trustee with crucial information gleaned from their research. This information enabled the Trustee to prepare and file the requisite schedules and progress the case to the point it is today, clearly benefitting the Estates. The tasks performed by Fowler White are not duplicative of the tasks performed by Trenam Kemker. Trenam Kemker's tasks were narrowly focused on logistics of the filing, whereas Fowler White's tasks encompassed the broader strategy and research necessary for the filing. "[T]he mere fact that several attorneys are representing petitioning creditors does not foreclose an award of administrative expenses to each of them, so long as there is a definite effort

⁴ Deducted fees and expenses were marked "NC" for "No Charge" on the detailed exhibits attached to the

to avoid duplicative work and to represent all petitioning creditors on an efficient basis.” *In re Key Auto*, 384 B.R. at 607 (quoting *In re Hanson Industries*, 90 B.R. at 412). The time entries contained in the Administrative Expense Application show the extent and necessity of this work.

Moreover, the delay in retention of Fowler White was due to the unsettled nature of the proceedings in the first few months, including the Trustee’s delay in appointment as permanent trustee. As evidenced by Declaration ¶ 12 and Composite Exhibit A thereto, the Trustee requested that much of the work be performed pre-retention. As one example, publishing notice of the Debtors’ bankruptcy cases abroad was requested by the Trustee in June 2008, more than three months before Fowler White’s retention as Special Counsel to the Trustee. The Petitioning Creditors complied based on an understanding that they would subsequently be compensated for the services they timely provided to benefit the Estates, many of which were of an urgent nature and were required to protect assets and the Estates during the Gap Period. It would be inequitable to now punish the Petitioning Creditors for their willingness to assist the Trustee at his request. Accordingly, the Trustee’s objection on these grounds is not persuasive and should be overruled.

Lastly, the Trustee asserts that the Administrative Expense Application should be disallowed to the extent it is based upon Section 503(b)(3)(B) because court approval is required for such an award. Although court approval is typically required for an award under this subsection, some courts have allowed expense claims under this subsection

Administrative Expense Application.

without prior court approval. *See e.g., In re Morad*, 328 B.R. 264 (1st Cir. BAP 2005); *In re George*, 23 B.R. 686 (S.D. Fla. 1982); *In re Zedda*, 169 B.R. 605 (Bankr. E.D. La. 1994); *In re Antar*, 122 B.R. 788 (Bankr. S.D. Fla. 1990); *In re Johnson*, 72 B.R. 115 (Bankr. E.D.N.C. 1987); *In re Rumpza*, 54 B.R. 107 (Bankr. D.S.D. 1985). The rationale courts have employed is based on equitable principles, finding that the benefit to the estate obtained by the creditor outweighs the creditor's failure to obtain prior court approval. *Id.*; 4 Collier on Bankruptcy ¶ 503.10[3] (Alan N. Resnick & Henry J. Somme eds. 16th ed.). Petitioning Creditors submit that the Amount Sought, to the extent it falls into Section 503(b)(3)(B), should be allowed in equity even absent prior court approval based on the benefit to the Estates.

IV. CONCLUSION

Based upon the foregoing law, together with the undisputed facts as cited above, Petitioning Creditors are entitled to a final summary judgment in their favor and against the Trustee with respect to the Administrative Expense Application.

WHEREFORE, Petitioning Creditors request (a) entry of an order granting final summary judgment in their favor and against the Trustee; (b) entry of an order approving the Administrative Expense Application and allowing the claim in the remaining amount of \$95,753.06; and (c) such additional relief as the Court may deem appropriate.

Dated: March 13, 2013

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via CM/ECF and/or U.S. mail to: **Debtors**, Ulrich Felix Anton Engler and Private Commercial Office, Inc., 1217 Cape Coral Parkway, Apt. 121, Cape Coral, FL 33904; **Trustee**, Robert E Tardif, Jr., Post Office Box 2140, Fort Myers, FL 33902; **United States Trustee - FTM7, 7**, Timberlake Annex, Suite 1200, 501 E. Polk Street, Tampa, FL 33602; and all registered **CM/ECF recipients** on March 13, 2013.

/s/ Stephanie C. Lieb
Attorney