

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

HEARING DATE: November 30, 2009
HEARING TIME: 10:00 a.m.

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In re :
Oldco M Corporation., et al., : Case No. 09-13412 (MG)
(f/k/a Metaldyne Corporation, et al.) : (Jointly Administered)
Debtors. :
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OBJECTION OF THE UNITED STATES TRUSTEE TO 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 (the "Applications") of the below listed retained professionals (collectively, the "Applicants") submitted in these cases for the period of May 27, 2009 to August 31, 2009 (the "First Interim Application Period") seeking allowance of interim compensation and reimbursement of out of pocket expenses:

Professional	Fees	Expenses
Jones Day	\$4,012,181.50	\$128,058.48
AlixPartners	\$1,309,741.75	\$18,186.73
Foley & Lardner, LLP	\$232,502.00	\$5,822.46
Lazard Freres & Co., LLC	\$474,193.55 (Lazard is only seeking payment of 50% of this amount)	\$7,472.96
Deloitte Tax, LLP	\$92,417.00	\$91.00
Donnelly Penman & Partners	\$220,000.00	\$4,059.24
Reed Smith, LLP	\$426,044.50	\$20,841.32
Huron Consulting Services	\$278,819.50	\$7,096.17

The United States Trustee makes the following comments and objections to the Applications for the First Interim Application Period

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 and 331 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”), Administrative Order M-104, Guidelines for Fees and Disbursements for Professionals in Southern District of New York Bankruptcy Cases (the “Local Guidelines”), Administrative Order M-151, Amended Guidelines for Fees and Disbursements for Professionals in Southern District of New York Bankruptcy Cases (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§¹ (the “UST Guidelines,” and together with the Local Guidelines and the Amended Guidelines, the “Guidelines”).

BACKGROUND

¹ 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).

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 are 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 operate 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 unsecured creditors (the “Committee”) in these cases.² 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.

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

Plan and Disclosure Statement

8. As of the date hereof, the Debtors have not filed a plan and disclosure statement.

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 third quarter of 2009.

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 (10th 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 (7th 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 (11th 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 (11th 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

A. All Applicants, Percentage Fee Reduction

As set forth above, according to the Monthly Compensation Order, professionals in these jointly administered cases are paid 80% of their fees and 100% of their expenses on a monthly basis. The United States Trustee respectfully requests that the Court deny the professionals' request for a full award of fees until the final resolution of these cases.³ The results achieved in these cases serve as an important factor in determining the reasonableness of the efforts of the applicants. Because a plan and disclosure statement have not been filed, the results of these cases are still unknown and the ultimate benefit to the estates for the services rendered by the professionals simply cannot be assessed at this time. In re Child World, Inc., 185 B.R. 14, 18 (Bankr. S.D.N.Y. 1995) (hold backs, while not mandated by statute, are commonly used by courts to moderate potentially excessive interim allowances and to offer an incentive for timely resolution of the case); see also In re Bank of New

³ Because Lazard Freres & Co., LLC only seeks payment of 50% of its fees, the United States Trustee is not seeking an additional "hold back" for this applicant.

England Corp., 134 B.R. 450, 458-59 (Bankr D. Mass. 1991) (because of the difficulty in determining whether services were actual and necessary when reviewing interim applications, bankruptcy courts routinely require percentage reductions until the end of the case), affirmed, 142 B.R. 584 (D. Mass. 1992). Accordingly, The United States Trustee requests that the Court reduce any compensation awarded to the Retained Professionals by a percentage to be determined by the Court (colloquially referred to as a “holdback”) pending the final resolution of the cases.

B. Specific Objections

Jones Day

Jones Day seeks reimbursement of \$14,798.80 for the expense of internal photocopying at \$.20 per page. See Jones Day Application at ¶ 44(b) and Exhibit 3, Docket No. 899. Paragraph F.2 of General Order M-151 of the Amended Guidelines provides that photocopying may be reimbursed at \$.20 per copy or cost, whichever is less. From the United States Trustee’s participation in the fee committees established in the Enron Corp., Global Crossing, Ltd. and Adelphia Communications Corp. cases, the United States Trustee understands that the fee committees each recommended, in their reports to their respective judges, that this expense be allowed at \$.10 per copy, until proof of actual cost of photocopying is shown, so that compliance with Paragraph F.2 of the Amended Guidelines is ensured. Accordingly, until Jones demonstrates that its cost of internal photocopying is \$.20 per page, the United States Trustee objects to the award of \$7,399,40 to Jones Day.

In addition, Jones Day seeks reimbursement for food and beverages in the amount of \$6,290.87. See Jones Day Application at Exhibit 3, Docket No. 899. In the detail provided, there are multiple instances where Jones Day seeks reimbursement for meals that exceed \$20.00 per person,

the maximum amount allowable under the Guidelines for overtime meals after 8:00 p.m. See Local Guidelines at D(9). By way of example only, the following requests exceed \$20:

6/11/09	R T Routh	\$49.00	Food & Beverage Expenses
6/11/09	GR Howard	\$50.58	Food & Beverage Expenses
6/18/09	R T Routh	\$42.00	Food & Beverage Expenses
8/6/09	M E Hemann	\$50.00	Food & Beverage Expenses
8/13/09	A L Mascioni	\$30.31	Dinner on 8/5 (room service)
		\$21.20	Breakfast on 8/5 (room service)

The United States Trustee requests that the Court reduce any reimbursement to Jones Day by \$6,290.87 or the actual amount relating to meals exceeding \$20.00.

AlixPartners

Except as set forth in the All Applicants, Percentage Fee Reduction section above, the United States Trustee has no objection to the allowance of interim fees and reimbursement of out of pocket expenses to the Applicant in the amounts requested.

Foley & Lardner

Foley & Lardner seeks \$1,190 for 2 hours of non-working travel time incurred on August 7, 2009. This amount equates to \$595 per hour. It is customary practice in this Circuit, as well as in many others, that travel time is charged at one-half the professional's hourly rate. See Petronella v. ACAS, No. Civ. 302CV01047 (WWE), 2004 WL 1688525 at *1 (D. Conn. Jan. 23, 2004) (citing Spray Holdings, Ltd. v. Pali Fin. Group, Inc., 2003 U.S. Dist. LEXIS 13980 (S.D.N.Y. 2003); Wilder v. Bernstein, 975 F.Supp. 276, 283-84 (S.D.N.Y. 1997)); see also, In re Raytech Corp., 241 B.R. 785, 790 (D. Conn. 1999) (vacating and remanding bankruptcy court's allowance of full compensation for attorneys' non-working, non-local travel time for determination of "customary billing practice for

nonproductive travel time in the ‘prevailing community’”); In re Kuhn, 337 B.R. 668, 676 (Bankr. N. D. Ind. 2006) (travel time in this district is compensated at one-half of the professional’s hourly rate); In re Caribbean Const. Servs., Inc., 283 B.R. 388, 395 (Bankr. D.V.I. 2002) (non-working travel time compensable at 50% of customary hourly rate unless evidence establishes that professional used time productively by preparing for meeting or court proceeding); In re Anderson Grain Corp., 222 B.R. 528, 532 (Bankr. N.D. Tex. 1998) (50% of customary hourly rate for non-working travel time more than adequate as “[t]here are just too many distractions while traveling to consider that full hourly rates should be allowed.”). Accordingly, the United States Trustee objects to the full award of fees associated with Foley & Lardner’s request for non-working travel time.

In addition, Foley & Lardner seeks the reimbursement of \$3,558.41 for “travel” expenses. It is unclear if these expenses include first class airfare or other luxury accommodations. Pursuant to the Guidelines, first class travel and luxury accommodations are not compensable by the estates. See Amended Guidelines at D(7); UST Guidelines at (b)(5)(i). Accordingly, the United States Trustee requests that until the underlying documentation is produced, the Court disallow Foley & Lardner’s reimbursement of expenses for travel in the amount of \$3,558.41.

Lazard Freres

The United States Trustee does not object to the amount of fees and expenses requested by this applicant

Deloitte Tax

Certain of Deloitte's time entries are vague. In order for the Court to determine whether the time expended is reasonable, time entries such as meetings, conferences, correspondence and telephone calls must identify the participants, describe the substance of the communications, explain its outcome and justify its necessity. Brous, 370 B.R. at 573-74; In re Fibermark, Inc., 349 B.R. 385, 396 (Bankr. D. Vt. 2006)). Similarly, with respect to research or reviewing materials, the time entries must at a minimum provide a description of the issue that is being researched or reviewed. In re Baker, 374 B.R. 489, 496 (Bankr. E.D.N.Y. 2007). The following time entries are vague and to not permit the reviewer to determine if the fees sought are reasonable and necessary:

8/10/09	Shehu, Olindo	Chapter 11 Administration	2.0 hrs.	\$700.00
8/11/09	Shehu, Olindo	Chapter 11 Administration	.5 hrs.	\$175.00
8/20/09	Shehu, Olindo	Chapter 11 Administration	1.7 hrs.	\$595.00
8/21/09	Shehu, Olindo	Chapter 11 Administration	1.1 hrs.	\$385.00
8/27/09	Clarke, Michael Alan	Chapter 11 Administration	.5 hrs.	\$150.00
				Total: \$2,005

Absent explanation, the United States Trustee requests that the Court reduce Deloitte's requested fees by \$2,005.

Donnelly Penman & Partners

Except as set forth in the All Applicants, Percentage Fee Reduction section above, the United States Trustee has no objection to the allowance of interim fees and reimbursement of out of pocket expenses to the Applicant in the amounts requested.

Reed Smith

According to the Reed Smith fee application, an associate provided 31.30 hours of services between June 5, 2009 through June 10, 2009, at a cost of \$10,485.50, drafting a summary of what appears to be the Debtors’ “first day” motions. It appears that this time may be excessive.

Accordingly, absent further explanation, the United States Trustee objects to the full award of the fee requested by this Applicant.

Huron Consulting

Certain of Huron’s time entries are vague. In order for the Court to determine whether the time expended is reasonable, time entries such as meetings, conferences, correspondence and telephone calls must identify the participants, describe the substance of the communications, explain the outcome and justify its necessity. Brous, 370 B.R. at 573-74; In re Fibermark, Inc., 349 B.R. 385, 396 (Bankr. D. Vt. 2006)). Similarly, with respect to research or reviewing materials, the time entries must at a minimum provide a description of the issue that is being researched or reviewed. In re Baker, 374 B.R. 489, 496 (Bankr. E.D.N.Y. 2007). The following time entries are vague and to not permit the reviewer to determine if the fees sought are reasonable and necessary:

6/10/09	Case Administration	Omer Ozgozokara	4.25 hrs - Review of Court Dockets	\$1,763.75
6/16/09	Case Amination	Omer Ozgozokara	2 hrs - Internal Call	\$830.00
6/18/09	Business Plan & Analysis of Operations	Omer Ozgozokara	8.75 hrs - Reviews, analysis, internal calls	\$3,631.25
7/23/09	Other	Omer Ozgozokara	.5hrs - Access to the data room	\$207.50
				Total: \$6,432.50

Absent explanation, the United States Trustee requests that the Court reduce Huron’s requested fees by \$6,432.50

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
November 17, 2009

Respectfully submitted,

DIANA G. ADAMS
UNITED STATES TRUSTEE

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