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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. **ART INTELLECT, INC., a Utah corporation, d/b/a Mason Hill and Virtual MG, PATRICK MERRILL BRODY, LAURA A. ROSER, and GREGORY D. WOOD,** Defendants.	**OBJECTION TO RECEIVER'S FIRST APPLICATION FOR FEES AND EXPENSES** Case No.: 2:11-cv-00357 Judge Tena Campbell

Defendants Patrick M. Brody and Laura A. Roser, through their attorneys, respectfully object to the receiver's application for fees and expenses for himself and others [Doc. 104]. While the application contains a conclusion that the fees are reasonable, insufficient subsidiary facts are proffered to demonstrate such reasonableness and the fees appear grossly excessive

under even cursory consideration of the actual scope of legal work likely reasonably required by this matter.

Regardless of how this court ultimately rules on whether or not there was a "security" involved here and whether this court has subject matter jurisdiction, this matter involves a finite and identifiable number of transactions in which a nonrefundable payment towards a purchase of real estate was made. A number of those real estate transactions closed or were on the verge of closing with a conveyance of real estate to the purchaser when the Receiver took over the business of Mason Hill.

This case, from the Receiver's standpoint, thus involved only those transactions in which a nonrefundable payment was made but a purchase transaction did not close. The gist of the SEC complaint herein is that the purchasers who did not close should get their nonrefundable payment back as a disgorgement. The population of that set of purchasers is finite and identifiable enough to consider them on a case by case basis, with an equitable consideration of their equitable claim for disgorgement weighed against some basic equitable defenses such as clear "lack of clean hands" on the part of at least some purchasers.

If the court concludes it has subject matter jurisdiction and orders disgorgement of some of the nonrefundable purchase payments made, it is likely Art Intellect, Inc., is in the position to satisfy those disgorgements within a reasonable amount of time without need for a receiver's further involvement, or, in the alternative, to post a sufficient bond to satisfy all of such reasonably foreseeable disgorgement judgments while appealing to the Tenth Circuit, once management of that corporation is restored back to its owner from this court's receiver.

In light of this, it appears a reasonable and prudent receiver would have limited his role up to this point to not much more than identifying the purchase transactions where the transactions had not closed and then obtaining leave of the court to allow Art Intellect, Inc., and its owner [Laura Roser Brody] to close as many of those transactions as possible by a lifting of this court's restraints and freezes to the extent needed to accomplish that.

The receiver has not shown why "forensic accounting" was needed at all here, and, if it was, what its scope and its purpose should have been. Nor has the receiver shown that his efforts in liquidating property have been reasonably connected to the actual needs presented at this stage of the case. As the receiver and his counsel are members of the Utah State Bar, the court can take note that the application for fees does not satisfy the traditional *Estate of Quinn* application for fees in Utah. See, *Matter of Estate of Quinn*, 830 P.2d 282 (Utah App. 1992). The receiver has made only a preliminary showing of hours worked multiplied by hourly rate. But he has not applied the traditional measures of reasonableness applicable to the legal profession such as explaining "exactly what legal work the petitioning attorney or attorneys performed, both in terms of the nature of the work and the time spent in its performance." *Id*. at 285. He has not shown that the work he claims was "reasonably necessary to adequately conclude the matter". I*d.* Nor has he explained to the court that rates charged to the receivership estate are consistent with those rates charged in similar cases. *Id.*

Utah's *Estate of Quinn* approach makes it clear that even if an attorney has satisfied his professional duties in charging a reasonable fee under the well-established factors to be applied in ascertaining if a fee is professionally reasonable, that those same factors may still lead to a denial of a fee application in cases such as this where a court is being asked to approve a fee

application. The court is directed under *Quinn* and its predecessor case *Dixie State Bank v. Bracken*, 764 P.2d 985 (Utah 1988) to adjust the amount of the fee, when necessary, to reflect the courts consideration of the various criteria set forth in the Utah Code of Professional Responsibility DR-106. *Id.* The *Dixie State Bank* factors include: the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved. *Id*. at 989.

Since the receiver's application for fees and costs does not satisfy the *Estate of Quinn* factors by these Utah lawyers, this court should reject their application without prejudice. Further, since any appeal here will be to the Tenth Circuit, and that court on occasion resorts to Colorado state court decisions in analysis of the law, this court should also now apply the Colorado requirement that a fee application such as the one before the court must affirmatively show that attorney fees have been mitigated to the extent possible. *Board of County Com'rs v. Kraft Bldg.*, 122 P.3d 1019 (Colo.App. 2005). Such a showing has not been made here, and the said Colorado rule is especially well suited for a case such as this one where there is a temptation for a receiver and a counsel for a receiver to make an overly optimistic appraisal of the legal work that is actually needed to protect the interests of the contractual counterparty claimants.

The amount claimed by the receiver and his support team is grossly excessive in relation to what has been accomplished. According to the receiver's accounting (which he says cost $43,038.50 by his staff accountants) the receiver has accumulated approximately $47,500 in cash from the assets of Mason Hill and the Brodys. Of that amount, more than $37,000 was in bank

accounts when the receiver took over operations. Therefore, the receiver has only "accumulated" about $10,000 in assets. Yet the receiver claims to have incurred over $106,000.00 to secure those $10,000. Something is wrong with those results.

While the receiver may have broad authority to undertake efforts to secure the receivership estate and to safeguard the assets of the receivership estate, to go forward and recklessly incur $1000 in costs for every $100 recovered is not reasonable and does not benefit the receivership estate.

The application for fees should be denied, without prejudice, and the receiver should be required to justify his seemingly excessive application.

Dated this 19th day of August, 2011.

NELSON SNUFFER DAHLE & POULSEN, PC

/s/
Steven R. Paul
Attorneys for Defendants and Cross-claim Plaintiffs

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