

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

In re:)	
)	
Lady Baltimore Foods, Inc.,)	Case No. 02-43428
)	Chapter 11
Debtor,)	
)	
Lady Baltimore of Missouri, Inc.,)	Case No. 02-43429
)	Chapter 11
Debtor,)	
_____)	
)	
LADY BALTIMORE FOODS, INC.,))	
and LADY BALTIMORE OF)	
MISSOURI, INC.)	
)	
Plaintiffs,)	
)	
v.)	Adversary No. 03-7007
)	
U.S. FOODSERVICE, INC.,)	
)	
Defendant.)	
_____)	

ORDER GRANTING PLAINTIFF’S MOTION FOR SANCTIONS

This matter comes before the Court on Plaintiffs’ Motion for Sanctions Related to Costs Associated with Plaintiffs’ Motion to Compel Discovery (Doc. No. 58). Both parties have submitted briefs. The Court has reviewed the briefs and the law, and is prepared to rule. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and § 157(c)(2).

I. FACTS

On December 31, 2002, Lady Baltimore Foods, Inc. and Lady Baltimore of Missouri, Inc., (“Lady Baltimore”) filed a voluntary bankruptcy petition for protection under Chapter 11 of the United States Bankruptcy Code. Prior to filing bankruptcy, Lady Baltimore entered into an

agreement to sell most of its assets to U.S. Foodservice (“USF”). The problems associated with that sale form the basis of this adversary proceeding.

Lady Baltimore originally served the instant discovery, constituting requests for production and interrogatories, on USF on March 26, 2003. It withdrew them when USF objected to them having been served prior to the parties’ planning meeting, required by Rule 26(f) of the Federal Rules of Civil Procedure. The discovery was then re-served June 23, 2003. Thus, USF in effect had four months to properly respond to the discovery. Notwithstanding this extended time period, USF’s responses were obviously inadequate,¹ prompting Lady Baltimore to repeatedly demand the missing information through letters and phone calls to USF’s attorneys. After unsuccessfully making the requisite good faith efforts to confer to obtain the information without court intervention, as required by D. Kan. Rule 37.2, Lady Baltimore filed a Motion to Compel.

USF’s counsel forthrightly admitted, at the hearing, that USF had additional information it could have, and frankly should have, disclosed, without requiring Lady Baltimore to file the motion to compel. This Court granted the motion and ordered USF to forthwith provide appropriate interrogatory responses and to produce all requested documents. The Court reserved Lady Baltimore’s request for an award of sanctions pending USF’s supplementation to Lady Baltimore.

USF provided approximately 6,000 additional pages of documents as a result of this Court’s Order sustaining the motion to compel. In addition, supplemental interrogatory responses provided the names of additional individuals with knowledge regarding the parties’ dispute. Following the

¹Lady Baltimore’s Motion to Compel, Doc. No. 42, sets out the bases for this Court’s conclusion that USF’s responses were simply inadequate. USF did not seriously dispute this at the hearing on the matter. Included as a basis for the motion, for example, was USF’s blanket objection to production of many documents on the basis of attorney client or work product privilege, without providing any kind of privilege log that would have enabled Lady Baltimore, or this Court, to evaluate the claims of privilege.

procedure outlined by the Court, Lady Baltimore has now filed a motion for sanctions, which is the subject of this order.

II. ANALYSIS

A. USF is Subject to Sanctions .

Rule 37 of the Federal Rules of Civil Procedure, incorporated into bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7037, provides that, upon granting a motion to compel, “the court shall . . . require the party . . . whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney fees. . . .” Fed. R. Bankr. P. 7037(a)(4)(A). Pursuant to Rule 7037, a party may avoid sanctions after a successful motion to compel, if it can show (1) the motion was filed prior to the movant’s making a good faith effort to obtain the information without court action, (2) the opposing party’s nondisclosure was substantially justified, or (3) other circumstances make an award unjust. *Id.*

USF does not dispute that Lady Baltimore conferred in good faith to obtain the missing information before being forced to file the motion to compel, and this Court finds that Lady Baltimore made a good faith effort to resolve this issue without court action. USF’s defense is that, although approximately 6,000 pages of additional documents were ultimately disclosed after this Court granted the motion to compel, a number USF does not dispute, the information contained therein was likely of limited value to Lady Baltimore because most of the information had already been provided to Lady Baltimore in other documents produced with initial disclosures, or the information was otherwise already generally available to it prior to the filing of the motion to compel production. USF alleges that the newly produced documents, although admittedly responsive to Lady Baltimore’s requests, were not material, and that USF’s initial disclosures

“provided substantial information for debtors to begin their discovery efforts.” See Opposition to Plaintiff’s Motion for Sanctions (Doc. No. 72). It is unclear to this Court whether USF is arguing that its failure to initially disclose these documents was substantially justified, or if it is arguing that an award would be unjust under these circumstances, but the Court disagrees with either assertion.

First, it is irrelevant that the information in these documents was, in USF’s judgment, immaterial or duplicative. As long as the information is discoverable, i.e. reasonably calculated to lead to the discovery of admissible evidence, and is not privileged or unduly burdensome, USF is obliged to disclose it to Lady Baltimore upon a proper request. Second, whether or not USF provided substantial information upon which Lady Baltimore could begin its discovery efforts is not the correct standard. In order to justify its actions, USF would have to show that it was substantially justified in refusing to disclose this information. USF does not even argue it had substantial justification for withholding the information, such as that the now disclosed documents were privileged or work product.

Third, it is not proper for the producing party to determine what is or is not relevant to its adversary’s case; that is not for USF to decide. One, of many, examples, was USF’s failure to disclose requested e-mail communications dealing with this multi-million dollar transaction, apparently on the basis that USF did not think they were particularly important. A party is required to disclose all discoverable information, not privileged, requested by an adversary or required by statute to be disclosed. USF did not properly disclose requested documents to Lady Baltimore—documents that they were given almost four months to compile, and USF is, therefore, subject to sanctions.

B. Lady Baltimore is Entitled to Reasonable Expenses

As noted above, Rule 7037 entitles the moving party to the “reasonable expenses incurred in making the motion.” The movant bears the burden of proving that the fee requested is reasonable. *Smith v. Freeman*, 921 F.2d 1120, 1122 (10th Cir. 1990). The trial court has discretion in deciding what is reasonable. *Id.* The court may consider customary billing practices in the locale, and it may also use its own knowledge and experience in determining reasonableness. *Id.* To calculate reasonable attorneys fees, the court must multiply the reasonable number of hours that movant’s attorney reasonably spent on the motion by a reasonable hourly rate. *Aquilino v. Univ. of Kan.*, 109 F.Supp. 2d. 1319, 1324 (D. Kan. 2000) (citing *Jane L. v. Bangerter*, 61 F.3d 1505, 1509 (10th Cir. 1995)).

Lady Baltimore’s attorneys have provided this Court with a detailed accounting of hours used in filing this motion. In condensed form, it provides the following:

Motion to Compel (7 pages)			8.7 hours
Review of Defendant’s Response			.9 hours
Reply Brief (10 pages)			13.3 hours
Discussion of Hearing and Coordination			2.05 hours
Preparation Time			2.4 hours
Travel Time			3 hours
Hearing			1 hour
Order Draft (including court requested revision)			2.3 hours
Client Update (re: Motion to Compel)			.4 hours
Total			34.05 hours
Partner hours	16.7 hrs	\$250/hr	\$4,175.00
Associate hours	15.3 hrs	\$140/hr	\$2,142.00
Paralegal hours	2.05 hrs	\$ 85/hr	174.25

1. Reasonable Hours

USF generically argues that the hours used to prosecute the Motion to Compel were excessive, and that two attorneys were used to prosecute the motion, where one would be adequate. USF fails to provide the Court with any specific entry where it claims time billed was excessive, or where it claims Lady Baltimore has double-billed. Furthermore, USF has failed to indicate the amount it believes would be reasonable.

The Court has reviewed the itemization, and finds that although the fees do seem somewhat high in light of the rather simple motion to compel that was at stake, the bottom line is that it was USF's conduct that precipitated the need to file the motion in the first instance. It appears that the two attorneys and paralegal were used in an efficient way, intended to reduce cost. The associate attorney and paralegal researched and drafted the briefs, while the more costly partner reviewed the drafts, recommended changes, and attended the hearing (alone). The Court's review of the fee request revealed no evidence of double billing.

In addition, this Court is less than sympathetic toward USF, which could have prevented all of the fees by initially cooperating in the discovery process. USF had the power to stop incurring the fees at any time by providing full disclosure to Lady Baltimore, and by responding to Lady Baltimore's requests to resolve the matter without the necessity of filing any motion. Instead, USF challenged, erroneously, Lady Baltimore's Motion to Compel, resulting in the additional expenses of a reply brief and a hearing. Accordingly, this Court finds that Lady Baltimore's attorneys reasonably spent 34.05 hours on the Motion to Compel.

2. Reasonable Rate

USF also fails to challenge the reasonableness of the hourly rate used for this fee request, and does not suggest any alternate rates from which this Court may choose. This Court has no

reason to believe that it is not customary for Mr. Chaykin, or similarly situated attorneys of his skill and experience, to charge \$250 per hour in cases of this complexity. The Court would be surprised if USF's lead counsel charged significantly less, which may explain why the hourly rate charges were not questioned by USF. Furthermore, this Court believes that such a rate is within the zone of reasonableness for the kind and complexity of litigation involved in this case. *See Fidelity and Deposit Co. of Md. v. Hartford Cas. Ins. Co.*, 215 F.Supp. 2d. 1171, 1189 (D. Kan. 2002) (finding as a matter of fact that \$205 to \$250 per hour was a reasonable rate for an experienced partner at a respected Kansas City firm).² Without evidence or even a challenge by UFS to the hourly rates, this Court also accepts as reasonable Lady Baltimore's hourly rates for the time spent by the associate attorney and paralegal.

C. USF is the Party or Person to be Sanctioned

Finally, the Court needs to determine against whom the sanctions should be levied, as sanctions must be levied upon the responsible person. *White v. General Motors Corp, Inc.*, 908 F.2d 675, 685 (10th Cir. 1990). Lady Baltimore has prayed for relief against USF, and this Court has no reason to believe that USF's experienced counsel failed to meet his ethical obligations to inform his

²Some courts have reduced the rate allowed for travel time, claiming that such time is unproductive and should be valued accordingly. *See Smith v. Freeman*, 921 F.2d at 1124 (holding that it is not an abuse of discretion for a trial court to reduce travel time rate to 25% of the attorney's normal rate.); *see also Aquilino v. Univ. of Kan.*, 109 F. Supp. 2d at 1326 (limiting travel time rate to 50% because it is "inherently unproductive" time). Although this Court is not directly confronted with the issue, as it was not raised by UFS, the Court believes, under the facts of this case, that unless it can be shown that travel time can be used in other productive ways, or that appearance at the hearing should have been delegated to an attorney located in the court city, such time should be allowed at the attorney's full hourly rate. The Court recognizes that travel by automobile to a court hearing presumably deprives the attorney of the opportunity to engage in meaningful work on a case. Furthermore, based on the Court's knowledge of billing practices, it seems to be the custom to bill the client for travel time at the attorney's regular rate, even if no substantive work is, or can be, done during that time. Therefore, the Court will not herein *sua sponte* reduce this fee request simply because travel time was billed at the full hourly rate.

client about the proper handling of discovery requests. Furthermore, USF was in control of all relevant documents and apparently failed to turn them all over to its attorney, who in turn was unable to produce them to Lady Baltimore. Accordingly, this Court has no evidence before it that the sanctions related to USF's inadequate disclosure should be assessed against anyone other than USF.

III. CONCLUSION

USF did not fully and faithfully participate in the discovery process, despite repeated warnings from Lady Baltimore that it would seek court intervention. The Court found it necessary to compel disclosure due to USF's improper withholding of information. The Court now holds that USF's failure to disclose clearly discoverable material is sanctionable. Lady Baltimore has provided an adequate and reasonable accounting of its time spent preparing and arguing its Motion to Compel, and USF has failed to adequately object to that accounting. Therefore, Lady Baltimore is entitled to \$6,491.25 to cover its expenses in filing and defending that motion.

IT IS, THEREFORE, BY THIS COURT ORDERED that Lady Baltimore's Motion for Sanctions is granted against USF in the amount of \$6,491.25.

IT IS SO ORDERED this 27th day of January, 2004.

JANICE MILLER KARLIN
United States Bankruptcy Judge
District of Kansas

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the Memorandum and Order was deposited in the United States mail, postage prepaid on this 27th day of January, 2004, to the following:

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