

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

IN RE:)	
)	
WARREN DEAN CONSTABLE,)	Case No. 99-41918
LUCILLE VERA CONSTABLE,)	Chapter 12
)	
Debtors.)	
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**ORDER ALLOWING IN PART AND DENYING IN PART DEBTORS’
MOTION FOR APPROVAL OF FEES AND EXPENSES**

The debtors’ Motion for Approval of Fees and Expenses (“Motion”), filed September 12, 2001, and the objection of the standing chapter 12 trustee, Eric J. Rajala, first came before this Court on November 5, 2001, this Court’s Topeka motions docket. David R. Klaassen appeared for the debtors and Eric J. Rajala appeared pro se. For the reasons set forth below, the Court grants in part and denies in part the Motion, and allows debtors’ counsel an additional opportunity to be heard concerning those entries which the Court has questioned should counsel so desire. The balance of the Motion is granted and the fees allowed.

Debtors filed this Chapter 12 case on August 25, 1999 and applied to this Court to appoint David R. Klaassen as debtor in possession counsel on the same day. Debtors’ application reflected that Mr. Klaassen would serve as counsel to the debtors and bill his time at \$100.00 per hour. Mr. Klaassen conducts his solo law practice at Marquette, Kansas and is known to this Court as a capable and experienced agricultural insolvency law practitioner. In an order dated September 27, 1999, the Honorable Julie A. Robinson approved Mr. Klaassen’s employment at this stated rate.

The provisions of the Bankruptcy Code clearly provide that the trustee or a debtor may employ professionals on any reasonable terms and conditions with the Court's approval. 11 U.S.C. §328(a)¹. The Court has the latitude to allow a change in the terms of representation should the terms initially approved prove to be improvident in light of unanticipated developments. See In re Baroff, 105 F.3d 439 (9th Cir. 1997)(An award of fees is within the sound discretion of the court); In re Grosswiler Dairy, Inc., 257 B.R. 523, 528 (Bankr. D. Mont. 2000)(In ruling on a request for professional fees, bankruptcy court must consider whether professional exercised reasonable billing judgment.) Section 329(a) requires attorneys representing debtors to file statements of compensation paid and to be paid and § 329(b) provides that the Court may order that excessive compensation be refunded by the attorney to the estate. Section 330(a) provides that the Court may award fees which equate to reasonable compensation for actual and necessary services rendered by the estate's attorney as well as the reimbursement of necessary expenses. In particular, §330(a)(3)(A) requires the court, in fixing an appropriate fee, to consider "all relevant factors" which include: (1) counsel's time spent; (2) the rates charged for such services; (3) whether the services were necessary to the administration or beneficial at the time they were rendered; (4) whether they were performed in a reasonable amount of time commensurate with the complexity, importance and nature of the problem; and (5) whether the compensation charged is reasonable based on the customary compensation charged by comparably skilled practitioners in non-bankruptcy cases. In considering Mr. Klaassen's Motion, the Court is guided by the foregoing principles as informed by its own experience, both as a practitioner and a judge.

¹ All subsequent references are to the Bankruptcy Code.

The Trustee's objections fall into two categories: one concerning the amount of time expended and claimed for by Mr. Klaassen in the performance of certain activities in the case and the other concerning Mr. Klaassen's driving pleadings from Marquette to Topeka and charging for the time, albeit at half his ordinary rate.

The Trustee's objections relative to time spent and charged are specific. First, the Trustee questions the amount of time spent by Mr. Klaassen in preparation of the schedules and statement of affairs. He calls out a specific entry for September 27, 1999 which details a review of all documents and other relevant materials to "completely finalize" the schedules and charges 18 hours. The Court notes that, in the days preceding, counsel spent another 13 hours apparently devoted to the schedules. The Court has reviewed the schedules which run to 37 pages, but which do not appear extraordinarily complex. The Court notes, however, the thoroughness and attention to detail with which these schedules have been prepared, something this Court wishes to encourage rather than sanction. Mr. Klaassen did advise the Court that these debtors came to him with their affairs in some considerable degree of disorder and that they required extensive legal counseling in the course of this case.

While there is little question that counsel's efforts were necessary at the time and benefitted the estate, the Court is left with a serious question about the utilization of almost an entire calendar day in this pursuit and whether the time spent was commensurate with the complexity of the matter at hand. Because Mr. Klaassen's employment has been approved at a rate which is, in this Court's experience, considerably less than that which is charged by similarly skilled attorneys for work performed both within and without the bankruptcy context, and because of the quality of the work product, the Court inclines toward reducing, rather than disallowing, this part of the fee request. Accordingly, the September 27, 1999 entry for 18 hours will be reduced to 8

hours attributable to schedules-related work.

The Trustee also complains regarding time expended on the drafting of the Constables' Chapter 12 plan. The Trustee points to three entries from December 21 through December 23, 1999, during which time counsel spent 24.35 hours in drafting the plan. The Court has reviewed the plan which, when filed on December 23, 1999, was 71 pages in length and dealt with no fewer than 16 classes of claims. The work product is, as with the schedules, commendably detailed and thorough. As with the schedules, the Court is perplexed at the expenditure of more than a calendar day in the preparation of this plan and would reduce the time billed by 10 hours, allowing 14.35 hours for plan drafting and execution.

The Trustee then points to 19.75 hours expended by Mr. Klaassen in the preparation of the Amended Plan which was filed on or about April 1, 2000. Both of these entries are made for April 1, 2000 and represent an expenditure of over 19 hours in one day on this case. The entries emphasize that the time was not only spent on preparation and drafting, but also in phone conferences with the debtors concerning the content of the amended plan. It appears that this amendment was the result of eleven (11) plan confirmation objections elicited by the first plan. Debtors were able to resolve some of these objection by the time of the first confirmation hearing and were therefore required to file an amended plan in anticipation of final confirmation. Further, the initial plan was complex, featuring detailed tables and exhibits pertinent to each secured creditors' treatment. Still, 19.75 hours strikes the Court as excessive for the effort at hand (particularly in one day) and the Court reduces the allowance of time for the amended plan by 19.75 hours to 10 hours.

Next, the Trustee objects to the 13.5 hours expended in the preparation and drafting of the confirmation order. On July 2, and again on July 21 and 22, 2000, counsel expended 13.5 hours

preparing the confirmation order. The Court views the preparation of the confirmation order in a different light than preparation of the plan. In the Court's practice experience, the confirmation order is the document which memorializes all or many of the agreements between debtors and creditors which differ from the plan treatments. These orders tend to be bandied back and forth as part of the settlement and resolution dialogue and the debtors' counsel, as principal drafter, cannot always control the amount of time to be expended in preparing them. This order, entered on August 15, 2000, appears to be lengthy and detailed, speaking to numerous amendments and adjustments in the plan's treatment of secured creditors as well as addressing several objections to claims. The Court overrules the Trustee's objection as to this series of entries.

The Trustee's last time-related issue involves 8 hours spent by Mr. Klaassen in the preparation and drafting of the debtors' motion for sale of certain real property incident to the confirmed plan. The Court notes that two entries, one on November 8, 2000 and the other on November 9, 2000 include these 8 hours, along with additional time spent by Mr. Klaassen in dealing with parties to the sale agreement concerning various issues. While the sale motion is detailed and thorough, the Court believes this document could have been assembled in less time and, accordingly, reduces by four (4) hours the time charged for this service.

The Trustee notes the existence of a "batched" entry for 7.75 hours spent in negotiating and drafting the sales contract on November 7, 2000. The Court discourages batched entries which make it difficult, if not impossible to determine how much time was expended on each particular task listed in the batch. See In re Cascade Oil, 126 B.R. 99, 105 (D. Kan. 1991). This appears to be the only such entry in Mr. Klaassen's motion and numerous other batch entries contain detail as to time. The Court temporarily disallows this entry pending Mr. Klaassen's providing supplementation of same with a breakdown for time expended.

Turning to the Trustee's second concern, counsel's driving of pleadings to Topeka, the Trustee questions three charges for counsel's personal travel to Topeka to file documents. First, Mr. Klaassen traveled to Topeka on October 27, 1999 to file a pleading which was most likely the debtors' objection to Caterpillar's motion for stay relief which was due that day. The drive from Marquette to Topeka is a two-and-a-half hour drive for which Mr. Klaassen billed 1.25 hours each way. Then Mr. Klaassen made the same drive on December 23, 1999, ostensibly to file the plan which was due on December 24. He billed 2.5 hours for this service. Finally, Mr. Klaassen billed another 2.5 hours for a trip to Topeka for filing on January 4, 2000 which appears to be the last day upon which an objection to Cooperative Finance Association, Inc.'s stay relief motion could be filed.

At the hearing on November 5, 2001, the Court queried Mr. Klaassen concerning the efficacy of driving these pleadings to Topeka versus mailing or transporting them by other means. Mr. Klaassen responded that each of these drives was necessitated by the looming deadlines in question. It appears to the Court that, with better planning, these documents could have been prepared timely so that they might have been overnighted to Topeka at considerably less cost than \$250 per trip plus mileage reimbursements of \$91.35 per trip according to the expenses statement contained in the Motion. The Court will allow the mileage expense prayed for, but disallow the driving time of 7.5 hours.

Section 330 (a) simply does not accommodate paying attorneys fees for driving to file documents absent a showing of considerable exigency. Generally, services which could be performed at a lower rate by clerical personnel or others cannot be compensated at attorney rates. See In re Roffle, 216 B.R. 290, 295 (Bankr. D. Colo. 1998) and In re Pirani, 232 B.R. 891, 893 (Bankr. E.D. Tex. 1999) ("The Court will not allow compensation in instances where the services

performed by the professional are in the nature of overhead or could be performed by a non-billing or lower billing professional.”) The Pirani court makes specific reference to faxing, copying, mailing, and filing documents with the court as tasks which are either non-compensable or which should be performed by non-attorney personnel. 232 B.R. at 893-894. While there are certainly situations where the filing of documents may require an attorney’s presence, e.g. the presentation and filing of a preliminary order for cash collateral usage or post-petition financing or the seeking of preliminary injunctive relief, the situations presented here do not fit into that category.

In summary, the Court reduces Mr. Klaassen’s fee allowance as follows:

<u>Date/Time Entry</u>	<u>Time Disallowed</u>	<u>Fee Amount</u>
September 27, 1999	10.00 Hours	\$1,000.00
December 21-23, 1999	10.00 Hours	1,000.00
April 1, 2000	9.75 Hours	975.00
November 8-9, 2000	4.00 Hours	400.00
November 7, 2000 (batch)	7.75 Hours	775.00
Driving Entries (Time only)	<u>7.50 Hours</u>	<u>750.00</u>
TOTAL	49.00 Hours	\$4,900.00

The Court recognizes that Mr. Klaassen has not had the benefit of an evidentiary hearing on these issues, however, and if Mr. Klaassen indicates a desire to be heard on any or all of these reductions by filing a request for evidentiary or other hearing within 10 days of the entry of this Order, such a hearing will be convened at the convenience of the docket. If no such request is filed, this Order will be deemed final as entered this day. Those fees and expenses not questioned by the objecting parties or expressly allowed as detailed herein shall be deemed allowed as requested.

Wherefore, the Court:

1. Grants the Motion in part, allowing fees in the amount of \$41,285.00 and expenses in the amount of \$6,326.23, for a net allowance, after application of the debtors' \$500.00 retainer, of \$47,111.23;
2. Denies the Motion in part, reducing Movant's application by \$4,900.00; and
3. Orders that Movant file with this Court a written request for evidentiary hearing should Movant desire further hearing on the fees and/or expenses reduced or denied in this Order, the same to be filed within ten (10) working days of the entry of this Order on the docket.

IT IS SO ORDERED.

Dated this 21st day of November, 2001.

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

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the **Order Allowing in Part and Denying in Part Debtor's Motion For Approval of Fees and Expenses** were deposited in the United States mail, postage prepaid on this 21st day of November, 2001, to the following:

David R. Klaassen
Attorney at Law
2649 6th Avenue

Marquette, KS 67464

Eric C. Rajala
Metcalf Bank Building
11900 College Blvd., Suite 341
Overland Park, KS 66201

U.S. Trustee
301 N. Main, Suite 500
Wichita, KS 67202

Warren and Lucille Constable
2429 12th Road
Blue Rapids, KS 66411

Janet Swonger,
Judicial Assistant

