

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

**HEARING DATE: April 12, 2010**  
**HEARING TIME: 10:00 a.m.**

-----X  
In re :  
Oldco M Corporation., et al., : Case No. 09-13412 (MG)  
(f/k/a Metaldyne Corporation, et al.) : (Jointly Administered)  
Debtors. :  
-----X

**OBJECTION OF THE UNITED STATES TRUSTEE TO SECOND INTERIM  
APPLICATIONS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES**

**TO THE HONORABLE MARTIN GLENN, BANKRUPTCY JUDGE:**

Diana G. Adams, the United States Trustee for Region 2 (the "United States Trustee"), has reviewed the following applications of the below listed retained professionals submitted in these cases seeking allowance of second interim compensation and reimbursement of out of pocket expenses:

| Professional              | Fees           | Expenses    |
|---------------------------|----------------|-------------|
| Jones Day                 | \$1,948,752.50 | \$81,696.53 |
| AlixPartners              | \$1,083,101.00 | \$3,433.10  |
| Foley & Lardner, LLP      | \$228,939.50   | \$1,338.78  |
| Deloitte Tax, LLP         | \$143,959.00   | \$366.00    |
| Baker & McKenzie          | \$212,674.56   | \$2,425.69  |
| Reed Smith, LLP           | \$220,558.50   | \$7,283.81  |
| Huron Consulting Services | \$71,829.75    | \$31.36     |

The United States Trustee makes the following comments and objections to the applications.

## **JURISDICTION, VENUE AND STATUTORY PREDICATES**

1. The Court has jurisdiction over these matters pursuant to 28 U.S.C. §§ 157 and 1334. These are core proceedings pursuant to 28 U.S.C. § 157(b). Venue is proper pursuant to 28 U.S.C. § 1408.

2. The statutory predicates are Sections 330 of title 11, United States Code (the “Bankruptcy Code”). These matters were initiated pursuant to Rule 2016 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), Rule 2016-1 of the Local Bankruptcy Rules for the Southern District of New York (the “Local Rules”), Amended Guidelines for Fees and Disbursements for Professionals in Southern District of New York Bankruptcy Cases, dated November 25, 2009 (the “Amended Guidelines”) and the United States Trustee Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330<sup>1</sup> (the “UST Guidelines,” and together with the Amended Guidelines, the “Guidelines”).

## **BACKGROUND**

### General Background

3. The Debtors commenced these cases by filing voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on May 27, 2009.

4. The Debtors were global manufacturers of highly engineered metal components for the global light vehicle market. See Jones Day Fee Application at ¶ 4, Doc No. 899. The Debtors operated through two business units, the Powertrain segment and the Chassis segment. Id.

5. On June 4, 2009, the United States Trustee appointed an official committee of

---

<sup>1</sup> The Bankruptcy Court for this district has adopted the UST Guidelines. See In re Brous, 370 B.R. 563, 569 n8. (Bankr. S.D.N.Y. 2007).

unsecured creditors (the “Committee”) in these cases.<sup>2</sup> Docket No. 129. The Committee retained Reed Smith, LLC as counsel. Docket No. 525.

6. On June 23, 2009, the Court entered an Order Pursuant to Sections 105(a) and 331 of the Bankruptcy Code and Bankruptcy Rule 2016(a) Establishing Procedures for Interim Monthly Compensation and Reimbursement of Expenses of Professionals (the “Monthly Compensation Order”). Docket No. 287. According to the Monthly Compensation Order, professionals in these cases may be paid 80% of their fees and 100% of their expenses on a monthly basis. Id.

7. On August 12, 2009, the Court entered an order authorizing the sale (the “Sale”) to MD Investors of substantially all of the Debtor’ assets. See Jones Day Fee Application at ¶ 6, Doc No. 899. The Sale closed on October 16, 2009. Id.

#### Plan and Disclosure Statement

8. On February 23, 2010, the Court entered an order confirming the Debtors’ Second Amended Joint Plan of Liquidation. Docket No. 1384.

#### Operating Reports

9. The Debtors are current with the filing of their monthly operating reports. The Debtors are also current with the payment of quarterly fees due pursuant to Section 1930 of title 28, United States Code through the fourth quarter of 2009.

---

<sup>2</sup> Amended Committee Appointments were filed on June 18, 2009 and June 23, 2009. See Doc Nos. 248 and 297.

## GENERAL STANDARDS

Section 330 of the Bankruptcy Code provides that:

After notice to the parties in interest and the United States trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103-

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

11 U.S.C. § 330(a)(1)(A) and (B).

Section 330 focuses on reasonableness and benefit to the estate of the professionals' services.

In re Lederman Enter., Inc., 997 F.2d 1321, 1323 (10<sup>th</sup> Cir. 1993). Accordingly, an application for compensation and reimbursement of expenses must demonstrate that the professional's services were necessary and made a beneficial contribution to the estate or its creditors. In re Engel, 124 F.3d 567, 573 (3d Cir. 1997).

Under section 330, the bankruptcy court has the authority to reduce fees or expenses requested when they are disproportionate to the benefit to the estate, even if it has already approved the professional's retention under sections 327 and 328 of the Bankruptcy Code. In re Taxman Clothing Co., 49 F.3d 310, 316 (7<sup>th</sup> Cir. 1995); see Zolfo, Cooper & Co. v. Sunbeam-Oster Co., Inc., 50 F.3d 253, 262 (3d Cir. 1995) (affirming lower courts' denial of improperly documented and inadequately detailed expenses). Moreover, services of a poor quality which are the consequence of wrongful or unethical conduct, may result in denial of any fee or an order for return of any fee paid. Red Carpet Corp. v. Miller, 708 F.2d 1576 (11<sup>th</sup> Cir. 1983).

Under Section 330(a)(1)(B) of the Bankruptcy Code, only documented expenses that are

actual and necessary are reimbursable. 11 U.S.C. § 330(a)(1)(B). Professionals must “furnish enough specificity for the Court to establish whether a given expense was both actual and necessary.” In re Korea Chosun Daily Times, 337 B.R. 758, 769 (Bankr. E.D.N.Y. 2005) (quoting In re S.T.N. Enters., Inc., 70 B.R. 823, 834 (Bankr. D. Vt. 1987)); see also In re Fibermark, Inc., 349 B.R. 385, 395 (Bankr. D. Vt. 2006) (in order to be compensated from the estate, the professional must demonstrate, “not just recite – that . . . the expenses sought to be reimbursed are actual and necessary and that no other reasonable, less expensive alternatives were available.”). Expenses are “actual” if they are incurred and not based on a formula or pro rata calculation. Id. at 400. Moreover, they are “necessary” if they were “reasonably needed to accomplish proper representation of the client.” Korea Chosun, 337 B.R. at 769 (quoting In re Pacific Express, Inc., 56 B.R. 859, 865 (Bankr. E.D. Cal. 1985)).

Each applicant bears the burden of proof in all fee matters. In re Keene Corp., 205 B.R. 690, 695 (Bankr. S.D.N.Y. 1997); In re JLM, Inc., 210 B.R. 19, 24 (B.A.P. 2d Cir. 1997). The burden of proof to show entitlement to fees should “not be taken lightly, especially given that every dollar expended on legal fees results in a dollar less that is available for distribution to the creditors.” In re Spanjer Bros., Inc., 191 B.R. 738, 747 (Bankr. N.D. Ill. 1996) (quoting In re Pettibone Corp., 74 B.R. 293, 299 (Bankr. N.D. Ill. 1987)). The failure of an applicant to sustain the burden of proof as to the reasonableness of the compensation may result in the denial of the request for compensation. In re Beverly Mfg. Corp., 841 F.2d 365 (11<sup>th</sup> Cir. 1988).

With respect to the interim fee applications, pursuant to 11 U.S.C. 331, interim fee awards are discretionary, and are subject to reexamination and adjustment during the course of the case. Spanjer

Brothers, Inc., 191 B.R. at 747 (citing In re Jensen-Farley Pictures, Inc., 47 B.R. 557 (Bankr. D. Utah 1985)). Any interim fees awarded or paid are payable on account and are subject to the Court's review at the time of the final fee applications.

### **OBJECTION/COMMENTS**

Jones Day  
Foley & Lardner  
Reed Smith  
Huron Consulting

The United States Trustee does not object an award of the requested fees and expenses to the applicants.

AlixPartners

Section A of the Amended Guidelines requires each fee application to contain a certification which states, among other things, that (a) the Certifying Professional has read the application, (b) the application complies with the Guidelines, (c) the fees and disbursements sought are permitted by the Guidelines and are billed at rates in accordance with practices customarily employed by the applicant, (d) in providing reimbursable services, the applicant does not make a profit on those services, (d) the chair of each official committee and the debtor have been provided not later than 21 days after the end of each month with a statement of fees and disbursements accrued during such month, and (e) the chair of each official committee and the debtor have all been provided with a copy of the fee application at least 14 days before the date set for the hearing on the fee application. The Alix Partners fee application does not contain such a certification. Docket No. 1230. Accordingly, until such a certification is provided, the United States Trustee objects to the application.

### Deloitte Tax

The applicant seeks significant fees for its services related to billing this estate. Of the \$143,959.00 sought by the applicant, \$26,007 (over 18%) is for preparing monthly bills and interim fee applications. See Deloitte Tax Fee Application at Exhibit C, Docket No. 1377. By way of comparison only, although Huron Consulting Services, Financial Advisor to the Committee, is seeking \$71,829.75 in fees, it is only seeking \$3,228.50 (approx 4%) for services associated with its “Retention/Fee Application” project category. See Huron Consulting Services Fee Application at 2, Docket 1365. Accordingly, the fees associated with the applicant’s fee application and monthly billing services are excessive and should be reduced.

### Baker & McKenzie

The majority of the applicant’s time records contain block billing. Billing records, however, must clearly identify each discrete task billed, indicate the date the task was performed, the precise amount of time spent (not to be billed in increments greater than one-tenth of an hour), who performed the task, the level of experience and that person’s hourly rate. In re Baker, 374 B.R. 489, 494 (Bankr. E.D.N.Y. 2007) (citing In re Fibermark, Inc., 349 B.R. 385, 395 (Bankr. D. Vt. 2006)). See also, UST Guidelines at (b)(4)(iii). Aggregating of multiple tasks into one billing entry, typically referred to as block billing or “lumping,” is routinely disallowed as it makes it exceedingly difficult to determine the reasonableness of the time spent on each of the individual tasks performed. See Baker, 374 B.R. at 494. As a result of “lumping” time, the “timekeeper fails to sustain [his] burden of providing that [his] fees are reasonable.” In re Brous, 370 B.R. 563, 576 (Bankr. S.D.N.Y. 2007). Consequently, courts summarily will disallow time for discrete legal services merged together in a

fee application. Baker, 374 B.R. at 494, 496 (bankruptcy court deducted 20 percent from the requested fees for improper block billing); see also, In re M. Fabrikant & Sons, Inc., Case No. 06-12737 (SMB) (Bankr. S.D.N.Y. Jan. 13, 2009) (Memorandum Decision Regarding Applications for Professional Fees and Reimbursement of Expenses) (ECF Doc. # 976) (bankruptcy court allowed only 30 minutes for each “lumped” entry, irrespective of the aggregate time billed for that entry). Accordingly, the United States Trustee submits that the Court should disallow and/or reduce the applicant’s request for compensation.

Wherefore, the United States Trustee prays that the Court sustain the objections contained herein and grants such other and further relief as is just and proper.

Dated: New York, New York  
March 4, 2010

Respectfully submitted,

DIANA G. ADAMS  
UNITED STATES TRUSTEE

By: /s/ Paul K. Schwartzberg  
Paul K. Schwartzberg  
Trial Attorney  
33 Whitehall Street, 21<sup>st</sup> Floor  
New York, New York 10004  
Tel. No. (212) 510-0500