NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In the matter of	:	Case No. 04-46898/JHW
THCR/LP Corporation, et al.	:	**OPINION ON FEE ENHANCEMENT**
Debtors.	:	

FILED
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U.S. BANKRUPTCY COURT
CAMDEN, N.J.
BY: Robert J. Cooper Judicial Law Clerk to Chief Judge Wizmur

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Counsel for the Equity Committee seeks an enhancement to the lodestar amount in its final fee application in light of the extraordinary result that it obtained for the debtors' public non-insider shareholders. The Debtors and the United States Trustee object and contend that counsel has already been adequately and reasonably compensated for their work, and that there is insufficient justification for a fee enhancement. Because an enhancement is permitted in rare and exceptional cases, and because I believe that this is such a case, I will grant counsel's fee enhancement as requested.

FACTS AND PROCEDURAL HISTORY

During the third quarter of 2003, Trump Hotel & Casino Resorts, Inc. and its affiliated entities, the Debtors herein (hereinafter jointly referred to as "THCR"), while recognizing that their cash flows were sufficient to fund operations, came to believe that their core businesses were not generating "cash flows necessary to reinvest in the maintenance or expansion of their hotel and casino properties at levels consistent with those of their competitors." Resp. to Obj. to D.S. at 4. [Dkt. #482] The Debtors determined to recapitalize and reorganize their financial obligations in order to achieve sufficient cash flow to service debt, to increase capital expenditures, and to grow the business and its profitability. To facilitate their recovery and expansion, THCR retained Latham & Watkins LLP as legal counsel and UBS Securities LLC as its financial advisor. At the time, THCR's Board of Directors consisted of five directors, one of whom was Donald J. Trump ("DJT"). The THCR Board also formed a Special Committee, comprised of the four directors other than DJT (the "Independent Directors"), to assist THCR in the restructuring process. The Special Committee retained Ropes & Gray LLP as legal counsel and Jefferies & Company as financial advisor. The need for the Special Committee was apparently dictated by the fact that DJT was negotiating with the company regarding his own holdings and compensation arrangements in the context of the restructuring. At the time, DJT owned approximately one-third of Old THCR Common Stock[1], with options to purchase which, if exercised, would afford DJT an equity position of approximately 56.4% of THCR stock. The remaining Old THCR Common Stock was publicly owned by non-insiders.

In early 2004, the two major secured noteholder groups, namely the Trump Atlantic City Associates Noteholders ("TAC") and the Trump Casino Holdings, LLC First and Second Priority Noteholders ("TCH"), together holding approximately $1.8 billion in secured debt, formed separate committees, and joined with THCR, the Special Committee and DJT to negotiate a restructuring plan. Following extensive exploration of potential investors and sources of

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1 "Old THCR Common Stock" was defined in the Debtors' Chapter 11 plan as "all authorized and issued shares of common stock of THCR, par value of $0.01 per share, and any right, contractual or otherwise, to acquire any common shares of THCR, existing prior to the Reverse Stock Split." Debtors' Chapter 11 Plan at 14. [Dkt. #901]

capital, the parties entered into a Restructuring Support Agreement ("RSA") on October 20, 2004, wherein the parties contemplated that Chapter 11 cases would be filed and that their pre-negotiated plan would be promptly submitted to the bankruptcy court for confirmation. The RSA provided in relevant part that the secured debt would be reduced from about $1.86 billion to $1.25 billion, the interest rates due on the secured debt would be reduced, and the debtors would gain access to $500 million of bank financing for capital expenditures. DJT agreed to infuse the Company with $55 million in cash, and would receive consideration for his contribution, as well as for his shares of equity in the company, in various forms, including New Common Stock[2], a 25% interest in the Miss Universe, LP, and ownership of the Atlantic City Boardwalk property known as the World's Fair site. The World's Fair site was valued at approximately $7.5 million. The public non-insider shareholders of THCR, who were viewed as "out of the money", would retain their existing THCR stock, subject to a 1,000-to-1 reverse stock split (worth approximately $300,000), and would receive a pro-rata distribution of one-year warrants to purchase 3.4 million shares of stock in the reorganized THCR.

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[2] "New Common Stock" was defined in the Debtors' Chapter 11 Plan as "the 50,000,000 shares of common stock of Reorganized THCR, par value $0.001 per share, authorized hereunder on the Effective Date and any additional shares authorized for the purposes specified herein." Debtors' Chapter 11 Plan at 11 [Dkt. #901]

On November 21, 2004, THCR and 25 of its affiliates filed their voluntary Chapter 11 petitions. On a consolidated basis, the debtors scheduled approximately $1.6 billion in assets and $1.8 billion in liabilities. They sought expedited processes to move the pre-negotiated plan to confirmation. Over the objection of the debtors and the TAC and TCH Committee Noteholders, who argued that the public non-insider shareholders did not need a formal committee because they were "out of the money" and because they had been well represented in prepetition negotiations, the United States Trustee ("UST") appointed an Official Committee of Equity Security Holders (hereinafter the "Committee") on December 28, 2004.[3] The firm of Stutman, Treister & Glatt

[3] Among the contentions of the debtors to the UST opposing the appointment of an official committee of equity security holders were the following statements:

a. "[T]he interests of equity interest holders have been more than adequately represented in the 11 months of negotiations leading up to the implementation of the Pre-negotiated Cases . . . [T]he Independent Directors have actively negotiated to preserve value for shareholders." Omnibus Reply, Exh. A at 1-2. [Dkt. #1451]

b. The formation of an equity committee would duplicate the function of the Independent Directors, and would only serve "to inflate the expenses to the estate and the Debtors' creditors (i.e., the real stakeholders in these cases). Furthermore, the negotiation process is complete with respect to the economic parameters of the restructuring. Sophisticated and motivated parties have invested substantial amounts of time and resources in formulating a viable plan. The Independent Directors represented the shareholders interests in this process." Id. at 3.

c. "[T]he Debtors are insolvent." Id. at 1. "As of the petition date, ("ST&G") was retained as counsel for the Committee.[4]

Debtors' original proposed disclosure statement and Chapter 11 plan were filed on December 15, 2004. The plan proposed was consistent with the terms of the RSA. An adequacy hearing was originally set for January 21, 2005 and subsequently rescheduled for February 14, 2005. The disclosure statement was amended several times, and an order approving the amended disclosure statement was entered on February 15, 2005.

During the months following the filing, into March 2005, the Debtors, the TAC and TCH Committees, and DJT exerted considerable and concerted effort to move the RSA plan toward confirmation. Because court approval was granted on the first day of the case to pay all trade creditors in full, no Unsecured Creditors Committee was appointed. To emphasize the need for prompt plan confirmation, the plan supporters highlighted the fact that the

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> the Debtors' liabilities exceeded approximately $1.9 Billion; all of those liabilities have to [be] satisfied in full before equity holders receive a distribution. . . . [T]he holders of TAC Notes and TCH Second Notes have agreed to a discounted return under the Pre-Negotiated cases in order to enable existing equity holders to share any recovery." Id. at 5.

[4] An order was entered on February 14, 2005 approving the retention of ST&G, effective January 5, 2005. The Bayard firm was retained as litigation, corporate, local and co-counsel to the Equity Committee on February 23, 2005.

secured noteholders had invested upwards of $1.8 billion in the company and had agreed to substantial negative adjustments to their positions, the fact that the livelihood of 12,000 company employees was at stake, and the fact that thousands of trade creditors depended on the survival and continued viability of the company. They also noted that any significant delay would derail the plan, to the serious detriment of all parties in interest. The RSA provided that the Noteholders could terminate the agreement if the disclosure statement was not approved by February 15, 2005, and if an order confirming the Chapter 11 plan was not entered by April 15, 2005.

In various pleadings submitted after the formation, including an objection to the adequacy of the Debtors' Disclosure Statement, the Equity Committee vigorously urged that more time was needed to allow the Committee to understand the transactions proposed in the plan, that the package for DJT was a "sweetheart deal" that treated him much more favorably than the non-insider shareholders, and that the non-insider shareholders deserved more value than the plan offered. The plan supporters urged just as vigorously that the Committee's arguments should be overruled because the interests of the non-insider shareholders were well represented by the Special Committee during pre-petition negotiations, and because substantially all of the Debtors' assets were liened by the TAC and TCH Noteholders, leaving little or no value for equity.

The following excerpts are illustrative of the Debtors' position:

1. "The Debtors took extraordinary steps prepetition to include in the plan negotiations the voices and concerns of all parties in the Debtors' capital structure. . . . The interests of interest holders in particular . . . were fully represented by a special committee of Independent Directors who, as described below, met regularly with the Debtors' senior management team (and without DJT) to press for concessions for interest holders." Resp. to Objections to D.S. at 3 [Dkt. #482]

2. "Secured Noteholders . . . are owed approximately $1.9 billion as of the Petition Date and are entitled to payment in full before any recovery by the Debtors' equity holders." Id. at 4.

3. "As related to them by their advisors, the Independent Directors understood that, as THCR was either insolvent or in the zone of insolvency, they owed fiduciary duties not only to THCR's equity holders, but also to its creditors. Because the Noteholders were organized, ably represented by counsel and financial advisors, and thoroughly involved in the negotiations, . . . such Noteholders were able to protect their own interests in negotiating a possible recapitalization of THCR. Furthermore, because DJT was represented by his own counsel and actively participating in the negotiations, he too was capable of protecting his interests as the controlling shareholder in THCR. Accordingly, the Independent Directors, throughout their oversight of the negotiating process, were primarily concerned about preserving value for the public, non-affiliated shareholders of THCR." Id. at 10.

4. "[T]he Debtors' Liquidation Analysis, set forth in Exhibit F to the Disclosure Statement, demonstrates that the equity holders would not receive any distribution in a liquidation of the Debtors under chapter 7. The Equity Committee has not

challenged the liquidation analysis. . . . [T]he equity holders will not receive any distribution if the Debtors do not implement a reorganization and remain overleveraged with high-interest rate debt." Id. at 13.

5. The debtors accused one of the members of the Equity Committee with having bought equity "for the primary purpose of disrupting the process." Id. at 11, n. According to the debtors, the only intent of the Equity Committee was "to impede the reorganization plan that was carefully negotiated and crafted over a ten month period by the Debtors, the Independent Directors, the Noteholders and DJT. These tactics are not in the best interest of the Debtors and their creditors and the Court should overrule these objections." Id. at 12.

Against this backdrop, with the deadline for plan objections scheduled for March 21, 2008 and plan confirmation scheduled for April 5, 2005, counsel for the Equity Committee reviewed over a hundred boxes of documents and took thirteen depositions in March. Counsel analyzed the THCR corporate structure with the goal of maximizing the value to be recovered by the public non-insider shareholders through the debtors' restructuring efforts. The debtors' prepetition corporate structure is illustrated effectively by ST&G in its fee application as follows:

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              THCR
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          THCR Holdings
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TAC Subsidiaries     TCH Subsidiaries
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Final App. of ST&G for Compens. & Reimb. of Expenses at 6. [Dkt. #1341] ST&G came to recognize that the secured claims held by TAC Noteholders and TCH Noteholders were not cross-collateralized, i.e. the TAC Subsidiaries had not guaranteed the TCH Subsidiaries, and vice versa. As well, neither THCR nor THCR Holdings had guaranteed the TAC and TCH secured debts. Most notably, Committee counsel discovered that THCR held unencumbered rights to a Prepetition Trademark License agreement with Trump, valued somewhere between $50 and $85 million, and claimed that equity for THCR shareholders. As ST&G has explained:

> ST&G's analysis brought to the forefront the primary implications of the Debtors' corporate structure (i.e. the absence of cross guarantees between the TAC Subsidiaries and the TCH Subsidiaries and the absence of "top down" guarantees from THCR and THCR Holdings). First, to the extent that equity existed in either the TAC Subsidiaries or the TCH Subsidiaries, the THCR shareholders were entitled to the value of such equity ahead of the secured creditors of the other side of the capital structure. Second, THCR shareholders also were entitled to any value from assets held at the THCR and THCR Holdings level (after accounting for any THCR and THCR Holdings debts), because such assets were beyond the reach of the Bondholders' claims.
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> Based on these two implications, ST&G made it a paramount concern for the Equity Committee to advocate against any commingling of the separate TAC and TCH capital structures, and to identify and preserve the value of any assets held at the THCR and THCR Holdings levels.

Id. at 7.

With the filing of its objection to the Debtors' Chapter 11 plan on March

21, 2005, ST&G highlighted the fact that the Prepetition Trademark License represented a very significant asset of THCR. Because THCR had no liability for the secured debt against the TAC and TCH Subsidiaries, and had nominal debts otherwise, the value of the Prepetition Trademark License arguably "entitled non-insider shareholders to tens of millions of dollars in reorganization value recovery." Id. at 9. As ST&G correctly points out, "[t]his discovery stood in stark contrast to the treatment of public shareholders obtained by the Special Committee and its professionals under the RSA and the Pre-Negotiated Plan, which (as noted above) provided for non-insider shareholders to retain less than $300,000 worth of stock (plus receive the one-year warrants)." Id.

In its sixty-four page Objection, the Equity Committee cited many other grounds for objecting to the debtors' plan. The Objection discussed other potential sources of recovery for the public non-insider shareholders besides the proceeds of the Prepetition Trademark License, including THCR's 25% interest in the Miss Universe Pageant, worth between $5 and $10 million. That interest was slated to be transferred to DJT in consideration for the $55 million cash infusion from DJT and other DJT contributions. "The problem is that none of the foregoing 'contributions' by Mr. Trump are for THCR's benefit (or even for THCR Holdings' benefit)." Obj. of Equity Comm. at 9-10. [Dkt. #823] Rather, the DJT consideration would inure only to the benefit of the TAC and

TCH Noteholders.

A mere two days after the Equity Committee's objection to confirmation was filed, the debtors, the other parties to the RSA and the Equity Committee reached a consensual arrangement. The debtors filed a Second Amended Joint Plan of Reorganization on March 30, 2005. [Dkt. #901] The amended plan reflected a dramatic change in the treatment of the public non-insider shareholders. The shareholders were to retain their common stock, subject to the same reverse 1,000 to 1 split, and were still to receive a pro rata share of the Class A warrants. In addition, they were now to receive pro rata shares from the proceeds of the sale of the World's Fair property, plus a cash payment on the effective date of the plan. The cash payment was in the amount of $17.5 million. The World's Fair property ultimately sold for $25.15 million.[5] The ultimate recovery enjoyed by the public non-insider shareholders was valued at upwards of $40 million. The Second Amended Plan was confirmed on April 5, 2005. [Dkt. #976]

ST&G filed its final fee application on July 15, 2005, seeking compensation in the amount of $978,530.25 in counsel fees and $112,053.81

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[5] The World's Fair property was sold at auction on September 13, 2005 to BET Investments, Inc. Trump Boardwalk Partners, LLC was the next highest bidder. [Dkt. #1498]

in expenses for services rendered during the three month time period of January 5, 2005 through April 5, 2005. [Dkt. #1341] In addition, ST&G sought an additional $500,000 as a bonus or fee enhancement for the "exemplary and unexpected result procured for the Debtors' shareholders by ST&G." Final Fee App. at 3. ST&G contends that through its efforts, it was able to increase the recovery for the shareholders from less than $300,000, plus "the right to expend out-of-pocket funds to exercise warrants for the purchase of stock in the reorganized Debtors," Id. at 2, to a distribution of approximately $40 million in cash for shareholders. Counsel contends that they "developed and litigated legal theories that transformed what would have been an abysmal failure for shareholders into an outstanding success." Id. at 3. They believe that "[t]his result is nothing short of extraordinary, particularly considering that the Debtors and every major creditor constituency long had regarded shareholders as being out of the money." Id. at 2. ST&G points out that the bonus sought here comprises less than 2% of the cash consideration obtained by ST&G for the shareholders. Id. at 3. They claim that such an enhancement is more than deserved in light of the result obtained by them in this case.

The Debtors and the United States Trustee ("UST") both object to a fee enhancement of any kind. They contend that the lodestar amount paid to ST&G represents the proper compensation for their services. The UST points out that ST&G's fee application already reflects a blended hourly rate of $421.88. The proposed fee enhancement would increase the fee request by more than 51%, raising the blended rate to $637.46 per hour. The UST asserts that this amount "goes well beyond reasonable and necessary services and exceeds the compensation contemplated at the time Stutman was retained." UST Obj. at 5. [Dkt. #1414] Moreover, the UST contends that the gain for shareholders was not the work of ST&G alone, and that the Bayard firm, co-counsel for the Equity Committee, was also "instrumental in improving the dividend to shareholders and [yet they] did not seek any enhancement beyond their hourly rates." Id. Similarly, the debtors maintain that ST&G's work was "no different, unique or more special than any other committee counsel's efforts which aggressively seek to compel a greater distribution to shareholders than originally anticipated." Debtors' Obj. at 6. [Dkt. #1418] Debtors acknowledge that ST&G's work "reflect[ed] diligence and high professional standards," but contend that counsel's results "were neither extraordinary or unique, but in fact were a reasonable result for which its services were retained and for which it [was] adequately compensated." Id. at 7.

ST&G's final fee application was apparently not listed for hearing or brought to the court's attention. After the open matter was discovered in April 2008, it was heard by telephone conference call on May 8, 2008. Final decision on ST&G's request for a fee enhancement was reserved at that time.

DISCUSSION

Neither the debtors nor the UST dispute that ST&G should be compensated for its regular fees and expenses as requested. The dispute is over whether counsel's "reasonable compensation" in this case requires enhancement of the lodestar.

Section 330 governs the compensation that may be awarded to counsel employed by an equity committee. 11 U.S.C. §§ 330; 1103. Section 330(a) provides in relevant part:

> (a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a . . . professional person employed under section 327 or 1103--
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> (A) reasonable compensation for actual, necessary services rendered by the . . . professional person, or attorney and by any paraprofessional person employed by any such person; and
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> (B) reimbursement for actual, necessary expenses.
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> . . .
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> (3) 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--
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> (A) the time spent on such services;
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> (B) the rates charged for such services;
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> (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; and

(E) 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 (2004).[6]

To determine whether such compensation is "reasonable," consideration of the first two factors listed under section 330(a)(3), the time spent and the rate charged, or "lodestar," is ordinarily presumed to be a reasonable fee. Blum v. Stenson, 465 U.S. 886, 104 S. Ct. 1541, 79 L.Ed.2d 891 (1984); In re Busy Beaver Bldg. Centers, Inc., 19 F.3d 833, 856 (3d Cir. 1994). To calculate the lodestar, "a court first establishes a reasonable hourly rate (corresponding to the value of the services and the cost of comparable services in § 330(a)(1)) for each set of compensable services (corresponding to the nature of the services in § 330(a)(1)), and then multiplies each rate by the reasonable number of hours of compensable work included in each respective set (corresponding to the time and extent of the services in § 330(a)(1))." In re Busy Beaver, 19 F.3d at 849 n.21. See also In re AT & T Corp., 455 F.3d 160,

[6] Reference is made to section 330 as it was enacted in 2004 at the time that the Debtors' petition was filed.

164 (3d Cir. 2006); In re Cendant Corp. Litigation, 264 F.3d 201, 255 (3d Cir. 2001), cert. denied, 535 U.S. 929, 122 S. Ct. 1300, 152 L.Ed.2d 212 (2002). The lodestar approach has its roots in both common fund cases and in fee-shifting statutes. In re Busy Beaver, 19 F.3d at 849. The hourly billing rate must be reasonable for the geographical area, the work accomplished and the attorney's experience. In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 306 (3d Cir. 2005). In considering the nature, extent and value of the services rendered, and in addition to the lodestar calculation, the bankruptcy court is directed to consider, among other factors,[7] the benefit of the services to the estate, the complexity of the task, and a comparison with rates charged in the nonbankruptcy market. In re Busy Beaver, 19 F.3d at 853-54.

Section 330 does not contain an express authorization to award an enhancement or bonus. Nevertheless, courts have found authority for the use of enhancements and/or bonuses to award a "reasonable" fee under section 330, particularly by reference to decisions rendered in both nonbankruptcy fee-shifting and common fund cases. In fee-shifting cases, often dealing with such

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[7] By directing the bankruptcy court to consider "all relevant factors, including" the five listed factors, courts have concluded that the list is not all inclusive. In re Lan Assocs. XI, LP, 192 F.3d 109, 123 (3d Cir. 1999). Some courts utilize the 12 factor test used in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) to determine the reasonableness of an application for fees. See, e.g., In re Dynamic Tours & Transp., Inc., 359 B.R. 336, 344-45 (Bankr. M.D.Fla. 2006); In re King, 350 B.R. 327, 332 (Bankr. S.D.Tex. 2006).

federal statutory schemes as civil rights[8] and environmental protection[9], the "losing side" pays the counsel fees for the "winning side." In common fund cases, counsel for the party who creates, preserves or increases the fund that will be used to pay the claimants, is paid from that fund. The jurisprudence regarding the calculation of reasonable attorneys' fees in bankruptcy cases and the availability of enhancements under section 330 has drawn from both types of cases. See, e.g., In re UNR Indus., Inc., 986 F.2d 207, 209 (7th Cir. 1993) ("Although bankruptcy situations certainly share many attributes of common fund cases . . . courts have viewed fee-shifting statutes as providing a more suitable analogy."); In re Apex Oil Co., 960 F.2d 728, 731-32 (8th Cir. 1992); In re Boddy, 950 F.2d 334, 337 (6th Cir. 1991); In re Manoa Finance Co., 853 F.2d 687, 691 (9th Cir. 1988) ("§ 330 and fee-shifting statutes are sufficiently similar to justify applying the same general principles for fee enhancements"); In re Blue Coal Corp., 206 B.R. 721, 727 (Bankr. M.D.Pa. 1997) ("enhancements for bankruptcy representation is likely to require considerations of factors utilized in both common fund and fee-shifting cases").

Several United States Supreme Court decisions rendered in fee-shifting

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[8] 42 U.S.C. § 1988 ("[t]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.").

[9] 42 U.S.C. § 7604(d) ("The court . . . may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.").

cases have recognized the opportunity to award a lodestar enhancement where the statute permits a "reasonable" fee to be awarded to the prevailing party, but the decisions have gradually narrowed the circumstances in which such fee enhancement may be awarded. In Hensley v. Eckerhart, 461 U.S. 424, 435, 103 S. Ct. 1933, 1940, 76 L.Ed.2d 40 (1983), a civil rights cases, the Supreme Court determined that the starting point to assess reasonableness is the lodestar calculation, and recognized that "in some cases of exceptional success an enhanced fee may be justified." Hensley was followed by another civil rights case, Blum v. Stenson, 465 U.S. 886, 104 S. Ct. 1541, 79 L.Ed.2d 891 (1984), where the fee applicant sought a 50% upward adjustment of the lodestar calculation. Placing the burden on the applicant to establish entitlement to such an adjustment, the Court determined that the lodestar calculation presumptively compensated the applicant reasonably. Neither the "novelty and complexity of the issues," Id. at 898, 104 S. Ct. at 1549, nor the "quality of representation", Id. at 899, 104 S. Ct. at 1549, served to justify an enhancement. An enhancement is justified "only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" Id. See also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 730, 107 S. Ct. 3078, 3089, 97 L.Ed.2d 585 (1987) ("Delaware II") (Any enhancement to a lodestar calculation based on risk of loss or contingency "would be limited to "an amount no more than one-third of the lodestar."); Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 566, 106 S. Ct. 3088, 3098, 92 L.Ed.2d 439 (1986) ("Delaware I") ("[T]he lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance.").

Bankruptcy courts have often cited these Supreme Court fee-shifting cases to award counsel fee enhancements under section 330 in those rare cases where exceptional success has been achieved. For example, in In re One City Centre Assocs., 111 B.R. 872, 879 (Bankr. E.D.Cal. 1990), the court granted an enhancement to counsel for the Chapter 11 trustee in light of the "extraordinarily rare and exceptionally successful resolution" of the case, crediting counsel's "creativity, spontaneity, business acumen, and diligence." At the outset, it appeared that the Chapter 11 debtor, which owned one commercial property that was half occupied, was administratively insolvent. The property was encumbered by substantial secured debt, and many disputes with unsecured creditors were unresolved. "[W]ithin a remarkably short period of time (eleven months from filing to sale date)," Id., and burdened by numerous obstacles, the applicant resolved and satisfied all claims, and anticipated a dividend to equity holders. "A single misstep in a case of this magnitude could easily have resulted in a substantial loss to every involved interest from the secured creditor to the administrative claimants and equity security holders. Despite the incredible pressure, however, Applicant performed flawlessly and achieved a substantial and unlikely benefit to the estate (ie., full satisfaction of claims)." Id. The court agreed that the results "exceeded the value reflected by the initial lodestar calculation." Id. The lodestar calculation amounted to approximately $180,000. The enhancement request was $300,000. The enhancement awarded was $33,618.50, based on the increase by the court of the applicant's initial billing rate to match his final billing rate, with an added bonus factor of $10 per hour.

Similarly, in In re Southern Merchandise Distrib., Inc., 117 B.R. 725, 727 (Bankr. S.D.Fla. 1990), the court granted an enhancement of approximately $8,000 to a lodestar of approximately $26,000, noting that "[v]irtually the entire bankruptcy estate was generated as a result of the efforts undertaken by Applicant in instituting and prosecuting preference litigation." "Considering the meager funds initially available to Applicant in order to fund the trustee's litigation, the results obtained are outstanding." Id. And in Covad Communications, the Delaware District Court was also persuaded that debtor's counsel obtained exemplary results, warranting an enhancement. In re Covad Communications Group, Inc., 292 B.R. 31, 32 (D.Del. 2003) (awarding a $1 million bonus plus an option to purchase 100,000 shares of the debtor's stock). Citing the skill and expertise of the applicant, the Chapter 11 debtor's counsel, and the lack of objection by creditors, the court agreed that:

> Covad's reorganization was remarkable. Covad, facing certain failure, was able to reorganize with sufficient liquidity to execute its business plan, with the various creditor and equity constituencies receiving a substantial recovery-a true "win win" under the circumstances.

Id. See also In re Buckridge, 367 B.R. 191, 202 (Bankr. C.D.Cal. 2007) ("Upward adjustment of the lodestar amount is permissible, provided there is both '"specific evidence" on the record and detailed findings' that one or more factors are not fully reflected in the lodestar."); In re Nucentrix Broadband Networks, Inc., 314 B.R. 574 (Bankr. N.D.Tex. 2004); In re El Paso Refinery, L.P., 257 B.R. 809 (Bankr. W.D.Tex. 2000); In re Blue Coal Corp., 206 B.R. 721 (Bankr. M.D.Pa. 1997).

Bankruptcy courts that have denied enhancement requests have acknowledged the authority to adjust the lodestar upwards, but have determined that the facts presented did not justify such an adjustment. For example, in In re Brous, 370 B.R. 563 (Bankr. S.D.N.Y. 2007), the court denied the Chapter 7 trustee an enhancement, noting that "[t]he entire estate was generated from the sale of a single piece of property," Id. at 572, which "was consistent with a trustee's duty to 'collect and reduce to money the property of the estate.' There was nothing exceptional about the sale." Id. at 572-73. Denying the request for enhancement, the court explained:

> This is not a criticism of the Trustee or his performance. He did what he could with the hand he was dealt. The point is that he has failed to demonstrate, as he must, that this is the rare case that calls for an enhancement of the "lodestar."

Id. at 573. See also In re Meronk, 24 Fed. Appx. 737 (9th Cir. 2001) (denying enhancement where firm failed to provide specific evidence why lodestar alone was not reasonable); In re Chewning & Frey Security, Inc., 328 B.R. 899, 916 (Bankr. N.D.Ga. 2005) (the court found "nothing remarkable nor any unique issues or unforeseen obstacles" and no other factors sufficient to justify an adjustment); In re Amberjack Interests, Inc., 326 B.R. 379 (Bankr. S.D.Tex. 2005). See also In re Siharath, 285 B.R. 299, 306 (Bankr. D.Minn. 2002) (a § 362(h) case relying on § 330 by analogy and denying an enhancement because case "involves simple facts and issues generally found in many violation of the automatic stay cases").

In In re Big Rivers Elec. Corp., 252 B.R. 676 (W.D.Ky. 2000), the district court reversed a bankruptcy court decision awarding an examiner an enhancement of $2,110,564 or four times its lodestar amount. Focusing on the lodestar amount and the question of reasonable compensation for the services rendered, the district court noted that counsel simply did what they were retained to do. Id. at 687. The court acknowledged that quality service was given, but "there [was] no evidence to suggest that the quality of service rendered was superior to that which one should reasonably expect in light of the hourly rates charged." Id.

In this case, we are presented with the rare and exceptional case in which specific evidence is readily available to demonstrate that an upward adjustment of the lodestar amount earned by ST&G is justified. Particularly because of the results obtained, the lodestar amount does not adequately compensate the applicant. The Supreme Court has held that "presumably", the results obtained, along with other factors including the novelty and complexity of the issues, the specific skill and expertise of counsel, and the quality of representation, are subsumed within the lodestar and do not serve as an independent basis for an upward adjustment. Delaware I, 478 U.S. at 565, 106 S. Ct. at 3098. The operative word in that statement is "presumably," because a presumption may be rebutted. "[T]he results achieved may, under appropriate circumstances, serve as the basis for a fee enhancement, such as when a skilled lawyer obtains an exceptional result efficiently, quickly and effectively." In re Buckridge, 367 B.R. at 204. A case may be described as "rare and exceptional" if the results obtained "exceed the reasonable expectations of the parties under the Bankruptcy Code." In re Farah, 141 B.R. 920, 925 (Bankr. W.D.Tex. 1992).

Here, we have outstanding and highly skilled lawyers from ST&G (including shareholders Frank Merola and K. John Shaffer, and associates

Christine Pajak and Nathan Schultz) who have obtained an exceptional result, exceeding the reasonable expectations of the parties, and who have obtained that result efficiently, quickly and effectively. The exceptional result is the recovery through the Chapter 11 process by public non-insider shareholders of a cash package worth approximately $40 million, plus one-year warrants to purchase stock in the reorganized company. When the case was filed, the Debtors expected that the recovery by the non-insider shareholders, as provided in the prenegotiated plan, would be worth approximately $300,000. The Debtors based their expectations on the fact that another sophisticated, highly skilled law firm had represented the Debtors' Special Committee, whose primary focus was the interests of the public non-insider shareholders. The law firm represented the Special Committee for nearly a year prior to the filing of the petition, had achieved a package for the non-insider shareholders worth about $300,000, and had cost the Debtors over $1 million in legal fees.

ST&G achieved these results efficiently, employing primarily two shareholders (each at $575 per hour) and two associates ($350 and $325 per hour) to perform nearly 75% of the time spent on the case. Only 1% of the billing was at a rate over $600 an hour. Over half of the compensated time was billed at$350 an hour or less.

ST&G achieved exceptional results in the case quickly and effectively.

They were retained as of January 5, 2005. The RSA entered into by the parties prior to the bankruptcy filing imposed extremely tight time constraints on the process, permitting the secured noteholders to terminate the agreement if the Debtors' disclosure statement was not approved by February 15, 2005, and if an order confirming the Chapter 11 plan was not entered by April 15, 2005. Under enormous time pressure, the firm successfully investigated highly complex transactions, and promptly translated the results of that effort into a very effective objection to the Debtors' pre-negotiated plan. The effectiveness of the objection is readily demonstrated by the nearly immediate acquiescence of all other parties in interest in the case, including the Debtors, DJT, and the secured noteholders, to substantial concessions to the non-insider shareholders. The consensual arrangement was arrived at without derailing the reorganization process. The Debtors' amended plan was able to go forward as scheduled, and an order confirming the plan was entered on April 5, 2005. The applicant has met the heavy burden of justifying entitlement to an enhancement.

ST&G seeks a bonus of $500,000 for its work in this case, which represents an upward adjustment of over 50% of the lodestar amount ($978,530.25). The touchstone to determine the appropriate amount of the enhancement is that the award must represent "reasonable compensation for actual, necessary services rendered," considering "the nature, the extent, and the value of such services." 11 U.S.C. § 330 (a)(1)(A) and (a)(3). While we understand that such an award may not be a windfall to the applicant, In re One City Centre Assocs., 111 B.R. at 879, there is no uniform standard to guide the discretion that must be exercised by the bankruptcy court to achieve a reasonable compensation award.

Because most bankruptcy courts faced with an enhancement request have adopted, or at least borrowed from, the construct of compensation applicable to fee-shifting cases, In re Farah, 141 B.R. at 928, the Supreme Court imposition of a 30% cap on fee enhancements in fee-shifting cases involving the risk of non-payment in Delaware II, supra, is instructive here. While there are notable differences between compensation awarded under federal fee-shifting statutes and compensation awarded under the Bankruptcy Code[10], the fee-shifting statutes, like section 330(a)(1) of the Code, require that the fees awarded be "reasonable." See, e.g., 42 U.S.C. § 7604(d) ("reasonable attorney and expert witness fees" may be awarded). In Delaware II, the Supreme Court, in recognizing that "the matter of risk-enhancement [is left] to

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[10] The "fit" between compensation in fee-shifting cases and bankruptcy cases may be criticized on many grounds. In re Farah, 141 B.R. at 928. The concept of awarding fees to the "prevailing" party in some cases, to compensate plaintiff's lawyers for not prevailing in other cases, is not relevant in bankruptcy cases. Id. As well, in fee-shifting cases, "enhancement actually penalizes defendants with the strongest cases, authorizing the highest fees in cases least likely to be won, . . . a notion completely foreign to bankruptcy." Id.

the informed discretion of the courts," 483 U.S. at 728, 107 S. Ct. at 3088, expressed concern about the "severe difficulties and possible inequities involved in making upward adjustments for assuming the risk of nonpayment," Id., and "the uncertainties involved in determining the risk of not prevailing and the burdensome nature of fee litigation." Id. at 730, 107 S. Ct. at 3089. To guide the exercise of the trial courts' discretion in awarding fees, the Court "deem[ed] it desirable and an appropriate application of the statute to hold that if the trial court specifically finds that there was a real risk-of-not-prevailing issue in the case, an upward adjustment of the lodestar may be made, but, as a general rule, in an amount no more than one-third of the lodestar." Id.

With substantial differences noted between enhancements based on the risk of nonpayment and enhancements based on results obtained,[11] the search for a parameter to guide the exercise of discretion in awarding an enhancement is satisfied by the 30% cap imposed in Delaware II. Even with the adoption of the cap as a framework for a determination of the amount of enhancement to award, the exercise is still admittedly subjective. Nevertheless, in light of the enormous success achieved here by the applicant, I can readily conclude that

[11] The Supreme Court expressed its intention that the limitation on enhancements "will at once protect against windfalls for attorneys and act as some deterrence against bringing suits in which the attorney believes there is less than a 50-50 chance of prevailing." 483 U.S. at 730, 107 S. Ct. at 3089. While the desire to protect against windfalls coincides with a section 330 reasonableness assessment, the deterrence effect has no relevance.

the amount of the enhancment should be 30% of the lodestar ($978,530.25), or $293,559.07.

The applicant shall submit a form of order in conformance with this opinion.

Dated: August 1, 2008

JUDITH H. WIZMUR
CHIEF JUDGE
U.S. BANKRUPTCY COURT