

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

TELEPHONE (605) 224-0560
FAX (605) 224-9020

April 25, 2001

Stan H. Anker, Esq.
Counsel for Debtor
2902 West Main Street
Rapid City, South Dakota 57702

Bruce J. Gering,
Assistant United States Trustee
Suite 502, 230 South Phillips Avenue
Sioux Falls, South Dakota 57102

Subject: *In re Jacob P. Klammes,*
Chapter 13; Bankr. No. 00-50433

Dear Counsel:

The matter before the Court is Attorney Stan H. Anker's fee application and the United States Trustee's objection. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, the Court will allow total fees (compensation, sales tax, and expenses) of \$2,606.92.

SUMMARY OF FACTS. Jacob P. Klammes ("Debtor") filed a Chapter 13 petition on September 22, 2001. According to Debtor's schedules, his assets included his exempt homestead and an exempt burial plot and just over \$15,000 in personalty, some of which was declared exempt. For liabilities, Debtor listed three secured creditors, none of which had a claim on his home, and sixteen unsecured creditors.

Debtor employed Stan H. Anker as his bankruptcy counsel. Attorney Anker disclosed a retainer of \$1,000, but he did not estimate in his disclosure of compensation what his total fees for the case would be.

Debtor filed his proposed plan with his petition and schedules. Under the plan, Debtor estimated his remaining attorney's fees would be \$2,000. He stated he had no secured claims in default. With two secured creditors, he stated he would pay them outside the plan under the terms of the original agreements. Secured creditor Sears was to be paid in full by the

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thirteenth month of the plan. Unsecured creditors were to receive monthly payments that would, over the 36-month plan term, pay them each 17% of their claim. Debtor also pledged disposable income.

Activity in the file was minimal. Debtor amended his schedule of exemptions on October 6, 2000. Trustee Dale A. Wein objected to Debtor's plan on November 10, 2000 on the grounds that the plan did not comply with 11 U.S.C. §§ 1325(a)(3), 1325(a)(4), and 1325(b). The objections were resolved by the parties before the November 14, 2000 confirmation hearing. Debtor submitted a Plan as Confirmed and confirmation order on November 16, 2000.

Shortly thereafter, Attorney Anker filed his fee application pursuant to Fed.R.Bankr.P. 2016 and Local Bankr. R. 2016-1(b). He requested \$2,865.90 for 24.63 hours of service at \$116 per hour, sales tax of \$171.95, and reimbursement of \$375.50 in expenses. The United States Trustee objected to the fee application on the grounds that the fees charged were too high for this case in which there were limited creditors and essentially no unique circumstances or extraordinary issues.

A hearing was held March 13, 2001. Testimony from Chapter 13 Trustee Dale A. Wein and Rapid City attorney John H. Mairose and arguments from both sides that were given earlier that afternoon in *In re Peterson*, Bankr. No. 00-50410, were incorporated into this case by agreement of the parties. A couple differences were noted for the record. Attorney Anker stated that Debtor Jacob Klammes had some health problems and he required more conference time than usual. Also, a Plan as Confirmed was required in this case, but not in *Peterson*. Assistant U.S. Trustee Gering argued that \$1,500 was a reasonable fee in this case, contrasted to \$1,400 in *Peterson*. The Court took the matter under advisement.

APPLICABLE LAW. As the Court recently discussed in *In re Greenwood*, Bankr. No. 00-50415, slip op. (Bankr. D.S.D. Dec. 28, 2000), the standards for allowing compensation and reimbursement from the bankruptcy estate to a debtor's counsel in this District are provided by 11 U.S.C. § 330. Section 330 essentially provides that a debtor's attorney is entitled to "reasonable compensation for actual, necessary services" and "reimbursement for actual, necessary expenses." It also provides that:

In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including--

(A) the time spent on such services;

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- (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). These several factors, incorporated into § 330(a) by amendments to the statute in 1994, reflect the often-followed criteria set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). See *Buchanan v. Laughlin (In re McKeeman)*, 236 B.R. 667, 670-71 (B.A.P. 8th Cir. 1999). Application of the factors allows the court to use the "lodestar" method of calculating fees: multiplying the reasonable hourly rate by the reasonable number of hours required. *Id.*; *Chamberlain v. Kula (In re Kula)*, 213 B.R. 729, 736-37 (B.A.P. 8th Cir. 1997). Further,

In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

11 U.S.C. § 330(a)(4)(B). The applicant bears the burden of establishing entitlement to a fee award and documenting the appropriate hours expended. *H.J. Inc. v. Flygt Corp.*, 925 F.2d 257, 260 (8th Cir. 1991). A case by case, item by item review of the fee application is appropriate. *In re Marolf's Dakota Farm Cheese, Inc.*, Bankr. No. 89-50045, slip op. at 8 (Bankr. D.S.D. October 17, 1990) (cites omitted).

DISCUSSION. The Court is satisfied that Attorney Anker's hourly rate for professional services is appropriate for his experience and skill level. The Court is also confident that Attorney Anker's fee application accurately sets forth the services he rendered and the time he expended on each service. It is also clear that

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Attorney Anker provided Debtor with thorough, competent legal representation. Where his fee request runs into a problem, however, is with the non professional nature of some services that were rendered and with the total fees charged in light of the complexity of the case.

It has long been the policy in this District that compensation paid from the bankruptcy estate is for professional or paraprofessional services only. *In re Quick Release, Inc.*, 6 B.R. 713, 716 (Bankr. D.S.D. 1980) (Ecker, J.); *In re Yankton College*, 101 B.R. 151, 159 (Bankr. D.S.D. 1989) (Ecker, J.); *In re Alderson*, 114 B.R. 672, 681 (Bankr. D.S.D. 1990) (Hoyt, J.); *In re Overby*, Bankr. No. 89-10129, slip op. at 3-4 (Bankr. D.S.D. Nov. 14, 1990) (Hoyt, J.). In contrast, ministerial or clerical services, such as making copies, preparing certificates of service, preparing form letters, and forwarding documents to the Clerk's office, are included in the attorney's office overhead. *In re Rose Ranch Operating Partnership*, Bankr. No. 90-30016 (jointly administered), slip op. at 9 (Bankr. D.S.D. July 21, 1995). Compare *In re Busy Beaver Building Centers, Inc.*, 19 F.3d 833, 848-54 (3rd Cir. 1994) (discussing when and how clerical services may be compensated from the estate); see *In re Poseidon Pools of America, Inc.*, 180 B.R. 718, 745-46 (Bankr. E.D.N.Y. 1995) (discussing *Busy Beaver Building Centers*).

As Attorney Anker stated, he handles his cases with very limited assistance from support staff. While that helps Attorney Anker assure that his clients are well served, his office practice nonetheless does not permit him to charge the bankruptcy estate for non professional services. In this case, these ministerial services include: preparing cover letters to the Clerk or Debtor on September 21, 2000, September 25, 2000 (apparent forwarding of Notice of Bankruptcy Case Filing at .4 hours), September 28, 2000 (apparent forwarding of Notice of Commencement of Case at .4 hours), October 5, 2000, November 14, 2000, and December 5, 2000 for a total of 2.48 hours; and preparing certificates of service on September 28, 2000, October 5, 2000, and December 5, 2000 for a total of .98 hours. This will result in a deduction in allowed compensation of \$402.60¹ plus associated sales tax.

Another limited deduction is also appropriate. Compensation

¹ The hourly rate used by the Court in its calculation was \$116.36, which was the figure used by Attorney Anker in his fee application.

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for .5 hours on November 6, 2000 when Attorney Anker first drafted the confirmation order will not be allowed. The draft was premature since the deadline for filing objections to the plan had not yet passed. Moreover, the confirmation order is a form order within the Local Bankruptcy Rules (Appendix 19) and requires minimal professional input. The .3 hours allowed for preparing the final order on November 9, 2000 is more than adequate.

An overall deduction of \$300 in compensation will also be made based on the nature of the case and customary fees in this District. *Bachman v. Pelofsky (In re Peterson)*, 251 B.R. 359, 363-65 (B.A.P. 8th Cir. 2000); *McKeeman*, 236 B.R. at 670-72. While Attorney Anker carefully attended to details and meticulously kept Debtor informed, the case was not complex. Debtor had a limited number of creditors. No issues were litigated. Attorney Anker did not have to engage in significant negotiations with secured creditors or Trustee Wein to secure a confirmable plan.

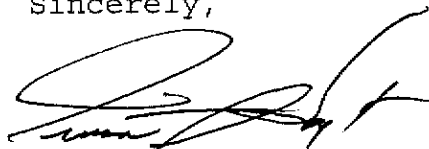
The United States Trustee did not specifically object to any of Attorney Anker's expenses and no deductions will be made in this area. The Court, however, does bring to Attorney Anker's attention that charges for sending a fax should reflect only the cost of the long distance call, if any, and the cost of the paper; all else is overhead. For receiving a fax, the only cost should be the paper used. See *In re Citi-Westport Partners*, Bankr. No. 94-40047, slip op. at 2 (Bankr. D.S.D. March 6, 1995); *In re McTighe Industries, Inc.*, Bankr. No. 98-40440, slip op. at 3-4 (Bankr. D.S.D. March 9, 1999).

The allowed sum is still higher than the norm in the District for a similar Chapter 13 case. From the Application and evidence presented, however, the Court cannot find a further basis to reduce fees in this case in light of § 330(a)(3)(D). The Local Bankruptcy Rules Committee is currently considering whether a Chapter 7 fee guide needs to be established and whether our base Chapter 13 fee set forth in Local Bankr. R. 2016-1 is too low. If and when the new bankruptcy legislation comes into effect, reasonable fees may change again. Until then, the Court, United States Trustee's office, and debtors' attorneys will have to take each case as it comes and assess the fees requested in light of the circumstances of each case and the experience and skills of the attorney rendering services. Debtors' attorneys, including Attorney Anker, guided by § 330(a), will have to continue to find efficient ways to provide necessary services at a reasonable cost. 11 U.S.C. § 329(b); see *Schroeder v. Rouse (In re Redding)*, 247 B.R. 474, 477-79 (B.A.P. 8th Cir. 2000) (comparison of §§ 329 and 330).

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An order will be entered allowing Attorney Anker \$2,105.11 for compensation, \$126.31 for sales tax, and \$375.50 for reimbursement of expenses. With the \$1,000 retainer already received, that will leave \$1,606.92 to be paid through the plan.

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.

APR 25 2001

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

By CN

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

APR 25 2001

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

Case: 00-50433 Form id: 122 Ntc Date: 04/25/2001 Off: 3 Page : 1

Total notices mailed: 4

Debtor Klammes, Jacob P. 1110 N. Haines Ave, Rapid City, SD 57701

Aty Anker, Stan H. 2902 West Main Street, Rapid City, SD 57702

Trustee Wein, Dale A. Bankruptcy Trustee, PO Box 1329, Aberdeen, SD 57402-1329

Aty Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321