IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	
	)	
PWS HOLDING CORPORATION,	)	Chapter 11 Case Nos.
BRUNO'S, INC., et al.,	)	98-212-SLR through
	)	98-223-SLR
Debtors.	)	(Jointly Administered)

MEMORANDUM ORDER

At Wilmington this 30th day of January, 2002, having reviewed the papers submitted and heard oral argument on the motions of HSBC Bank USA ("HSBC") and W.R. Huff Asset Management Co., L.L.C. ("Huff") for allowance of administrative expenses;

IT IS ORDERED that said motions are denied, for the reasons that follow:

1. **Jurisdiction.** This court has jurisdiction to consider these motions pursuant to 28 U.S.C. § 1334.

2. **Background.** On February 2, 1998, PWS Holding Corporation, Bruno's Inc., and various of their affiliates (collectively referred to as "Bruno's") filed for protection under chapter 11 of the Bankruptcy Code. On February 18, 1998, the Office of the United States Trustee for the District

of Delaware appointed a statutory unsecured creditors' committee (the "Committee"). Among the named members of the Committee were movants HSBC and Huff. HSBC was serving at the time as the Indenture Trustee for Bruno's 10.5% Senior Subordinated Notes due 2005. As of February 1998, Huff held over 50% of the principal amount of the Subordinated Notes.[1] The remaining members of the nine-member Committee included trade and bank representatives.[2] The Committee was represented throughout the chapter 11 proceedings by the law firm of Pepper Hamilton L.L.P. Nevertheless, HSBC engaged its own counsel,[3] as did Huff.[4]

3. By January 1999, plan negotiations had commenced. Although the Committee voted to seek approval for each of its four constituencies to retain counsel to represent

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[1]During the course of the chapter 11 cases, Huff purchased additional Subordinated Notes and, by 1999, held almost 75% of the principal amount of said Notes.

[2]The Committee also included a union representative for a period of time.

[3]In February 1998, HSBC engaged the New York law firm of Pryor Cashman Sherman & Flynn L.L.P. In June 1999, HSBC engaged the Delaware law firm of Connolly Bove Lodge & Hutz L.L.P.

[4]During 1998, Huff was represented in the chapter 11 cases by Jones, Day, Reavis & Pogue. In May 1999, Huff engaged the New York law firm of Berlack, Israels & Liberman L.L.P. and the Delaware law firm of Klehr, Harrison, Harvey, Branzburg & Ellers L.L.P.

it in plan negotiations, with such counsel to be paid by Bruno's, Bruno's declined to accept responsibility for such costs. (Huff Ex. #1) By April, it became apparent that the subordinated bondholders would be out of the money under the plan of reorganization as proposed.

4. **Movants' participation in the chapter 11 cases.** During the course of the chapter 11 cases, HSBC and Huff participated in the following proceedings:

a. **May and June 1999.** Both HSBC and Huff filed objections to Bruno's motion to extend its exclusive period to file and seek acceptances of a plan of reorganization. Both objections were denied.

b. Both HSBC and Huff filed motions requesting the appointment of an examiner to investigate Bruno's 1995 leveraged recapitalization. The court ultimately approved these motions and appointed an examiner. Months and over $1,000,000 later, the examiner confirmed Bruno's and the Committee's position that claims based upon the leveraged recapitalization were not viable and should not be pursued by Bruno's or any other party in interest.

c. Both HSBC and Huff filed objections to Bruno's disclosure statement. Although the objections were overruled, both HSBC and Huff were given the opportunity to

include counterstatements with their contentions in the disclosure statement. Only Huff took advantage of this opportunity. The plan ultimately was accepted by a clear majority of the unsecured creditors.

d. **August 1999.** Huff requested authority to conduct due diligence in connection with the preparation of an alternative plan of reorganization. HSBC joined in the motion. The motion was granted. Despite imposing the burdens of due diligence on the estate, however, none of Huff's various proposals ever generated any serious consideration by any other party in interest.

e. Huff initiated an action against various third parties in Alabama state court for their role in the 1995 leveraged recapitalization. Bruno's commenced a proceeding in this court to stay the Alabama action. The action was stayed by agreement of the parties.

f. **October 1999.** After publication of the examiner's report, Huff requested authority to prosecute for its own benefit certain of the claims pending in the Alabama action. HSBC joined in this motion.

g. **December 1999.** HSBC and Huff filed objections to Bruno's plan of reorganization. After a contested three-day confirmation hearing, the court overruled

the objections, denied Huff's claims prosecution motion, and confirmed the plan.

h. **January 2000.** Huff filed an emergency motion for stay pending its appeal of the confirmation order. HSBC joined in this motion. The motion was denied.

i. By opinion dated September 18, 2000, the United States Court of Appeals for the Third Circuit denied the appeals filed by HSBC and Huff and affirmed the confirmation order.

5. **Movants' contentions.** HSBC contends that it is entitled to its attorneys' fees and costs based on three theories. First, it contends that Bruno's was required by the Trust Indenture Act of 1939, as amended, to retain an Indenture Trustee and, therefore, the costs associated therewith should be borne by the estate. Second, HSBC contends that it was performing services under an executory contract - the Indenture - and is entitled to payment for its services pursuant to 11 U.S.C. § 503(b)(1). Third, HSBC contends that, as a member of the Committee, it was performing a service during the chapter 11 cases consistent with 11 U.S.C. § 503(b)(3)(F). Huff contends that it is entitled to reimbursement for its attorneys' fees and costs pursuant to § 503(b)(3)(F), as a member and co-chair of the Committee. Huff

also relies on § 503(b)(3)(D) as additional grounds for its request, as a result of its substantial contributions to the chapter 11 cases.

6. **Analysis.**

a. **Compliance with the Trust Indenture Act of 1939, as amended.** HSBC cites to the Third Circuit's opinion in Commonwealth of Pennsylvania v. Conroy, 24 F.3d 568 (3d Cir. 1994), for the proposition that, so long as Bruno's was required by law to retain an Indenture Trustee, Bruno's should be required to pay the costs of its services under the Indenture. The Trust Indenture Act of 1939, however, is not a law like the environmental law at issue in Conroy that promotes public health or safety. Consequently, there is no evidence of record that the duties of the Indenture Trustee were of such importance that the costs of fulfilling such duties should be accorded administrative expense priority.

b. **Performance under an executory contract.** HSBC contends that the Indenture is an executory contract. The court disagrees. The Third Circuit has characterized an executory contract as one "under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of

the other." Cinicola v. Scharffenberger, 248 F.3d 110, 123 (3d Cir. 2001) (citing In re Columbia Gas Sys. Inc., 50 F.3d 233, 238 (3d Cir. 1995)). Recognizing Bruno's prechapter 11 financial obligation to the Subordinated Noteholders and its prechapter 11 obligation to pay certain fees of the Indenture Trustee, neither the Subordinated Noteholders nor the Trustee owed any duties or had any obligations to Bruno's. The record indicates that all of HSBC's actions during the chapter 11 cases were undertaken on behalf of the Subordinated Noteholders, not on behalf of Bruno's or the estate.

c. **Service as a Committee member.** Both HSBC and Huff claim entitlement to reimbursement for attorneys' fees and costs pursuant to § 503(b)(3)(F), which provides as follows:

> (b) After notice and a hearing, there shall be allowed, administrative expenses ... of this title, including–
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> (3) the actual, necessary expenses ... incurred by–
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> . . .
>
> (F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee[.]

Section 503(b)(4) allows as administrative expenses

> (4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under 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[.]

(Emphasis added)

d. The Third Circuit, in In re Merchants Acceptance Corp., 198 F.3d 394 (3d Cir. 1999), interpreted the statutory language recited above to include reimbursement by the debtor's estate of attorneys' fees and expenses incurred by a member of the Committee. In so doing, however, the Third Circuit was cognizant of the potential for abuse "if every member of a committee were to claim attorney's and accountant's fees," thus "unnecessarily drain[ing] estate assets." Id. at 400. The Third Circuit left it to the bankruptcy court

> to ensure that only those fees that are demonstrably incurred in the performance of the duties of the committee, the statutory standard, are reimbursed. Moreover, in its review of each application to determine whether the fee requested is reasonable, as required by statute, the bankruptcy court must necessarily determine whether the services were necessary. This review is committed to the sound discretion

of the bankruptcy courts.

Id. at 403. The burden of proving that the requested fees and expenses are reasonable and necessary is on the applicant. Zolfo, Cooper & Co. v. Sunbeam-Oster Co., Inc., 50 F.3d 253, 260 (3d Cir. 1995).

e. In this case, HSBC argues that its "fees and expenses were incurred in significant part as a direct result of its services on the Committee, which services were beneficial to the creditors body as a whole." Huff argues that its opposition to what "it viewed as a self-interested plan formulation process . . . dominated by parties seeking protection from avoidance actions" was consistent with its fiduciary responsibilities as a Committee member. Moreover, the "propriety of the reimbursement of Huff's actual and necessary expenses . . . is particularly compelling here" because Committee counsel recognized that "it could not represent any individual constituency on the Committee" in the plan negotiation process.

f. The court concludes that the "services" rendered by movants as Committee members were neither necessary nor reasonable. Committees appointed under § 1102 generally include representatives of various constituencies

harboring different interests and views. To the extent, then, that movants base their fee applications on the mere fact that they represented a constituency with a markedly different take on the reorganization process does not make their services "necessary," as it can be assumed that every committee operates in just this way.[5] In other words, just doing their work as Committee members cannot be all that is required under § 503(b)(3)(F). Moreover, to be a "reasonable" expense under § 503(b)(4), it must have been of some value to the estate. In this case, the movants' opposition at virtually every stage of the proceedings diminished the estate, ultimately without any redeeming value.

g. **"Substantial contribution."** Huff argues that it is entitled to its expenses under the authority of § 503(b)(3)(D), which provides reimbursement to

> a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, **in making a substantial contribution** in a case under chapter 9 or 11 of this title.

(Emphasis added) "In determining whether there has been a

[5]Likewise, the fact that Committee counsel could not represent any individual constituency in plan negotiations strikes the court as being appropriate in every case, not just this case.

‘substantial contribution’ pursuant to section 503(b)(3)(D), the applicable test is whether the efforts of the applicant resulted in an actual and demonstrable benefit to the debtor’s estate and the creditors." Lebron v. Mechem Financial Inc., 27 F.3d 937, 944 (3d Cir. 1994) (citing In re Lister, 846 F.2d 55, 57 (10th Cir. 1988)). As further explained by the Third Circuit in Lebron,

> [s]ubsection 503(b)(3)(D) represents an accommodation between the twin objectives of encouraging "meaningful creditor participation in the reorganization process," . . . and "keeping fees and administrative expenses at a minimum so as to preserve as much of the estate as possible for the creditors." . . . Inherent in the term "substantial" is the concept that the benefit received by the estate must be more than an incidental one arising from activities the applicant has pursued in protecting his or her own interests.

27 F.3d at 944 (citations omitted). Moreover,

> [e]ven though a benefit may have been conferred to the estate, reimbursement should be excluded where the activities primarily served the interest of the interested parties, and would not have been undertaken absent an expectation of reimbursement from the estate. . . . In other words, the acts must have been designed to benefit others who would foreseeably be interested in the estate. . . . In the absence of such a finding, there can be no award of expenses even though there may have been a benefit to the estate. . . .

In re AM International, Inc., 203 B.R. 898, 904 (Bankr. D.Del.

1996) (citations omitted).

h. Movants in these chapter 11 cases argue that they made a substantial contribution to the estate and the creditors in at least two ways: (1) the elimination of certain third-party releases; and (2) an increase in recoveries by general unsecured creditors from 26 cents to 30 cents on the dollar. Bruno's asserts in response that the releases were voluntarily withdrawn and that the causes of action so preserved in fact will inure, if at all, only to the benefit of the moving parties, not to the estate. With respect to the increase in recovery for the unsecured creditors, Bruno's contends that the increase was a result of negotiations between Bruno's, the Senior Lenders, and the trade creditors, not as a result of anything HSBC and Huff did. Moreover, the increase for the unsecured creditors was counterbalanced by an equivalent decrease in the value of the consideration distributed to the Senior Lenders, not as a result of new value being added to the estate.

i. Based on the record, the court concludes that the movants' participation in these bankruptcy proceedings did not result in any actual and demonstrable benefit to the estate and its creditors. The movants have not carried their burden of proving that the withdrawal of the

releases and the increase in recovery amounts were related to their efforts. To the extent that Huff argues that its efforts "also served to preserve the integrity of the chapter 11 process in these cases," the court respectfully disagrees. The court gave movants every opportunity to demonstrate to the court and the other parties in interest that the reorganization process was legally flawed and that there was value to be had in alternative courses of action. Evidence to support movants' position was never forthcoming. In the absence of any evidence that the "integrity" of the process was ever actually at risk, the court will not reward Huff for its opposition to virtually every step of the reorganization process. In sum, movants' efforts did not result in any actual and demonstrable benefit to any party but their constituents. Under these circumstances, therefore, the court denies both applications for reimbursement of attorneys' fees and expenses.

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United States District Judge