

Signed: September 14, 2006

SO ORDERED



**ROBERT A. GORDON
U. S. BANKRUPTCY JUDGE**

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
at Baltimore**

In Re: OR Partners, Inc. *
* Case No. 04-18625-RAG
* Chapter 11
Debtor *

In Re: OR Ramblewood, LLC *
* Case No. 04-17917-RAG
* Chapter 11
Debtor *
* Jointly Administered Under
* Case No. 04-18625-RAG

**ORDER APPROVING FIRST INTERIM APPLICATION OF DAVID E. RICE, TRUSTEE,
AND HIS COUNSEL, VENABLE LLP, FOR: (I) ALLOWANCE OF COMPENSATION
AND REIMBURSEMENT OF EXPENSES AS COUNSEL TO THE TRUSTEE,
(II) ALLOWANCE OF TRUSTEE’S COMMISSION, AND (III) AUTHORIZATION FOR
PAYMENT OF FEES, EXPENSES AND TRUSTEE’S COMMISSION**

Before the Court for consideration at a hearing held on July 24, 2006 was the First Interim Application of David E. Rice, Trustee, and his Counsel, Venable LLP (hereafter "Venable"), for: (I) Allowance of Compensation and Reimbursement of Expenses as Counsel to the Trustee, (II) Allowance of Trustee’s Commission, and (III) Authorization for Payment of Fees, Expenses and Trustee’s Commission (hereafter, “Application”) filed on May 22, 2006 (Dkt. No. 279-1). LBC, Inc. (hereafter,

“LBC”) and Larry Cunningham (hereafter, "Cunningham") filed a Joint Opposition to the Application (hereafter "Joint Opposition", Dkt. No. 283) on May 25, 2006. After hearing from the Parties, the Court denied the Joint Opposition for the reasons stated below. However, the Court took consideration of the Application under advisement to determine whether the method selected by the Trustee for the approval of his commission is permissible.

In their Joint Opposition, LBC and Cunningham argued that the compensation requested by Trustee and Venable was excessive when compared with the amount and difficulty of work performed. Although this is a jointly administered case, the Application only requests approval of fees and expenses in connection with a sale of assets belonging to the estate of OR Partners, Inc. During the course of the hearing, the Court learned that LBC and Cunningham are not creditors of the estate of OR Partners, Inc., but instead allege themselves to be creditors of the estate of OR Ramblewood, LLC. Accordingly, as this application does not provide for the allowance of any fees in connection with the estate of OR Ramblewood, LLC, LBC and Cunningham do not have standing to contest this Application. Moreover, even if they had standing, the Joint Opposition does not raise any substantive basis for the denial of the Trustee’s fees and expenses. For the reasons stated at the hearing, the Joint Opposition was therefore denied.

However, under 11 U.S.C. § 330(a)¹, the Court has an independent duty to review trustee's and professional's fees and expenses. The Court’s concern in this case, and the reason underlying the independent review that preceded this Order, arises from the somewhat unusual nature of the Trustee’s fee request.

As presented by the Application, the Trustee and his law firm, Venable, seek to recover (a) an allowance of compensation and expenses incurred by Venable as the Trustee’s counsel, (b) a separate

¹ Hereafter, all code sections refer to the United States Bankruptcy Code found at Title 11 of the United States Code unless otherwise noted.

award of the Trustee's commission and (c) the Court's authorization for the payment of the commission, fees and expenses from the proceeds of the sale of estate property. The creditors that hold liens against the proceeds have consented to the payment to the Trustee in the amounts set forth in the Application. Application at 2.

The problem presented by the Application is that the Trustee, in lieu of seeking an award of compensation based upon the commission schedule in Section 326, has instead decided to seek compensation based upon the hourly rate he would normally charge as an attorney multiplied by the number of hours that he devoted to the case. Application at 27. This is troubling for two reasons.

When the court has authorized the trustee to serve as an attorney for the estate, Section 328(b) requires that the "court may allow compensation for the trustee's service as such attorney ... only to the extent that the trustee performed services as attorney ... for the estate and not for performance of any of the trustee's duties that are generally performed by a trustee without the assistance of an attorney ... for the estate." Here, the Trustee has folded all of his services, both as an attorney and as trustee, into a single mass set forth in Exhibit D to the Application. No detailed explication is provided as to which services were purely legal and which were solely related to his duties as trustee. The Court cannot, and should not, be required to sift through the identified services to draw the distinction required by Section 328(b). A court's failure to honor that distinction, by awarding fees instead of commissions under somewhat similar circumstances, has resulted in the reversal of the award for an abuse of discretion. Assistant U.S. Trustee v. John Galt, Ltd., 130 B.R. 464, 466 (S.D. W. Va. 1989).

Moreover, the Trustee has relied upon a straightforward formula that multiplies his total hours by his normal hourly rate. In effect, the Trustee seeks reimbursement as if he were an attorney for all services rendered. However, the Trustee has not provided the kind of detailed analysis, such as that provided earlier in the Application with respect to Venable's fees and expenses, that one would normally expect under the multi-layered "lodestar" criteria that must be satisfied to determine whether

professional fees are reasonable. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) as adopted by the Fourth Circuit in Barber v. Kimbrell's, Inc., 577 F.2d 216 (4th Cir. 1978). The Trustee writes, "If this application were prepared in exact conformity to the applicable rules regarding fee applications, the Trustee's time entries which reflect legal work would be described in the paragraphs above and included in Exhibit "A". However, the Trustee seeks compensation on an hourly basis only, and not at the higher percentage-based commission allowed by §326 of the Bankruptcy Code." Application at 27. This is followed by a flat summarization of the Trustee's fee calculation which results in a total bottom line figure of \$115,248.00 in compensation sought.

The Trustee correctly notes the amount requested is substantially less than what his commission would be if calculated under Section 326. If calculated pursuant to the normal formula, the Trustee could request a commission exceeding \$200,000. Hence, the estate appears to be receiving a substantial benefit by the Trustee's decision not to seek the commission he otherwise may be entitled to receive. The Court notes, however, that, as acknowledged by counsel for the Trustee at the hearing, unsecured creditors will receive nothing from the proceeds of the real estate sales and most, if not all, of those proceeds will be divided between the Trustee and the lien holders. It appears that the Trustee's reduced fee may be as much the result of a compromise between the Trustee and the lien holders as anything else.

Nevertheless, the overarching principle to be enforced whenever professional fees are sought is whether they are reasonable under Section 330(a). The Application reflects that the Trustee has performed substantial services for the estate in a highly competent manner as befits the first rate reputation and skill of the Trustee and his law firm. Moreover, counsel for the Trustee indicated at the hearing that the Trustee is aware of other potential assets and that the administration of this case is far from complete.

If the Trustee had instead decided to present an application seeking a commission in an amount voluntarily reduced to the amount he now seeks, without injecting the element of what would otherwise be his attorney's fees, then the concerns noted in this Opinion would not have been raised. The Court concludes however that notwithstanding those concerns, the Trustee is seeking substantially less than he might otherwise recover under Section 326 and he is not using the proposed hourly rate mechanism as a subterfuge to gain a greater amount of compensation than he would be entitled to for his Trustee's duties under Section 326. These important findings distinguish this case from the decision in John Galt, Ltd. Therefore, the Application will be approved and the requested fees and expenses shall be awarded with the same to be paid from the proceeds of the sale of the estate's real estate as requested in the Application.

It is, therefore, by the United States Bankruptcy Court for the District of Maryland,

ORDERED, that for reasons stated above, the Trustee's First Interim Application of David E. Rice, Trustee, and his Counsel, Venable LLP, for: (I) Allowance of Compensation and Reimbursement of Expenses as Counsel to the Trustee, (II) Allowance of Trustee's Commission, and (III) Authorization for Payment of Fees, Expenses and Trustee's Commission, is GRANTED.

ORDERED, that legal fees of Venable LLP ("Venable"), counsel for David E. Rice, the Chapter 11 Trustee herein (the "Trustee"), in the amount of \$154,572.00 pursuant to the Application should be, and the same hereby are ALLOWED AND APPROVED, on an interim basis, said amounts being allowed compensation for services rendered and expenses incurred for the period from June 22, 2005; through December 28, 2005; and it is further,

ORDERED, that reimbursement of Venable's reasonable, necessary expenses in the amount of \$14,963.56 is hereby ALLOWED AND APPROVED, on an interim basis, said amount being the reasonable, necessary expenses incurred by Venable incident to its representation of the Trustee in the above-captioned case; and it is further,

ORDERED, that the Trustee's commission be ALLOWED AND APPROVED, on an interim basis, in the amount of \$115,248.00, pursuant to 11 U.S.C. § 326; and it is further,

ORDERED, that the Trustee should be, and he hereby is, AUTHORIZED AND DIRECTED to pay the combined sum of \$284,783.56 as an allowed Chapter 11 administrative expense of the above-captioned bankruptcy case pending in this Court, such amount to be paid from the proceeds of sale of the real property known as the Taney Manor Apartments and the Mount Pleasant Heights Apartments, such properties being the collateral securing the claims of (a) Baltimore Community Lending, Inc., formerly know as Baltimore Community Development Financing Corporation, and (b) (with regard to the Taney Manor Apartments only) Arnold Bloom, as trustee for the Baltimore-Belmont Nominee Trust.

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End of Order