

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

IN RE:

GENERAL CAPACITOR, LLC,

Debtor.

CASE NO.: 19-40279-KKS
CHAPTER: 7

ORDER DENYING *MOTION FOR RECONSIDERATION OF ORDER*
GRANTING, IN PART, MOTION TO PAY BROKER BLACKHAWK
TECHNOLOGIES, LLC (DOC. 336) (ECF NO. 350)

THIS MATTER is before the Court upon the motion (“Motion”)¹ filed by Kasper Holdings of Tallahassee, LLC (“Kasper”) seeking “reconsideration” of this Court’s order authorizing the Chapter 7 Trustee (“Trustee”) to pay the Broker a commission of \$75,840.00.² No party filed a response to the Motion. While the Court appreciates the clarity of Kasper’s restated argument in the Motion, the Court still disagrees with Kasper’s conclusion. For that reason, the Motion is due to be denied.

The issue at hand requires perusal of certain sections of the Bankruptcy Code pertaining to compensation of professionals. Relevant

¹ *Motion for Reconsideration of Order Granting, in part, Motion to Pay Broker Blackhawk Technologies, LLC (ECF No. 336)*, ECF No. 350.

² *Order Granting, In Part, Motion to Pay Broker, Blackhawk Technologies, LLC (ECF No. 283)*, ECF No. 336.

here is compensation of a brokerage firm, Blackhawk Technologies, LLC (“Blackhawk”). The Trustee retained Blackhawk, with Court approval, to assist in the marketing and sale of assets.

We begin by looking at the Trustee’s application to employ Blackhawk (“Application”).³ That Application, which Kasper received and to which it did not file an objection, specifically requested employment of Blackhawk pursuant to Sections 327(a) and 328(a) of the Bankruptcy Code.⁴ The Application also specified that Blackhawk’s compensation was to be a percentage of the amount for which the assets were sold.⁵ The approved Application specifically provided that Blackhawk’s compensation “should not be subject to the standard of review under Section 330”⁶ The order approving the Application specified that Blackhawk was employed pursuant to Sections 327(a) and 328(a) and made no mention of Section 330.⁷

³ *Trustee’s Expedited Application for Employment of Blackhawk Technologies, LLC*, ECF No. 168.

⁴ *Id.* at pp. 8–9.

⁵ *Id.* at ¶ 6.

⁶ *Id.* at ¶ 21.

⁷ *Order Approving Trustee’s Application for Employment of Professional (Doc. 168)*, ECF No. 172, ¶ 2.

DISCUSSION

Case law is clear that compensation established under 328(a) of the Bankruptcy Code is not subject to later adjustment pursuant to Section 330(a).⁸ Once the Court approved the Trustee's Application to employ Blackhawk, the amount of Blackhawk's compensation was firmly established, unless those terms were later proved to be "improvident in light of developments not capable of being anticipated at the time."⁹

Here, no party, including Kasper, claims that the amount of Blackhawk's compensation should be reduced or adjusted. Rather, Kasper quarrels with the Court's determination that the Trustee may pay Blackhawk now.

Kasper argues that Blackhawk's compensation is an administrative claim under 11 U.S.C. §503(b)(2) that must be paid along with all administrative claims of equal priority. But this argument misses the mark. Section 503(b)(2) specifically includes "compensation . . . awarded

⁸ See, e.g., *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); *In re Hungry Horse, LLC*, 574 B.R. 740, 746 (Bankr. D. N. Mex. 2017); *In re Clark*, Case No. 12-30716-KKS, 2014 WL 10250672, at *2 (Bankr. N.D. Fla. July 28, 2014); *In re Chewing & Frey Sec., Inc.*, 328 B.R. 899, 911 (Bankr. N.D. Ga. 2005).

⁹ 11 U.S.C. § 328(a).

under section 330(a)” but makes no mention of compensation awarded under Section 328(a).¹⁰

Kasper attempts to bootstrap Section 328(a) compensation into Section 503(b)(2), by relying on the language in Section 330(a) that provides that after notice and a hearing, and *subject to section 328*, the court may award reasonable compensation to a professional employed under Section 327.¹¹ But courts have interpreted the “subject to” language in Section 330(a) to mean that once compensation to a professional is awarded under section 328(a), that compensation cannot be revisited or revised after the fact because of the prohibition of such adjustments that is a vital part of Section 328(a).¹²

Courts, including this one, do not read the “subject to” language in 330(a) as language of inclusion; rather, this language is considered limiting.¹³ Nowhere does the Bankruptcy Code or do the courts interpret

¹⁰ 11 U.S.C. §503(b)(2)

¹¹ 11 U.S.C. § 330(a)(1).

¹² *See, e.g., In re Nat'l Gypsum Co.*, 123 F.3d 861, 862–63 (5th Cir. 1997); *Fundamental Long Term Care*, 626 B.R. at 57 (citing *Hungry Horse*, 574 B.R. at 746); *In re Clark*, 2014 WL 10250672, at *2; *Chewing & Frey Sec.*, 328 B.R. at 911.

¹³ Cases cited *supra* note 12; *see generally*, *A Guide to Reading, Interpreting and Applying Statutes*, Georgetown University Law Center, 12 <https://www.law.georgetown.edu/wp-content/uploads/2018/12/A-Guide-to-Reading-Interpreting-and-Appling-Statutes-1.pdf> (Last visited Feb. 25, 2022) (noting that the “subject to . . . may limit the scope of the statute, or may indicate that a certain part of the statute is controlled or limited by another section or statute”).

the “subject to” language in section 330(a) in such a way as to make compensation awarded under Section 328(a) equate to an award under section 330(a), which then would be subject to Section 503(b)(2). Kasper fails to connect these dots.

The legislative history of Section 328(a) is clear: by enacting this section, Congress’ goal was to facilitate trustees’ ability to hire professionals to assist in liquidating estate assets.¹⁴ “Congress enacted § 328(a) to eliminate the previous uncertainty associated with professional compensation in bankruptcy proceedings, even at the risk of potentially underpaying, or, conversely, providing a windfall to, professionals retained by the estate under § 328(a).”¹⁵ Courts generally view professional fee approval under Section 328(a) as “pre-approved fees.”¹⁶ “[P]rofessionals employed by the estate have the option of being compensated under either § 328(a) or § 330(a).”¹⁷

The differences between §§ 328 and 330 affect the timing and process of the court's review of fees. For instance, under

¹⁴ *In re Coho Energy*, 395 F.3d 198, 204 (5th Cir. 2004).

¹⁵ *ASARCO*, 702 F.3d at 258.

¹⁶ *See, e.g., In re Nestor*, 628 B.R. 707, 720 (Bankr. S.D. Fla. 2019) (Section 328(a) “is the Bankruptcy Code section under which contingency fee arrangements are authorized”); *In re Clark*, 2014 WL 10250672, at *2 (“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.”).

¹⁷ *ASARCO*, 702 F.3d at 260 (citing *In re Texas Sec., Inc.*, 218 F.3d 443, 445 (5th Cir. 2000); *Nat'l Gypsum*, 123 F.3d at 862).

§ 328, the bankruptcy court reviews the fee at the time of the agreement and departs from the agreed fee only if some unanticipated circumstance makes the terms of that agreement unfair. Under § 330, the court reviews the fees after the work has been completed and looks specifically at what was earned, not necessarily at what was bargained for at the time of the agreement. Bankruptcy professionals are aware that the amount of any professional's fees will be less certain if the bankruptcy court awards fees under § 330. Such uncertainty prompted Congress to enact § 328 to allow professionals to have greater certainty as to their eventual payment.¹⁸

Here, the Trustee's retention of Blackhawk pursuant to Section 328(a) to sell tangible and intangible assets was no different than if the Trustee had retained Blackhawk to sell real property. In such a situation, the real estate broker would be paid a percentage commission at closing if he or she procured a sale that actually closed. If that broker did not obtain a willing and able buyer, and no sale closed, the broker would be entitled to no compensation. That is precisely the way the Trustee retained and proposed to pay Blackhawk here.

The district court in *In re Hannah Baby, LLC v. Chaffe Securities, Inc.*, affirmed the bankruptcy court's order allowing payment of professional fees to the debtor's restructuring advisor and investment

¹⁸ *Miller Buckfire & Co. v. Citation Corp. (In re Citation Corp.)*, 493 F.3d 1313, 1318–19 (11th Cir. 2007).

banker that were pre-approved under Section 328(a).¹⁹ Similarly in *In re John Q. Hammons Fall 2006, LLC*, over objection of a creditor, the bankruptcy court awarded and approved payment of a professional's pre-approved "Restructuring Transaction" fee of \$7,000,000.00 because the agreement provided that the fee would be paid upon consummation of the transaction, which did, in fact, occur.²⁰

Addressing fee applications and objections to professional fees approved under Section 328(a), Bankruptcy Judge Robert Drain stated:

Section 328(a) reflects the view that professionals are entitled to know what they are likely to be paid for their work. If you agree to hire someone on a flat fee or percentage-fee basis, there should be some comfort that the compensation will be paid and that a court will not simply impose a new and different deal after all the work has been done.²¹

¹⁹ *In re Hannah Baby, LLC v. Chaffe Secs., Inc.*, Case No. 1:19-cv-160-LG-RHW, Case No. 1:19-cv-173-LG-RHW, 2020 WL 1249905 (S.D. Miss. Mar. 16, 2020).

²⁰ *In re John Q. Hammons Fall 2006, LLC*, 600 B.R. 436, 441, 447 (Bankr. D. Kansas) ("Because the Agreement provides that UBS is entitled to a Restructuring Transaction Fee of \$7,000,000 upon consummation of a Restructuring Transaction, UBS will be awarded \$7,000,000 as a Restructuring Transaction Fee.") The order approving employment of the professional specifically authorized the debtors to pay "all fees and expenses of [the professional] on the terms and conditions of [the Agreement]" *Id.* at 441. The objecting creditor became obligated to pay all fees and expenses under the confirmed joint plans of reorganization, to the extent the fees were awarded by the bankruptcy court. *Id.* at 439. Had the parties here included such language in the order approving the Trustee's employment of Blackhawk, perhaps Kasper's objection and this ruling could have been avoided. But even with such language in the order, the creditor in *John Q. Hammons* opposed the award and obligation to pay the professional.

²¹ *In re Relativity Fashion, LLC*, Case No. 15-11989(MEW), 2016 WL 8607005, at *3 (Bankr. S.D.N.Y. Dec. 16, 2016).

Judge Drain concluded his well-reasoned and exhaustive discussion of section 328(a) and how it affects professional fee applications by approving the fee application before him on the basis that the professional “had satisfied the terms of its engagement letter, and . . . is entitled to the fee that it negotiated”²²

In *In re Wolf*, the Chapter 7 trustee retained an attorney to represent him on a contingency fee basis.²³ The bankruptcy court in *Wolf* approved that fee agreement under Section 328(a), but later disallowed the contingency fee and instead awarded an hourly rate.²⁴ The district court reversed and awarded the 1/3 contingency fee; the Ninth Circuit affirmed.²⁵

Kasper urges that Blackhawk’s compensation, which it maintains is governed by 503(b)(2), must be treated, and paid, with the priority of other administrative claims under Section 726(b).²⁶ But that is not what the Bankruptcy Code says. This argument would only be correct if Blackhawk’s claim were one covered by Section 503(b), which it is not.

²² *Id.* at *12.

²³ *In re Wolf*, 862 F.2d 319, 1998 WL 124779, at *2 (9th Cir. 1988) (“[T]he bankruptcy court and the trustee faithfully complied with section 328 in employing” the professional.)

²⁴ *Id.* at *1.

²⁵ *Id.* at *5.

²⁶ Tellingly, this *pro rata* distribution would include Kasper’s allowed administrative claim.

Only claims described in Section 503(b)(2) are covered by Section 507(a)(2), and then governed to be paid *pro rata* under Section 726(b). Once again, Kasper fails to connect the dots between these sections of the Bankruptcy Code. Kasper cites no authority in support of this argument, and the Court has located none.

All parties, including Kasper, agree that Blackhawk has performed everything the Trustee retained it to do. No party objects to, or even questions that Blackhawk has earned the compensation it contracted for and that this Court approved under section 328(a). Rather, Kasper's argument—that Blackhawk's compensation should be paid *pro rata* with other administrative claims because this estate may be administratively insolvent—essentially seeks to reduce Blackhawk's compensation outside of the purview of Section 328(a). This argument contradicts the plain language of Section 328(a) and other sections of the Bankruptcy Code. If the Court were to rule as Kasper requests, such a ruling would be contrary to the purpose and legislative history of Section 328(a).

In light of the history of this case and the Chapter 11 debtor's prior unsuccessful attempt to sell the same assets, the possibility that this estate might become administratively insolvent was capable of being

anticipated when the Trustee retained Blackhawk. Because Blackhawk's retention was specifically conditioned on Sections 327 and 328(a) of the Bankruptcy Code after notice to all creditors, including Kasper, and because Blackhawk performed what it was retained to do, it is appropriate to allow the Trustee to pay Blackhawk its commission now.

For the reasons stated, it is

ORDERED: the *Motion for Reconsideration of Order Granting, in Part, Motion to Pay Broker Blackhawk Technologies, LLC (Doc. 336)*, ECF No. 350, is DENIED.

DONE and ORDERED on February 25, 2022.

A handwritten signature in black ink, appearing to read 'K. Specie', written over a horizontal line.

KAREN K. SPECIE
Chief U. S. Bankruptcy Judge

Counsel for Kasper Holdings of Tallahassee, LLC 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.