

IN THE CHANCERY COURT OF THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

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2011 OCT 11 AM 11:20

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D.C. & M.  
**COPY**

MARIE MURPHY, SPECIAL DEPUTY )  
COMMISSIONER OF COMMERCE AND )  
INSURANCE FOR THE STATE OF )  
TENNESSEE, )

Petitioner, )

v. )

No. 10-507-III

SMART DATA SOLUTIONS, LLC )  
a Tennessee limited liability company, )  
AMERICAN TRADE ASSOCIATION, )  
INC, an Indiana nonprofit corporation with )  
its principal place of business in Tennessee, )  
AMERICAN TRADE ASSOCIATION, )  
LLC, an Arkansas limited liability company, )  
SERVE AMERICA ASSURANCE, )  
a corporation with an unknown location, )  
BART S. POSEY SR., ANGIE POSEY )  
OBED W. KIRKPATRICK, RICHARD )  
H. BACHMAN, WILLIAM M. WORTHY )  
and COLIN YOUELL, )

Respondents. )

**LIQUIDATOR'S REPLY IN SUPPORT OF**  
**THE LIQUIDATOR'S MOTION FOR APPROVAL OF FEES**

On October 7, 2011, Marie Murphy, in her capacity as Special Deputy Commissioner of Commerce and Insurance for this receivership matter ("Commissioner") and as Statutory Liquidator of Smart Data Solutions, LLC ("SDS"), American Trade Association, Inc., American Trade Association, LLC (collectively referred to as "ATA"), and Serve America Assurance ("SAA"), filed a motion for approval of fees incurred by the Special Deputy Liquidator, special counsel, and third party contractors for services performed from January 1, 2011 through June 30, 2011, pursuant to Tenn. Code Ann. § 56-9-310(a)(4). The affidavits of Special Deputy

Commissioner Marie Murphy, Elizabeth Martin (General Counsel of the Tennessee Department of Commerce and Insurance (“Department”), Mark Jaquish (Director of Receiverships for the Department), John Williams (Director of Internal Audit for the Department), and Paul Eggers (Special Deputy Liquidator) were submitted to the Court along with the motion and set forth in detail the procedures and the process that is followed by the Commissioner and her staff in reviewing the detailed fee invoices and in exercising her discretion in determining the fee payments. The Liquidator has also filed with the Court the certifications that describe the rate, the hours worked, the amount charged, and the person(s) performing the work.

On October 20, 2011, the Liquidator’s counsel received a response in opposition to the Liquidator’s motion for approval of fees that was filed by new counsel on behalf of Respondents, Bart Posey, Sr., Angie Posey, and SDS, LLC.<sup>1</sup> The Respondents argue that the fees should be denied because the Liquidator has not resolved any proofs of claim filed in the Liquidation and thus has not handled the Liquidation in an efficient, expeditious, or economical manner.<sup>2</sup> See Respondents’ Response, at 3. The Respondents

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<sup>1</sup> Now that the Tennessee Court of Appeals has affirmed this Court’s decision that ATA and SDS are insurers subject to the Insurers Rehabilitation and Liquidation Act, Tenn. Code Ann. §§ 56-9-101, *et seq.*, and has returned the mandate signifying the end of the appeal, the Order of Liquidation entered on May 20, 2010 has become final and cannot be appealed. Pursuant to the Liquidation Order and the Liquidation Act, the Liquidator is vested with exclusive authority over ATA, SDS, and SAA, and a permanent injunction is in place to prohibit the transaction of any business on behalf of ATA, SDS, or SAA by anyone other than the Liquidator unless such activity is authorized in writing by the Liquidator. Further, pursuant to Tenn. Code Ann. § 56-9-309, SDS, ATA, and SAA will be dissolved either by the Liquidator’s petition for an order of dissolution of the corporate existence of SDS, ATA, and SAA or by operation of law upon discharge of the Liquidator at the end of the receivership. As a result of the above, SDS, ATA, and SAA may not be represented at this stage of the Liquidation by anyone other than the Liquidator. Therefore, the Liquidator requests that the Court clarify that Mr. Long and Mr. Herbison may only represent the individual respondents, Bart Posey and Angie Posey, and may not represent the entities of SDS, ATA, or SAA, which are exclusively controlled by the Liquidator. Based on the Liquidator’s position, the Liquidator will refer to the Respondents for purposes of this motion as only Bart Posey, Sr., and Angie Posey.

<sup>2</sup> The Respondents have either conveniently forgotten or refuse to acknowledge that any arguable delay in resolving proofs of claim have resulted because of their own actions in this receivership. After appealing

do not oppose the Liquidator's separate motion to proceed with issuing notices of determination, which was also filed on October 7, 2011 by the Liquidator.

This is not the first time that the Respondents have opposed the Liquidator's motion to approve fees. On September 25, 2010, the Respondents filed a response in opposition to the Liquidator's fee motion for services provided from February 24, 2010 through August 31, 2010, in essence contesting the reasonableness of the fees approved by the Liquidator and claiming that the fee amounts appeared to be excessive. See Response in Opposition to Motion to Approve Fees (filed on Sept. 25, 2010), at 3. The Respondents argued that a closer inspection of the fees was necessary and appropriate because Respondents had appealed the liquidation of the companies to the Court of Appeals and did not want the Commissioner to continue to expend the companies' resources excessively in the event that the Respondents were successful on their appeal. See id.

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this Court's Liquidation Order to the Tennessee Court of Appeals, the Respondents in September 2010 challenged the Liquidator's experience and ability to process proofs of claim and expressed their desires to minimize claims liability in the event that the Court of Appeals overturned the Liquidation Order. The Liquidator was ordered not to issue notices of determination on proofs of claim referred to in Tenn. Code Ann. § 56-9-327 or to submit the report on the Liquidator's determination and recommendation for claims referred to in Tenn. Code Ann. § 56-9-331 until the Court ordered those phases to proceed. The Liquidation provided the Respondents with information about its proof of claim processing on or around January 14, 2011, and has been proceeding with its duties pursuant to the Liquidation Order and the Liquidation Act while waiting for the appeal period to conclude which occurred in August 2011. The Respondents have filed no further objections with the Court about the Liquidator's proof of claim processing, and instead, have currently represented that they are not opposing the Liquidator's motion to issue notices of determination, which in essence concludes the Respondent's challenge.

Further, at all stages of the Liquidation, the Liquidator and Special Deputy Liquidator have complied with the statutory requirements and their responsibilities in accordance with the Liquidation Act and with the orders of this Court. As both the Court and the Respondents are aware, the Liquidation has received over 12,700 proofs of claim (most of which contain multiple claims and some of which contain hundreds of claims). See Notice of Filing Report on Number and Types of Proofs of Claim (filed on Jan. 31, 2011). During the Respondents' appeal of the Liquidation Order, the Liquidation has continued to operate, as allowed by the Court, pursuant to the Liquidation Order and the Liquidation Act, which has included but has not been limited to pursuing asset recovery actions and working through proofs of claim so that the Liquidator could issue notices of determination and adjudicate proofs of claims in accordance with Tenn. Code Ann. § 56-9-327 once the Court ordered those stages of the Liquidation to proceed.

This Court rejected the Respondents' arguments and determined in its November 15, 2010 Memorandum and Order that State of Tennessee v. Xantus Health Plan of Tennessee, Inc., 2000 WL 630858 (Tenn. Ct. App. May 17, 2000) (copy attached to the Liquidator's Motion for Approval of Fees (filed on Oct. 7, 2011), instructs the Court about its statutory obligation in determining the propriety of the Commissioner's fee motion. See Nov. 15, 2010 Order, at 2. Accordingly, the Court is not required to undertake a detailed review of the invoices before approving payment and is authorized by law to rely upon the Commissioner's discretion in approving fees. See id. at 2-3.

In the November 15, 2010 Memorandum and Order, the Court made several findings of fact about the affidavits and filings submitted by the Liquidator along with the motion. The Court found that the affidavits submitted by the Liquidator were reliable because of the experience and high level of the responsibilities of the affiants. See id. at 3-4. These high ranking persons with knowledge of the propriety of fees in receiverships reviewed the fees and the underlying invoices. See id. at 4. Several of the affiants established that the fees are either at a discount or market rate for the services performed. See id. Further, the affidavits established that there was not duplication, there was no excessive time, there was no contradiction between the invoices, that the rates were reasonable, that the Department's rates and protocol had been adhered to, and that there were no mathematical inaccuracies. See id. Based on these findings, the Court concluded that it was satisfied that the Commissioner had performed her duty to protect the interests of the estate and granted the motion for approval of fees. See id. at 4-5.

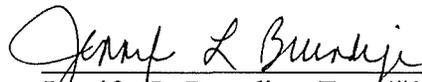
Upon a review of the Liquidator's current motion for approval of fees, along with the affidavits and attachments, the Liquidator has provided adequate information for the

Court again to determine that the Liquidator has properly exercised her discretion in overseeing and approving the fees incurred by the Liquidation. The affidavits establish that high ranking persons with knowledge of the propriety of fees in this area reviewed the fees and the underlying invoices. The affidavits further establish that the fees are either at a discount or market rate for the services performed, that there was not duplication, that there was no excessive time, that there was no contradiction between the invoices, that the rates are reasonable, that the Department's established rates and protocol were adhered to, and there were no mathematical inaccuracies.

Additionally, nothing has changed in the rates or in the Department's protocol and procedures for reviewing and determining the reasonableness of fees since the Court's approval of the fee motion for services provided from February 24, 2010 through August 31, 2010 and of the fee motion for services provided from September 1, 2010 through December 31, 2010. Therefore, the Liquidator respectfully requests that this Court determine that the Liquidator has performed her duty to protect the interests of the estate and grant the Liquidator's fee motion.

Respectfully submitted,

LUNA LAW GROUP, PLLC

  
Jennifer L. Brundige, Esq. (#020673)

LUNA LAW GROUP, PLLC

333 Union Street, Suite 300

Nashville, TN 37201

(615) 254-9146

*Special Counsel for the Liquidator and  
Special Deputy Liquidator*

**CERTIFICATE OF SERVICE**

I hereby certify this the 24<sup>th</sup> day of October, 2011, that a true and exact copy of the foregoing has been served by U.S. mail, postage pre-paid, and/or via email as indicated, to the parties and interested entities listed on the attached service list.

**Attorneys For Petitioner**

Sarah A. Hiestand  
Senior Counsel  
Financial Division  
Office of the Attorney General  
P.O. Box 20207  
Nashville, Tennessee 37202-0207

Lyndsay F. Sanders  
Senior Counsel  
Law Enforcement & Special Prosecutions Division  
Office of the Attorney General  
P.O. Box 20207  
Nashville, Tennessee 37202-0207

Robert M. Garfinkle  
Garfinkle, McLemore & Young, PLLC  
2000 Richard Jones Road, Suite 250  
Nashville, Tennessee 37215

**Attorneys for Respondents Obed W. Kirkpatrick, Sr. and Linda Kirkpatrick**

David L. Raybin  
Hollins, Raybin & Weissman, P.C.  
Suite 2200, Fifth Third Center  
424 Church Street  
Nashville, Tennessee 37219                      615-256-6666 ext 220; Fax: 615-254-4254

**Respondent Serve America Assurance, Ltd.:**

Serve America Assurance, Ltd. Company  
117 Winding Oak Way  
Blythewood, South Carolina 29016

Serve America Assurance, Ltd.  
c/o Beema Pakistan Company, Ltd.  
M. Shahnawaz Agha, Chairman  
412-427 Muhammadi House  
I.I. Chundrigar Road, P.O. Box 5626  
Karachi-74000, Pakistan

Email: [shahnawazagha@yahoo.com](mailto:shahnawazagha@yahoo.com)

**Individual Respondents:**

Mr. William M. Worthy II  
P.O. Box 462  
Isle of Palms, SC 29451

Bart Posey  
3448 Forest Park Drive  
Springfield, TN 37172

Richard H. Bachman  
1600 Magpie Cove  
Austin, Texas 78746

Collin Youell  
1551 North Flagler Drive, #1116  
West Palm Beach, FL 33401  
**(Unknown, not able to deliver to this address)**

Fletcher W. Long  
John E. Herbison  
Long & Herbison, PLLC  
1310 Madison Street  
Clarksville, TN 37040  
**(Attorneys for Individual Respondents Bart and Angie Posey)**

  
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JENNIFER L. BRUNDIGE