

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: : Chapter 11
Refco Inc., et al., : Case No.: 05-60006 (RDD)
Debtors. : (Jointly Administered)

**FIRST AND FINAL APPLICATION OF ELISE BERKOWER, CONSUMER PRIVACY
OMBUDSMAN, APPOINTED PURSUANT TO SECTION 332 OF THE BANKRUPTCY
CODE FOR FINAL APPROVAL AND ALLOWANCE OF COMPENSATION FOR
SERVICES RENDERED DURING THE PERIOD FROM NOVEMBER 6, 2006
THROUGH AND INCLUDING DECEMBER 26, 2006**

Name of Applicant: Elise Berkower

Authorized to Provide Professional Services to: United States Bankruptcy Court for the Southern District of New York

Date of Retention: November 7, 2006 (effective as of November 6, 2006)

Period for which compensation is sought: November 6, 2006 – December 26, 2006

Amount of Compensation requested: \$ 14,525.00

Amount of Expense reimbursement requested: \$ 0.00

This is a: _____ interim _____ x _____ final application
The total time expended for the preparation of this application is 3 hours and the corresponding compensation requested is \$ 900.00 (which amount is included in this final fee application). Although fees for the preparation of this application were incurred outside of the fee period, the remainder of this fee application characterizes them as having been incurred within the fee period in light of the final nature of this application.

This is the first and final fee application filed by Elise Berkower in these cases. No prior applications have been filed.

FIRST AND FINAL FEE APPLICATION OF ELISE BERKOWER, CONSUMER PRIVACY OMBUDSMAN,
(NOVEMBER 6, 2006 – DECEMBER 26, 2006)

NAME	POSITION; EXPERIENCE	HOURLY RATE	TOTAL HOURS	TOTAL COMPENSATION
Elise Berkower	Executive Vice President of Privacy Strategy, Chapell & Associates, LLC; admitted to practice in NY in 1984; certified as an Information Privacy Professional in 2005	\$300.00	48.42	\$14,525.00

SUMMARY TABLE OF SERVICES RENDERED DURING
ELISE BERKOWER'S COMPENSATION PERIOD
(NOVEMBER 6, 2006 – DECEMBER 26, 2006)

ACTIVITY	HOURS	FEES
Consumer Privacy Ombudsman's Interim Report to the Court	45.42	\$13,625.00
Preparation of Fee Application	3.00	\$900.00
Total	48.42	\$14,525.00

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FIRST AND FINAL APPLICATION OF ELISE BERKOWER, CONSUMER PRIVACY OMBUDSMAN, APPOINTED PURSUANT TO SECTION 332 OF THE BANKRUPTCY CODE, FOR FINAL APPROVAL AND ALLOWANCE OF COMPENSATION FOR SERVICES RENDERED DURING THE PERIOD FROM NOVEMBER 6, 2006 THROUGH AND INCLUDING DECEMBER 26, 2006

TO THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE:

Elise Berkower, Consumer Privacy Ombudsman (“Ombudsman”), appointed pursuant to Section 332 of the Bankruptcy Code, hereby submits her application (the “Application”) pursuant to 11 U.S.C. § 330, Rule 2016 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), the *Guidelines for Fees and Disbursements for Professionals in Southern District of New York Bankruptcy Cases*, adopted by the Court on June 24, 1991, and amended April 21, 1995 (together, the “Local Guidelines”), the *United States Trustee Guidelines for Reviewing applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330*, effective January 30, 1996 (the “United States Trustee Guidelines”) and the *Final*

Order Under 11 U.S.C. §§ 105 and 331, Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professional, dated December 13, 2005 (the “Interim Compensation Order”) for the allowance of final compensation for professional services rendered from November 6, 2006 through and including December 26, 2006 (the “Compensation Period”), and in support thereof, respectfully represents as follows:

I. INTRODUCTION

1. Bankruptcy Filing. On October 17, 2005 (the “Petition Date”), Refco Inc. and certain affiliates (“Debtors”) filed voluntary petitions for relief under chapter 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (as amended, the “Bankruptcy Code”). The Debtors continued to operate their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code until December 26, 2006.

2. Consumer Privacy Ombudsman. The Consumer Privacy Ombudsman was appointed by the United States Trustee on November 7, 2006 (effective November 6, 2006), pursuant to the *Ex Parte Order Under 11 U.S.C. §§ 332 and 363(b)(1) Appointing Consumer Privacy Ombudsman*, entered October 31, 2006 (Docket No. 3260), attached hereto as Exhibit “A.” On November 13, 2006, the Ombudsman filed her Report, issued pursuant to 11 U.S.C. §332(b). The Ombudsman appeared at the hearing on November 14, 2006 and answered the Court’s questions with regard to existing privacy and data protection laws as they related to the facts, circumstances and conditions of the Debtors’ proposed sale of “personally identifiable information,” as defined under 11 U.S.C. § 363(b)(1)(B).

3. Jurisdiction. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. Venue of the Debtors’ chapter 11 cases (the “Chapter 11 Cases”) is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding under 28 U.S.C. § 157(b)(2). The statutory predicate for the relief sought herein is section 330 of the Bankruptcy Code. Pursuant to

the Local Guidelines, a certification regarding compliance with the Local Guidelines is attached hereto as Exhibit “B.”

II. APPLICATION

4. The Ombudsman makes this final application for approval and allowance of compensation pursuant to section 330 of the Bankruptcy Code. In particular, she seeks approval of \$ 14,525.00 for legal services rendered in her capacity as Consumer Privacy Ombudsman.

5. The Ombudsman has not entered into any agreement, express or implied, with any other party for the purpose of fixing or sharing fees or other compensation to be paid for professional services rendered in these cases.

6. No promises have been received by the Ombudsman or any member of Chapell & Associates, LLC (“C&A”), her privacy consulting firm, as to compensation in connection with these cases other than in accordance with the provisions of the Bankruptcy Code.

7. The fees sought by this Application reflect an aggregate of 48.42 hours of time spent by the Ombudsman and recorded in performing her duties as Ombudsman at an hourly rate of \$300.00. The Ombudsman has taken all possible measures to reduce her fees in these cases, given the overall amount of professional fees incurred.

8. The Ombudsman rendered all services for which compensation is sought solely in connection with these cases, in furtherance of her duties and functions as Ombudsman.

9. C&A maintains computerized records of the time expended in the rendering of professional services required by Ms. Berkower’s responsibilities as Ombudsman. These records are maintained in the ordinary course of C&A’s practice. For the convenience of the Court and parties in interest, a billing summary for the period November 6, 2006 through and including December 26, 2006 is attached as part of the cover sheet, showing that it is the work of only Ms. Berkower for which compensation is sought. The compensation requested herein is based on the

customary compensation charged by the Ombudsman for similar services and by comparably skilled practitioners in her field.

10. Attached hereto as Exhibit “C” are time entry records broken down in tenths of an hour, based upon the United States Trustee Guidelines, setting forth a detailed description of services performed by Ms. Berkower in her capacity as Ombudsman.

11. C&A also maintains computerized records of all expenses incurred in connection with the performance of professional services. However, no such expenses were incurred in connection with the professional services performed in this matter.

III. SUMMARY OF PROFESSIONAL SERVICES RENDERED

14. The Ombudsman has performed services related only to the carrying out of her duties as Consumer Privacy Ombudsman.

15. In her capacity as Ombudsman, Ms. Berkower reviewed the privacy policy of www.refcofx.com provided by the attorneys for the Debtors, which had been printed out on June 20, 2006. Given that (a) the Debtors’ Petition Date was October 17, 2005, more than eight (8) months prior to the version of the privacy policy provided by the attorneys for the Debtors, (b) the Debtors operated multiple websites at which they collected customers’ personally identifiable information, (c) many of these websites were directed at non-United States citizens and subjects, and (d) at the time of her appointment, these websites had been taken down, Ms. Berkower used historical information accessible from the website www.archive.org to determine the relevancy of any previous versions of such policy and the policies of related websites.¹ Ms. Berkower reviewed the documents provided to her by the United States Trustee and the attorneys for the Debtors; sought and obtained additional information about the nature and origin of the personally

¹ See, e.g., the privacy policy for www.refcofx.com in effect on April 1, 2005, available at http://web.archive.org/web/20050305034926/www.refcofx.com/pp_disc.html, and the privacy policy for a Refco F/X United Kingdom website, www.refcofx.co.uk, as of June 1, 2005, available at http://web.archive.org/web/2005/0829140433/www.refcofx.co.uk/pp_disc.html.

identifiable information contained in the assets that the Debtors wished to sell; reviewed relevant U.S. and foreign laws relating to the collection and use of personal data; and drafted the report for the Court containing information pertinent to the facts, circumstances and conditions of the proposed sale by the Debtors of the asset consisting of personally identifiable information. The Ombudsman also appeared at the hearing on November 14, 2006 and responded directly to the Court's inquiries.

IV. FACTORS TO BE CONSIDERED IN AWARDING ATTORNEYS' FEES

16. The factors to be considered in awarding attorneys' fees as enumerated in *In re First Colonial Corp. of America*, 544 F.2d 1291, 1298-99 (5th Cir. 1977), have been adopted by most courts.² The Ombudsman respectfully submits that the consideration of these factors should result in this Court's allowance of the full compensation sought.

- (A) The Time and Labor Required. The Ombudsman was appointed on November 7, 2006, and had less than one (1) week to familiarize herself with the facts and circumstances of the case, and research the possible data protection law issues. The situation required a high degree of professional competence and expertise in order for the report to be completed in time for the hearing.
- (B) The Novelty and Difficulty of Questions. This was only the third instance, nation-wide, of the appointment of a Consumer Privacy Ombudsman under Bankruptcy Code section 332. Consequently, the questions involved were

² *In Re: Nine Assoc., Inc.*, 76 B.R. 943, 945 (S.D.N.Y. 1987). The factors embraced by the Fifth Circuit in *First Colonial* were adopted by the Fifth Circuit's decision in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), except that *First Colonial* also included the "spirit of economy" as a factor, which was expressly rejected by Congress in enacting section 330 of the Bankruptcy Code. *Stroock & Stroock & Lavan v. Hillsborough Holdings Corp. (In Re: Hillsborough Holdings Corp.)*, 127 F.3d 1398, 1403 (11th Cir. 1997). The remaining *First Colonial* factors continue to apply to determine the reasonableness of fees awarded under the Bankruptcy Code. 3 COLLIER ON BANKRUPTCY ¶ 330.04(3)(c) (Lawrence P. King, *et al.*, Editors, 15th Ed. 1997). In addition, a majority of the *First Colonial* factors are now codified in 11 U.S.C. § 330(a)(3). *Id.*

extremely novel and the fact that relevant websites so longer existed added to the difficulty of the assignment.

- (C) The Skill Requisite to Perform the Legal Services Properly. In addition to her background of more than eighteen (18) years in consumer protection and privacy law, the Ombudsman is certified as an Information Privacy Professional by the International Association of Privacy Professionals (“IAPP”).³ Given the very brief time period available in which to research and prepare a report, only someone with significant familiarity with privacy laws and data protection schemes would have been able to complete the report.
- (D) The Preclusion of Other Employment by Applicant Due to Acceptance of the Case. Because of the extremely short time period in which the Ombudsman’s report had to be prepared, Ms. Berkower had to focus solely on this matter to the exclusion of all other employment.
- (E) The Customary Fee. The compensation sought herein is based upon Ms. Berkower’s normal hourly rates for privacy consulting services.
- (F) Whether the Fee Is Fixed or Contingent. C&A charges customary hourly rates for the time expended by its members, and its fees are not outcome-dependent.

³ Certification as an information privacy professional requires passing an exam that covers the “definitions, concepts and applications of U.S. and international privacy laws and information management practices as well as the privacy implications of emerging technologies. This includes HIPAA, COPPA, GLBA, APEC Principles, OECD Guidelines, EU Directive, employee records management, workplace monitoring, contingency planning, incident handling, ... and other key items.” *See* https://www.privacyassociation.org/index.php?option=com_content&task=view&id=36&itemid=223. Once certified, a minimum of thirty (30) credits over a three (3) year period of qualifying Continuing Privacy Education (“CPE”) training are required to maintain certification. *See* https://www.privacyassociation.org/index.php?option=com_content&task=view&id=18&itemid=88.

- (G) Time Limitations Imposed by Client or Other Circumstances. The Ombudsman had less than a week to obtain and review the documents, research and identify the relevant privacy policies for websites that were no longer operating, research and determine the relevant privacy and data protection laws, and prepare her report. This required her to work evenings and at night.
- (H) The Amount Involved and Results Obtained. The United States Bankruptcy Court for the Southern District of New York approved the Debtors' sale of the customer and marketing lists of Refco F/X Associates to Gain Capital for \$750,000.00. The Court found, *inter alia*, that the type of information collected by the Debtors in connection with foreign exchange trading had not been proven to fall within the definition of "personally identifiable information" under 11 U.S.C. §101(41A), because the activities enabled by the Debtors were not a "typical consumer investment vehicle," and the "service" provided by the Debtors was merely offering access to a trading platform provided by a third party.⁴ Accordingly, the judge found that, as no personally identifiable information was implicated by the Debtors' sale of these lists, the requirements of section 363(b)(1)(B) were not triggered.
- (I) The Experience, Reputation and Ability of the Professional. As previously noted, Ms. Berkower has more than eighteen (18) years' experience in practicing consumer protection and privacy law, and is a Certified Information Privacy Professional. She serves on the Advisory Board of *The Privacy Advisor*, the official monthly newsletter of the IAPP, the largest

⁴ See Transcript of the Omnibus Hearing Before the Honorable Robert D. Drain, United States Bankruptcy Judge for the Southern District of New York, *In re Refco, Inc., et al*, 11/14/06 at 52-53.

association of privacy professionals in the world, and the only credentialing authority for privacy practitioners. She has testified before the Federal Trade Commission on privacy-related issues on behalf of technology industry groups, and published articles on subjects relating to privacy and data protection law. Ms. Berkower's experience and expertise enabled her to complete her report in time for the scheduled hearing.

- (J) The "Undesirability" of the Case. This appointment was not undesirable.
- (K) Nature and Length of Professional Relationship. The statute requires the Consumer Privacy Ombudsman to be "a disinterested person"⁵ to ensure an objective and unbiased report be provided to the Court. The Ombudsman has rendered and filed an objective, unbiased report with the Court.

V. ALLOWANCE OF COMPENSATION

17. The professional services rendered by the Ombudsman required a high degree of professional competence and expertise to address, with skill and dispatch, the complex issues that arose in these cases. The Ombudsman respectfully submits that the services rendered to the Court were performed efficiently, effectively and economically.

18. The allowance of compensation for the services rendered in bankruptcy cases by a Consumer Privacy Ombudsman is expressly provided for in section 330(a)(1) of the Bankruptcy Code.

19. With respect to the level of compensation, section 330(a)(1)(A) of the Bankruptcy Code provides, in pertinent part, that the Court may award to a consumer privacy ombudsman, "reasonable compensation for actual, necessary services rendered." Section 330(a)(3), in turn, provides that:

⁵ 11 U.S.C. § 332(A).

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—

- (A) the time spent on such services;
- (B) the rates charged for such services;
- (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;
- (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
- (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and expertise in the bankruptcy field; and
- (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. §330(a)(3).

20. The congressional policy expressed above provides for adequate compensation in order to continue to attract qualified and competent professionals, including Consumer Privacy Ombudsmen, to bankruptcy cases.⁶

21. The total time spent by the Ombudsman during the period of November 6, 2006 through and including December 26, 2006, was 48.42 hours and has a fair market value of \$14,525.00. Of this time, \$900.00 (or 6.1%) was spent preparing this fee application. As shown by this Application and supporting exhibits, the Ombudsman's services were rendered economically and without unnecessary duplication of efforts.

⁶ *In Re: Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 850 (3d Cir. 1994) (“Congress rather clearly intended to provide sufficient economic incentive to lure competent bankruptcy specialists to practice in the bankruptcy courts.” [Citation and internal quotation marks omitted]); *In re Drexel Burnham Lambert Group, Inc.*, 133 B.R. 13, 18 (Bankr. S.D.N.Y. 1991) (“Congress’ objective on requiring that the market, not the court, establish attorneys’ rates was to ensure that bankruptcy cases were staffed by appropriate legal specialists.”)

VI. EXPENSES

22. The expenses incurred during this period and relating to these matters are in the nature of “nonreimbursable overhead,” as defined in the Guidelines. Consequently, no reimbursement for expenses is sought.

VII. WAIVER OF MEMORANDUM OF LAW

23. Based upon the supporting authorities contained herein, and because this Application presents no novel issues of law, the Ombudsman respectfully requests that the Court waive the requirement of Local Bankruptcy Rule 9013-1(b) of filing a separate memorandum of law in support of this Application.

VIII. NOTICE

24. The Ombudsman has given notice of this Application to (a) counsel for the Debtors, and (b) the Office of the United States Trustee. The Ombudsman understands other parties in interest will receive notice separately.

IX. CONCLUSION

WHEREFORE, the Ombudsman respectfully requests the Court to enter an order, substantially in the form attached hereto as Exhibit “D,” (a) allowing Elise Berkower final compensation for professional services rendered as Consumer Privacy Ombudsman for the period November 6, 2006 through and including December 26, 2006 in the amount of \$14,525.00 and (b) such other and further relief as is just.

Dated: February 7, 2007
New York, New York

/s/ Elise Berkower
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