IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
LERNOUT & HAUSPIE SPEECH PRODUCTS N.V.,	:	Case No. 00-4398 (JHW)
Debtors.	:	

OBJECTION OF LIQUIDATING TRUSTEE TO FINAL APPLICATION OF MILBANK, TWEED, HADLEY & McCLOY LLP, AS GENERAL BANKRUPTCY COUNSEL FOR LERNOUT & HAUSPIE SPEECH PRODUCTS N.V., UNDER 11 U.S.C. §§ 330 AND 331, SEEKING APPROVAL AND ALLOWANCE OF COMPENSATION FOR SERVICES RENDERED AND FOR REIMBURSEMENT OF EXPENSES FROM NOVEMBER 29, 2000 THROUGH AND INCLUDING APRIL 2, 2004

The Litigation Trustee ("**Litigation Trustee**") of the Lernout & Hauspie Speech Products N.V. Litigation Trust ("**Trust**"), by and through his undersigned counsel, Bilzin Sumberg Baena Price & Axelrod LLP, hereby files this objection (the "**Objection**") to the *Final Application of Milbank, Tweed, Hadley & McCloy LLP, as General Bankruptcy Counsel for Lernout & Hauspie Speech Products N.V., Under 11 U.S.C. §§ 330 and 331, Seeking Approval and Allowance of Compensation for Services Rendered and for Reimbursement of Expenses From November 29, 2000 Through and Including April 2, 2004* (the "**Final Fee Application**") dated as of June 1, 2004, pursuant to §§ 105, 328-331 of title 11 of the United States Code, 11 U.S.C. § 101 *et seq.* (the "**Bankruptcy Code**"), Rules 3007, 7001, 7013 and 9014 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**") and respectfully submits the following:

PROCEDURAL BACKGROUND

1. On November 29, 2000, the Debtor and its affiliated debtors and debtors-in-possession, L&H Holdings, USA, Inc. ("**L&H Holdings**") and Dictaphone Corporation ("**Dictaphone**" and, together with the Debtor and L&H Holdings, the "**L&H Group**"), filed voluntary petitions in this Court under chapter 11 of the Bankruptcy Code.

2. On March 11, 2003, the Official Committee of Unsecured Creditors for the Debtor filed the Official Committee of Unsecured Creditors' Plan of Liquidation for Lernout & Hauspie Speech Products N.V. under chapter 11 of the Bankruptcy Code (the "**Plan**"). On April 10, 2003, the Bankruptcy Court approved the disclosure statement relating to the Plan, and on May 30, 2003, the Bankruptcy Court entered the *Findings of Fact and Conclusions of Law Relating to Order Under 11 U.S.C. § 1129 of the Bankruptcy Code Confirming Official Committee of Unsecured Creditors' Plan of Liquidation for Lernout & Hauspie Speech Products N.V. under chapter 11 of the Bankruptcy Code* (the "**Confirmation Order**").

3. The effective date of the Plan is April 2, 2004, pursuant to that certain *Notice of (A) Effective Date of the Official Committee of Unsecured Creditors' Plan of Liquidation for Lernout & Hauspie Speech Products N.V. Under Chapter 11 of the Bankruptcy Code, and (B) Appointment of Plan Administrator* (the "**Effective Date Notice**"), dated as of April 5, 2004. Pursuant to the Effective Date Notice, all final fee applications for professional fees must be filed with the Bankruptcy Court by June 1, 2004, and the Bankruptcy Court must receive all objections to such fee applications no later than June 16, 2004.

4. On June 1, 2004, Milbank filed the Final Fee Application.

FACTUAL BACKGROUND

5. The Litigation Trustee has been charged with the review and analysis of possible claims the Trust may have against various third parties.

6. These claims include, among others, causes of action (1) against financial advisors Klynfeld Peat Marwick Goerdeler Bedrijsrevisoren and KPMG LLP (collectively "**KPMG**")

with respect to their actions and/or inactions regarding the Debtor, (2) against several Korean banks with respect to factoring agreements and other financial arrangements involving the Debtor and/or its subsidiaries, and (3) against certain banks, investment banks and others for the avoidance of fraudulent transfers (collectively the "**Claims**").[1]

7. Upon information and belief, certain of the Claims may now be time-barred by applicable statutes of limitation. Accordingly, the Litigation Trustee may be barred from recovering substantial amounts on the Claims. The exact amount of the damages lost by the running of the applicable statutes of limitations is not now known with any certainty, but may be as much as $400,000,000.

8. If statutes of limitations preclude the Trust from pursuing any of the Claims, Milbank, as Debtor's general bankruptcy counsel, may be liable for failing to timely assert such Claims.[2]

OBJECTION

A. Approval of a final fee application implies acceptable professional services.

9. Section 330(a)(3)(A) of the Bankruptcy Code provides in pertinent part:

> In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including –
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

10. The language of § 330(a)(3)(A) refers to the court's duty to consider "the nature, the extent, and the value of such services." 11 U.S.C. § 330(a)(3)(A). A fee application proceeding

[1] The Litigation Trustee reserves the right to raise such other and further causes of action for malpractice as may be discovered while preparing the malpractice claim against Milbank. The Claims listed are not exclusive, and the Litigation Trustee reserves the right to add to or take away from this list of potential causes of action as the facts supporting such causes of action demand.

[2] The Litigation Trustee's belief that statutes of limitation may have run on certain causes of action against KPMG or the Korean banks, or on fraudulent transfer avoidance actions against certain banks, investment banks and others is not to be construed as an admission that any applicable statutes of limitation have run. Whether or not the statutes of limitation have run is a matter to be decided in other courts of competent jurisdiction.

necessarily includes an inquiry into the quality of professional services rendered by a professional. *See Grausz v. Englander*, 321 F.3d 467, 473 (4th Cir. 2003).

11. This inquiry does not occur in a vacuum. Inquiry demands answer, and the answer in the context of a fee application sounds in final judgment either approving or denying a fee application. *See id.*; *In re Iannochino*, 242 F.3d 36, 44 (1st Cir. 2001) (holding that a fee award that determines all of the compensation owed to an attorney pursuant to § 330 may be considered a final judgment).

12. The final judgment approving a fee application pursuant to § 330 contains an implicit finding that a professional's services were acceptable. *See Grausz*, 321 F.3d at 473; *Iannochino*, 242 F.3d at 47 ("[a] bankruptcy court therefore makes an implied finding of quality and value in the professional services provided to [the estate] during the bankruptcy."); *In re Intelogic Trace Inc.*, 200 F.3d 382, 387 (5th Cir. 2000) ("[b]y granting Ernst & Young's fee application, the bankruptcy court implied a finding of quality and value in Ernst & Young's services.").

13. Professional malpractice can lead to the denial of all requested fees. *See In re W.J. Servs., Inc.*, 139 B.R. 824, 827-28 (Bankr.S.D.Tex. 1992) ("The authorities agree that misconduct of counsel constitutes a sufficient reason for denying any and all attorney's fees to applicant counsel."), *disapproved of on other grounds, In re Walker*, 51 F.3d 562, 570-71 (5th Cir. 1995); *id.* ("Courts have repeatedly used fee denial as the most effective weapon against malpractice."); *In re Dalton*, 95 B.R. 857, 860 (Bankr. M.D.Ga. 1989) (holding that counsel for debtors was not entitled to attorney's fees where his services failed to meet minimum acceptable standards); *In re Chin*, 47 B.R. 894, 897 (S.D.N.Y. 1984) (affirming a bankruptcy judge's order remitting an attorney's fees upon a finding that the attorney was negligent in representing the debtor); *In re Wilson*, 11 B.R. 986, 991 (Bankr. S.D.N.Y. 1981) (holding that an attorney's fees should be returned to the estate where the representation was incompetent).

B. Approval of a final fee application and the doctrine of *res judicata.*

14. In the Third Circuit, the test for determining whether a claim is barred by the doctrine of *res judicata* (claim preclusion) is whether there has been (1) a final judgment on the merits in

a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same causes of action. *Corestates Bank, N.V. v. Huls Am. Inc.,* 176 F.3d 187, 194 (3d. Cir. 1999); *Board of Trustees of Trucking Employees Welfare Fund, Inc. v. Centra*, 983 F.2d 495, 504 (3d. Cir. 1992); *Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 963 (3d. Cir. 1991); *U.S. v. Athlone Indus., Inc.*, 746 F.2d 977, 983 (3d. Cir. 1984); *In re PHP Healthcare Corp.*, 2002 WL 923932 at * 2 (Bankr. D.Del. May 7, 2002).

15. As noted above, approval of the Final Fee Application would be a final judgment with an implied finding that the services provided by Milbank were acceptable. In other words, it would be tantamount to a finding that Milbank did not commit malpractice. It is clear that the elements of the doctrine of *res judicata* would be met and the Litigation Trustee would be prevented from pursuing a malpractice claim against Milbank after the Final Fee Application is approved.

16. The standard enunciated by the courts that have addressed the issue of malpractice claims in fee application proceedings is clear – the Litigation Trustee must raise the issue of malpractice claims he knows or should have known about at the time of the fee hearing since the bankruptcy court is an effective forum to litigate a malpractice claim. *See Grausz*, 321 F.3d 467 at 473 ("Because it might not appear at first blush that a malpractice claim should be asserted in a bankruptcy fee proceeding, two practical considerations should be taken into account. These are (1) whether [plaintiff] knew or should have known before the fee proceeding ended of the real likelihood of a malpractice claim, and (2) whether the fee proceeding in bankruptcy court provided [plaintiff] an effective forum to litigate his claim.") (internal citations omitted); *Intelogic*, 200 F.3d at 388, 389; *Epstein v. Visher*, 1997 WL 231108, at *3 (N.D.Cal. March 24, 1997) ("Claims are barred if they were actually brought, or if they *could have been brought* in the prior proceeding.") (emphasis in original), *aff'd*, 152 F.3d 924 (9th Cir. 1998) (Table, Text in Westlaw, No. 97-15893).

17. Although the Litigation Trustee is compelled to object to the Final Fee Application to preserve its malpractice claim against Milbank, the depth and scope of any such malpractice

claim has yet to be determined. Therefore, before the Court enters an order on the Final Fee Application, the Court should allow the Litigation Trustee the opportunity to prove the malpractice claim against Milbank, or approve the Final Fee Application on one of the criteria set forth below:

C. The Court may stay the fee application proceedings pending the Litigation Trustee's consideration of the Claims to determine if any of them are time barred and develop any malpractice claim that may exist.

18. The case law that addresses the propriety of raising malpractice claims in the context of a fee application proceeding generally concern plaintiffs that failed to raise any objection to the final fee application and instead waited to file separate malpractice actions in state court. *See Grausz*, 321 F.3d 467, 473, 474 (debtor filed malpractice action in circuit court after final fee application approved); *Iannochino*, 242 F.3d at 41 (debtors filed malpractice action in Massachusetts state court after final fee application approved); *Intelogic*, 200 F.3d at 385 (trustee filed malpractice action in Texas state court after final fee application approved); *but see Shaw v. Replogle*, 2000 WL 1897344, at * 1 (N.D. Cal. Dec. 22, 2000) (debtor objected to fee application on the basis of professional malpractice, lost on the merits, and subsequently filed a malpractice action in San Francisco County Superior Court), *aff'd*, 22 Fed.Appx. 899, 2001 WL 1662644, at *1 (9th Cir. Dec. 28, 2001) (unpublished opinion), *cert. denied*, 537 U.S. 990 (2002).

19. Although the plaintiffs in the cases referenced above did not object to the respective final fee applications, the cases do reveal guidance for this Court on how to address a malpractice claim that *is* raised in a fee application proceeding.

20. Simply put, the Court may stay the hearing on the Final Fee Application to provide the Litigation Trustee with time to conduct discovery and develop a malpractice case pursuant to Part VII of the Bankruptcy Rules. *See Grausz*, 321 F.3d at 475 ("[i]f Grausz was concerned about not being able to finalize his malpractice damages at the time of the fee proceeding, *he could have requested a stay of the proceeding pending the court's resolution of Sampson's nondischargeability suit.*") (emphasis added); *Intelogic*, 200 F.3d at 390 ("Thus, even if [plaintiff] had only informed the bankruptcy court of its concerns and not immediately sought

affirmative relief for malpractice, the bankruptcy court could have stayed the fee hearing and permitted time for discovery and development under the procedures available in Part VII of the Bankruptcy Rules.").

21. The Litigation Trustee now knows of potential malpractice claim(s) prior to the hearing on the Final Fee Application. The extent of the damages is not now known with specificity. The Litigation Trustee will need time to consider litigation against KPMG and/or the Korean banks to determine if those causes of action (or any of them) are time barred, and must await the outcome of the avoidance actions filed against certain defendants in which fraudulent transfer claims were not asserted to develop any malpractice case that may arise therefrom.

22. The general awareness of a malpractice claim is enough to support the relief requested. Upon similar facts, the Fourth Circuit in *Grausz* found that staying the fee proceeding pending resolution of another suit was appropriate. In that case, the plaintiff Grausz argued that he could not have raised his malpractice claim in the fee proceeding because the claim was not mature. *See Grausz*, 321 F.3d at 475. According to Grausz, he would suffer no damages until later, when a *separate nondischargeability trial* concluded and the court denied Grausz a discharge. The Court stated that "if Grausz was concerned about not being able to finalize his malpractice damages at the time of the fee proceeding, he could have requested a stay of that proceeding pending the court's resolution of Sampson's nondischargeability suit." *Id.*

23. A similar situation arises in this case. Until a court rules on whether the claims are time-barred, the Litigation Trustee cannot accurately liquidate the damages caused by Milbank's malpractice.

24. The Court is also not constrained by the fact that a fee application proceeding is a contested matter. *See Intelogic*, 200 F.3d at 389 ("The Trustee argues that these malpractice claims are counterclaims that could only be raised in an adversary proceeding, and that because the fee hearing is a contested matter, and not an adversary proceeding, these claims could not be addressed at the fee hearing. We disagree.").

25. Bankruptcy Rule 3007 provides that an objection to a claim, coupled with a request for affirmative relief, becomes an adversary proceeding. *See* Fed.R.Bankr. 3007; *Intelogic*, 200 F.3d at 390 ("Had [plaintiff] objected to the fee application and included with its objection a claim for affirmative relief on account of the alleged malpractice, the matter would have become an adversary proceeding.").

26. Moreover, Bankruptcy Rule 9014 provides that "[t]he court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply." Fed.R.Bankr. 9014. "Under Part VII, the bankruptcy court is to apply the Federal Rules of Civil Procedure governing discovery in adversary proceedings." *Intelogic*, 200 F.3d at 390.

27. Accordingly, the Litigation Trustee objects to the entry of any order approving the Final Fee Application and requests this Court to stay the fee application proceeding for Milbank until the issue of Milbank's malpractice can be decided, subject to section D below.

D. Any order approving final fee application must preserve right of Litigation Trustee to pursue malpractice claim.

28. The Litigation Trustee does not oppose approval of the Final Fee Application *as long as its rights to pursue the malpractice claim are preserved.* The ability to pursue malpractice claims is a critical right of the Trust.

29. The *Grausz* case shows that the Court can stay the proceedings on the Final Fee Application to await another separate proceeding that will form the basis of any malpractice and allow time for the parties to prepare for an adversary proceeding. *See Grausz*, 321 F.3d at 475.

30. However, the Litigation Trustee believes that the facts of this case are unique enough that the Court may find it appropriate to approve the Final Fee Application while preserving the right of the Litigation Trustee to pursue its malpractice claim.

31. As stated above, the Litigation Trustee is not opposed to entry of an order approving the Final Fee Application provided that it expressly accomplishes the following:

a. Approval of the Final Fee Application will not prevent the Litigation Trustee from pursuing any malpractice claim against Milbank in this Court or any other court of

competent jurisdiction because of issue preclusion, claim preclusion, or any other theory at law or equity;

b. Approval of the Final Fee Application shall not be considered either an explicit or implicit finding on the quality or value of the professional services rendered by Milbank due to the pending malpractice action against Milbank;

c. Payments made pursuant to any approved Final Fee Application or previous interim fee applications are subject to disgorgement upon a finding of this Court, or any other court of competent jurisdiction, of damages to the Trust resulting from malpractice committed by Milbank; and

d. The Litigation Trustee shall not be limited in an award for damages for malpractice solely to the amount of Fees and Expenses awarded to Milbank pursuant to the Final Fee Application or any previously awarded interim fee applications.

32. The Litigation Trustee believes that the provisos referenced above provide the most appropriate method for accomplishing this goal.

CONCLUSION

WHEREFORE, for the reasons set forth above, it is respectfully requested that the Court enter an order either (a) staying the hearing on the Final Fee Application to permit time for discovery and development of the Litigation Trustee's malpractice claim, or (b) approving the Final Fee Application *subject to the provisos set forth herein*, and (c) granting the Litigation Trustee such other and further relief as is just and proper.

Dated: Wilmington, Delaware
June 16, 2004

Respectfully submitted,

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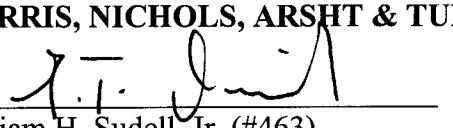
MORRIS, NICHOLS, ARSHT & TUNNEL



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