

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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November 17, 1988

John R. Hughes, Esq
Post Office Box 1859
Sioux Falls, South Dakota 57101

Re: Sioux Alfalfa Meal Company
Chapter 7 87-40649
Fee Application

Dear Mr. Hughes:

This letter opinion considers your pending application for payment of Debtor's attorney's fees. It is instructive to begin by briefly stating the history of this case. The Debtor filed its Chapter 11 Petition in the Southern Division of this District on November 5, 1987. By an order entered May 4, 1988 Judge Ecker recused himself from presiding on the case. The order of recusal retains venue in Sioux Falls. The pending fee application was submitted May 26, 1988. The application was noticed for a hearing scheduled June 22, 1988. No one objected to the application within five days of the date set for hearing as contemplated by Local Rule 304. Your telephonic appearance was the only appearance made at the June 22, 1988 hearing.

On June 23, 1988 I wrote you informing that the Court would fulfill its independent duty to scrutinize the fee application despite lack of objections from parties in interest I requested, among other things, that you supply an itemization of the time spent on each entry contained on your statement accompanying your application. See B.R. 2016(a). You complied with this request by filing an amended fee application June 27, 1988.

After the court considered the amended application I responded with a letter addressed to you July 19, 1988. By this letter I requested a brief, and/or the submission of evidence regarding two aspects of your application which concerned the Court. My first concern regarded the 13.9 hours attributed to preparing the Debtor's Schedules and Statement of Financial Affairs. I questioned "whether this length of time was reasonably necessary to complete these forms and whether this service is even compensable at an attorney's full hourly rate." See In re Air of Vermont, Inc., 43 B.R. 237 (Bkrcty- D. Vt. 1984). I next questioned "whether the many

hours of work performed pursuing confirmation of a chapter 11 plan is compensable where the case is ultimately converted to chapter 7 particularly where the debtor's proposed chapter 11 plan provided for total liquidation." You complied to my request by tiling a brief September 2, 1988. The case history contained in the brief is particularly helpful due to this Court's late entry into this bankruptcy.

Schedules and Statement of Financial Affairs

The Air Vermont case states that time spent preparing and rewriting schedules is a "routine," ministerial' or "clerical" service most of which should be rendered by an accountant warranting a much smaller fee." 43 B.R. at 241. Your brief asserts that the distinction between ministerial, routine, or clerical services and services of a "truly legal" nature is not universally accepted, and is poor judicial policy. However, District Judge Nichol recognized the distinction in In re Doyle-Lundstra Sales Corp., 19 B.R. 1003 (D.S.D. 1982), and this Court is bound to apply that ruling given the absence of Eighth Circuit Court of Appeals or United States Supreme Court authority to the contrary.

Even applying the ministerial/legal distinction, I find the itemized entries on the amended fee application fully compensable. Now that the Court has a better understanding of the history of Sioux Alfalfa I hold the preparation of the schedules in this case were difficult enough to warrant the full \$85.00 per hour fee. In this regard I note Judge Ecker's order entered December 3, 1987 granting your motion for extension of time to file statement of financial affairs and schedules. I also hold that the time expended preparing these documents was reasonable and necessary within the meaning of 11 U.S.C. §330.

Time Spent Pursuing Confirmation of Chapter 11 Plan

In my July 19, 1988 letter I expressed concern regarding the many hours spent pursuing confirmation of a Chapter 11 plan providing for total liquidation. Obviously, in the normal case, if a debtor wishes to liquidate as opposed to reorganize, he should file in Chapter 7 where the need for debtor's counsel's services are minimized.

After reviewing the history of this case I find the services rendered in an attempt to confirm a Chapter 11 liquidation plan were reasonable and necessary. It was not unjustifiable to operate under the strategy that a more successful sale of the Debtor's processing plant was likely if the Debtor was allowed to remain in possession. It was logical therefore to file in Chapter 11. Also, the liquidation of the Debtor was intended from the outset of the bankruptcy, the liquidation plan was filed with four months of the petition, and it appears no services were wasted in an ill advised attempt to reorganize the Debtor.

Despite the fact that my concerns in the July 19, 1988 letter have been obviated, I still am unable to approve the amended fee

application at this time. Your proposed order approving the fees does not reveal the specific source from which the \$6,308.32 is to be derived. Entry 20(c) of the Statement of Financial Affairs filed December 22, 1987 reveals a \$12,000.00 "retainer" was paid to your law firm October 29, 1987, a week before the case was filed. Because the October payment is described as a retainer, it apparently was not payment for services rendered, but rather for services to be rendered in connection with the bankruptcy case. On the present record it is unclear whether the amount requested in the amended fee application is to be paid from the \$12,000.00 retainer, or if it is in addition to the retainer amount. Since the itemized statement accompanying the amended application includes entries for services rendered from the date of petition until the date of application, it appears that the amount applied for is to be paid from the \$12,000.00 retainer, and not in addition thereto. However, this will have to be clarified prior to my approving the application. Of course, any amount of the \$12,000.00 retainer not required for the payment of court approved postpetition attorney's fees must be returned to the estate.

It appears the \$1,873.57 revealed on your attorney's fees disclosure was for work incurred prepetition. Court approval prior to the payment of these fees was therefore not required. In re Tn-County Water Association, Inc., 1988 Bankr. Lexis 1659 (Bkrtcy D.S.D.).

One final matter, you did not apply for approval as Debtor's counsel until March 16, 1988, the day the order of approval was entered. When this matter is finally cleared up and I enter your proposed order approving the payment of fees I will enter an order approving your appointment as Debtor's counsel nunc pro tunc to the date of petition. This nunc pro tunc order will insure that you warrant fees from the date of petition, instead of from the date the order approving your appointment was entered. Please supply such a nunc pro tunc order.

This letter decision constitutes the Court's conclusions of law in this matter. Because there are no contested facts, findings of fact will not be entered.

Very truly yours,

Irvin N. Hoyt
Chief Bankruptcy Judge

INH/sh

CC: Bankruptcy Clerk