

The Honorable Frank E. Cuthbertson
Hearing Date: May 7, 2010
Hearing Time: 9:00 a.m.
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

In Re:
MCUBE PETROLEUM, INC., a Washington
corporation;
BASILAM PETROLEUM, LLC, a
Washington limited liability company;
DISKI PETROLEUM, LLC, a Washington
limited liability company;
HALMAHERA - REMBANG, LLC, a
Washington limited liability company;
LARAMIE PETROLEUM, INC., a
Washington corporation; and
ORNA INTERNATIONAL, LTD, a British
Virgin Islands company.

Case No. 09-2-08315-6

**RECEIVER'S MOTION FOR
APPROVAL OF SETTLEMENT**

I. INTRODUCTION AND RELIEF REQUESTED

William L. Beecher, in his capacity as Receiver in the above-captioned Receivership proceeding (the "Receiver"), has filed a Motion with this Court seeking entry of an Order approving a settlement of the claims asserted by the Receiver against Defendant Glaser, Weil, Fink, Jacobs, Howard & Shapiro, LLP ("Glaser") in *Beecher v. Glaser, et al.*, Pierce County Superior Court Case No. 09-2-14145-8 (the "Glaser Action"), for a payment to the Receiver of the amount of \$127,500 within 10 days of the entry of an Order approving the settlement. In addition, the Receiver requests an Order determining that the fees of the Receiver and Counsel

1 are fair and reasonable and ordering payment to Brain Law Firm LLC and the Receiver of the
2 allowed fees on receipt of the proceeds of settlement. Finally, the Receiver requests dismissal of
3 this matter with prejudice as against Glaser.

4 **II. STATEMENT OF FACTS**

5 The allegations against Glaser in the Glaser Action were as follows: Glaser had a long-
6 standing representation relationship with Paul P. Rusnak, the Paul P. Rusnak Family Trust (the
7 "Trust"), and various members of the Rusnak family (including Victoria Pearson) as of April
8 2006. As of April 18, 2006, the Trust was a principal creditor and equity security holder of
9 MCube Petroleum, Inc. ("MCube") by virtue of loaning MCube \$10 million.

10 On November 19, 2006, MCube's general counsel, Jack Loftis, circulated a report (the
11 "Loftis Report) to, among others, Ms. Pearson, a Trust beneficiary who had represented the
12 Trust in the MCube loan transaction. Ms. Pearson then forwarded the Loftis Report to a
13 member of Glaser, Barry Fink, on the same date. As of November 19, 2006, Ms. Pearson was
14 also a MCube Board member.

15 The Loftis Report asserted that MCube's financing activities had involved violations of
16 state and federal securities anti-fraud regulations. In particular, the Loftis Report was explicit
17 that MCube had misrepresented to investors the use that would be made with Hal-Rem investor
18 funds and, that such misrepresentations were undoubtedly violations of securities

19 At the suggestion of Ms. Pearson, Glaser was hired by MCube to investigate the
20 allegations of the Loftis Report and suggest appropriate remedial action. No disclosure, written
21 or oral, of an actual or potential conflict of interest arising from the simultaneous representation
22 of the Trust (as a MCube creditor) and MCube was made to the MCube Board or management
23 by Glaser, although Ms. Pearson made oral disclosure of the representation relationship between
24 the Rusnak family and Trust and Glaser.

25 There is no information which would indicate that the potential conflicts arising from
26 representation of MCube in relation to its financial status and fundraising concurrent with
27 MCube's principal creditor and equity holder were ever discussed with MCube's Board or
28

1 management. Obviously, Glaser would become privy to confidential financial and other
2 information regarding MCube which Glaser could be obligated to disclose to its other client, the
3 Trust. Nor were any conflict waivers obtained.

4 Irrespective of the disclosure of the representation relationship, the Receiver has
5 contended that the conflict was non-waiveable and/or that RPC 1.7 was violated. As a result, the
6 Receiver has asserted that \$255,000 in legal fees and costs paid to Glaser is subject to the
7 remedy of disgorgement.

8 At the time the Loftis Report was circulated, MCube was advised by two different
9 outside securities counsel to cease any fundraising activities which could be viewed as further
10 sales of securities. As part of its representation of MCube, Glaser provided advice as to how
11 MCube could accomplish interim fundraising through loans to MCube from its then CEO and
12 principal shareholder, Robert Miracle. Approximately \$1.8 million in additional funds were
13 raised through Mr. Miracle during the engagement of Glaser.

14 As the Receiver currently understands the advice given by Glaser, MCube was advised
15 that it could not be directly involved in the fundraising activities, and that lenders to Mr. Miracle
16 could have no recourse to MCube to avoid Mr. Miracle's activities from being characterized as
17 further fundraising activities by MCube. If lenders to Mr. Miracle had no recourse to MCube, it
18 was thought that the fundraising could not be viewed as MCube fundraising.

19 In practice, while Mr. Miracle was the ostensible borrower, it appears that some if not
20 most lenders were told by Mr. Miracle that the loans would be secured by or convertible to
21 treasury shares of MCube stock. In addition, proceeds of most of the loans were paid directly to
22 MCube. Thus, the actual fundraising activity: (1) created recourse liability to MCube for
23 investor/lenders; and (2) did not conform to the advice given by Glaser. The evidence acquired
24 to date supports the conclusion that Glaser was unaware of and had no direct participation in any
25 improper fundraising activity.

26 Under the Receiver's Settlement Agreement with Glaser, in return for a payment to the
27 Receiver of the amount of \$127,500 within 10 days of the entry of an Order approving the
28

1 settlement, the Receiver has agreed to release all claims arising from the subject matter of the
2 Glaser Action against Glaser. The Order authorizing appointment of the Receiver and
3 authorizing the Receiver to retain counsel specifies that the Receiver is entitled to payment of
4 3% of the gross proceeds of settlement, and, counsel entitled to 30%, respectively \$3,825 and
5 \$38,250. There are no unreimbursed costs. Net proceeds to the Receivership Estate will be
6 \$85,425.

7 III. EVIDENCE RELIED ON

8 This Motion is based on the Declaration of Paul E. Brain filed herewith and the files and
9 records herein.

10 IV. DISCUSSION

11 A. The Disgorgement Claim.

12 It is important in analyzing the reasonableness of the settlement to distinguish between
13 the two claims because the remedies and elements of proof are different. The first claim is based
14 on the alleged violation of conflicts of interest rules. The second is, in effect, a malpractice
15 claim.

16 The recognized remedy for violation of the conflicts of interest rules is disgorgement of
17 fees:

18 The trial court did not decide that Denver committed malpractice. The trial court
19 ruled as a matter of law that, because of the conflict of interest, Denver could not
20 adequately represent both investors and promoters. The malpractice and
21 negligence issues were reserved for phase two of the trial. Thus, Denver's
22 reliance on malpractice cases is misplaced.

23 The trial court specifically relied on *Woods v. City Nat'l Bank & Trust Co.*,
24 312 U.S. 262, 61 S.Ct. 493, 85 L.Ed. 820 (1941) and *Silbiger v. Prudence Bonds*
Corp., 180 F.2d 917 (2d Cir.1950), *cert. denied*, 340 U.S. 831, 71 S.Ct. 37,
95 L.Ed. 610 (1950) in ordering disgorgement. In *Woods* a unanimous Court
noted:

25 Where [an attorney] ... was serving more than one master or was subject to
26 conflicting interests, he should be denied compensation. It is no answer to
say that fraud or unfairness were not shown to have resulted....

27 ... A fiduciary who represents [multiple parties] ... may not perfect his claim
28 to compensation by insisting that, although he had conflicting interests, he

1 served his several masters equally well.... Only strict adherence to these
2 equitable principles can keep the standard of conduct for fiduciaries “at a
3 level higher than that trodden by the crowd.” See Mr. Justice Cardozo in
4 *Meinhard v. Salmon*, 249 N.Y. 458, 464; 164 N.E. 545 [(1928)]. *Woods*,
5 312 U.S. at 268-69, 61 S.Ct. at 497. The general principle that a breach of
6 ethical duties may result in denial or disgorgement of fees is well
7 recognized. S. Gillers & N. Dorsen, *Regulation of Lawyers: Problems of*
8 *Law and Ethics* 265 (2d ed. 1989); *Ross v. Scannell*, 97 Wn.2d 598, 610,
9 647 P.2d 1004 (1982) (“[p]rofessional misconduct may be grounds for
10 denying an attorney his fees”).

11 *Eriks v. Denver*, 118 Wn.2d 451 at 462, 824 P.2d 1207 (1992). Ultimately, however, the Trial
12 Court has the discretion to decide what impact, if any, a lawyer’s misconduct will have on a
13 claim for attorneys’ fees. *Kelly v. Foster*, 62 Wn. App. 150, 156, 813 P.2d 598 (1991); and
14 *Forbes v. American Bldg. Co. West*, 148 Wn. App. 273, 198 P.3d 1042 (2009).

15 In this case, while the Receiver is of the opinion that the Court would find that an ethical
16 violation occurred, it is unclear that the Trial Court would require complete disgorgement of the
17 fees. Although the technical requirements of RPC 1.7 were not complied with, the record
18 establishes that MCube management was aware of Glaser’s continuing representation of the
19 Trust and the Rusnak family when the representation of MCube was undertaken in November
20 2006. The settlement amount is within the range of reasonable potential outcomes on this claim.

21 **B. The Malpractice Claim.**

22 The crux of the issue on this claim concerns causation. To establish a right to recover
23 damages, the Receiver would have to be able to show that Glaser’s failure to fulfill professional
24 duties to MCube caused damages. If the Receiver cannot make such a showing, it is immaterial
25 whether Glaser’s conduct was otherwise wrongful.

26 Fundamentally, Glaser’s advice concerning fundraising was not followed. The critical
27 elements of those financing activities from the perspective of the Receiver were: (1) the offer of
28 MCube treasury shares as security for loans; and (2) payment by lender/investors directly to
MCube. These are the elements of the fundraising activities which were particularly
problematic for MCube because these elements arguably create recourse by individual
lender/investors against MCube and constitute prohibited fundraising by MCube itself. It

1 appears to have been the original thrust of Glaser's advice that individual lender/investors could
2 not have recourse against MCube. Because the terms and conditions of the financing were
3 changed, proof that the liabilities created for MCube were caused by Glaser becomes very
4 problematic.

5 The argument can of course be made that Glaser should have advised MCube that no
6 financing activities of any kind should have been undertaken. Again, the problem is once again
7 that Glaser's advice was apparently not followed.

8 **C. Other Considerations.**

9 Over the course of the litigation, the Receiver was ultimately able to access
10 documentation relating to Glaser's activities including privileged documentation that would not
11 otherwise be available in a typical litigation. The lack of evidence in this documentation of
12 culpable conduct by Glaser was a factor in the decision to settle.

13 For a variety of reasons, including issues affecting the professional reputations of the
14 Glaser lawyers involved, it was apparent that litigating this matter to conclusion would be a
15 protracted proceeding. As this Court is aware, the matter has already spawned one appeal before
16 the resolution of any substantive issue.

17 In the absence of compelling evidence establishing culpability on the part of Glaser with
18 respect to MCube's fundraising activities, the Receiver concluded that the cost of pursuing these
19 claims was not worth any potential benefit, particularly given the continuing damage to the
20 professional reputations the litigation would cause. On the other hand, the partial disgorgement
21 of fees by Glaser is, in the Receiver's view, an adequate and reasonable result.

22 Finally, the settlement was achieved through a mediation process with the assistance of a
23 mediator well-versed in the commercial law issues involved in this case over a period of about a
24 week. While the communications between the mediator and the parties are privileged, the fact
25 that this settlement was achieved through this process demonstrates, at a minimum, that all
26 relevant settlement considerations were explored.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

V. CONCLUSION

This is a Receivership Estate with limited resources. Continuing the litigation against Glaser without a clearer path to a recovery would create no benefit for the creditors. The result is reasonable in light of all the facts and circumstances and the Receiver would request:

1. An Order Approving the Settlement;
2. An Order Approving Payment of Counsel Fees from the Proceeds; and
3. An Order of Dismissal with Prejudice with respect to all of the claims against Glaser.

DATED this 29th day of April, 2010.

BRAIN LAW FIRM PLLC

By: 

Paul E. Brain, WSBA #13438

Counsel for Plaintiff William L. Beecher, Receiver