

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:)
) Bankr. Case No. 92-50206
BRUNO, INC.,)
d/b/a Molly B's Truck Stop,)
Restaurant & Motel, a South) Chapter 11
Dakota Corporation,) MEMORANDUM OF DECISION RE:
Employer's Tax ID No.46-0412862) FEE APPLICATION OF
) DEBTOR'S COUNSEL
Debtor.)

The matter before the Court is the Application for Approval and Payment of Debtor's Attorney Fees filed by Lynn, Jackson, Shultz & Lebrun, P.C. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum and accompanying Order shall constitute findings and conclusions under F.R.Bankr.P. 7052.

I.

Debtor Bruno, Inc., filed a Chapter 11 petition on August 3, 1992. Debtors assets totaled \$1,708,797.85 and its liabilities were \$984,474.93. Debtor had three secured creditors for \$660,000.00, one priority creditor for \$31,000.00, thirteen unsecured creditors for \$293,474.93, and two equity security holders. Debtor held three executory contracts: a contract for deed whereby Debtor was purchasing its truck stop business; a lease for telephone equipment; and a lease of the truck stop restaurant to Lucas Management Services.

By Order entered August 4, 1992, Debtor's employment of Lynn, Jackson, Shultz and Lebrun, P.C., as its attorney was approved. Haven Stuck of Lynn, Jackson was to be paid \$125.00 per hour. Services by paralegals were to be compensated at \$45.00 per hour.

Debtor's Amended Chapter Eleven Plan of Reorganization was confirmed by Order entered April 7, 1993. The plan provides for full payment over time of all creditors. The case is ready for entry of a final decree once the Court resolves an objection to the claim of Lucas Management Services.¹

Lynn, Jackson filed an Application for Approval and Payment of Debtor's Attorney Fees on May 7, 1993. The Application included an itemization of services and expenses and the resumes for two paralegals who performed services in the case. Lynn, Jackson sought compensation of \$27,950.00 for 223.60 hours of service by Attorney Stuck, \$840.00 for 21.00 hours of service by Paralegal Straub, \$2,112.75 for 46.95 hours of service by Paralegal Hazen, sales tax of \$1,898.44, and \$1,156.50 in expenses for a total of \$33,957.69.

Lynn, Jackson served notice of the Application. No objections were timely filed. The Court took the Application under advisement on June 8, 1993.

II.

Section 330 of the Bankruptcy Code states the Court may award to a debtor's attorney

- (1) reasonable compensation for actual, necessary services rendered by such . . . attorney . . . based on the nature, extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a [bankruptcy case].
- (2) reimbursement for actual, necessary expenses.

¹ On June 3, 1993, the Court asked the interested parties to submit additional evidence in that contested matter.

Services rendered by the debtor's counsel must benefit the estate, rather than only the debtor, to be compensated from the estate. *In re Reed*, 890 F.2d 104, 105-06 (8th Cir. 1989). The benefit, however, need not be measurable in monetary terms. *In re Brandenburger*, 145 B.R. 624, 628-29 (Bankr. D.S.D. 1992).

Federal Rule of Bankruptcy Procedure 2016(a) sets forth what information a fee application must include if compensation and reimbursement are sought from the estate:

1. a statement of the payments already made or promised to the applicant;
2. the source of the compensation paid or promised;
3. the particulars of any sharing agreement;
4. the services rendered;
5. the time expended;
6. the expenses incurred; and
7. the amounts requested.

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). Time records should reflect the actual time spent to render each particular service. *In re McDaniel Enterprises, Inc.*, Bankr. No. 88-10199, slip op. at 4 (Bankr. D.S.D. April 9, 1991).

Inadequate documentation may warrant a reduced fee. [Cites omitted.] Incomplete or imprecise billing records preclude any meaningful review by the . . . court of the fee application for "excessive, redundant, or otherwise

unnecessary" hours[.]

H.J. Inc., 925 F.2d at 260 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). The Court must refer to the lodestar approach and the twelve factors recognized in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974).² *In re Grimes*, 115 B.R. 639, 642-43 (Bankr. D.S.D. 1990); see also *P.A. Novelly v. Palans (In re Appex Oil Co.)*, 960 F.2d 728 (8th Cir. 1992). 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). Even if no objections to the fee application are filed by interested parties, the Court is still required to examine the application sua sponte. *In re Hogg*, 103 B.R. 207, 209 (Bankr. D.S.D. 1988).

There is no per se rule in the Code against compensation for multiple appearances by members of the applicant's firm or for intra-office conferences. *Marolf Dakota Farms Cheese*, slip op. at 8. Instead, if compensation for more than one professional or paraprofessional is sought for the same service or for an intra-

² 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.

office conference, the applicant must show that the multiple appearance was necessary and that the fee charged for each professional or paraprofessional was reasonable. *Id.*

"[U]ncertainties should be resolved against the [applicant], if arising because of imprecise record-keeping without adequate justification. *H.J. Inc.*, 925 F.2d at 261 (quoting *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1275 (8th Cir. 1980)); *In re Hanson*, Bankr. No. 386-00136, slip op. at 7 (Bankr. D.S.D. March 8, 1989). The applicant should be allowed to submit additional records before the Court decides to reduce the lodestar for inadequate documentation. *H.J. Inc.*, 925 F.2d at 260.

III.

The Court has reviewed Lynn, Jackson's fee application. The size of the allowance sought -- \$33,957.69 -- indicated a thorough review was necessary because the case did not involve complex legal issues and there were few creditors. In addition, from the inception of the case some legal services were rendered to correct unnecessary procedural problems.³

³ Lynn, Jackson attempted to pay Debtor's filing fee with a personal check from one of Debtor's principals, contrary to the Clerk's long standing policy not to accept personal checks from debtors. The Bankruptcy Clerk advised Lynn, Jackson of this error by letter dated August 3, 1992. Next, Lynn, Jackson did not have principals of the Debtor properly sign the petition. The United States Trustee advised Lynn, Jackson of this error on August 3, 1992. Finally, Debtor aborted an apparently settled adversary proceeding and, instead litigated questions regarding a lease of its restaurant to Jeff Lucas through a contested matter. That matter is more fully discussed in the Memorandum.

Insufficiently Documented or Justified Services. Many entries are not sufficiently documented to show that a professional (not secretarial) service had been rendered that was necessary and of benefit to the estate. See *In re Yankton College*, 101 B.R. 151, 159 (Bankr. D.S.D. 1989). Several other entries are for basic research on bankruptcy law and procedure that should be within the general knowledge of a practitioner charging \$125.00 hour for bankruptcy services. Compare *In re Overby*, Bankr. No. 89-10129, slip op. at 5-6 (Bankr. D.S.D. November 14, 1990). Absent further documentation or justification by Lynn, Jackson which shows that the following services are necessary and that the charge for them is reasonable, these services will not be compensated:⁴

07-27-92	HLS	review documents from business	.5
07-29-92	HLS	review financial documents	.9
07-30-92	HLS	review filing requirements	.2
07-31-92	DPH	Telephone conference with Clerk of Court regarding preparation of mailing matrix and filing requirements	.3
		review rules and requirements for filing Chapter 11	.5
		compile checklist of information which debtor needs to provide to U.S. Trustee and set up of DIP account, and filing requirements	.4

⁴ Some entries on Lynn, Jackson's fee application may have more than one problem.

07-31-92	HLS	review financial records	1.0
08-04-92	HLS	review letter from Trustee and requirements of debtor	.7
08-05-92	HLS	Review correspondence from U.S. trustee regarding procedure	.4
08-05-92	DPH	telephone conference with Bankruptcy Clerk re: type of check required	.1
08-17-92	DPH	telephone conference with Clerk of Courts re: Matrix	.1
08-19-92	DPH	telephone conference with client re: creditor addresses -2	.3
08-26-92	DPH	review local and federal rules	.2
10-08-92	DPH	Telephone conference with bankruptcy clerk re: adversary proceedings	.1
10-23-92	DPH	review statutes and case law re: requirements	2.6
10-26-92	HLS	review requirements for Disclosure Statement and Plan	.7
10-26-92	DPH	Prepare memo re: outline of requirements for Chapter 11 plan and disclosure statement	.80
11-02-92	DPH	telephone conference with client	.1
11-12-92	DPH	telephone conference with clerk of courts re: hearing	.4
11-13-92	DPH	review requirements re:plan confirmation	.8
12-16-92	HLS	letter to Gering	.2
		telephone conference with Marlis	.4
12-29-92	DPH	Conference with Attorney Stuck	.2
		review Bankruptcy Rules	.2
		draft response for Attorney Stuck's review	.3

02-19-93	HLS	serve and file amended Disclosure Statement	.5
03-30-93	HLS	conference with court regarding scheduling of confirmation hearing and Lucas claim	.6
04-30-93	HLS	Prepare, serve and file Reply Brief on Lucas claim	1.2

Post-confirmation Services. All services rendered after confirmation on April 7, 1993, except those associated with preparing briefs on the Lucas claim and complying with the post-confirmation order, will be disallowed as those services were not for the benefit of the estate. The post-confirmation services that will not be compensated from the estate [but remain a personal obligation of Debtor or its principals] are:

04-21-93	HLS	Telephone conference with Doug regarding audit	.5
		telephone conference with Attorney Stan Anker regarding audit	.3
04-22-93	HLS	Telephone conference with Jay (2); conference with Doug all regarding audit	1.0
04-23-93	HLS	telephone conference with Doug, Jay and John Walker regarding audit	1.0
04-26-93	HLS	Telephone conference with Attorney Anker	.4
		conference with auditors and Doug Rogers regarding audit results	1.3
		telephone conference with Jay regarding financial records	.3
		letter to Marlis regarding audit results	.5
04-27-93	HLS	Telephone conference with auditor John Walker regarding audit	.5

		telephone conference with Attorney Stan Anker regarding audit	.5
		telephone conference with Jay regarding audit	.3
04-28-93	HLS	Review correspondence from Ketel, Thorstenson	.3
		telephone conference with Attorney Anker all re: audit	.5
04-29-93	HLS	Conference with Attorney Anker	.5
		conference with Doug Rogers, both regarding audit	.5
		review audit report	.8
04-30-93	HLS	telephone conference with Doug regarding audit	.5
		telephone conference with Attorney Anker regarding audit	.6
05-03-93	HLS	Telephone conference with Doug (2) regarding audit and management	.7

Expenses. Lynn, Jackson needs to justify the use of express mail services on November 19 and 27, 1992 and March 9, 1993. See Grimes, 115 B.R. at 646. Lynn, Jackson also needs to explain how it charged for facsimile transfers on December 23, 1992, January 29, 1993, and March 1, 8, 10, 30, 1993. Only the cost of the long distance telephone charge, if any, and the paper are reimbursable. Other associated costs with using the facsimile machine are overhead not directly billable to Debtor.

Telephone charges for April 21, 22, and 26, 1993 and May 4, 1993 are disallowed because they are associated with disallowed post-confirmation services.

Preparing the Original Fee Application. Lynn, Jackson has not billed for the time spent by Mr. Stuck or a paralegal in preparing the fee application. That time (excluding secretarial time in typing or copying the application) is compensable, if reasonable, and may be included by Lynn, Jackson in an amended fee application. The time spent preparing any amended fee application to satisfy objections is not compensable.

Reviewing Financial Documents. Attorney Stuck spent 21.55 hours and a paralegal spent 2.1 hours reviewing financial documents and talking to Debtor's accountant. Little explanation of or justification for these hours is given. When the Court considers that Lynn, Jackson's attorney and paralegals have also expended over 13 hours preparing Debtor's petition and schedules and over 65 hours preparing Debtor's plan and disclosure statement, the question is raised whether these additional hours spent on financial matters are reasonable. Reviewing Debtor's financial history and establishing necessary projections regarding the feasibility of the plan are necessary services. However, this work was also presumably done during the many hours the firm spent preparing Debtor's schedules, plan, and disclosure statement. Thus, absent further justification in an amended fee application, the Court will disallow the firm's requested compensation and related expenses for reviewing financial documents because those hours are not reasonable in light of the many hours Lynn, Jackson also spent on Debtor's

schedules, plan, and disclosure statement. The firm will need either to justify the large amount of time consumed on Debtor's schedules, plan, and disclosure statement and state why those hours do not include the review of Debtor's finances or explain the purpose of the separate entries regarding review of financial documents.

Resolving the Lucas Claim. Lynn, Jackson spent over 50 hours in attorney time and over 25 hours by paralegals attempting to resolve problems Debtor had with its restaurant tenant, Jeffrey Lucas. Initially, Debtor filed an adversary complaint against Lucas on November 16, 1992 claiming Lucas had breached the lease. Debtor sought damages for lost rental income and a termination of the lease. Lucas counterclaimed on December 15, 1992 for lost income caused by roof leaks and repairs and he sought a continuation of his tenancy. (Lucas also obtained an Order requiring Debtor to assume or reject the lease by January 31, 1993. Debtor filed a notice of assumption on February 1, 1993.) Debtor's complaint was dismissed on January 19, 1993 because Debtor had not given Lucas notice of a default as required by the lease. Prior to the March 24, 1993 trial scheduled on Lucas' amended counterclaim, Lester Nies, counsel for Lucas, informed the Court by letter dated March 11, 1993 that the parties had settled their dispute. The terms of the settlement were outlined in the letter. Mr. Nies inquired on both his and Mr. Stuck's behalf whether Debtor would have to seek court approval of the settlement. Therein, Nies

said, "It is Bruno's position that the best interests of the parties in interest and creditors would be served by a rapid resolution of this matter [and] Mr. Lucas desires to accomplish the settlement without further hearing, if possible." The Court replied by letter dated March 12, 1993 that the settlement would have to be noticed to all creditors and other parties in interest as required by F.R. Bankr.P. 9019(a) and 2002(a)(3). The parties did not notice the settlement. Instead, they stipulated to a dismissal of the adversary on March 26, 1993. Thereafter, Lucas filed an amended proof of claim, Debtor objected to it, and a hearing was held on whether Lucas had a rightful claim against Debtor for a replaced water heater, lost income due to roof leaks and repairs, and costs to be paid when the lease terminated.

Debtor's procedural maneuvers regarding the Lucas lease and its reluctance to notice the stipulation in the adversary for creditor approval were not explained. Absent justification in an amended fee application, Lynn, Jackson's time spent on the adversary proceeding will not be allowed, especially where Plaintiff-Debtor's complaint was premature.

Only those services directly attributable to resolving the Lucas lease questions through the adversary proceeding will be disallowed absent further justification. The Court has allowed time for Attorney Stuck to meet with Debtor's principals and gather information about the Lucas lease since that information was presumably used later when the Lucas lease questions were resolved

through Debtor's objection to Lucas' amended claim.

Lynn, Jackson's attorney spent 8.1 hours in research on the Lucas lease and the firm's paralegals spent 15.9 hours of research on the Lucas lease. Since Attorney Stuck's hourly rate of \$125.00 presumes competency on common bankruptcy questions regarding executory contracts, the firm must also justify the necessity of this research by describing the legal question involved and the purpose of the research.

Services Regarding the Potential Sale or Lease of the Truckstop. Attorney Stuck spent 42 hours working on a potential sale or lease of the truckstop. Neither a sale nor lease of Debtor's business was contemplated within Debtor's original or amended plan. A review of the case file and the fee application indicates those services fostered a venture separate from Debtor's reorganization under Chapter 11 and were likely for the benefit of Debtor's equity security holders, not the bankruptcy estate. Absent evidence to the contrary, compensation for those hours will not be allowed from the estate.

Lynn, Jackson may file an amended fee application to address the Court's objections discussed herein and may request an evidentiary hearing. To assist counsel in preparing an amended application, the Court has attached as Exhibit A a copy of Lynn, Jackson's itemized fee statement on which problematic entries not otherwise identified by date above have been highlighted.

If Lynn, Jackson should choose not to file an amended fee

application, the firm should so inform the Court by letter by no later than September 13, 1993 and the Court will enter an order based on the original fee application and the findings and conclusions of this Memorandum.

Dated this ____ day of August, 1993.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy

(SEAL)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:

)

) Bankr. Case No. 92-50206
BRUNO, INC.,

)
d/b/a Molly B's Truck Stop,

)
Restaurant & Motel, a South

) Chapter 11
Dakota Corporation,

)
) ORDER ALLOWING DEBTOR'S,
Employer's Tax ID No.46-0412862

) COUNSEL TO FILE AN

) AMENDED FEE APPLICATION
Debtor.
)

In compliance with and recognition of the Memorandum of Decision Re: Fee Application of Debtor's Counsel entered this day,

IT IS HEREBY ORDERED that Debtor's counsel, Lynn, Jackson, Shultz & Lebrun, P.C., may file an amended fee application to address the Court's objections to the firm's Application for Approval and Payment of Debtor's Attorney Fees as set forth and more fully described in the Memorandum. The firm may also request an evidentiary hearing; and

IT IS FURTHER ORDERED that should Lynn, Jackson, Shultz & Lebrun, P.C., decide not to file an amended application, the firm should so inform the Court by letter on or before September 13, 1993 and the Court will enter an order based on the firm's original Application for Approval and Payment of Debtor's Attorney Fees and the findings and conclusions of the Court as set forth in the Memorandum of Decision Re: Fee Application of Debtor's Counsel.

So ordered this ____ day of August, 1993.

BY THE COURT:

ATTEST:

PATRICIA MERRITT, CLERK

Irvin N. Hoyt
Chief Bankruptcy Judge

By _____
Deputy
(SEAL)