

**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF SOUTH DAKOTA**

**ROOM 211**

**FEDERAL BUILDING AND U.S. POST OFFICE**

**225 SOUTH PIERRE STREET**

**PIERRE, SOUTH DAKOTA 57501-2463**

**IRVIN N. HOYT**  
**BANKRUPTCY JUDGE**

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March 9, 1999

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Assistant U.S. Trustee  
230 S. Phillips Ave., #502  
Sioux Falls, South Dakota 57102

Subject: *In re McTighe Industries, Inc.*,  
Chapter 11; Bankr. No. 98-40440

Dear Counsel:

The matter before the Court is Attorney James A. Craig's final application for fees and costs as Debtor's bankruptcy counsel and the United States Trustee's objection thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and subsequent order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court will allow Attorney Craig an hourly rate of \$150.00 in this case but compensation for basic bankruptcy research will not be authorized. Also, the expense allowance for faxes will be reduced to \$.50 per page.

SUMMARY. Counsel are both intimately familiar with this case, the issues that were presented, and the result obtained. At the time of confirmation, Attorney Craig requested \$150.00 per hour for his 263.18 hours of service, sales tax of \$2,368.62, costs of \$1,160.48, and sales tax on costs of \$60.81. The United States Trustee objected to Attorney Craig's fee application on the grounds that a retainer received by Attorney Craig had not been properly accounted for or approved by the Court and that the hourly rate requested was too high when compared to the rates charged by attorneys in the locale of comparable skill. In the alternative, if the hourly rate requested is approved, the United States Trustee urged that compensation for hours on basic bankruptcy law research by Attorney Craig be disallowed.

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At a February 10, 1999 hearing on the fee application, the Court ruled that Attorney Craig could accept an hourly rate of \$125.00 or request an evidentiary hearing to justify the requested rate of \$150.00. The Court advised Attorney Craig that \$150.00 was at the very top end of rates sought in bankruptcy cases in this District. At the confirmation hearing on February 18, 1999, Debtor's operating officer testified as to their satisfaction with Attorney Craig's services and the rate he charged, especially when compared to rates of out of state counsel. The United States Trustee stood on his objections.

GENERAL LAW. The applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended. *H.J. Inc. v. Flygt Corp.*, 925 F.2d 257, 260 (8th Cir. 1991) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). The Court should refer to the lodestar approach and the twelve factors recognized in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). *Chamberlain v. Kula (In re Kula)*, 213 B.R. 729, 736-39 (B.A.P. 8<sup>th</sup> Cir. 1997); *In re Grimes*, 115 B.R. 639, 642-43 (Bankr. D.S.D. 1990); see also *P.A. Novelly v. Palans (In re Apex Oil Co.)*, 960 F.2d 728 (8th Cir. 1992). The twelve factors discussed in *Johnson* are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform legal services properly; (4) the preclusion of employment due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19.

A case by case, item by item review of the application is appropriate. *In re Marolf Dakota Farms Cheese, Inc.*, Bankr. No. 89-50045, slip op. at 8 (Bankr. D.S.D. October 19, 1990) (cites omitted).

DISCUSSION: RETAINER. Attorney Craig has resolved the disclosure problem regarding the retainer received. As long as the receipt of the funds is disclosed and the funds are held in the attorney's trust account pending approval of a fee request, a debtor's attorney is in compliance with 11 U.S.C. § 329(a) and F.R.Bankr.P. 2016(b). *In re Independent Sales Corp.*, 73 B.R. 772, 774-75 (Bankr. S.D. Ia. 1987) (cited with approval in *Snyder v. Dewoskin (In re*

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Mahendra), 131 F.3d 750, 758 n.8 (8<sup>th</sup> Cir. 1997)). In future cases, of course, Attorney Craig must insure that this disclosure is timely as required by the Rule.

DISCUSSION: HOURLY RATE. As stated by the Court at the February 10, 1999 hearing, an hourly rate of \$150.00 is at the highest level seen for bankruptcy work in this District. While it will be allowed in more complex cases for attorneys with substantial experience and expertise, the Court will not compensate attorneys at that rate for elemental or remedial research or non professional services. That means fee applications at this rate must be carefully scrutinized by the United States Trustee and the Court.

From testimony presented, it is clear that Debtor was satisfied with Attorney Craig's representation and the outcome of Debtor's liquidating plan. Although there was not a significant number of complex legal issues, the case did require an experienced bankruptcy attorney who could get all the loose ends tied and foster a sale of the business as a going entity. Therefore, the Court will allow an hourly rate of \$150.00 in this case for Attorney Craig. However, compensation for rudimentary research on May 21, 1998 (2 hours), May 26, 1998 (3.83 hours), July 1, 1998 (1 hour), July 30, 1998 (4 hours), and August 3, 1998 (3 hours), will not be allowed. Where different services on the same date were not separately itemized as required by F.R.Bankr.P. 2016(a), the Court has estimated the research time.

DISCUSSION: FAX CHARGES: Finally, the Court is unable to approve a cost of \$1.00 per page for each fax sent or received by Attorney Craig. Section 330(a)(1)(b) only allows reimbursement of actual expenses. As discussed in *In re Citi-Westport Partners*, Bankr. No. 94-40047, slip op. (Bankr. D.S.D. March 6, 1995), an appropriate charge for sending a fax is the cost for the telephone transmission, if any, that is not already included in the attorney's overhead. Local faxes would incur no additional telephone charge while faxes sent long distance would cost the actual charge of the long distance telephone call. There is no additional paper involved that is not included in overhead. For receiving a fax, the actual cost in the paper to print the transmission received. *Id.*

The Court does not want to discourage the use of fax machines. They save time and resources and are now a common, integral element in business communication,

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unlike even a few years ago. Compare *In re CF & I Fabricators Of Utah, Inc.*, 131 B.R. 474, 494 (Bankr. D. Utah 1991). When a fax serves as a substitute for regular mail service, however, it should not be considered arbitrarily a non overhead expense that is billable to the bankruptcy estate. Section 330(a) of the Code states only actual, necessary expenses may be reimbursed. The Code does not contemplate a profit on expenses. *Id.* at 493-94.

*Citi-Westport Partners*, slip op. at 2.

There is no evidence before the Court that Attorney Craig's actual expense to send or receive one page by fax is \$1.00. Accordingly, in the absence of better evidence of the actual cost in this case, the Court will reduce the allowed charge to a more reasonable rate of \$.50 per page. No doubt higher allowed reimbursement rates for faxes have been approved without objection in other cases in this District. When a high hourly rate is allowed as in this case, however, reimbursable costs must be carefully valued and separated from overhead.

Attorney Craig shall prepare an order consistent with this letter decision.

Sincerely,



Irvin N. Hoyt  
Bankruptcy Judge

INH:sh

CC: case file (docket original; copies to parties in interest)

I hereby certify that a copy of this document  
was mailed, hand delivered, or faxed this date  
to the parties on the attached service list.

**MAR 09 1999**

Charles L. Nail, Jr., Clerk  
U.S. Bankruptcy Court, District of South Dakota  
By 

**NOTICE OF ENTRY**  
Under F.R.Bankr.P. 9022(a)  
**Entered**

**MAR 09 1999**

Charles L. Nail, Jr., Clerk  
U.S. Bankruptcy Court  
District of South Dakota

Case: 98-40440 Form id: 122 Ntc Date: 03/09/1999 Off: 4 Page : 1  
Total notices mailed: 8

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