

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Re: DATA Hardware Incorporated,
CHAPTER 11

Debtor.

Bky. NO. 92-34155

ORDER

This matter is before the Court on application of Debtor's attorney, Larkin, Hoffman, Daly & Lindgren (Larkin), for interim compensation. Objection was filed by the U.S. Trustee. Hearing was held on December 22, 1992. Appearances are as noted in the record. The Court, having reviewed the entire file, considered the briefs and arguments presented, and being fully advised in the matter, now makes this ORDER pursuant to the federal and local Rules of Bankruptcy Procedure.

I.

Debtor is in the business of buying and selling IBM computers and computer components in the secondary market. As recently as 1990, Debtor had annual sales of \$155,000,000, and in 1991 \$108,000,000. David Heinen is the sole shareholder of the Debtor, and until late 1991 or early 1992 was its CEO. On April 17, 1992, Heinen and the Debtor were sentenced in Federal District Court after conviction of 28 counts of fraud in connection with business transactions involving IBM in 1988. At the sentencing the Debtor was represented by Lewis Remele, Jr.. Ronald Meshbeshier represented Heinen. Larkin apparently had some prior involvement representing the corporation, but its role in the criminal proceeding on behalf of either the Debtor or Heinen is not clear from the present record.(1)

Footnote 1

At the sentencing, Remele represented to the District Court that the corporate defendant was then under new management by Donald Eisma, who was its current CEO. Remele indicated to the court that Remele had been brought in as counsel because "the Larkin firm thought that there were some issues with respect to Mr. Eisma's own personal questions as being the CEO versus the corporation." (Trans. 3-91 Crim. 25, Sentencing, April 17, 1992, p.8.) At the commencement of the bankruptcy case, Larkin was in possession of \$80,000 remaining from a \$100,000 retainer taken earlier from the corporation for services apparently to be rendered in connection with the difficulties the corporation was experiencing as a result of the criminal conviction. End Footnote

Remele argued at the hearing that the Debtor was under new

outside management by its current CEO Donald Eisma, who was laboring to turn the company around after the criminal conviction, and that the court should take this good faith effort into consideration when sentencing the corporation, particularly when imposing a fine. (See: Sentencing Tran., p.9 et seq.) The corporation was fined \$500,000 to be paid as set by the probation office. Sometime between the sentencing and the bankruptcy filing (and before any of the fine was paid), Eisma either resigned or was removed as CEO, and Terri Heinen, David Heinen's spouse, became CEO. Terri Heinen is not a shareholder of the Debtor, and apparently has had no significant managerial experience with either the Debtor or anyone else. She was retained as CEO at a monthly salary of \$12,000. Assisting her in running the company is Sheila Pellow, who was elevated to comptroller from manager of finance and operations support. Ms. Pellow's salary of \$35,000 per year did not change upon her promotion.

A Chapter 11 bankruptcy petition was filed on July 28, 1992, and the attorney for the U.S. Trustee conducted his first meeting of creditors on October 1, 1992. The Trustee was aware of the information related above by the conclusion of the creditors' meeting. On November 9, 1992, the Trustee filed a motion for expedited relief seeking an order appointing a trustee to assume control over the Debtor's business affairs.(2) The Court declined the expedited request, but ordered the appointment of an examiner and continued the motion for appointment of a trustee for evidentiary hearing pending the examiner's report. The matter has not yet been heard.

Footnote 2

In making that observation, the Court does not trivialize the allegations of the Trustee against the Heinens. In light of: the course undertaken by the Debtor prior to sentencing; representations regarding motives of the Debtor made to the District Court at sentencing; and, the subsequent replacement of an apparently highly qualified CEO by an inexperienced Terri Heinen, substantial explanations and assurances are certainly in order.

End Footnote

In the meantime, Larkin has filed with the Court the present application for allowance of interim fees of \$69,234.75, and reimbursement of expenses in the amount of \$1057.57. The request is for services rendered and costs incurred from the date of filing through October 31. The amount sought does not include compensation for any services rendered in connection with the pending motion for the appointment of a trustee or the actual formulation of a disclosure statement or reorganization plan. The U.S. Trustee objects to the application, claiming that the fees requested are excessive and that they were rendered on behalf of the shareholder of the Debtor, David Heinen, and his spouse, not on behalf of the Debtor or the Debtor's estate. The U.S. Trustee urges that the Court reduce the fees allowed by one-third, and that it authorize distribution of only one-half the allowed fees pending resolution of the motion for the appointment of a trustee.

II.

A careful review of the application and the accompanying exhibits reveal no apparent inappropriate or excessive charges for stated services rendered or costs incurred. The detailed exhibits submitted in support of the application, and the Petition and Schedules, disclose a complex case requiring substantial early attention to bankruptcy related investigation, analysis, review,

and processing of information. The exhibits also reveal the existence of substantial bankruptcy issues that appear from the application to have been properly identified and reasonably addressed. While \$69,000 is a substantial sum, it appears from the record to be a reasonable and necessary expenditure in the reorganization effort of the Debtor, in light of the nature and scope of the Debtor's business and its recent history. The Trustee's complaints of excessive charges are premised upon generalization and conjecture.

The Trustee argues that one-half the awarded fees should be withheld from distribution pending resolution of his motion for the appointment of a trustee. The purpose to be served by such an order is not clear. None of the compensation presently sought is for services apparently rendered to the Heinen's individually or on their behalf, defending against the Trustee's motion or otherwise. Furthermore, the premise for ultimately denying compensation to Larkin is presently nothing more than unresolved allegation against principals of the Debtor.(3) Even if those allegations are found to be true, it does not follow that compensation for services rendered in good faith for and on behalf of the Debtor by counsel while the principals are in charge of the Debtor, should be denied. The Trustee has not alleged any misconduct, breach of duty, or dereliction on the part of Larkin. Finally, if it appears or is shown that Larkin has acted inappropriately in the case, remedial measures can be applied at the time such a finding is made, including both rescission of past allowances and denial of future fee awards.

Footnote 3

In making that observation, the Court does not trivialize the allegations of the Trustee against the Heinen's. In light of: the course undertaken by the Debtor prior to sentencing; representations regarding motives of the Debtor made to the District Court at sentencing; and, the subsequent replacement of an apparently highly qualified CEO by an inexperienced Terri Heinen, substantial explanations and assurances are certainly in order.

End Footnote

An order requiring withholding a portion of an otherwise allowable fee pending determination of the Trustee's motion for the appointment of an acting trustee would, under the presently developed facts and circumstances of the case, unjustifiably punish Larkin and chill the firm's ability to effectively represent the interests of the client as it deems appropriate and necessary.

III.

Accordingly, based on the foregoing, IT IS HEREBY ORDERED: the objection of the U.S. Trustee to the application of Larkin, Hoffman, Daly & Lindgren for allowance of interim fees and costs is overruled and the application is allowed in the total amount of \$70,292.32 as requested.

Dated: December 29, 1992.

By The Court:

DENNIS. D. O'BRIEN
U.S. BANKRUPTCY JUDGE