

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

<b>IN RE:</b>	)	
	)	
<b>DAVID GRIFFITHS,</b>	)	<b>Case No. 96-42736</b>
	)	<b>Chapter 12</b>
	)	
<b>Debtor.</b>	)	
_____	)	

**ORDER ON APPLICATION FOR APPROVAL OF  
INTERIM ATTORNEY'S FEES AND  
TRUSTEE'S MOTION FOR DISCHARGE**

This matter is before the Court on the Application For Approval Of Interim Attorney's Fees (the "Application") by Metcalf & Justus ("Counsel"), filed herein on March 2, 2001, and on the Trustee's Motion for Discharge. This case was filed on November 15, 1996, a Plan confirmed herein on or about May 12, 1998, and the Chapter 12 Trustee, Eric J. Rajala, filed his Motion for Discharge in a Chapter 12 by Trustee on December 11, 2000. On January 4, 2001, Counsel objected to the trustee's motion out of time, stating that a discharge should not be granted until his fee application had been approved and payment arrangements between him and Mr. Griffiths had been made. Two months later, on March 2, 2001, Counsel filed the Application at bar. This is the first fee application of any kind filed by Counsel in this case.

This matter comes to this Court's attention on a somewhat unusual record. This matter was called on the March 5, 2001 Topeka Chapter 12 docket before the Honorable Julie A. Robinson, B.J. <sup>1</sup> At the March 5<sup>th</sup> hearing, Mr. Griffiths appeared in person and stated that he had made all

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<sup>1</sup> As of June 14, 2000, all Chapter 12 cases in this district have been assigned to the undersigned except where my recusal is necessary as the result of a conflict for a previous

of the payments provided for under the plan. This is consistent with the trustee's report. Mr. Griffiths further stated to Judge Robinson that he did not know that he owed Counsel anything more because, in the four years' span of this case, he had never received a bill. This Court notes in this connection that the billings attached to Counsel's application in support thereof are dated March 2, 2001.

Mr. Griffith presented to the Court two documents which, according to the March 5, 2001 courtroom minute sheet, were admitted into evidence as Exhibits "A" and "B". Exhibit "A" is a copy of a letter from Patrick S. Bishop, Esq., an attorney in Fort Scott, Kansas, to William Metcalf requesting that Mr. Metcalf correspond with or contact Mr. Griffiths and explain the basis for Mr. Metcalf's January objection to the motion for discharge. This letter was mailed on or about February 21, 2001. Exhibit "B" is a copy of another letter from Mr. Bishop dated March 2, 2001 addressed "To Whom It May Concern." This letter states that, pursuant to Mr. Griffiths' request, Mr. Bishop had called and written Mr. Metcalf, requesting an explanation of the attorney's fees allegedly owed Mr. Metcalf by Mr. Griffiths and that Mr. Bishop's efforts had elicited no response. The minute sheet further reflects that the matter was taken under advisement for the purpose of reviewing the Application and issuing a further order.

After the March 5, 2001 hearing, Judge Robinson forwarded the files in the matter to the undersigned for further consideration and appropriate orders. This Court now considers Counsel's Application and the trustee's discharge motion.

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representation. As a matter of convenience both to counsel and to the Judges, Topeka cases are initially called on the Topeka docket at which time Judge Robinson determines whether pretrial conferences, status conferences, or other proceedings before me are necessary. If evidentiary or other hearings are necessary, they are scheduled before me at a time convenient to the Court and counsel.

## FINDINGS OF FACT

The Court makes the following findings of fact. As stated above, this case was filed on November 15, 1996. Shortly thereafter, Counsel filed an application for employment which was executed under oath by Mr. Griffiths. The employment agreement described by that application set forth that Mr. Griffiths would pay a \$2,500.00 retainer fee plus a \$200.00 expense advance to Metcalf & Justus. Metcalf & Justus would prosecute the bankruptcy case, billing against the retainer at a rate of \$90 per hour plus expenses at cost, all amounts to be paid from Mr. Griffiths' future income. According to the Application, Counsel has received a retainer fee of \$2,500.00 plus the \$200.00 expense advance mentioned above. However, Counsel states that the total fees and expenses earned in this case to date are \$5,899.95, \$3,199.95 more than the amounts already paid in by Mr. Griffiths. Finally, Counsel states that should Mr. Griffiths agree to pay the sum \$1,000.00 within sixty (60) days of March 5, 2001, Counsel is willing to waive the remainder of the fees due. No employment agreement appears to have been attached to the employment application or the order approving Metcalf & Justus' appointment. Further, this Court is unable to locate a Rule 2016(b) Disclosure Statement pertaining to fees, which should typically be filed and transmitted to the United States Trustee within 15 days after the entry of the order for relief as provided by §329 of the Code. See Fed. R. Bankr. P. 2016(b).<sup>2</sup> Thus, the only information in the

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<sup>2</sup> All statutory references herein are the to the United States Bankruptcy Code, Title 11, United States Code, unless otherwise designated. Section 329(a) provides, *inter alia*, "any attorney representing a debtor in a case under this Title or in connection with such case, whether or not such attorney applies for compensation under this Title, shall file with the Court a statement of compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation." Arguably, the employment application, which contains all this information, suffices as a Rule 2016(b) disclosure.

file concerning the fee agreement between Counsel and Mr. Griffiths is contained in the employment application and the order approving same.

On March 5, 1997, Counsel filed Mr. Griffiths' Chapter 12 plan of reorganization. The plan provided, *inter alia*, that the trustee would first pay all claims accorded priority under §507 which would include §503(b) administrative expenses including attorneys fees and expenses payable under §330(a). The plan was amended on July 18, 1997, but the amendments did not affect this particular provision. The plan as amended, designates the administrative claims as "Class One" claims which include the attorney's fees of Metcalf & Justus and are to be "paid upon request to Metcalf & Justus as set forth in the agreed Application to Employ Attorney submitted by Metcalf & Justus and the order approving said agreement entered by the Court herein." This plan was confirmed on May 12, 1998. The order of confirmation filed that day contains no reference to administrative expenses or attorney's fees beyond the broad statement that the plan complied with §§1222 and 1225.

The court file reflects that this application is the first fee application of any kind filed in the case. According to the Application, Counsel began rendering services to Mr. Griffiths on or about October 31, 1996, which services were apparently billed against Mr. Griffiths' \$2,500.00 retainer. According to Counsel's statement, the retainer was exhausted around March 12, 1997, nearly four years ago. It appears to this Court that Counsel has in fact received all the retainer, notwithstanding that no Court has entered an order approving any payment. Mr. Griffiths now asserts that he did not know he owed Counsel anything until Counsel filed his objection to the motion for discharge on January 4, 2001. In all other respects, Mr. Griffiths' plan is completed and he should receive a discharge.

#### **ANALYSIS**

Counsel's objection to the motion for discharge and his Application raise three issues. First, the Court must determine the reasonableness of the fees and expenses requested, utilizing the provisions of §330(a)(3) and (a)(4). Counsel bears the burden of showing the reasonableness of requested fees. See In re Cascade Oil Co., Inc., 126 B.R. 99, 104 (D. Kan. 1991). Second, the Court must consider whether Counsel's failure to keep Mr. Griffiths informed concerning the degree and extent of his fees as they were earned by failing to bill Mr. Griffiths forms a basis for the reduction of the amount of fees allowed. Finally, the Court must determine whether Counsel's having already paid himself from the retainer without the Court's approval merits further reduction of the fees allowed or a disgorgement.

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). There is no general right to attorney's fees under the Bankruptcy Code, thus, an award of fees is within the sound discretion of the court. See In re Baroff, 105 F.3d 439 (9<sup>th</sup> Cir. 1997); Cascade Oil, 126 B.R. at 104. The Court should award fees that are actual and necessary to the debtor's case determined by a reasonableness standard. See Cascade Oil, 126 B.R. at 104; In the Matter of Kenneth Leventhal & Co., 19 F.3d 1174 (7<sup>th</sup> Cir. 1994). 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 (10<sup>th</sup> Cir. 1981), including but not limited to, the time and labor required, the novelty and difficulty of the question, and the customary fee. See Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5<sup>th</sup> Cir. 1974).

The Court has carefully considered the Application and supporting billing statements. See Cascade Oil, 126 B.R. at 106 (Bankruptcy Code imposes mandatory duty on the bankruptcy court to exercise billing judgment in award of fees.) The Court bears in mind that for almost the entirety

of the history of this case, this matter was assigned to Judge Robinson and presumably these fees and expenses were applied for based upon Judge Robinson's fee application guidelines which are found in In re Krug 174 B.R. 826, 830 (Bankr. D. Kan. 1994). Counsel's fee application substantially complies with Judge Robinson's guidelines. Nevertheless this Court must consider whether the fees requested are reasonable taking into account all of the relevant factors involved including those enumerated under §330(a)(3) and (4). Section 330 (a)(3) provides that among the "relevant factors" are:

- A. The time spent rendering legal services;
- B. The rates charged for those services;
- C. Whether the services were necessary to the administration of or beneficial at the time when the service was rendered in a case under this Title;
- D. Whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem addressed; and
- E. Whether the compensation is reasonable based upon the customary compensation charged by comparably skilled practitioners in cases other than cases under Title 11.

In addition, §330(a)(4)(B) provides that where a Chapter 12 debtor is an individual, the Court may allow reasonable compensation to the debtor's attorney for representing the debtor's interests based upon the consideration of the benefit and the necessity of such services to the debtor and the other factors set forth in this section.

At first blush, Counsel's application for \$5,899.95 does not appear excessive. This Court is well aware of the nature and complexity of most Chapter 12 cases and that representing debtors

in these cases requires a substantial commitment of counsel's time, resources and tenacity. Moreover, Counsel appears to have obtained a reasonable result in this case. However, in studying the fee application carefully, this Court does question the time spent on certain services. The statement of services contains numerous entries for the "receipt and review" of letters and pleadings. Many of the entries are charged two-tenths (.2) of one hour. This Court believes that entries for the receipt and review of pleadings or documents should not exceed one-tenth of an hour unless some showing is made that the document received and read is lengthy or complex. Indeed, within Counsel's billing statement are several "receipt/review" entries for which only one-tenth (.1) of an hour was billed. Counsel's statement fails to differentiate the "receipt/review" entries billed at two-tenths of an hour from those billed at one-tenth (.1) of an hour. Accordingly, the Court reduces 86 such entries from two-tenths (.2) of an hour (or \$18.00) to one-tenth (.1) of an hour (or \$9.00) for a reduction of some \$774.00. See Cascade Oil, 126 B.R. at 105 (Court has discretion to deny fees and expenses that are so inadequately documented as to prevent determination of reasonableness.)

Further, the Court found six entries for "receipt/review" services for which three-tenths (.3) of an hour were assessed. These were for the receipt and review of plan objections, an agreed stay relief order, and a notice of default. Again, nothing distinguishes any of these pleadings as being unusually lengthy or complex. The Court reduces these entries from three-tenths (.3) to one-tenth (.1) of an hour each, thereby further reducing the amount of fees requested by \$108.00. See Cascade Oil, 126 B.R. at 105.

Additionally, the Court notes some five time entries which appear to be excessive, but are most likely the result of a data input error in the billing process. These are as follows:

- A. On Page 16 of Counsel's Statement, there are two entries for the receipt and

review of a letter from Kevin LaChance (Maximus) regarding agreed order for relief from stay, each charged at one hour for \$90. Each of these charges should be reduced to .10 of an hour or \$9.00 per entry for a reduction of \$162.00.

- B. On Page 16 of Counsel's Statement, there are two entries for .30 of an hour each for the receipt and review of agreed orders for relief from SRS Services and Ford Motor Credit. Not only are these charges excessive, but they appear also to be for more than \$90 per hour. Accordingly, the Court reduces these entries to \$9.00 each, resulting in a reduction of \$36.00.
- C. On Page 17 of Counsel's statement, the Court notes two entries for the receipt, review and calendaring of a notice of hearing on the trustee's motion for discharge and a notice with objection deadline on motion for turnover of funds. Each of these are charged at one-half (.5) of an hour. The entry with respect to the trustee's final report should be reduced to one-quarter (.25) hours or \$22.50 and the entry for the receipt and review of the notice with objection deadline on motion for turnover of funds should be reduced to one-tenth (.1) of an hour or \$9.00 for a further reduction of \$36.00.

The foregoing reductions total \$1,148.50, which should be subtracted from the \$5,899.95 total, leaving a remainder of \$4,751.45. In making these reductions, the Court finds that Counsel's \$90 hourly rate is very reasonable, if not low. The Court also finds that the services performed were necessary to the administration of the case and were performed within a reasonable amount of time commensurate with their complexity and importance. The Court also finds the fees to be reasonable based upon the customary compensation charged in cases other than cases under this Title. While the requirements of §330 appear to have been met, this does not end the inquiry.

Counsel's failure to seek an interim allowance of fees and expenses at any time during this case until immediately prior to the granting of Mr. Griffiths' discharge troubles the Court. Although no direct evidence supports his belief, Mr. Griffiths' conclusion that he owed Counsel no more fees is understandable. He paid Counsel \$2700 and received no billings over a five year period of time. While this Court finds no bankruptcy case law directly on point, it notes that Mr. Griffiths' counsel, just like any lawyer in any other case, has professional duties to his client concerning regular communication and fees. Both bankruptcy and non-bankruptcy law require that fees be reasonable. See Kan. R. Prof. Conduct 1.5(c) (Requiring fees to be reasonable and expressing a preference that all fee agreements be set forth in writing). Further, attorneys have a duty to keep their clients reasonably informed regarding the status of their matter and to comply with any reasonable request for information. See Kan. R. Prof. Conduct 1.4(a). This Court sees no reason why the duty to communicate should not extend to fees and expenses, particularly while the client is attempting to complete a Chapter 12 payment plan and when Counsel knows or should know that the client will be ineligible to receive his discharge until all of the payments under the plan including payments to the attorney, are made. It is an unfortunate consequence of Chapter 12 and §1228(a) that the need to resolve unpaid debtor's attorney's fees issues can block a debtor's discharge as this provision interposes an obvious conflict between the debtor's interests and those of his attorney. The tension raised by this "conflict," can be greatly relieved if attorneys regularly inform their debtor clients of the extent of fees earned so that the client will have an opportunity over several years' time to make appropriate provisions to pay them. This is vastly preferable to the client's learning of the fees at the end of the case, after he has exhausted all of his disposable income.

Nothing prevented Counsel from seeking an interim fee allowance at any time during the

pendency of this case. Sections 328 through 331 provide for the awarding of interim compensation not more than once every 120 days after the entry of order for relief or more often as the court may permit. There was no reason for Counsel not to make these interim applications before March of 2001. The Court is also disturbed by Counsel's apparent failure to respond to either Mr. Bishop's or Mr. Griffiths' inquiries. Thus, this Court feels obligated to balance Counsel's performance and achievements in this case with Counsel's failure to keep Mr. Griffiths fully advised concerning the extent of his fee obligation. The Court notes that in Counsel's Application, Counsel "offered" to reduce the remaining balance of his fees after application of the retainer amounts, to \$1,000. While this Court recognizes that such a substantial fee reduction can be a serious blow to any lawyer, the Court cannot ignore Counsel's failure to bill his client timely and, accordingly, finds that Counsel's fees and expenses in the amount of \$4,751.45 (as reduced above) shall be further reduced to \$3,700.00 (\$2,500 retainer plus \$200 cost advance, plus \$1,000 allowance for balance of case).

Finally, the context of Counsel's Application suggests that Counsel has drawn on the retainer paid by Mr. Griffiths in November of 1996. While this Court does not criticize Counsel for drawing the filing fee separately paid in November of 1996, there is a serious problem with drawing on retainer fees without this Court's approval. Such a retainer is property of the bankruptcy estate and, as such, compensation from property of the estate can only be taken when it has been approved, even on an interim basis, as provided by §330 and 331. Bankruptcy courts commonly require disgorgement of retainers drawn without the Court's permission or order. See In re Indep. Eng'g Co. Inc., 197 F.3d 13 (1<sup>st</sup> Cir. 1999). Because the record here is unclear whether Counsel has in fact drawn on this retainer without this Court's approval no such disgorgement order will be made in this case. However, all counsel are advised that this Court

will not hesitate to order disgorgement in cases where it determines that estate funds have been applied to attorney's fees and expenses without filing a properly noticed motion for interim compensation and this Court's order.

### **CONCLUSION**

Based upon the foregoing, Counsel's application is granted, however, only to the extent of \$3,700.00. Counsel's requested attorney's fees are reduced as set forth in the body of this order, first by \$1,148.50 for excessive time entries and second by \$1,051.45 because of Counsel's failure to regularly bill his client or apply for interim compensation prior to the trustee's filing a motion for discharge in this case.

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

In re David Griffiths; Case No. 96-42736-12

Order On Application For Approval Of Interim Attorney's Fees And Trustee's Motion For Discharge

The Trustee shall prepare and submit his customary form of order granting Mr. Griffiths his discharge and closing the case. Mr. Griffiths' obligation to pay the remaining allowed fees of \$1,000 to Counsel shall survive the discharge.

**IT IS SO ORDERED.**

Dated this 18<sup>th</sup> day of April, 2001.

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

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

In re David Griffiths; Case No. 96-42736-12

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**CERTIFICATE OF SERVICE**

The undersigned certifies that copies of the **Order on Application For Approval of Interim Attorney's Fees And Trustee's Motion For Discharge** were deposited in the United States mail, postage prepaid on this 18th day of April, 2001, to the following:

Metcalf & Justus  
3601 SW 29<sup>th</sup> , Suite 207  
P.O. Box 2184  
Topeka, KS 66601

Eric Rajala  
Chapter 12 Trustee  
11900 College Blvd  
Suite 341  
Overland Park, KS 66210

David Griffiths  
803 Walnut  
Mound City, KS 66056

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Janet Swonger,  
Judicial Assistant

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

In re David Griffiths; Case No. 96-42736-12

Order On Application For Approval Of Interim Attorney's Fees And Trustee's Motion For Discharge