UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

IN RE:	)	CASE NO. 89-50045-INH
	)	
MAROLF DAKOTA FARMS CHEESE, INC.,	)	CHAPTER 11
	)	
	)	MEMORANDUM OF DECISION
Debtor.	)	

The matter before the Court is the Application for Final Compensation of Attorney's Fees of Debtor's Counsel filed by James P. Hurley (Applicant) of Bangs, McCullen, Butler, Foye & Simmons and the objections thereto filed by the United States Trustee, as well as those objections raised sua sponte by the Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). This ruling shall constitute Findings and Conclusions as required by Bankr. R. 7052.

I.

On April 16, 1990 Applicant filed an Application for Final Compensation of Attorney's Fees of Debtor's Counsel (Application). The United States Trustee filed an objection on April 23, 1990 that argued Applicant had failed to disclose what sums, if any, Applicant had already received from Debtor as a retainer. That objection was resolved on April 30, 1990 when Applicant filed a response which stated that while Applicant's Disclosure of Compensation, filed on February 22, 1989 pursuant to Bankr. R. 2016(b), declared Debtor had promised to pay Applicant a retainer of $20,000, no retainer was ever received.

A hearing on the Application was held May 1, 1990. At the hearing, the Court raised the issue of whether Applicant had sufficiently justified all legal services performed by more than one attorney or paralegal at the same time, that is, whether Applicant had explained the necessity of all "double billing" entries. In response, Applicant filed a letter on May 22, 1990 that reviewed some of the reasons why double billing may be appropriate in a complex case.

Specific items of service for which more than one attorney or paralegal requested compensation were not addressed. Applicant, however, did agree to cut in one-half the total compensable time charged by one senior partner, Joseph M. Butler, for times when Butler and Applicant both attended conferences.

The Court's final review of the Application disclosed another significant problem. The Court, by letter dated May 30, 1990, informed Applicant of its concern that some services rendered by Applicant were for the benefit of Debtor's principal, Michael Marolf, rather than for the debtor corporation and that Applicant's representation of both Debtor and Marolf may have constituted an impermissible conflict of interest. Noting that denial of all fees **in this case** due to this potential conflict of interest would not be justified, the Court instructed Applicant to file an amended application that addressed three specific areas of potential conflict: (1) the debt owed to Marolf by Debtor totaling $461,668; (2) the debt owed by Marolf to Debtor of $49,278 for loans against future commissions and bonuses; and (3) Marolf's personal liability on a bond issued by American States Insurance Company. On June 18, 1990 Applicant filed a letter with the Court that reviewed the three potential areas of conflict. With each, Applicant stated there was adequate disclosure of the financial dealings between Debtor and Marolf and that at all times Applicant worked for the benefit of Debtor. Applicant further stated that any benefits that enured to Marolf when Debtor and/or Marolf made various agreements with creditors concomitantly benefitted Debtor. Applicant supplemented the June 18, 1990 response with another letter dated on July 13, 1990. In this final letter, Applicant stated that upon a complete review of all time charged in the case, he did not find any charges that should be eliminated from the Application because they benefited Marolf only, rather than Debtor and its bankruptcy estate.

II.

CONFLICT OF INTEREST

Under 11 U.S.C. § 327, the bankruptcy estate, with the court's approval,

may employ as its attorney a person who does "not hold or represent an interest adverse to the estate, and that [is] disinterested." 11 U.S.C. § 327(a)(in pertinent part). The Code defines a disinterested attorney as one who "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to ... the debtor ... or for any other reason." 11 U.S.C. § 101(13)(E).[1] In Chapter 11, a person is not disqualified from serving as the debtor's attorney because of employment by a creditor unless a creditor or the United States Trustee objects and the court determines that an actual conflict of interest exists. 11 U.S.C. § 327(c).

The court's supervisory role under § 327 is effective only if the applicant has made full disclosure of any "connections with the debtor, creditors, or any other party in interest, their respective attorney and accountants" as required by Bankr. R. 2014(a). The court must then carefully consider any objections and enter appropriate findings. See W.F. Dev. Corp. v. United States Trustee (In re W.F. Dev. Corp.), 905 F.2d 883, 884 (5th Cir. 1990).

Simultaneous representation of a debtor corporation and its controlling shareholder by one attorney or firm and the actual or potential conflicts of interest that it creates is not a novel issue in bankruptcy. Generally, simultaneous representation is not a disqualifying conflict per se under 11 U.S.C. § 327(a) but the potentiality for disqualification in bankruptcy is very real. Law Office of J.E. Losavio, Jr. v. Trustee and Creditors' Committee (In re Neidig Corp.), 113 B.R. 696 (D. Colo. 1990); In re Plaza Hotel Corp., 111 B.R. 882, 890 (Bankr. E.D. Ca. 1990). The debtor-corporation needs to uncover and scrutinize all financial dealings by the owner carefully to insure that all avoidable preferences, fraudulent transfers, or claims for equitable

[1] The definition of "disinterested person" under 11 U.S.C. § 101(13) contains four other subsections but subsection (E) is considered to be all-inclusive. See In re Star Broadcasting, Inc., 81 B.R. 835, 838-839 (Bankr. D.N.J. 1988).

subordination are exposed. Plaza Hotel Corp., 111 B.R. at 890. If the owner has guaranteed corporate debt, an actual conflict exists because the corporation's and owner's interests are no longer identical even if the owner-guarantor waives any rights of subrogation or reimbursement. Id. at 890-91 and 890 n.22. Moreover, the corporate debtor must maintain its status as the debtor-in-possession and fiduciary for creditors free of any compromising attitudes fostered by ownership interests. Id. at 890. An owner's and the debtor-corporations's consent to the simultaneous representation is ineffective because it is not an arm's length decision but is one made by "the same person changing hats." Id. at 891. Finally, the cost of separate representation is not a factor; the integrity of the bankruptcy process is paramount to the cost to the estate of engaging separate counsel. Colorado National Bank v. Ginco, Inc. (In re Ginco, Inc.), 105 B.R. 620, 622 (D. Colo. 1988); In re Lee, 94 B.R. 172, 178 (Bankr. C.D. Ca. 1989).

That an actual conflict of interest existed in this case is clear. See Plaza Hotel Corp., 111 B.R. at 890; In re Star Broadcasting, Inc., 81 B.R. 835 (Bankr. D.N.J. 1988). Debtor's principal stockholder, Marolf, not only was owed money by Debtor but he in turn owed funds to Debtor. Moreover, corporate obligations were guaranteed by Marolf. The question then, at this post-confirmation juncture, is what, impact, if any, this conflict should have on Applicant's fee request. The Code authorizes the Court to deny compensation for services and reimbursement of expenses

> if, at any time during such [attorney's] employment ..., such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

11 U.S.C. § 328(c)(in pertinent part); see, e.g., Diamond Lumber v. Unsecured Creditors Committee, 88 B.R. 773, 776 (N.D. Tex. 1988); In re McKinney Ranch Associates, 62 B.R. 249, 252-53 (Bankr. C.D. Cal. 1986). This harsh sanction, however, must be weighed against the realities of this case.

> Rigid rules can be sterile and lacking in universal application. At the same time, an "every case on its own facts" approach can be facile and unhelpful. Ethical experience is the key. Until more is gained, rigidity may be feasible at the far ends of the ethics spectrum, while flexibility governed by facts must reign in a gradually diminishing area between those extremes.

Arkansas v. Dean Food Prods. Co., 605 F.2d 380, 383 (8th Cir. 1979), overruled on other grounds, Firestone Tire & Rubber v. Risjord (In re Multi-Piece Rim Prods. Liab.), 612 F.2d 377 (8th Cir. 1980)[2].

Since this issue has never been fully addressed by this Court and since no objections were lodged against Applicant's employment, this case may, at best, serve as a learning experience for all. No fees will be disgorged due to Applicant's dual representation of Debtor and Marolf. The better time to remedy this conflict was at the inception of the case, not post-confirmation. See Lee, 94 B.R. at 180. Applicant and other debtor's counsel, however, are admonished to insure that such conflicts do not arise again. All affidavits filed in compliance with Bankr. R. 2014(a) must completely disclose any relationship the applicant has with a corporate debtor and its principals. The Court and the United States Trustee's office, as well as other interested parties, will need to more closely scrutinize employment applications to insure that such conflicts do not go unchallenged.

III.

"DOUBLE BILLING"

The Court's final objection to this Application is that Applicant and one or more of his partners, associates, or paralegals have on several occasions each billed Debtor for the same meeting with Debtor or a creditor and that some intra-office conferences have not been justified. Most courts have not adopted a per

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[2] In re Multi-Piece Rim Prods. Liab. was vacated sub nom on unrelated grounds by Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981).

se rule disallowing fees for multiple appearances at hearings or for intra-office conferences. See, e.g., In re Aztec Co., 113 B.R. 414, 415 (Bankr. M.D. Tenn. 1990); In re Pothoven, 84 B.R. 579, 585 (Bankr. D.S. Iowa 1988). The Code does not demand that. Rather, 11 U.S.C. § 330(a)(1) allows **reasonable** compensation for services that are **actual** and **necessary**. There may be some complex cases and proceedings that demand the legal services of more than one professional but where a matter can be adequately addressed by one, denial of or reduction in compensation is appropriate. Aztec, 113 B.R. at 415; Pothoven, 84 B.R. at 585. The fee applicant has the burden of showing that the multiple appearance or intra-office conference was necessary and that the fee charged by each professional is reasonable. In re Wiedau's, Inc., 78 B.R. 904, 908-09 (Bankr. S.D. Ill. 1987); see also In re Grimes, 115 B.R. 639, 642 (Bankr. D.S.D. 1990). A case by case, item by item review of the fee application is appropriate. Aztec, 113 B.R. at 416.

Upon a review of this Application and the letters of explanation submitted by Applicant, compensation for services on the following dates by the stated professionals will be denied because Applicant has failed to show that the second professional's attendance, in addition to Applicant's or another professional's attendance, at meetings with Debtor or a creditor were necessary or that various intra-office conferences were necessary, as required by §330(a)(1):

Joseph M. Butler	Hours
2-21-89	1.50
2-24-89	2.50
3-8-89	1.00
3-13-89	3.00
3-16-89	2.00
3-24-89	1.50
4-18-89	1.75
5-19-89	2.00
9-26-89	3.00
9-27-89	8.00
10-6-89	2.00
11-7-89	4.00
11-8-89	8.00
11-10-89	4.00
	44.25 x $150 = $6,637.50

Thomas H. Foye	
9-26-89	2.50
	2.50 x $150 = $375.00
Mark F. Marshall	
2-21-89	1.25
10-27-89	1.50
	2.75 x $80 = $220.00
Patrick K. Duffy	
3-14-89	3.50
5-16-89	3.25
	6.75 x $80 = $540.00
Debra Niemi	
3-6-89	1.50
3-27-89	.50
9-6-89	1.00
10-5-89	1.00
12-5-89	.50
12-27-89	1.50
	6.00 x $40 = $240.00

The total fees that will be disallowed for unjustified "double billings" or intra-office conferences is $8,012.50. The hourly rate that has been deducted for "double billing" is that of the professional's whose presence at the hearing or meeting seemed most superfluous. Pothoven, 84 B.R. at 585; Wiedau's, Inc., 78 B.R. at 908-09; compare In re B & W Management, 63 B.R.395, at 405 (Bankr. D.D.C. 1986). In this case, it appeared most appropriate to allow Applicant's hourly rate to be charged for those hearings or meetings that he attended with another professional since his presence was generally necessary and his hourly rate was reasonable for the services rendered.

Applicant's willingness to cut in half the time billed by his partner Joseph Butler in recognition of some unnecessary "double billing" is laudable but it does not meet the requirements of § 330(a)(1). The Code allows reasonable compensation only for "actual, necessary" services. While it may be easier to make a percentage reduction in compensation awards when the fee application contains errors or is otherwise inadequate, the Court must make a specific finding of those services which may be compensated under § 330(a).

The Court notes that paralegal Debra Niemi billed time for several intra-office conferences with Applicant. It does not appear that Applicant has also charged for these conferences and the time billed by Niemi is not excessive. Accordingly, the paralegal's fees for these conferences will be allowed.

Finally, Applicant is cautioned that future applications must include a better itemization of the time spent on different legal services rendered on the same day. "Lumping" of time for all services performed on a single day by a

professional is not acceptable. In re Hansen, Bankr. No. 386-00138, slip op. at 5-7 (Bankr. D.S.D. March 8, 1990). That shortcoming in this Application has unnecessarily resulted in a reduction of fees for Applicant and his firm. Where the Court could not distinguish between the charges for disallowed multiple appearances or intra-office conferences and other legal services rendered on the same day, the "lumped" time was disallowed.

An order granting Applicant compensation for legal services of $132,105.50 plus sales tax of $7,926.33 will be entered.

Dated this 17th day of October, 1990.

BY THE COURT:

_____
Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

IN RE:	)	CASE NO. 89-50045-INH
	)	
	)	
MAROLF DAKOTA FARMS CHEESE, INC.,	)	CHAPTER 11
	)	
	)	ORDER APPROVING APPLICATION
	)	FOR FINAL COMPENSATION
Debtor.	)	OF ATTORNEY FEES OF DEBTOR'S COUNSEL

In recognition of and conjunction with the Memorandum of Decision entered October 17, 1990,

IT IS HEREBY ORDERED that the Application for Final Compensation of Attorney's Fees of James A. Hurley is approved in the amount of $132,105.50 for legal services plus sales tax of $7,926.33.

So ordered this 19th day of October, 1990.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By: _____
Deputy Clerk