

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 Debtors
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 Jeffrey L. and Roxann L. Peterson,*
Chapter 13; Bankr. No. 00-50410

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 \$2,824.62.

SUMMARY OF FACTS. Jeffrey L. and Roxann L. Peterson ("Debtors") filed a Chapter 13 petition on September 8, 2000. In their schedules also filed that day, Debtors disclosed that they owned a house. Their personal property included an older camper and five vehicles, two of which were not currently running. The value of all their personalty was \$23,512, which included \$8,280 that Debtor Roxann Peterson was owed for back child support. Debtors declared their house exempt as their homestead and they declared all their personalty exempt. Debtors listed two secured creditors who held mortgages on their house. They listed no priority creditors, and they listed twenty unsecured creditors whose claims totaled \$38,127.38. They had one co-debtor on an unsecured claim held by Jewelers National Bank for \$538.58. Their statement of financial affairs did not reveal any unusual problems or circumstances on the petition date.

Debtors employed Stan H. Anker as their bankruptcy attorney. Attorney Anker disclosed that he received a retainer of \$1,000 and that he would charge \$120 per hour for his services.

31

Re: Jeffrey and Roxanne Peterson
April 25, 2001
Page 2

Debtors filed their proposed plan with their petition and schedules. Therein, they estimated that Attorney Anker would be paid an additional \$2,000 through the plan. Debtors disclosed in their plan that the secured claims were not in default and that these creditors would be paid under the original terms of their agreements. Debtors proposed to pay unsecured claim holders approximately 25% of their claims plus disposable income.

Trustee Dale A. Wein objected to Debtors' claimed exemptions on the grounds that Debtors had exceeded their allowance under S.D.C.L. § 43-45-4. Trustee Wein also objected to Debtors' proposed plan on the grounds that Debtors had not unconditionally committed their disposable income to the plan, that Attorney Anker's fees needed approval, and that the last plan payment date was incorrect. None of the Trustee's objections were significant. No other party in interest objected.

A confirmation hearing was held November 14, 2000. The parties reported that the Trustee's objections were resolved. Attorney Anker was directed to prepare a confirmation order that included the parties' resolution of the disposable income objection, corrected the clerical error in the last plan payment date, and recognized the necessity for Attorney Anker to have his fees approved post-confirmation.

On December 6, 2000, Attorney Anker filed his fee application. He sought \$3,055.20 for compensation of legal services, \$181.31 for sales tax on services, and \$337.86 for reimbursement of expenses, for a total of \$3,576.37.

The United States Trustee timely objected to Attorney Anker's fee application on the grounds that the fees sought were excessive. She argued the case presented no unique circumstances or significant legal issues which would justify higher than average fees.

Debtors did not respond to Trustee Wein's objection to claimed exemptions. The objection was sustained.

A hearing on Attorney Anker's fee application was held March 13, 2001. Dale A. Wein, Chapter 13 Trustee for the District of South Dakota, testified, based on his experience, that this was a case of low or minimal difficulty since there were no problems with secured creditors, no dischargeability issues, only one schedule amendment was required, and no Plan as Confirmed was needed. He concluded that the fees sought by Attorney Anker were excessive in light of the circumstances of the case and the limited work required to get a plan confirmed. Trustee Wein did not dispute the appropriateness of Attorney Anker's hourly rate of

Re: Jeffrey and Roxanne Peterson
April 25, 2001
Page 3

\$120, but he opined that the total compensation for services in this case should not exceed \$1,400.

Rapid City area bankruptcy attorney John H. Mairose was called by Attorney Anker to testify. Attorney Mairose stated that his review of the file indicated that Attorney Anker spent a great deal of time with Debtors getting information and preparing the case. He said it was clear that Attorney Anker attended to all the details in the case. Attorney Mairose opined that Attorney Anker's hourly rate of \$120 was reasonable when compared to other attorneys' rates in the area. As to the time spent on the case, Attorney Mairose said that was harder to judge without knowing the particular debtors involved. While the time spent seemed high, he stated, it was clear that the time spent was all designed to achieve a successful conclusion.

The matter was taken 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;
- (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-

Re: Jeffrey and Roxanne Peterson
April 25, 2001
Page 4

followed criteria set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). See *Bachman 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 Attorney Anker provided Debtors 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 charge 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

Re: Jeffrey and Roxanne Peterson
April 25, 2001
Page 5

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 Debtors on September 6, 2000, September 11, 2000, September 19, 2000, November 14, 2000, and December 1, 2000 (total of 2.16 hours); preparing certificates of service on September 19, 2000, and December 1, 2000 (total .55 hours). This will result in a deduction in allowed compensation of \$325.20 plus associated sales tax.

Three other deductions will be made. The first is for .5 hours on November 6, 2000 when Attorney Anker drafted the confirmation order. The draft was premature since the last date for filing plan objections had not passed. Also, only .3 hours will be allowed for redrafting the confirmation order on November 9, 2000. The order is a form order set forth in Appendix 10 of the Local Bankruptcy Rules for the District of South Dakota and requires minimal professional input.

The third deduction is an overall deduction of \$300 based on the nature of the case and the 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 Debtors informed, the case was not complex. Debtors 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. See *In re Citi-Westport Partners*, Bankr. No. 94-40047,

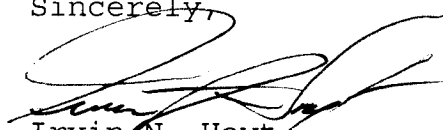
Re: Jeffrey and Roxanne Peterson
April 25, 2001
Page 6

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 any 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).

An order will be entered allowing Attorney Anker \$2,346.00 for compensation, \$140.76 for sales tax, and \$337.86 for reimbursement of expenses. With the \$1,000 retainer already received, that will leave \$1,824.62 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 _____

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: 00-50410 Form id: 122 Ntc Date: 04/25/2001 Off: 3 Page : 1

Total notices mailed: 5

Debtor Peterson, Jeffrey L. 8075 Blucksberg Drive, Sturgis, SD 57785

Debtor Peterson, Roxann L. 8075 Blucksberg Drive, Sturgis, SD 57785

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