

UNITED STATES BANKRUPTCY COURT

DISTRICT OF IDAHO

IN RE)
) **Case No. 09-02515-TLM**
TERENCE LEE MCCUE and)
DESIREE MARIE MCCUE,) **Chapter 7**
)
Debtors.)
_____)

**SUMMARY ORDER APPROVING COMPENSATION
OF SPECIAL COUNSEL**

On December 6, 2009, the chapter 7 trustee in this case, Jeremy Gugino (“Trustee”), filed an application for approval of his employment of Chad Nicholson and the firm of Rossman Law Group, PLLC, (“Special Counsel”) under § 327(e). Doc. No. 24. Though referencing in such application a proposed contingency fee agreement, the form of order submitted by Trustee, and entered by the Court on January 3, 2010, Doc. No. 26 (“Employment Order”), indicated that compensation would be subject to § 330. Neither Trustee’s application nor form of order referred to § 328 of the Code.

On March 26, 2012, Trustee filed a motion to approve a compromise of the underlying controversy for which Special Counsel had been retained, and for compensation of Special Counsel. Doc. No. 37. In that motion, Trustee inaccurately alleged that the Employment Order provided for compensation of Special Counsel on a contingency fee basis. *Id.* at 6, ¶ 21. The Court approved the underlying compromise, but after colloquy at hearing with Trustee and Special Counsel, abated consideration of the compensation request pending further

submissions.

Prior to Trustee's March 26, 2012 motion, this Court clarified that under the Ninth Circuit's decision in *The Circle K Corp. v. Houlihan, Lokey, Howard & Zukin, Inc. (In re The Circle K Corp.)*, 279 F.3d 669 (9th Cir. 2002), in order to ensure review of a professional's compensation under § 328 rather than § 330 of the Code, a trustee's application for employment approval and proposed order should specifically request and order retention under § 328. *See In re Blackburn*, 11.1 I.B.C.R. 14, 2011 WL 289355 (Bankr. D. Idaho 2011). "In the absence of preapproval under § 328, fees are reviewed at the conclusion of the bankruptcy proceeding under a reasonableness standard pursuant to 11 U.S.C. § 330(a)(1)." *Id.* at 15 (quoting *Circle K Corp.*, 279 F.3d at 671). *See also In re Werry*, 11.3 I.B.C.R. 112, 114, 2011 WL 3800016 at *4 (Bankr. D. Idaho 2011) (recognizing that professional compensation is under either § 328 or § 330, that *Friedman Enters. v. B.U.M. Int'l, Inc. (In re B.U.M. Int'l, Inc.)*, 229 F.3d 824, 829 (9th Cir. 2000), explains these are "mutually exclusive" provisions, and that a "bright-line test" for determining which will apply is established by *Circle K*).

On June 7, 2012, Trustee filed another application for approval of Special Counsel's compensation. Doc. No. 45 ("Amended Application"). As before, it seeks allowance of compensation of \$4,000.00 in fees and \$1,674.16 in costs. However, unlike the earlier application, the Amended Application is supported by a declaration of Special Counsel itemizing services rendered and expenses incurred. *See* Doc. No. 45-1 ("Declaration").

After considering this record and, in particular, the Declaration, the Court determines that the compensation of Special Counsel in the requested amounts is reasonable and may properly be allowed *under § 330(a)* consistent with the Employment Order and the case law. The Amended Application is therefore GRANTED and Special Counsel is allowed compensation in the amount of \$4,000.00 and reimbursement of expenses in the amount of \$1,674.16 under § 330 of the Code. Trustee may disburse funds in satisfaction thereof.

IT IS SO ORDERED.

DATED: June 8, 2012



A handwritten signature in black ink, appearing to read "Terry L. Myers".

TERRY L. MYERS
CHIEF U. S. BANKRUPTCY JUDGE