

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

IN RE:

GENERAL CAPACITOR, LLC,

CASE NO.: 19-40279-KKS

CHAPTER: 7

Debtor.

ORDER GRANTING, IN PART, *MOTION TO PAY BROKER*
***BLACKHAWK TECHNOLOGIES, LLC* (ECF NO. 283)**

THIS MATTER came before the Court for a hearing on September 1, 2021 on the Chapter 7 Trustee's *Motion to Pay Broker Blackhawk Technologies, LLC* ("Motion to Pay," ECF No. 283). Creditors Kasper Holdings of Tallahassee, LLC ("Kasper"), AMWAT Warehousing and Storage ("AMWAT"), and Florida State University Research Foundation, Inc. and Florida State University Sponsored Research (collectively "FSU") filed objections.¹ At the conclusion of the hearing, the Court

¹ *Kasper Holdings of Tallahassee, LLC's Objection and Response in Opposition to Trustee's Motion to Pay Broker Blackhawk Technologies, LLC* [Doc. 283], ECF No. 288; *Joinder of Residential & Commercial Transport Company, LLC d/b/a AMWAT to Kasper Holdings of Tallahassee, LLC's Objection and Response in Opposition to Trustee's Motion to Pay Broker Blackhawk Technologies, LLC*, ECF No. 289. FSU originally filed a certificate of no objection, but then subsequently withdrew that certification and filed an objection. *Certificate of No Objection*, ECF No. 309, withdrawn at ECF No. 316; *Florida State University and Florida State University Research Foundation Inc.'s Objection to the Trustee's Motion to Pay Blackhawk Technologies, LLC (D.E. 283)*, ECF No. 315.

requested additional briefing.²

Having reviewed the Motion to Pay, Objections, briefs, and relevant case law, and having heard argument of counsel, the Court determines that the Motion to Pay is due to be granted, in part: the Chapter 7 Trustee is authorized to pay Blackhawk, but not the amount set forth in the motion.

BACKGROUND

General Capacitor, LLC (“Debtor”) filed a Chapter 11 petition on May 16, 2019.³ Debtor’s case was converted to Chapter 7 on November 26, 2019.⁴ Theresa M. Bender was appointed as the Chapter 7 Trustee (“Trustee”).⁵

On July 1, 2020, the Trustee filed an expedited application to employ broker Blackhawk Technologies, LLC (“Blackhawk”) pursuant to

² Kasper, AMWAT, and the Chapter 7 Trustee filed briefs. *Brief in Support of Kasper Holdings of Tallahassee, LLC’s Objection and Response in Opposition to Trustee’s Motion to Pay Broker Blackhawk Technologies, LLC* [Doc. 288], ECF No. 329; *Trustee’s Response to the Court’s Request for Supplemental Briefing on Trustee’s Motion to Pay Blackhawk Technologies, LLC* (Doc. 283), ECF No. 330; *Memorandum of AMWAT in Support of its [sic] Joinder to Kasper Holdings of Tallahassee, LLC’s Objection and Response in Opposition to Trustee’s Motion to Pay Broker Blackhawk Technologies, LLC*, ECF No. 331.

³ *Voluntary Petition for Non-Individuals Filing for Bankruptcy*, ECF No. 1.

⁴ ECF No. 131. The Court entered an order memorializing its findings on January 9, 2020. *Order Granting Debtor’s Motion to Convert to Chapter 7* (Doc. 109), *Overruling Objection* (Doc. 126) and *Denying Motion to Dismiss* (Doc. 127), ECF No. 135.

⁵ The Trustee retained Ausley & McMullen, P.A., as special counsel. *Trustee’s Application for Employment of Counsel for Chapter 7 Trustee*, ECF No. 147; *Order Approving Trustee’s Application for Employment of Counsel for Chapter 7 Trustee* (Doc. 147), ECF No. 149.

11 U.S.C. §§ 327(a) and 328(a) “to assist in the collective marketing and sale of all of the Debtor’s assets together with related assets wholly owned by [FSU]” (“Application to Employ”).⁶ In the Application to Employ, the Trustee represented, among other things, that Blackhawk would be entitled to 25% of the gross proceeds received from the sale of assets (“commission”).⁷ Attached to the Application to Employ is a complete copy of the agreement between the Trustee and Blackhawk detailing the terms and conditions of Blackhawk’s employment (“Blackhawk Agreement”).⁸ No creditor or party in interest objected to the Application to Employ. On July 17, 2020, the Court entered an order approving the Application to Employ; that order became final in August of 2020.⁹

According to the Trustee, Blackhawk worked diligently to market the assets, including contacting a variety of companies throughout the world, all during the COVID-19 pandemic. Blackhawk ultimately identified SPEL Technologies, Private Limited (“SPEL”) as a buyer.

⁶ *Trustee’s Expedited Application for Employment of Blackhawk Technologies, LLC*, ECF No. 168, at ¶ 5.

⁷ *Id.* at ¶ 6.

⁸ *Intellectual Property Monetization Agreement*, *id.* at pp. 15–25.

⁹ *Order Approving Trustee’s Application for Employment of Professional (Doc. 168)*, ECF No. 172.

In February of 2021, the Trustee sought approval of bid procedures and an Asset Purchase Agreement (“APA”) with SPEL.¹⁰ No party filed an objection; the Court approved the bid procedures and APA by order dated March 16, 2021.¹¹ On May 28, 2021, the Trustee reported that she had consummated the sale to SPEL and the estate had received sale proceeds totaling \$345,600.00.¹²

THE MOTION TO PAY

By the Motion to Pay, the Trustee requests leave to immediately pay Blackhawk a commission, which the Trustee calculates to be \$86,400.00: 25% of \$345,600.00, the total proceeds of the asset sale. No party objects to the 25% commission rate, nor does any party complain that Blackhawk did not earn a commission.

Kasper and AMWAT argue that although the Court may approve an amount due to Blackhawk at this time, the Trustee should not be

¹⁰ *Trustee’s Expedited Motion for Entry of an Order: (A) Approving Sale Asset Purchase Agreement; (B) Authorizing the Sale of Debtor’s Assets Subject to Higher and Better Offers Free and Clear of Liens, Claims, Encumbrances and Interests; and (C) Approving Bidding Procedures*, ECF No. 240. The Trustee also noticed her intent to sell Debtor’s assets pursuant to the APA. *Notice of Intention to Sell Property of the Estate Free and Clear of Liens*, ECF No. 244.

¹¹ *Order Granting Trustee’s Expedited Motion for Entry of an Order: (A) Approving Sale Asset Purchase Agreement; (B) Authorizing the Sale of Debtor’s Assets Subject to Higher and Better Offers Free and Clear of Liens, Claims, Encumbrances and Interests; and (C) Approving Bidding Procedures (Doc. 240)*, ECF No. 252.

¹² *Report of Sale*, ECF No. 267.

permitted to pay Blackhawk's commission until the estate is fully administered and the Trustee is prepared to make a final distribution. Kasper and AMWAT suggest that this estate may be administratively insolvent. They assert that Blackhawk's commission is an administrative expense claim that should be paid *pro rata* with other administrative claims having the same priority under the Bankruptcy Code.¹³

FSU objects to the amount the Trustee proposes to pay Blackhawk. The Trustee calculated Blackhawk's proposed commission based on 100% of the proceeds from the sale of tangible and intangible assets. FSU argues that Blackhawk's commission due from the estate on the sale of intangible assets is to be calculated based on the amount due to the Trustee, which is 80% of proceeds of the sale of the intangible assets.¹⁴

DISCUSSION

Blackhawk is entitled to the 25% commission approved by the Court.

"The starting point for any discussion concerning a professional's fee is the relevant statutory framework set out in 11 U.S.C. §§ 327–

¹³ Both Kasper and AMWAT are entitled to administrative claims. *See Agreed Order Granting Motions of Kasper Holdings of Tallahassee, LLC Allowing Administrative Claim (Doc. 156 & 186)*, ECF No. 211; *Agreed Order Granting Residential & Commercial Transport Company, LLC d/b/a AMWAT Moving Warehousing and Storage's Agreed Motion for Allowance of an Administrative Expense Claim [ECF No. 179]*, ECF No. 181.

¹⁴ FSU does not quarrel with payment of Blackhawk's 25% commission on 100% of the proceeds of sale of the tangible personal property.

330.”¹⁵ Section 327 authorizes the Trustee to employ, with bankruptcy court approval, professionals to represent or assist her in carrying out her duties under the Bankruptcy Code.¹⁶ Section 328(a) authorizes the Trustee to employ a professional on a contingency basis.¹⁷ Section 330 authorizes the Court to award an employed professional reasonable compensation and necessary expenses.¹⁸

Once the terms of a professional’s employment are approved under Section 328, they are not subject to being reduced as unreasonable under Section 330(a).¹⁹ Pursuant to Section 328(a), the Court may deviate from the preapproved compensation only if it proves to have been “improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.”²⁰ Nothing in this case suggests that the 25% commission to Blackhawk was improvident. In fact, by all

¹⁵ *Miller Buckfire & Co. v. Citation Corp. (In re Citation Corp.)*, 493 F.3d 1313, 1318 (11th Cir. 2007).

¹⁶ 11 U.S.C. § 327(a).

¹⁷ 11 U.S.C. § 328(a).

¹⁸ 11 U.S.C. § 330(a)(1).

¹⁹ *In re Clark*, Case No. 12-30716-KKS, 2014 WL 10250672, at *2 (Bankr. N.D. Fla. July 28, 2014) (overruling objection to Trustee’s application to pay special counsel pursuant to an order authorizing special counsel’s employment on a 33.3% contingency fee basis. “Section 328 applies when the bankruptcy court approves a particular rate or means of payment, and § 330 applies when the court does not do so.”). *See also, In re ASARCO, LLC*, 702 F.3d 250, 257–58 (5th Cir. 2012); *In re Fundamental Long Term Care, Inc.*, 626 B.R. 51, 57 (Bankr. M.D. Fla. 2021) (citing *Clark*, 2014 WL 10250672, at *2); *In re Chewing & Frey Sec., Inc.*, 328 B.R. 899, 911 (Bankr. N.D. Ga. 2005).

²⁰ 11 U.S.C. § 328(a); *Fundamental Long Term Care, Inc.*, 626 B.R. at 58.

accounts the opposite is true: Blackhawk's efforts generated an excellent result.

Blackhawk's 25% commission on the sale of intangible assets shall be based on the Trustee's 80% of the proceeds.

The Court has ruled that FSU is entitled to 20% of the proceeds from the sale of intangible assets.²¹ Based on that ruling, FSU's argument that as to the sale of intangible assets Blackhawk's 25% commission from the estate should be based on the Trustee's 80% of the proceeds is correct. This argument is fully supported by the Blackhawk Agreement, which provides, in pertinent part:

Client [the Trustee] shall pay *Blackhawk fees equal to the sum of twenty-five percent (25%) of the Gross Revenue received by Client* [the Trustee] . . . Blackhawk acknowledged that Client [the Trustee] has an agreement with Florida State University [FSU] whereby Client will only receive 80% of any upfront payment for the IP Assets. *Blackhawk's fee shall be based solely on amounts received by Client*, as Blackhawk has a separate agreement with Florida Statue [sic] University.²²

Blackhawk's commission due from the estate based on 80% of the proceeds from the sale of intangible assets is \$75,840.00.²³

²¹ See Order Granting Florida State University and Florida State University Research Foundation Inc.'s Motion to Compel Payment in Accordance with the Order Granting Agreed Motion for Approval of Compromise and Settlement (D.E. 222), ECF No. 335.

²² ECF No. 168, pp. 16–17 (emphasis added).

²³ The Trustee received \$168,960.00 (80% of \$211,200.00) for the sale of the intangible property and \$134,400.00 (100%) for the sale of the tangible property. Thus, Blackhawk is entitled to 25% of \$303,360.00, which is \$75,840.00.

The Trustee may pay Blackhawk at this time.

Neither Kasper nor AMWAT cite controlling case law in support of their argument that it is premature to permit the Trustee to pay Blackhawk now. The cases Kasper and AMWAT cite are distinguishable.

Kasper relies on cases that involve interim compensation for debtor's Chapter 11 counsel approved under Section 331,²⁴ interim compensation awarded to Chapter 11 creditor's committee's counsel,²⁵ and compensation to post-petition creditors and suppliers.²⁶ Kasper cites cases in which brokers were denied administrative expense claims altogether, but those cases are inapposite. Here, unlike in those cases, Blackhawk complied with the procedural requirements of the Bankruptcy Code and Rules for approval of its commission.²⁷

Cases AMWAT cites are similarly distinguishable. In *Chewning & Frey Security, Inc.*, special counsel's contingency fee order specifically provided: "[P]ayment of compensation as set forth in Trustee's Application is subject to allowance by the Court upon application, notice

²⁴ *Specker Motor Sales Co. v. Eisen*, 393 F.3d 659 (6th Cir. 2004) (a case highly criticized).

²⁵ *In re CHC Indus. Inc.*, Case No. 8:03-bk-2077-PMG, 2006 WL 4968122 (Bankr. M.D. Fla. Sept. 5, 2006).

²⁶ *In re Fla. W. Gateway, Inc.*, 180 B.R. 299 (Bankr. S.D. Fla. 1995).

²⁷ See ECF No. 329, p. 13 for cited cases.

and hearing thereon.”²⁸ Neither the Application to Employ Blackhawk nor the order authorizing the Trustee’s retention of Blackhawk as broker contain such language. To the contrary, the Application to Employ Blackhawk specified the commission of 25%, and the manner to calculate the commission as to the intangible assets is clearly set forth in the Blackhawk Agreement.²⁹

Other cases AMWAT cites are equally inapplicable because the Motion to Pay does not equate to a request for this Court to rearrange priority of payment of claims using equitable means.³⁰ No cases cited by Kasper or AMWAT involve a broker’s or other professional’s percentage commission, or fee, approved under Section 328.

Kasper holds an allowed administrative expense claim pursuant to an order entered on September 22, 2020.³¹ If, Kasper is entitled to a “superpriority” administrative expense claim, as it claims,³² Kasper should have no issue with the Trustee paying Blackhawk now. Such payment will leave sufficient funds with which to pay any super priority

²⁸ *In re Chewing & Frey Sec., Inc.*, 328 B.R. 899, 907 (Bankr. N.D. Ga. 2005).

²⁹ ECF No. 168, pp. 16–17. The order approving the Trustee’s retention of Blackhawk specified that “all of the terms set forth in the agreement between the Trustee and Blackhawk Technologies, LLC, is APPROVED.” ECF No. 172, ¶ 1.

³⁰ ECF No. 331, ¶ 13 for cited cases.

³¹ ECF No. 211.

³² *See* ECF No. 329, pp. 9–10.

claims, even if lower tier administrative claims may only be paid *pro rata*. AMWAT has also been awarded an allowed Chapter 11 administrative claim because it provided valuable storage services to the estate post-petition.³³ But, AMWAT does not have a claim previously allowed by the Court after notice to creditors and parties in interest, as does Blackhawk.

Kasper and AMWAT received and had opportunity to object to the Trustee's Application to Employ Blackhawk.³⁴ Neither filed an objection. Kasper and AMWAT also received the order approving the Trustee's employment of Blackhawk.³⁵ Neither sought reconsideration of nor appealed that order.³⁶

³³ ECF No. 181.

³⁴ ECF No. 168, pp. 10–14.

³⁵ *Proof of Service of Order Approving Trustee's Application for Employment of Professional* (Doc. 172), ECF No. 173.

³⁶ Kasper's counsel filed a Notice of Appearance on March 6, 2020, well in advance of the Trustee's employment of Blackhawk. *Notice of Appearance and Request for Service*, ECF No. 155. AMWAT filed a claim on September 13, 2019, also far in advance of the Trustee's retention of Blackhawk. *See Proof of Claim* 8-1. Although the first record appearance of counsel for AMWAT was upon filing a joint motion with the Trustee on August 20, 2020, that motion makes clear that AMWAT, and likely its counsel, had been in communication with the Trustee and her counsel well before that motion was filed. *Residential & Commercial Transport Company, LLC d/b/a AMWAT Moving Warehousing and Storage's Agreed Motion for Allowance of an Administrative Expense Claim*, ECF No. 179, ¶ 11 ("The Chapter 7 Trustee is currently in the process of marketing for sale the Debtor's equipment that continues to be preserved and stored in the Warehouse. The marketing and sale will require AMWAT to continue storing the equipment, despite the Trustee's inability to make monthly rent payments.").

CONCLUSION

The Trustee retained Blackhawk pursuant to Sections 327 and 328 of the Bankruptcy Code. Compensation awarded to professionals under Section 330(a)(1) is, as that section specifies, subject to Sections 326, 328, and 329. Compensation awarded under Section 330(a) is an allowed administrative expense pursuant to Section 503(b)(2), but compensation awarded under Section 328 is not mentioned in Section 503(b)(2), or elsewhere in Section 503.³⁷ Compensation of professionals under Section 328 is not “subject to” Section 330. For the reasons stated, it is:

ORDERED:

1. The Trustee’s *Motion to Pay Broker Blackhawk Technologies, LLC* (ECF No. 283) is GRANTED, in part, as set forth in this Order.
2. The Trustee is authorized to pay Blackhawk a commission of \$75,840.00, calculated on 80% of the proceeds from the sale of intangible assets and 100% of the proceeds from sale of the tangible assets.

³⁷ 11 U.S.C. § 503(b)(2).

3. The Objections filed by Kasper and AMWAT (ECF Nos. 288 and 289) are OVERRULED.
4. The Objection filed by FSU (ECF No. 315) is SUSTAINED as provided in this Order.

DONE and ORDERED on January 20, 2022.



Karen K. Specie
Chief U.S. Bankruptcy Judge

Counsel for the Chapter 7 Trustee is directed to serve a copy of this Order on interested parties and file a proof of service within three (3) days of entry of this Order.