

**UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa**

In the Matter of	:	Case No. 98-01476-CH
	:	
DEALERS WAREHOUSE	:	Chapter 11
COMPANY,	:	
	:	
Debtor.	:	
	:	
	:	

ORDER – APPLICATION FOR INTERIM COMPENSATION AND EXPENSES

The Second and Final Application for Allowance and Disbursement of compensation to Miller, Canfield, Paddock and Stone, P.L.C., counsel for the Official Unsecured Creditor's Committee, and the objections thereto, and the First Interim Application for Allowance and Disbursement of Compensation to PricewaterhouseCoopers, LLP, Accountants for the Official Unsecured Creditors' Committee, and the objections thereto, came before the court on June 7, 1999.

The First Interim Application for Allowance and Disbursement of Compensation to Miller, Canfield, Paddock and Stone, P.L.C., and the objections thereto, had previously been submitted to the court.

The court took those matters under advisement and considers those matters fully submitted.

The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 157(b)(1) and § 1334. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A). The Court now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

1. Dealers Warehouse Company filed its voluntary petition under Chapter 11 of the Code on April 6, 1998. Said debtor has continued as the debtor in possession at all times herein.

2. Debtor filed its motion to employ Donald F. Neiman and Bradshaw, Fowler, Proctor & Fairgrave, P.C. (hereinafter the Bradshaw Firm) on April 6, 1998. The order authorizing the employment of the Bradshaw Firm was entered on May 4, 1998.

3. Debtor is in the lumber and millwork business with its principle place of business located in Ankeny, Polk County, Iowa. Its Amended Chapter 11 Plan was confirmed on December 28, 1998.

4. The Official Committee of Unsecured Creditors (hereinafter Committee) was appointed on April 30, 1998. David Spitler, United States Gypsum Co., Chicago, IL, was designated as the acting chairperson.

5. The Committee filed its application to employ Miller, Canfield, Paddock and Stone, P.L.C. (hereinafter Miller, Canfield or Applicant), Detroit, MI, as its counsel on May 13, 1998.

6. On June 8, 1998, the Court approved the retention of Miller, Canfield by the Committee to represent it in the course of these Chapter 11 proceedings, effective as of the date of the initial contact with the Committee.

7. The Committee filed its application to employ the accounting firm of Coopers & Lybrand, L.L.P., whose main offices are located at 203 North La Salle Street, Chicago, IL 60601 and 1301 Avenue of the Americas, New York, New York 10019-6013, as its financial consultants on May 29, 1998.

8. The application to employ Coopers & Lybrand as financial consultants was approved by stipulated order entered on July 2, 1998.

9. In its First Interim Application for Allowance and Disbursement of Compensation, Applicant prayed for compensation in the amount of \$28,825.50 and expense reimbursement in the amount of \$2,525.50, as adjusted. This was for the period of May 5, 1998 - July 31, 1998.

10. The First Interim Application reveals that Applicant employed three attorneys on this matter with a blended hourly rate of \$250.97 for a total of 108.2 billable hours.

11. This First Interim Application also shows that Applicant employed a legal assistant with a hourly billing rate of \$105.00 for 15.9 billable hours.

12. In its Second and Final Application for Allowance and Disbursement of Compensation, Applicant prayed for compensation in the amount of \$32,113.00 and expense reimbursement in the amount of \$4,866.04. This was for the period of August 1, 1998 - January 19, 1999.

13. The Second and Final Application reveals that Applicant employed three attorneys on this matter with a blended hourly rate of \$255.90 for a total of 112.4 billable hours.

14. Applicant charged \$105.00 per hour for 31.90 hours in the Second and Final Application for the legal assistant.

15. Miller, Canfield requests total compensation in the amount of \$60,938.50 and total expense reimbursement in the amount of \$7,391.54.

16. The First Interim Application for Allowance and Disbursement of compensation by PricewaterhouseCoopers LLP (hereinafter PWC) prayed for compensation in the amount of \$28,920.10 and expense reimbursement in the amount of \$1,070.19.

17. The court takes judicial notice that PricewaterhouseCoopers LLP is successor in interest to Coopers and Lybrand, L.L.P.

18. PWC and Debtor have entered into an agreement whereby PWC would accept \$22,000.00, and Debtor would not object to that amount as a compromise of the application and the objection thereto.

19. Counsel for the debtor in possession stated at the time of the meeting of creditors on May 14, 1998 that this would be a 100% repayment case.

20. The consensual confirmed amended plan provides that the allowed unsecured creditors claims, totaling approximately \$1.3 million, will be paid 100%, without interest, over the life of the plan of five years.

21. Counsel for the debtor in possession has been allowed fees in the amount of \$27,678.00 and expenses in the amount of \$6,138.98 for a total of \$33,816.98. This is for the period of April 7, 1998 through March 10, 1999.

22. The Bradshaw Firm employed two lawyers on this matter. Donald F. Neiman was the principal attorney with a billable hourly rate of \$150.00 and 163.7 billable hours. Paul A. Drey was the second attorney with a billable hourly rate of \$100.00 and 4.2 billable hours.

23. The Bradshaw Firm employed a legal assistant whose highest billable hourly rate was \$60.00 for a total of 48.0 billable hours.

24. Debtor was authorized to employ the firm of Humiston, Skokan, Warren & Eichenberger PC, Certified Public Accountants, on May 4, 1998. Their application for fees in the amount of \$5,929.25 and costs of \$66.00, for a total of \$5,995.25, has been approved by the court.

25. The Committee has prayed for professional fees and costs in the total amount of \$98,437.33.

26. The professional fees and costs for the debtor in possession total \$39,812.23.

DISCUSSION

The Committee was appointed pursuant to 11 U.S.C. § 1102(a), and counsel, Miller, Canfield, was employed by the Committee pursuant to 11 U.S.C. § 1103(a). Fed. R. Bankr. P. 2016(a) provides:

An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested.

The burden is on the fee applicant to prove that the applicant is entitled to compensation. In re Kula, 213 B.R. 729, 736 (8th Cir. BAP 1997).

11 U.S.C. § 330 governs the Court's award of compensation of officers. That section provides in pertinent part:

- (a)(1) After notice . . . and a hearing . . . , the court may award to . . . a professional person employed under section 327 or 1103--
- (A) reasonable compensation for actual, necessary services rendered by the . . . attorney and by any paraprofessional person employed by any such person; and
 - (B) reimbursement for actual, necessary expenses.

11 U.S.C. § 330. The court may award compensation that is less than the amount requested. 11 U.S.C. § 330(a)(2). In determining what is "reasonable compensation," the Court considers the value of the services, including a consideration of the following factors:

- (A) the time spent on such services;
- (B) the rates charged for such services;

- (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
- (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
- (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. § 330(a)(3). No compensation is allowed for the unnecessary duplication of services.

11 U.S.C. § 330(a)(4)(A). Services must be "reasonably likely to benefit the debtor's estate" or "necessary to the administration of the case" to earn compensation. Id.

The United States Bankruptcy Court for the Southern District of Iowa developed guidelines for evaluating fee applications in In re Pothoven, 84 B.R. 579 (Bankr. S.D. Iowa 1988). "The primary objective of any fee application is to reveal sufficient data to enable the court to determine whether the services rendered were reasonable, actual and necessary." Pothoven, 84 B.R. at 583. In addition, in making professional fee awards, bankruptcy courts must either make an express "lodestar calculation" or make a finding that the lodestar method is inappropriate under the circumstances. Kula, 213 B.R. at 736. Accord Boddy v. United States Bankruptcy Court, Western District of Kentucky (In re Boddy), 950 F.2d 334, 337 (6th Cir. 1994). The lodestar method is calculated as the number of hours reasonably expended multiplied by a reasonable hourly rate. Kula, 213 B.R. at 736. The lodestar amount reflects (1) the novelty and complexity of the issues; (2) the special skill and experience of counsel; (3) the quality of representation; and, (4) the results obtained. Id. at 738.

Generally, a reasonable hourly rate is the fee customarily charged in the court's locality for similar services. Blum v. Stenson, 465 U.S. 886, 104 S. Ct. 1541, 1547, 79 L. Ed. 2d 891 (1984); TCBY Systems, Inc. v. RSP Co., Inc., 33 F.3d 925, 931 (8th Cir. 1994); Avalon Cinema Corp. v.

Thompson, 689 F.2d 137 (8th Cir. 1982) (plaintiff's award of fees was reduced where plaintiff could have found adequate counsel closer to the situs of the case for substantially less than the amount charged by the out-of-state counsel). See also Chrapliwy v. Uniroyal, Inc., 670 F.2d 760 (7th Cir. 1982), cert. denied, 103 S.Ct. 2428, 461 U.S. 956, 77 L.Ed.2d 1315 (the trial court, in its discretion, might allow only an hourly rate that the local attorneys would have charged for the same service if they could do as well as higher-priced, out-of-town attorneys and there is no other reason to hire the out-of-town attorney); Mitland Raleigh-Durham v. Myers, 840 F.Supp. 235 (S.D. N.Y. 1993); In the Matter of Baldwin-United Corp., 36 B.R. 401 (Bankr. S.D. Ohio 1984); In re Wilson Foods Corp., 36 B.R. 317 (Bankr. W.D. Okla. 1984); In re Atlas Automation, Inc., 27 B.R. 820 (Bankr. E.D. Mich. 1983); In re International Coins & Currency, Inc., 22 B.R. 127, 131 (Bankr. D. Vt. 1982); In re Sutherland, 14 B.R. 55, 4 C.B.C.2d 1580 (D. Vt. 1981). But see Zolfo, Cooper & Co. v. Sunbeam-Oster Co., Inc., 50 F.3d 253, 260 (3d Cir. 1995) (appropriate starting point to determine out-of-town professionals' rate is the market rate of the market in which the out-of-town professional practices).

Once the lodestar amount has been calculated, the Court considers whether "rare and exceptional circumstances" exist to warrant an adjustment. Kula, 213 B.R. at 738. Out-of-town counsel will not always be limited to lower local rates. Id. Some circumstances may warrant higher rates, such as in a situation where the case is especially large or involves especially complex issues. In re Busy Beaver Building Centers, Inc., 19 F.3d 833, 855 n. 35 (3d Cir.1994) ("A run-of-the-mill bankruptcy case does not warrant the lofty fees of nationally-renowned law firms.... In other words, the reasonable hourly rate has a cap based on the expected and actual complexity of the case.").

"Judges are justified in relying upon their own knowledge of customary rates and experience concerning reasonable and proper fees, without the need for independent evidence." In re Pothoven, 84 B.R. 579 (Bankr. S.D. Iowa 1988). The description of each professional for whom compensation is sought "should enable the court to determine the appropriate hourly rate which is customarily charged in the community by someone who possesses similar skill, experience, expertise, stature and reputation." In re Pothoven, 84 B.R. 579, 584 (Bankr. S.D. Iowa 1988).

This was not a large case, and the factual and legal issues were not difficult. In fact, counsel for the Committee were not required to appear in court at anytime--as everything was handled by telephone conference calls.

The plan was filed on September 4, 1998. The Committee did not file an objection to the plan but participated in the negotiated terms of the consensual amended plan. The plan provided that the unsecured creditors would be paid in full. The amended plan continued this provision without change. The difference between the original disclosure statement and plan and the amended disclosure statement and plan was that a secured creditor had terminated a line of credit with the debtor which resulted in payments previously scheduled being delayed.

In this case, M. H. Traison, J. S. Green, and D. J. Hutchinson, all principals at Miller, Canfield, bill their services at the rate of \$260.00, \$265.00, and \$200.00 per hour respectively. The services of J. M. Pelland, a contract lawyer at Miller, Canfield, are billed at the rate of \$110.00 per hour. The services of R. E. Bartman, a paralegal, are billed at the rate of \$105.00 per hour.

These rates are significantly higher than those charged by local counsel of comparable ability and stature. This case is not large, nor did it present complex issues to warrant the

retention of counsel outside the community. Debtor's counsel stated that he had contemplated that the plan of reorganization would provide for the payment of 100% of the unsecured creditors' claims from the inception of the case and this goal was not attained by virtue of the negotiation skills of Committee's counsel.

Allowing the higher rates of out-of-state counsel when the necessity for them has not been shown would place an unfair burden on Debtor in this case, who chose to set up its business venture in this locality with its comparatively lower cost of doing business and concomitantly lower overhead costs. It is difficult for this court to believe, in a case such as this, that an Ankeny, Polk County, Iowa, business should be compelled to pay Detroit or Chicago overhead when legal services are locally available and which are also attuned to doing business in a climate of lower overhead.

After careful review of counsel for the Committee's Application for Interim Compensation and Expenses, this Court finds that the rates charged by Applicant are significantly higher than those charged by local counsel of similar background and experience, and that no necessity for the higher rates has been shown. Accordingly, a local billable hourly rate of \$150.00 for lawyer services and \$60.00 per hour for legal assistants will be allowed.

Applicant bills Debtor for a review of and a response to the United States Trustee's objection to Miller, Canfield's Interim Fee Application. A total of \$3,512.00 was charged. This work was not for the benefit of the Committee and did not benefit the estate. Accordingly, this amount must be disallowed.

A Committee meeting was held on August 6, 1998 in Chicago. Both J. S. Green and M. H. Traison prepared for and attended this meeting. One attorney for Debtor prepared for and traveled to Chicago for this meeting.

M. H. Traison charged 10.5 hours and \$2,730.00 for this work. J. S. Green charged 10 hours and \$2,650.00 for this work for a total of \$5,380.00 charged to Debtor. There is no showing why Debtor should be charged for two attorneys to prepare for and attend this meeting. Therefore, this appears to be a duplication of services and \$2,650 should be disallowed.

Applicant charges \$0.20 per copy for duplication expense. The court allows \$0.15 per copy. This charge is accordingly reduced by \$160.75.

Applicant charges \$1,690.00 for fax transmissions. Applicant has not furnished the court with the actual cost per page and has not advised the court why fax transmissions were required as opposed to the use of ordinary mail. The court concludes that this charge is not actual and necessary for the benefit of the estate and constitutes overhead which may not be reimbursed.

PWC and Debtor have agreed upon a compromise amount of \$22,000.00. The court accepts this amount without comment.

ORDER

IT IS ACCORDINGLY ORDERED, as follows:

- (1) The court hereby approves and allows the fees of Applicant in the amount of \$32,058.00, and the expenses of Applicant in the amount of \$5,540.79.
- (2) The court hereby approves and allows the fees and expenses of PricewaterhouseCoopers LLP in the total amount of \$22,000.00.
- (3) The fees and expenses awarded herein are final for work performed on behalf of the Committee during the time period from May 5, 1998 to January 19, 1999.
- (4) Debtor is directed to pay from estate funds the fees and expenses as approved by this order.

Dated this 22nd day of September, 1999.

RUSSELL J. HILL, CHIEF JUDGE
U.S. BANKRUPTCY COURT