

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)	
)	
CHANCE INDUSTRIES, INC.,)	Case No. 01-11698
)	Chapter 11
)	
Debtor.)	
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IN RE:)	
)	
CHANCE RIDES, INC.,)	Case No. 01-12000
)	Chapter 11
)	
Debtor.)	
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IN RE:)	
)	
CHANCE ENGINEERING, INC.,)	Case No. 01-12002
)	Chapter 11
)	
Debtor.)	
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**MEMORANDUM OPINION REGARDING
APPLICATION OF FINANCIAL FEDERAL, INC.
FOR ALLOWANCE OF ATTORNEYS FEES AND EXPENSES**

This matter is before the Court on the application of Financial Federal, Inc. (FFI) for reimbursement by the debtor of FFI’s attorneys fees, inspection fees, and other expenses, in connection with FFI’s secured claim in the case. FFI proceeds under 11 U.S.C. § 506(b)¹ and seeks the allowance of \$21,815.50 in attorneys fees and related expenses of \$2,656.05. In addition, FFI seeks reimbursement of direct inspection expenses of \$1,663.76. FFI seeks further allowance of attorneys fees in the amount of \$8,694 for services rendered in pursuit of this application up to the date of trial,

¹All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq. unless otherwise specified.

March 27, 2002. The debtors, Chance Industries, Inc., Chance Rides, Inc., and Chance Engineering, Inc. (hereafter referred to as “debtor”), the Unsecured Creditors Committee, and Intrust Bank each objected to the application. Intrust filed an itemized objection questioning various fee entries. While the Intrust objection has now been withdrawn, both debtor and the Committee have adopted its substance.

The Court has heard the testimony of several witnesses and received by stipulation a number of documentary exhibits. In addition, the parties provided the Court with post-trial designations of authority. The Court has carefully reviewed the record and makes the following findings of fact and conclusions of law. In summary, the Court finds that, while FFI should be accorded recovery of some of its attorneys fees and expenses from the bankruptcy estate, the amounts requested should be significantly reduced. FFI’s direct inspection expenses of \$1,663.76 are allowed.

FACTS

The Chance Industries bankruptcy case was filed on April 17, 2001.² On or about that date, at the joint request of the debtor and Intrust Bank, this Court entered an interim financing order which, for some reason, entirely disregarded the written subordination of Intrust’s lien to that of FFI. Intrust was and is debtor’s principal financier, but it had subordinated its liens to those granted to FFI in December of 2000. Notwithstanding this subordination, Intrust and debtor propounded to this Court an interim order which provided for Intrust’s receipt of a first lien on all of debtor’s assets in exchange for debtor’s use of Intrust cash collateral and Intrust’s advance of post-petition financing. Because of the early stage of the case and because neither party brought the subordination agreement to the attention of the Court, the order was entered as requested, significantly impairing FFI’s secured

²The Chance Rides and Chance Engineering cases were filed on May 1, 2001, and substantially consolidated with the Chance Industries case on August 8, 2001 (Docket No. 213).

position. FFI's omission proved expensive and time-consuming for the principal actors in the case as well as the Court. FFI hired the firm of Husch & Eppenberger ("H&E") to obtain clarification of the interim financing order, to seek stay relief, and to enforce FFI's probable oversecured claim. Christopher J. Redmond, a partner at H&E, was lead counsel for FFI in this matter.

FFI lent over \$1.3 million to debtor in December of 2000. FFI's loans were secured by three items of finished goods inventory: the Inverter, the Zipper, and the Slingshot. These are amusement rides built by debtor. FFI is a regular lender to companies engaged in the amusement industry and provides both floor planning and buyer financing. FFI is conversant in the customs and practices of the amusement industry. Prior to the date of the bankruptcy filing, debtor had repaid FFI at least \$142,234.80 of the indebtedness. Intrust had subordinated its position with respect to its sizeable secured loan to debtor to the position and loan of FFI.

Mr. Redmond was FFI's only witness at the hearing on FFI's fee application. Regrettably, neither a corporate representative of FFI nor its general counsel, Robert Grawl, testified. Thus, the Court has little feel for FFI's business motivations other than what Mr. Redmond reported on behalf of his client. In general, the evidence showed that upon FFI's discovery that the interim financing order had been entered priming FFI's security interests, FFI instructed H&E to make an aggressive effort to resolve that oversight and to protect FFI's rights in the collateral. Specifically, FFI was concerned that it would lose its senior secured status as to the three amusement rides and that debtor would be less than expeditious in selling them. According to Mr. Redmond, FFI believed in getting all of the issues in a bankruptcy affecting FFI resolved at the "front end" of the case. For this reason, FFI directed its counsel to secure a clarification of the financing order and seek immediate stay relief. FFI's reasons for proceeding in this decision were: (1) it was concerned that debtor was not moving quickly enough to sell the three amusement rides and that they were overpriced; (2) it feared that

debtor's reputation in the industry would be damaged by the bankruptcy and that buyers would no longer have confidence in its warranties; and (3) it formed a belief that debtor had not remitted to FFI a cash deposit of \$50,000.00 realized on one of the rides.

FFI filed its stay relief motion on May 8, 2001, barely three weeks after the case was filed. Immediately prior to filing of the motion, debtor, with the cooperation of FFI, had completed the sale of one of the rides for \$600,000, all of which was paid to FFI and credited on FFI's secured claim. Taken with the debtor's \$142,234.80 pre-petition payment referenced above, FFI had collected over \$740,000 of its \$1.3 million claim immediately prior to filing the stay relief motion.

Much lawyer time was expended in the drafting and prosecution of the stay relief motion. Mr. Redmond testified on cross examination that FFI was concerned that the debtor had "discounted" the Inverter ride, thus making the early pursuit of stay relief necessary. This contrasts with Mr. Redmond's testimony on direct that FFI was worried that the debtor was not moving quickly enough to sell the rides and that the debtor was asking too much for them.

The matter of the alleged "conversion" of a \$50,000 cash deposit is also questionable. When asked on cross examination if the \$50,000 had actually been paid to FFI as part of the \$140,000 pre-petition note payments, Mr. Redmond could not respond. The stay relief motion was eventually journalized by agreement on July 19, 2001 in an order containing a detailed plan for the disposition of the collateral.

In May 2001, FFI learned that the debtor intended to transport a ride to Maryland for sale to a carnival operator there. Apparently concerned that the ride should not leave the state of Kansas without debtor being paid in full, FFI's general counsel Robert Grawl instructed Mr. Redmond to prepare an injunction complaint and a motion for temporary restraining order *before* contacting debtor's counsel to discuss the fate of the Maryland-bound ride. Significant time was expended on

this effort; however, neither the complaint nor the motion was ever filed because Mr. Redmond and Mr. Grawl were able to resolve the matter by direct contacts with debtor's counsel and debtor's corporate in-house counsel. Once the matter was brought to debtor's attention, it was satisfactorily resolved by the parties in a day's time, although actual documentation took somewhat longer.

The scope of expense sought from the estate by FFI and H&E for conventional secured creditor representation is curious, particularly given the previously cordial relations between debtor and FFI. The testimony of debtor's corporate counsel, Jeff Roth, suggests that debtor and FFI had an informal and friendly relationship in which Mr. Roth routinely spoke with Mr. Grawl and FFI's loan officer, Terry Carter. Indeed, it appears that Mr. Roth and others affiliated with the debtor kept FFI informed as to progress on the sale of various rides. For example, Mr. Roth advised FFI that the debtor would be transporting the Inverter ride to Florida in an attempt to sell it. When the Inverter was sold, FFI financed the buyer and received the sale proceeds. The only real dispute known to Mr. Roth occurred when FFI demanded that rides be paid for before they were shipped. Mr. Roth testified that payment on delivery and successful set-up is more common in the industry and that he was ultimately able to convince Mr. Grawl of this point.

When asked why the debtor resisted the stay relief motion, Mr. Roth testified that the debtor wanted to retain the rides because it believed that the Chance family with its extensive, multi-generational contacts in the carnival and circus industry, was simply better situated to sell the rides than a finance company. Moreover, Mr. Roth stated that the debtor wanted to realize whatever profit there was to gain from the sale of these rides for the benefit of the bankruptcy estate. Ultimately, the sale of the rides yielded between \$80,000 and \$100,000 in excess of FFI's lien.

FFI's role in the case subsided after June 19, 2001. By this time, supplemental financing orders recognizing FFI's first lien position and Intrust's subordination agreement, and an agreed order

for stay relief had been entered.

According to its time records, H&E lawyers spent a considerable amount of time pursuing revision of the financing order to cure the inadvertent priming of FFI's lien by Intrust, threatening debtor with the injunction action for removal of a ride from Kansas, and in obtaining relief from stay as to the three rides which made up its collateral package. All interested parties agreed that FFI was amply secured and likely oversecured. For prosecuting these ends, FFI seeks attorneys fees in the amount of \$21,815.50 for some 94.5 hours expended by various H&E lawyers and staff. Mr. Redmond's time is the greatest, amounting to some 74.8 hours. H&E seeks an additional \$8,694 in attorney fees for 37.2 hours expended in the prosecution of the instant fee application.

As part of the closing of the sale of the last FFI collateral, Mr. Roth and Mr. Grawl agreed via letter that the debtor would escrow \$15,000 of sale proceeds against attorneys fees and expenses to be determined by this court. The letter was exchanged on or about September 20, 2001 but the proceeds were only escrowed a week before the fee application hearing. The letter includes a reference to \$10,000 of "undisputed" attorneys fees which appear to be included in FFI's \$21,815.50 attorneys fees request.

FFI also seeks reimbursement of \$1,663.76 from the bankruptcy estate, representing expenses incurred by FFI employees or agents for off-site inspections of FFI's collateral and obtaining tax and Dun & Bradstreet reports.

With respect to attorneys fees, Mr. Redmond testified that in 2001 his time was billed at a regular hourly rate of \$275. For favored clients, his 2001 rate was reduced to \$265. For international work, H&E billed Mr. Redmond's time at an hourly rate in excess of \$400. It appears that all of the work and time described in FFI's application was completed in locations no more exotic than Kansas City, Wichita, and Nashville, Tennessee. H&E employed associates who billed

anywhere from \$100 an hour and above. Mr. Redmond testified that, per instruction of this particular client, he was to personally handle the entire matter. The Court readily acknowledges Mr. Redmond's over thirty years' experience as a bankruptcy and insolvency lawyer. Indeed, Mr. Redmond commenced his career in Wichita and practiced in this community until the early 1990's. Mr. Redmond is nationally recognized for his expertise in insolvency law, particularly in the areas of international insolvency and cross-border fund tracing.

In comparison, J. Michael Morris, counsel for debtors, has practiced in this community for over 20 years and is the senior bankruptcy lawyer in his firm, Klenda, Mitchell Austerman & Zuercher. Mr. Morris' employment in this case was approved at the hourly rate of \$200. Edward J. Nazar, counsel for Intrust Bank, has practiced in this community for over 25 years and is the senior partner and bankruptcy counsel of his firm, Redmond & Nazar. Mr. Nazar's hourly rate was \$190. Both Mr. Morris and Mr. Nazar are recognized throughout Kansas as experts in this area of the law, having represented debtors and creditors as well as acting as trustees in numerous bankruptcy cases. Mr. Morris estimated that he spent \$3,348.75 dealing with FFI-related matters in this case. Mr. Nazar spent approximately \$2,000 representing Intrust Bank in these matters.

In support of Mr. Redmond's hourly rates, H&E asserts that it is not unusual for Kansas City, Missouri bankruptcy attorneys to seek and be paid in excess of \$280 per hour in cases pending in Kansas. While there was no evidence offered as to the "going rate" for chapter 11 bankruptcy creditors' work in the Wichita division, based on its frequent review of fee applications filed in this district and its own recent practice experience, the Court finds that the hourly rates charged by Mr. Nazar and Mr. Morris typify rates charged by experienced senior Wichita attorneys appearing in commercial cases before this Court.

ANALYSIS

FFI's application is based on §506(b) which provides –

To the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any *reasonable* fees, costs, or charges provided for under the agreement under which such claim arose. (Emphasis added.)

§ 506(b).

Thus, in addressing secured creditor fee applications, the Court must first consider whether there are provisions in the FFI documents underlying its claim which provide for attorneys fees and expenses to be borne by the debtor. In this case, both the promissory note and security agreement forms executed by the debtor provide for the assessment of “reasonable attorneys fees” incurred by FFI in the enforcement of its rights against the debtor. None of the objecting parties disputes this. Similarly, there is no dispute that the value of FFI's collateral is greater than FFI's allowed claim. This leaves only one area of controversy: the reasonableness of H&E's fees and FFI's inspection expenses.

FFI bears the burden of showing the reasonableness of its requested fees. In re Cascade Oil Co., Inc., 126 B.R. 99, 104 (D. Kan. 1991). As in an analysis of fees under § 330, unnecessary or excessive work should not be compensated under § 506(b). In re Wire Cloth Prod., Inc., 130 B.R. 798, 814 (Bankr. N. D. Ill. 1991). The bankruptcy court has a duty to conduct a discrete inquiry into every request for attorney's fees and that duty cannot be delegated. In re Zamora, 251 B.R. 591, 596 (D. Colo. 2000).

In deciding whether requested fees are necessary, the court looks to multiple factors, adopted in In re Permian Anchor Serv. Inc., 649 F.2d 763, 768 (10th Cir. 1981), including but not limited to, the time and labor required, the skill requisite to perform the legal service properly, and the customary fee. See Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). The Tenth

Circuit has recently reaffirmed its allegiance to these principles in Case v. Unified School District No. 233, 157 F. 3d 1243 (10th Cir. 1998). Courts have disallowed or reduced fees sought by a secured creditor on finding that the legal work was unnecessary or excessive. In re Josephs, 108 B.R. 654, 656-57 (Bankr. N. D. Ill. 1989).

The Court has carefully considered FFI's application and supporting billing statements. See Cascade Oil, supra at 106 (The Bankruptcy Code imposes a mandatory duty on the bankruptcy court to exercise billing judgment in an award of fees.) First, the Court addresses H&E's hourly rates and the reasonableness of those rates. While it is unquestioned that lead counsel for FFI has developed a considerable regional, and even national, reputation in the area of bankruptcy practice, this Court is hard pressed to see that the work required to protect and realize upon FFI's liens was of a nature or complexity to implicate "national rates". The Court should base its hourly rate award on what the evidence shows the market commands for analogous work. United Phosphorus, LTD., v. Midland Fumigant, Inc., 205 F.3d 1219 (10th Cir. 2000). In determining whether FFI's counsel's fees are reasonable, the Court is guided by a comparison of the fees requested by debtor's and other creditor's counsel in the matter. See Wire Cloth Prod., supra at 815.

The Court recognizes Mr. Redmond's testimony that at least two Missouri attorneys have been approved at \$280 per hour for their activity as debtor's attorneys in cases pending in Kansas. There is a substantial qualitative difference between representing a debtor in possession and in representing an oversecured creditor whose claim is largely (if not immediately) uncontested. Debtor representation entails substantially greater risk of repayment and usually involves coordination of numerous complex subjects. In this case, the preparation, filing, and pursuit of motions for relief from the stay to vindicate an ordinary commercial secured transaction do not, in this Court's view, warrant a "national" fee structure in this market. Accordingly, the Court concludes that the highest hourly rate

which can be allowed *against the debtor or the estate* for activities with respect to FFI's stay relief motion or the cash collateral and interim financing order issues is \$200 per hour. The Court heard no evidence with respect to local market rates charged by other personnel of commensurate levels of experience and, therefore, concludes that billing an associate at \$100 per hour and paralegal or secretarial staff at \$60 to \$90 per hour, is acceptable within the context of this case. Reducing Mr. Redmond's hourly rate from \$265 to \$200 results in a \$4,940 reduction of H&E's attorneys' fees.

In addition, the Court believes that many more hours than necessary were expended and billed by counsel for FFI in this matter. This Court need not burden the record with an itemization of every questioned entry. Robinson v. City of Edmond, 160 F.3d 1275, 1281 (10th Cir. 1998)(While the trial court is not required to justify every disallowed hour, "[t]he record ought to assure us that the district court did not 'eyeball' the fee request and cut it down by an arbitrary percentage...." [citation omitted]). The Court notes that many of the tasks described in counsel's billing statements appear to have taken much more time than would ordinarily be expected or required. The Court notes, for instance, a billing of 2.2 hours on April 24, 2001 to review FFI's loan documentation, which consists of three form promissory notes and security agreements. Nearly four hours were spent drafting the motion for stay relief over a two day period, followed by a 3.7 hour charge for paraprofessional work in issuing notices of the same. Notable, too, are the 4.3 hours billed by associate attorney Singer for reviewing the file and appearing at this Court's motion docket. There are many teleconferences which were billed at .3 and .4 hours, for which the topics would appear to require less than eighteen or twenty-four minutes of discussion. In addition, five hours were expended in preparing the "surprise" injunction complaint which was never even filed.

As Robinson directs, this Court must consider a number of factors in determining the reasonableness of the time spent on various matters:

[A]mong the factors to be considered were (1) whether the tasks being billed "would normally be billed to a paying client," (2) the number of hours spent on each task, (3) "the complexity of the case," (4) "the number of reasonable strategies pursued," (5) "the responses necessitated by the maneuvering of the other side," and (6) "potential duplication of services" by multiple lawyers.

160 F.3d at 1281, citing Ramos v. Lamm, 713 F.2d 546, 554 (10th Cir. 1983).

While a substantial amount of legal work was indicated, particularly when the debtor and Intrust inexplicably omitted FFI from all discussions and consideration of the initial financing order, this Court simply cannot find that attorney fees in excess of \$21,000 for this effort by FFI can be justified, especially when compared to the \$2,000 to \$4,000 expended by FFI's direct adversaries in this matter. The matters involved were not particularly complex and the strategies pursued were few. The omission of FFI from consideration in the initial financing order does justify the granting of fees greater than those charged by debtor's and Intrust's counsel; however, a multiplier of eight or ten is not warranted. These observations are based on the Court's experience not only as a judge, but also as a recent commercial bankruptcy practitioner for over twenty years in this market. See Beck v. Northern Natural Gas Co., 170 F.3d 1018 (10th Cir. 1999) (The trial judge is an expert in determining the value of legal services, and in so doing may draw on his own knowledge and experience.). See also, In re Digital Products Corp., 215 B.R. 478, 482 (Bankr. S. D. Fla. 1997) (citing In re Davidson Metals, Inc., 152 B.R. 917 (Bankr. N. D. Ohio 1993), aff'd 65 F.3d 168 (6th Cir. 1995)).

"One purpose of § 506(b) is to ensure that estate assets are not squandered by over-secured creditors who . . . fail to exercise restraint in the attorneys' fees and expenses they incur, perhaps exhibiting excessive caution, overzealous advocacy and hyperactive legal efforts." Digital Prod., supra at 482, citing In re Gwyn, 150 B.R. at 155 (Bankr. N. D. N.C. 1993). FFI had the unquestionable right to seek stay relief or adequate protection. It certainly had no choice but to respond to the priming of its liens when the Court, being deprived of the requisite background

information, entered the interim financing order. At the same time, the Court considers that FFI was at all times oversecured, had received a loan payment immediately pre-petition, and had been paid nearly one-half of its secured claim prior to the stay relief motion. FFI's testimony about its motivations for seeking that relief (diminishing collateral value and the debtor's lack of effort to sell), is inconsistent with its alleged motivation to prevent debtor from selling collateral by threatening the injunction action (debtor's aggressive efforts to sell and to deliver collateral outside the state). The rare case of an oversecured creditor should occasion a benefit to the estate and unsecured creditors, not a windfall for secured creditor counsel.

Assessing an additional \$8,694 for the prosecution of a \$21,815 fee application seems to the Court to be unnecessary and burdensome to the estate. Although the Tenth Circuit and this Court's fee guidelines allow fees for preparing and presenting a fee application, Case v. Unified School District No. 233, 157 F.3d 1243 (10th Cir. 1998), fees of nearly one-third the total fee application are excessive. The fee application contained little more than a recitation of all of the previous court proceedings. The exhibits offered in support of it were the same exhibits attached to FFI's proof of claim and other papers. At the specific request of the Court, only the briefest statements of authority were submitted. While the Court did require that a pretrial order be prepared and submitted, the trial on the application lasted less than three hours and featured only three witnesses. In the final analysis, this is simply not worth \$8,694.

Finally, the Court finds that FFI's documented expenses for inspection of its collateral are reasonable and justified by the record and they are allowed in the full amount of \$1,663.73.

Therefore, based on the conclusions and reductions set forth above, the Court allows Financial Federal Inc. \$10,000.00 in attorney's fees and expenses and \$1,663.73 for collateral inspection and

other expense. Both amounts shall be deemed a part of FFI's allowed secured claim pursuant to §506(b).

IT IS SO ORDERED.

Dated this 7th day of June, 2002.

ROBERT E. NUGENT, BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the **Memorandum Opinion Regarding Application of Financial Federal, Inc. For Allowance of Attorneys Fees And Expenses** were deposited in the United States mail, postage prepaid on this 7th day of June, 2002, to the following:

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