

SO ORDERED.

SIGNED this 5th day of July, 2022.



Dale L. Somers

Dale L. Somers
United States Chief Bankruptcy Judge

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

In re:

Elite Transportation LLC,

Debtor.

Case No. 22-10110-11

**Order Denying without Prejudice Counsel's Applications for
Allowance and Payment of Fees and Expenses and
Denying Motion to Modify**

Debtor Elite Transportation LLC employed the law firm of Mark J. Lazzo, P.A. (the "law firm") as counsel in its subchapter V Chapter 11 case. The law firm seeks allowance of its fees and expenses, but sooner than the 120 days permitted for filing applications for compensation by 11 U.S.C. § 331.¹ The law firm also seeks modification of an Order of this Court, in an

¹ Future statutory references are to title 11, the Bankruptcy Code, unless otherwise stated.

attempt to change the process for approval of monthly payment of fees and expenses found in Local Bankruptcy Rule 2016.1 (“LBR 2016.1”). The United States Trustee (“U.S. Trustee”) opposes both attempts. Finding no basis for the proposed derivations, the Court denies without prejudice all pending applications for fees and expenses² and denies the motion to vacate.³

I. Factual and Procedural Background

On February 25, 2022, Debtor filed its Chapter 11 bankruptcy petition as a small business debtor.⁴ An application to employ the law firm as counsel was filed the same date.⁵ Debtor later amended its petition to choose subchapter V.⁶

The Disclosure of Compensation of Attorney for Debtor filed with Debtor’s petition indicated counsel agreed to accept and had received a retainer of \$30,000, with hourly rates billed against the retainer at \$300 per hour.⁷ A supplemental application to employ additionally disclosed that, prior to filing, \$20,008 of the retainer had been applied to attorney fees incurred

² Doc. 66 (first application for allowance of fees and expenses); Doc. 117 (second application for allowance of fees and expenses); Doc. 135 (amended second application).

³ Doc. 115.

⁴ Doc. 1 p. 33.

⁵ Doc. 3.

⁶ Doc. 30.

⁷ Doc. 1 p. 74. The Statement of Financial Affairs filed with the petition indicated Debtor paid the firm \$20,000 on September 17, 2021, and then paid an additional \$10,000 on February 24, 2022. *Id.* p. 3.

prepetition and \$1738 was applied to the Chapter 11 filing fee, reducing the retainer balance to \$8254 at filing.⁸ Over objection from the U.S. Trustee based on disclosure issues, the Court granted Debtor's application to employ counsel, at an hourly rate of \$300 per hour for Mark Lazzo and \$275 per hour for Justin Balbierz.⁹

A week after the application to employ was granted, on April 14, 2022, the law firm filed its first application for allowance and payment of attorney fees and expenses.¹⁰ In that application, counsel sought authorization for fees of \$17,058.60 and expenses of \$656.63 from filing on February 25, 2022, through March 31, 2022. The application mistakenly reports it was not filed within 120 days of the case filing. The U.S. Trustee objected, arguing the application should be denied without prejudice, noting: (1) the application was filed only forty-eight days postpetition, and under § 331 an application for compensation may not be submitted sooner than 120 days postpetition, (2) Debtor's monthly operating reports for February and March 2022 had not yet been filed, and (3) counsel could, but had not, followed the procedures of this District's LBR 2016.1 regarding payment of monthly compensation.¹¹

⁸ Doc. 45.

⁹ Doc. 62.

¹⁰ Doc. 66.

¹¹ Doc. 77.

Counsel then filed a motion that was titled to permit “monthly fee applications,” but whose substance proposed compliance with LBR 2016.1.¹²

The motion stated the following regarding monthly payment of fees:

Pursuant to LBR 2016.1, Debtor’s counsel requests monthly payment of fees and expenses in accordance with the regular billing cycles of its law firm, and wishes to receive actual payment of one hundred percent (100%) of its allowed fees and one hundred percent (100%) payment of all allowed out-of-pocket expenses. In the event one hundred percent (100%) of the allowed fees are paid, Debtor’s counsel will hold no less than 10% of the allowed fees in trust pending the court’s approval of a final fee application in accordance with 11 U.S.C. §331.¹³

Debtor also filed the February and March 2022 monthly operating reports that were delinquent.¹⁴ An Order was entered granting the motion.¹⁵

A second application for allowance and payment of attorney fees and expenses was then filed, seeking compensation for services provided April 1, 2022 through May 31, 2022, for fees of \$31,820 and expenses of \$640.88.¹⁶

Counsel later amended that second application to correct the amounts requested therein, to \$34,855 and expenses of \$1854.79.¹⁷ The U.S. Trustee filed an objection to that second application that mirrored its first except for the complaint about missing operating reports: the interim application was

¹² Doc. 78.

¹³ *Id.* ¶ 3.

¹⁴ Docs. 90 and 91.

¹⁵ Doc. 108.

¹⁶ Doc. 117.

¹⁷ Doc. 135.

premature, and counsel should follow the procedure adopted by this District's LBR 2016.1 regarding payment of monthly compensation.¹⁸

Finally, Debtor's counsel filed a motion to modify the Court's Order on monthly compensation.¹⁹ In the motion to modify, counsel requested that monthly fee applications be permitted sooner than 120 days after Debtor's petition date and that it not be required to holdback any percentage of its fees pursuant to LBR 2016.1. The US. Trustee objected to this motion to vacate, arguing the proper procedure under § 331 and LBR 2016.1 is for professionals who desire monthly compensation and obtain the Court's approval, to then file a notice each month regarding their fees and expenses, collect the money from the client, hold the specified portion in trust, and then submit an interim fee application not sooner than 120 days since the case was filed or the last interim fee application was filed in which the professional seeks Court approval. The U.S. Trustee contended Debtor's counsel stated no basis for waiving these requirements of the Bankruptcy Code and Local Rules.

After hearing argument from the parties, the Court took these compensation matter under advisement.

¹⁸ Doc. 137.

¹⁹ Doc. 115.

II. Analysis

Matters concerning the “administration of the estate” are core proceedings under 28 U.S.C. § 157(b)(2)(A), over which this Court may exercise subject matter jurisdiction.²⁰

A small business debtor that has elected to be treated under subchapter V of Chapter 11 may employ an attorney to represent or assist the debtor in possession in performing its duties during the Chapter 11 case, subject to court approval thereof.²¹ It is the professional’s duty to perform its obligations under the Code and Federal Rules of Bankruptcy Procedure with respect to employment and compensation.²² Employed professionals have the burden to show all terms and conditions of employment are reasonable.²³

²⁰ This Court has jurisdiction pursuant to 28 U.S.C. § 157(a) and §§ 1334(a) and (b) and the Amended Standing Order of the United States District Court for the District of Kansas that exercised authority conferred by § 157(a) to refer to the District’s Bankruptcy Judges all matters under the Bankruptcy Code and all proceedings arising under the Code or arising in or related to a case under the Code, effective June 24, 2013. D. Kan. Standing Order 13-1 *printed in* D. Kan. Rules of Practice and Procedure (March 2018).

²¹ 11 U.S.C. § 327(a) (“the trustee, with the court’s approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee’s duties under this title”); § 1184 (stating that a subchapter V “debtor in possession shall have all the rights . . . and powers, and shall perform all functions and duties . . . of a trustee serving in a case under this chapter”).

²² *Jensen v. U.S. Trustee (In re Smitty’s Truck Stop, Inc.)*, 210 B.R. 844, 850 (10th Cir. BAP 1997).

²³ *Mkt. Ctr. E. Retail Prop., Inc. v. Lurie (In re Mkt. Ctr. E. Retail Prop., Inc.)*, 730 F.3d 1239, 1246 (10th Cir. 2013).

Bankruptcy courts in the Tenth Circuit are directed to strictly apply the Code's requirements relating to attorney's fees.²⁴

Under 11 U.S.C. § 331,²⁵ an attorney whose employment has been approved by the Court may then seek interim compensation from the Court, prior to final approval of that compensation under § 330. Section 331 states, in pertinent part:

A . . . debtor's attorney . . . employed under section 327 or 1103 of this title may apply to the court not more than once every 120 days after an order for relief in a case under this title, or more often if the court permits, for such compensation for services rendered before the date of such an application or reimbursement for expenses incurred before such date as is provided under section 330 of this title. After notice and a hearing, the court may allow and disburse to such applicant such compensation or reimbursement.

The District of Kansas has adopted LBR 2016.1. Pertinent here, subsection (a) of LBR 2016.1 permits counsel employed in Chapter 11 cases to "file a separate motion for monthly payment of fees and expenses." Subsection (b) then states:

²⁴ See, e.g., *SE Prop. Holdings, LLC v. Stewart (In re Stewart)*, 970 F.3d 1255, 1267 (10th Cir. 2020) (holding that full disgorgement should be the "default sanction" for a failure to disclose under § 329); *In re Mkt. Ctr. E. Retail Prop., Inc.*, 730 F.3d at 1250 (reversing and remanding bankruptcy counsel's fee award for failure of bankruptcy court's disregard of § 330(a)(3) factors); *In re Tahah*, 330 B.R. 777, 781 (10th Cir. BAP 2005) (reversing bankruptcy court's award of fees to Chapter 13 debtor's counsel for failure to make findings of fact concerning reasonableness under § 330).

²⁵ All future references to "Bankruptcy Code," "Code," or "§," refer to Title 11 of the United States Code.

Provisions for Payment of Fees and Expenses. The motion must state the percentage amount of fees and expenses the professional seeks to collect on a monthly basis. The motion may request that up to 100% of the fees and 100% of the expenses be paid monthly. The motion and the proposed order granting the motion must provide that in the event 100% of the fees are paid, the professional will hold no less than 10% of the fees in trust pending the court’s approval of an interim or final fee application, unless the court orders otherwise.

And then regarding the order on the motion, subsection (d) requires that the proposed order on the motion “must state that the allowance of monthly payments of fees and expenses does not constitute an interim or final approval of the fees and expenses.”

Section 331, by its terms, permits counsel to apply to a court for allowance of fees and expenses “not more than once every 120 days after an order for relief, or more often if the court permits.” The words of the statute are clear and should be given their ordinary meaning.²⁶ The 120-day restriction should be followed unless the Court gives permission otherwise. Other cases analyzing the same statute have so held.²⁷

²⁶ *Artis v. Dist. of Columbia*, 138 S. Ct. 594, 603 (2018) (“In determining the meaning of a statutory provision, we look first to its language, giving the words used their ordinary meaning.”) (internal quotation omitted).

²⁷ *See, e.g., In re Structurlite Plastics Corp.*, 91 B.R. 813, 817 (Bankr. S.D. Ohio) (noting “§ 331 requires a 120–day waiting period before interim compensation may first be awarded”); *In re T.A.B. Constr.*, 197 B.R. 821, 821 (Bankr. W.D. Tex. 1996) (denying interim fee application as premature under § 331; finding statutory language clear that counsel may apply to the court “until at least 120 days after the order for relief”); *In re Bicoastal Corp.*, 117 B.R. 700, 702 (Bankr. M.D. Fla. 1990) (permitting fee application in that case but noting approval “should not be construed to condone filing fee applications more often than once every 120 days

And the legislative history confirms this reading.²⁸

Counsel's argument for allowance of an earlier application is that Debtor's bankruptcy case is substantial, requiring "lots" of attorney time. Counsel argued he wanted to therefore "keep up" with filing fee applications and file them every sixty days, so counsel knows where he stands. Counsel also argued more frequent fee applications would actually aid creditors, the Subchapter V trustee, and the U.S. Trustee, because then all parties would be more informed by knowing the status of the administrative claims of the case. And finally, counsel contended the Order entered already permitted "monthly fee applications."

First, the Court rejects the contention that the Order entered permits fee applications to be filed monthly. The motion was titled with that loose language, but the substance of the motion permits the law firm to act "[p]ursuant to LBR 2016.1."

Second, although there are times that more frequent fee applications can, and even should, be permitted, those are "rare" cases, when the case is "exceptionally large," and when not permitting more frequent applications

without leave of Court"); *In re Augie/Restivo Banking Co., Ltd.*, 64 B.R. 236, 238 (Bankr. E.D.N.Y. 1986) (denying fee application without prejudice because as an interim fee application it was filed two weeks too early).

²⁸ H.R. Rep. No. 595, 95th Cong., 1st Sess. 330 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 5963, at 6287 (noting § 331 permits applications "not more than once every 120 days").

would place “undue hardship on counsel,”²⁹ among other reasons. This case does not fit into those exceptional parameters.

Third, the assistance to creditors and trustees is the exact reason the procedure of LBR 2016.1 is permitted. This District already permits monthly compensation of professionals in Chapter 11 cases following the procedures put in place by LBR 2016.1. The Rule requires a ten percent holdback because interim fees awarded under § 331 are not final until approved under § 330. Debtor’s counsel seeks to upend the strictures of § 331 and LBR 2016.1, but without justification beyond what is experienced in nearly every Chapter 11 case in this District. Debtor’s counsel should work with the U.S. Trustee to implement the procedure contemplated by LBR 2016.1. As the U.S. Trustee notes, LBR 2016.1 allows Chapter 11 counsel to be paid every month. Yes, the law firm must hold ten percent of its fees in trust, but this is a minimal burden considering fees are not final until final approval is given under § 330. The law firm may submit its fee applications no sooner than 120 days from case filing or the last interim fee application.

²⁹ *In re Knudsen Corp.*, 84 B.R. 668, 672 (9th Cir. BAP 1988); *see also* H.R. Rep. No. 595, 95th Cong., 1st Sess. 330 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 5963 at 6287 (noting applications are permitted more frequently under § 331 if the court permits and circumstances warrant, “such as in very large cases”).

III. Conclusion

The law firm's first application for allowance and payment of attorney fees and expenses³⁰ is denied without prejudice as premature. Likewise, the motion to modify the Court's Order previously granting relief under LBR 2016.1³¹ is denied.

In addition, the second application for allowance and payment of attorney fees and expenses,³² as amended,³³ that is currently set for hearing on July 13, 2022, is also denied without prejudice as premature.

The existing Order in this case³⁴ permits counsel to follow the practice envisioned by LBR 2016.1: file a notice each month regarding fees and expenses, collect those amounts from the client, hold the specified portion in trust, and then submit interim fee applications beginning 120 days postpetition, and every 120 days thereafter.

It is so Ordered.

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³⁰ Doc. 66.

³¹ Doc. 115.

³² Doc. 117.

³³ Doc. 135.

³⁴ Doc. 108.