

SIGNED.



Dated: April 23, 2008

James M. Marlara
JAMES M. MARLAR
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

<p>10 In re:</p> <p>11</p> <p>12 FIRST MAGNUS FINANCIAL CORPORATION,</p> <p>13</p> <p>14 Debtor.</p>	<p>) Chapter 11</p> <p>) No. 4:07-bk-01578-JMM</p> <p>) MEMORANDUM DECISION</p> <p>) RE: FEES REQUESTED BY MCA</p> <p>) FINANCIAL GROUP, LTD.</p>
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MCA Financial Group, Ltd. ("MCA") seeks an award of final fees and costs totaling \$481,192.00 (fees) and \$9,015.10 (costs) (Dkt. #1181).

The costs requested are reasonable and will be approved.

The fee request, however, presents a more difficult issue. On September 7, 2007, this court ordered that MCA could be retained by the Debtor-in-Possession, but its fees were to be limited to a maximum of \$75,000 per month for each of the first two months, and up to \$50,000 per month for each month thereafter.

The bankruptcy case was filed on August 21, 2007. MCA spent, as fees for which it now seeks compensation, the following:

1	08/21/07 - 09/20/07	\$181,145.00
2	09/21/07 - 10/20/07	95,590.50
3	10/21/07 - 11/20/07	57,429.00
4	11/21/07 - 12/21/07	55,777.00

5	12/22/07 - 01/21/08	26,624.00
6	01/22/08 - 02/21/08	58,478.50
7	02/22/08 - 02/28/08	6,148.00
	Total Fees Requested	\$481,192.00

This case, unfortunately, requires the court to determine if its earlier order should be modified. There has been no assertion that MCA underperformed, or that the quality of its work was deficient in any way.

Section 328(a) authorizes "the employment of a professional person under § 327 on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis." 11 U.S.C. § 328(a). Section 328(a) "clearly anticipates that the court will make a determination as to the reasonableness of a fee arrangement at the beginning of a case." *In re Dividend Dev. Corp.*, 145 B.R. 651, 655 (Bankr. C.D. Cal. 1992). The court may approve employment of a professional on "any terms and conditions that the court finds necessary to satisfy the requirement of reasonableness in section 328(a)." 3 *Collier on Bankruptcy* ¶ 328.02, at 328-5 (15th ed. rev. 2008) (citing *In re Federal Mogul-global, Inc.*, 348 F.3d 390, 393 (3d Cir. 2003) (bankruptcy court was authorized under § 328(a) to impose a \$30,000 monthly cap on chapter 11 professional's compensation when approving its employment application)).

The only statutory basis for later changing the employment terms of a professional's fee structure is if "such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." 11 U.S.C. § 328(a).

Examples of how this section of the Bankruptcy Code have been interpreted include the following:

1. An order that both approved a fee agreement and reserved the final application to the court's review was ambiguous and thus subject to a reasonableness review under § 330. *In re Circle K Corp.*, 279 F.3d

1 669, 673-74 (9th Cir. 2002); *see also In re B.U.M. Int'l, Inc.*, 229 F.3d
2 824, 829 (9th Cir. 2000) (where bankruptcy court conditionally
3 approved counsel's employment, a reasonableness review was
4 appropriate).

5 2. An unanticipated "managerial vacuum," which left the debtor
6 "stranded," justified an adjustment to the approved fee arrangement,
7 whereas "nettlesome" claim resolution and a longer-than-anticipated
8 reorganization period did not. *In re Home Exp., Inc.*, 213 B.R. 162,
9 166-67 (Bankr. N.D. Cal. 1997).

10 3. The rate of customary compensation in the local market could be
11 determined when the employment agreement was approved, and no
12 new developments were established to alter that fee. *In re Lindsey*,
13 1995 WL 106725 at *1 (Bankr. D. Idaho 1995) (mem.).

14 4. The bankruptcy court erred in reducing the terms of pre-approved
15 compensation (contingency fee) merely because the fraudulent
16 conveyance adversary proceeding turned out to be a "slam dunk"; such
17 result was capable of being anticipated. *In re Barron*, 225 F.3d 583,
18 585-56 (5th Cir. 2000); *see also In re Reimers*, 972 F.2d 1127 (9th Cir.
19 1992) (bankruptcy court should not have reduced special counsel's
20 contingent fee).

21 Here, the fee caps were unambiguous. MCA knew what limitations had been placed
22 upon it, in a liquidating chapter 11 context, yet it chose to exceed the maximum fee caps set by the
23 court, which the court had determined were reasonable in light of the customary rates and the
24 circumstances of the case. This voluntary action on MCA's part is outside of the types of boundaries
25 contemplated by the statute. This is not to say that MCA's efforts were unappreciated; but MCA
26 made the unilateral decision, albeit for altruistic reasons, to work beyond the caps set by the court.
27 Under the circumstances, and the record in this case, the court does not feel that anything developed
28 in the case which made the original budgetary restrictions "improvident" or unforeseeable. BLACK'S

1 LAW DICTIONARY (8th ed. 2004) defines "improvident" as meaning lack of foresight, or relating to
2 a judgment arrived at by using misleading information or a mistaken assumption. These facts were
3 not present in this case. Voluntary decisions of a professional to unilaterally exceed the fee caps
4 does not constitute an improvident condition which requires changing the terms of the employment
5 order.

6 Therefore, consistent with this court's employment order, the court will award MCA
7 the following fees for the following periods:

1	08/21/07 - 09/20/07	\$ 75,000
2	09/21/07 - 10/20/07	75,000
3	10/21/07 - 11/20/07	50,000
4	11/21/07 - 12/21/07	50,000
5	12/22/07 - 01/21/08	26,624
6	01/22/08 - 02/21/08	50,000
7	02/22/08 - 02/28/08	6,148
	Total Fees Allowed	\$332,772

17 The balance of MCA's requested fees will be disallowed. Any previous partial payment shall be
18 credited against the approved amount.

19 A separate order will be entered by the court. FED. R. BANKR. P. 9021.

20 DATED AND SIGNED ABOVE.

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2 on the date signed above:

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