



IT IS ORDERED as set forth below:

Date: April 8, 2015

**Paul W. Bonapfel
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

IN THE MATTER OF:	:	CASE NUMBER: 13-43341-PWB
	:	
METAUGUS, INC.,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 11 OF THE
Debtor.	:	BANKRUPTCY CODE
_____	:	
	:	
PRIVATE LABEL NUTRACEUTICALS, LLC,	:	
	:	
Plaintiff	:	
	:	
v.	:	ADVERSARY PROCEEDING
	:	NO. 14-4006
JAMES MILTON CONNAUGHTON,	:	
	:	
	:	
Defendant.	:	

ORDER

James Milton Connaughton, the remaining defendant in this action, seeks

reimbursement by the Plaintiff, Private Label Nutraceuticals, LLC, of fees and expenses incurred by him as a condition of dismissal of this adversary proceeding. For the reasons stated herein, the Court dismisses the adversary proceeding and awards Connaughton attorney fees in the amount of \$6,743.00 and expenses of \$26.71.

Prior to the filing of this case by Metaugus, Inc. (“Debtor”), Private Label Nutraceuticals, LLC (“PLN”) sued the Debtor, Mia Jackson, and James Milton Connaughton, the Debtor’s owner, in Cobb County Superior Court, for damages and injunctive relief for various tort claims arising from a former business relationship. One week later, the Debtor filed its chapter 11 bankruptcy petition. Three months after the Debtor filed its chapter 11 petition, PLN commenced this adversary proceeding asserting substantially the same claims against the same defendants.

Between the commencement of the adversary proceeding in February 2014 and approximately September 2014, the parties filed answers, various pretrial motions, and made some discovery demands. On or about June 12, 2014, PLN filed a motion to lift the stay of the proceedings in Cobb County Superior Court with the intention of proceeding against Jackson and Connaughton only. On August 26, 2014, the Superior Court entered an order lifting the stay and PLN reports that it has filed an amended complaint against only Connaughton and Ms. Jackson. PLN has dismissed its claims in this adversary proceeding against the Debtor and Ms. Jackson with their consent.

PLN seeks to dismiss its claims against Connaughton. Connaughton does not consent to a stipulated dismissal of this proceeding, but seeks to condition the dismissal on the payment of his attorney fees. Connaughton contends that the forum-switching and delays in

litigation have cost him time and expense that should be compensable as a condition of dismissing this action.

On October 21, 2014, the Court held a hearing on PLN's motion to dismiss its claims against Connaughton. Based on the findings of fact and conclusions of law, incorporated herein pursuant to FED. R. CIV. P. 52, made applicable by FED. R. BANKR. P. 7052, the Court granted the motion to dismiss the claims against Connaughton. Among other things, the Court emphasized that it was appropriate to dismiss the proceeding because, since the claims against the Debtor were dismissed, the Trustee was no longer a party and, therefore, nothing in the adversary proceeding affected the interests of the estate. The Court noted that, although there was the possibility of future litigation involving PLN and the Debtor, this was not a compelling reason to keep the adversary proceeding when the claims against Connaughton involved other unrelated claims controlled by nonbankruptcy law without any impact on the Debtor's reorganization or liquidation.

The Court concluded, nevertheless, that it could be appropriate to impose conditions on the dismissal, citing *McCants v. Ford Motor Co., Inc.*, 781 F.2d 855 (11th Cir. 1986), and that such conditions could include, if appropriate under the circumstances, attorney fees and expenses. The Court questioned the appropriateness of Connaughton's \$25,929.79 fee request and instead, suggested that some of the legal services provided to him were unnecessary or essentially would have been duplicative or inevitable regardless of the forum. As a result, the Court directed Connaughton to file a supplemental motion setting forth a revised itemization of fees and expenses to be considered as a condition of dismissal of the proceeding.

Connaughton's supplemental motion seeks \$10,046.71 in fees and expenses that he

contends would not otherwise have been incurred by him if the litigation had simply proceeded in one forum. Connaughton contends these fees and expenses span the time period of May 12, 2014 through and including August 18, 2014 fall into the following categories: legal services related to litigation of the Motion to Lift Stay filed by the PLN in the Superior Court and legal services related to the Motion for Protective Order and stay of discovery filed by PLN in the adversary proceeding.

Rule 41(a)(1) provides that a plaintiff may dismiss an action without a court order by filing a notice of dismissal before the opposing party files an answer or motion for summary judgment or upon a stipulation of dismissal signed by all parties. Otherwise, an action may be dismissed on the plaintiff's motion only by court order "on terms that the court considers proper." FED. R. CIV. P. 41(a)(2).

The Eleventh Circuit Court of Appeals has recognized that a court may attach conditions to the dismissal of an action, including reimbursement of a defendant's expenses of litigation if the defendant has been put to considerable expense in preparation for trial. *McCants v. Ford Motor Co., Inc.*, 781 F.2d 855 (11th Cir. 1986). The Eleventh Circuit noted in *McCants*, "Where a subsequent similar suit between the parties is contemplated, expenses awarded might be limited to those incurred in discovering information and researching and pressing legal arguments that will not be useful in the later suit." *Id.* at 860.

The purpose of such a fee award is not so much to sanction a plaintiff for frivolous litigation, but to make whole the defendant who incurred costs in litigation that she might not otherwise have incurred if either the suit had never been brought or if it proceeded in its current forum.

Using this analysis as a guide, it appears appropriate to condition dismissal of PLN's claims against Connaughton on the reimbursement of some of his attorney's fees and his expenses. Some legal tasks are just a simple cost of litigation that will occur regardless of the forum, such as drafting responsive pleadings, reviewing the status of a case, or general correspondence with clients or opposing counsel, and therefore, requiring PLN to compensate Connaughton for these is not appropriate. But Connaughton incurred other costs and fees solely because of the forum-switch that he otherwise would not have incurred and these costs, within reason, should be borne by PLN. These costs and fees are largely confined to the categories of the Motion to Lift Stay in the Superior Court proceeding and the Motion for Protective Order in the adversary proceeding.

Connaughton contends he should be compensated for legal work performed in these two areas because PLN's litigation strategy caused him to incur expenses he would not otherwise have incurred if the litigation had either stayed in Superior Court to begin with or proceeded in the Bankruptcy Court upon the filing of the adversary proceeding.

PLN contends that it is inequitable to require it to reimburse Connaughton for fees (1) incurred solely for time spent in the state court action; and (2) incurred once he was on notice that PLN intended to dismiss the bankruptcy action and proceed in state court.

The Court does not find persuasive PLN's argument that it is inequitable to require it to reimburse fees for time spent on a matter filed in the Superior Court, not the adversary proceeding. The line between time spent in the bankruptcy court and time spent in the state court is a wavering one. The parties straddled two forums because PLN initiated an adversary proceeding and then sought to return to state court. The fact that Connaughton was required to

represent himself in two different locations until the appropriate forum was determined is not a litigation tactic; it is simply a litigation necessity.

Likewise, the fact that PLN indicated its intent to dismiss the adversary action and resume litigation in Superior Court did not put an end to Connaughton's need for legal representation and advocacy, especially to the extent that there were pending motions ripe for adjudication and outstanding discovery requests in the adversary proceeding.

The Court has reviewed the time records and the docket in this case and concludes, utilizing a lodestar analysis and the factors set forth in *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) and Rule 1.5 of the Georgia Rules of Professional Conduct as guidelines, that it is appropriate to require PLN to reimburse Connaughton the sum of \$6,743.00 for attorney fees and \$26.71 for expenses. The Court will examine each category as set forth below.

Motion to Lift Stay

The Court will allow a fee of \$5,148.00 for work performed by Connaughton's counsel with respect to PLN's motion to lift stay filed in the Cobb County Superior Court. Specifically, the Court allows the following amounts as set forth in Exhibit A to Connaughton's Supplemental Motion.¹

Date	Professional	Hours
5/12/2014	RBC	.2
5/13/2014	JCC	1

¹ As reflected in Exhibit A to the Supplemental Motion [Doc. 54-1], time entries are designated by the initials of the professional. RBC is Robert B. Campos and JCC is James C. Cifelli. Campos's billable rate is \$275.00 per hour and Cifelli's rate is \$495.00 per hour.

5/14/2014	JCC	.3
6/16/2014 – 6/26/2014	RBC	4.5
7/9/2014	RBC	1.3
7/10/2014	JCC	.8
7/17/2014	RBC	.4
8/12/2014	RBC	2.8
8/15/2014	RBC	3.5 –Reduced (Time entry is for 5.5)
8/15/2014	JCC	.8
8/18/2014	RBC	.8

There are certain charges reflected in the time sheets that are excessive and duplicative for the work performed. For example, the Court has disallowed entries on 5/13/2014 (duplicative of previous work); 5/14/2014 (involved communications with attorney for other party, not PLN); 8/1/2014 (administrative tasks); 8/13/2014 (excessive); 8/14/2014 (excessive); and 8/15/2014 (travel). Those billed items not included in the chart above, therefore, are disallowed. The Court allows expenses of \$26.71 for disbursements on July 15, 2014, and September 10, 2014.

Motion to Stay Adversary Proceeding

The Court will allow a fee of \$ 1,595.00 for work performed by Connaughton’s counsel with respect to PLN’s motion for protective order and to stay discovery in the adversary proceeding. Specifically, the Court allows the following amounts as set forth in Exhibit A to Connaughton’s Supplemental Motion.

Date	Professional	Hours
7/7/2014	JCC	.5
7/9/2014	RBC	.4
7/11/2014	RBC	.6
7/16/2014	RBC	1.5
7/17/2014	RBC	.6
8/4/2014	RBC	.9
8/12/2014	RBC	.9

Again, there are certain charges that as reflected in the time sheets that are excessive and duplicative for the work performed. For example, the Court has disallowed entries on 7/7/2014 (RBC-duplicative); 7/7/2014 (LWM-administrative); 8/5/2014 (RBC-duplicative); 8/5/2014 (LWM-administrative); and 8/11/2014 and 8/12/2014 (JCC and GDS-duplicative). Those billed items not included in the chart above, therefore, are disallowed.

Based on the foregoing, the Court dismisses PLN's claims against Connaughton without prejudice and directs PLN to reimburse Connaughton for attorney fees in the amount of \$6,743.00 and expenses of \$26.71. It is, therefore,

ORDERED that the motion to dismiss without prejudice the claims against James Milton Connaughton is granted. It is

FURTHER ORDERED that Private Label Nutraceuticals, Inc. is directed to reimburse Connaughton \$6,743.00 in attorney fees and \$26.71 in expenses. It is

FURTHER ORDERED that all other pending motions are dismissed as moot.

End of Order

NOT INTENDED FOR PUBLICATION

Distribution List

James C. Cifelli
Lamberth, Cifelli, Stokes, Ellis & Nason
East Tower, Suite 550
3343 Peachtree Road, NE
Atlanta, GA 30326-1022

Robert B. Campos
Lamberth, Cifelli, Stokes, Ellis & Nason
Suite 550
3343 Peachtree Road, NE
Atlanta, GA 30326-1009

David Allen Roberts
3340 Peachtree Road, NE
Suite 2570
Atlanta, GA 30326

R. Scott Stevenson
Wong Fleming
Suite 500
2000 RiverEdge Parkway
Atlanta, GA 30328