**SO ORDERED.**

**SIGNED this 30th day of November, 2012.**

Janice Miller Karlin
United States Bankruptcy Judge

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

**In re:**
**HD Gerlach Company Inc.,**

**Debtor.**

**Case No. 12-40685**
**Chapter 11**

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**Order Requiring Creditor Central National Bank to Supplement its Privilege Log in Relation to its First Interim Application for Allowance and Payment of Attorney Fees and Expenses**

On October 12, 2012, Central National Bank (Central) filed its first application for fees and expenses, seeking almost $50,000 for the period December 2011 through October 2012.[1] Debtor objected to Central's fee motion in large part because the attached itemization was so heavily redacted that counsel was unable to determine the reasonableness of the fees.[2] At a hearing conducted November 14, 2012, after a

[1] Doc. 94.

[2] At the hearing on Central's motion, Debtor's counsel agreed that, if reasonable, the terms of the agreement between the parties allows for attorney fees and expenses pursuant to 11 U.S.C. § 506(b). In addition, this judge does not remember that counsel had any argument about the hourly rate requested. Therefore, it appears that only Debtor's

preliminary review of the heavily redacted fee itemization, the Court agreed that the redactions made it impossible for Debtor's counsel to assess reasonableness. On that basis, the Court believed it unfair to proceed to its own review of reasonableness without input of Debtor's counsel. The Court therefore ordered that Central provide opposing counsel and the Court with a less-redacted version of the itemization, where possible, and a privilege log to justify the remaining redactions. Central was also ordered to file an unredacted copy of the fee itemization under seal.

Central timely filed the unredacted itemization under seal. In addition, Central has eliminated some of the redactions—in other words, some words that were previously redacted are now viewable—and has presumably provided that less redacted itemization to Debtor. But these limited efforts haven't been very helpful. The amended itemization that opposing counsel received is still heavily redacted.

As an applicant for an award of attorney fees, Central has the burden of proving that the number of hours for which it seeks fees is reasonable considering the legal tasks for which fees are sought.[3] To satisfy its burden, Central must submit "meticulous, contemporaneous time records that reveal, for each lawyer for whom fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks."[4] Furthermore, this Court "has a positive and affirmative

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reasonableness challenge remains in dispute.

[3] *Malloy v. Monahan*, 73 F.3d 1012, 1017–18 (10th Cir. 1996).

[4] *Case v. Unified School District No. 233, Johnson County, Kansas*, 157 F.3d 1243, 1250 (10th Cir. 1998) (citing *Ramos v. Lamm*, 713 F.2d 546, 552 (10th Cir. 1983)) (also holding that a court is justified in reducing the number of reasonable hours when the

function in the fee fixing process, not merely a passive role."[5] For that reason, the itemization must be sufficient to allow the Court to determine reasonableness. That role is enhanced through the adversary process, by allowing both counsel to help educate the trial judge about the fees in a particular case.

As in a similar case, *Tomlinson v. Combined Underwriters Life Ins. Co.*,[6] the attorney billing statements here do not meet the standard required to support the award, at least in part, because

> "[t]hey have been redacted so as to eliminate practically all references to the subject matter or issue being researched or addressed, and the document being prepared, reviewed, or revised. In other words, the redactions render the fee request essentially unsupported because the redactions deprive the court of the ability to determine whether the time spent on a particular task was reasonable. The redactions also deprive Plaintiff of sufficient information to enable Plaintiff to formulate a reasoned objection."[7]

Although this Court has now been provided, under seal, an unredacted version of the time entries, Debtor's attorney has not. Debtor has no real ability to make the required

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attorney does not adequately document how "he or she utilized large blocks of time" and when hours claimed are unnecessary, irrelevant or duplicative). *Case* is very instructive on attorney fee awards, generally, including that time spent on generalized "conferences" between attorneys is not necessarily compensable when the billing entries are not sufficiently specific and do not indicate what happened at the conference, and time spent on background research spent familiarizing oneself with the general area of law should be absorbed in the firm's overhead and not billed to the client.)

[5] *Valenti v. Allstate Ins. Co.*, 243 F. Supp. 2d 200, 209 (M.D. Pa. 2003) (citing *Loughner v. University of Pittsburgh*, 260 F.3d 173, 178 (3d Cir. 2001)). In addition, not all hours expended in litigation are normally billed to a client, and applicants should exercise "billing judgment" with respect to a claim of the number of hours worked. *Malloy v. Monahan*, 73 F.3d at 1018 (also holding that a court has a corresponding obligation to exclude hours "not reasonably expended" from the calculation of fees).

[6] Case No. 08-cv-259-TCK-FHM, 2009 WL 2392950 (N.D. Okla. July 29, 2009).

[7] *Id.* at *1.

determination, and is deprived of the ability to support its argument that certain fees may not reasonable in light of the work required.[8]

And like in *Tomlinson*, this Court is also not persuaded by Central's arguments that the information redacted from the billing statements constitutes either protected attorney-client communication or work product, in the vast majority of the redacted entries. As the *Tomlinson* Court noted, and which is very true here, "the redacted information appears to be of the type that is routinely included in billing statements appended to fee requests. It does not appear that the billing statements contain professional advice or opinion or the mental impressions, conclusions, opinions, or legal theories of an attorney."[9]

Furthermore, the asserted privilege log does not meet the requirements of a proper privilege log, because it is so generic as to be essentially worthless to this Court, and undoubtedly to opposing counsel. Although there are well over 100 instances of redaction, the log only states one of two sentences for all these redactions. The first is "Attorney-client privilege as it reflects litigation strategy and the nature of services provided," and the second is "Work product doctrine as it reflects litigation strategy and the nature of services provided."

The attorney-client privilege is intended to encourage full and frank

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[8] The Court will note that without receipt of the unredacted copy, the fee application as originally filed lacked such specificity that the Court was simply unable to determine the reasonableness or accuracy of many charges. That lack of specificity, alone, would have justified the Court's complete denial of fees.

[9] 2009 WL 2392950, at *1.

communications between attorneys and their clients, therein promoting broader public interests in the observance of law and the administration of justice.[10] But that privilege

> "does not automatically extend to a peripheral fact regarding an attorney-client communication or the attorney-client relationship in general. The general nature of the privileged matter, the occasion and circumstances of any communications, actual circumstances of the attorney-client relationship remain discoverable, even when the underlying communication itself may be privileged. 'The attorney-client privilege only precludes disclosures of communications between attorney and client and does not protect against disclosures of the facts underlying the communication.' In general, the facts of legal consultation or employment, client identities, attorney's fees and the scope and nature of employment are not deemed privileged."[11]

Similarly, the work product doctrine protects unwarranted inquiries into the files and mental impressions of an attorney.[12] But the burden of proof is on the proponent of the doctrine. Any privilege must be weighed against the burden upon the party requesting attorney's fees to set forth, with specificity, the information that supports the fees they seek.[13]

The *Valenti* case is instructive. There the Court noted that it had

> "great concern with the defendant's liberal use of purported privilege to protect what can only be described as mundane and uninforming entries in their billing records. This use of purported "privilege" has greatly multiplied the work this court has had to undertake since the opposing party could not address any of the particulars that have been redacted from the billing statement presented .... As random examples of "privileged" information, selected from the billing, the defendant on July 13, 1999 redacted an itemization for Attorney Stein that reads "telephone conference with Jack Brinkman." Nothing in the description

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[10] *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

[11] *Valenti*, 243 F. Supp. 2d at 218 (citations omitted).

[12] *Hickman v. Taylor*, 329 U.S. 495 (1947).

[13] *Valenti,* 243 F. Supp. 2d at 218.

> describes the contents of the conversation, but merely that a phone call between one lawyer and another took place. It is hard to understand what privileged information would be disclosed by leaving that description unredacted.[14]

The redactions in this case are quite similar, and this Court is also hard placed to understand, except in maybe 5-10 possible instances, how the information could be remotely privileged.

As noted above, construing the concept of privilege exceedingly broadly, it is possible that a few redactions might contain privileged information. But Central has placed the Court in a situation where it is having to guess about a possible privilege, because the privilege log so inadequately describes the basis for claiming the privilege. For example, if the description of work done included research about a possible legal theory that the other side might be able to use (but maybe had not thought of yet), it is possible this Court would find a redaction of that fee entry is privileged. Admittedly an objection to a billing statement should not be used to smoke out theories that the objecting counsel might not have contemplated. Similarly, if a description identified a witness that opposing counsel did not wish to reveal at that juncture, for strategic reasons, the identity could theoretically fit into some privilege.

But again, this Court is left guessing whether a privilege truly exists, because the short-hand bases for redaction are simply inadequate. Again, the party seeking to invoke the attorney-client or work product privilege has the burden of establishing its applicability. To satisfy this burden, it is insufficient for the party invoking privilege to merely contend, without more, that the redacted information contains privileged

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[14] *Id.*

information."[15] A privilege log must describe the nature of the documents or communications not produced in a manner that, without revealing any potentially privileged information, will enable other parties to assess the claim.[16] Central's cursory log entries wholly fail to do this.

Accordingly, the Court requires Central to provide to the Court and to the Debtor a proper privilege log by **December 7, 2012.** This will enable the Court and opposing counsel a true opportunity to evaluate the privileges asserted, which is presently impossible. At some point before the hearing set for December 13, 2012, counsel for both parties should consult and decide which redactions are still truly disputed.

In addition, the Court again strongly encourages counsel to similarly consult and decide which of the dozens of time entries are in dispute as to the reasonableness of time spent, so that at the December 13 hearing, we do not have to use court time to discuss entries that are undisputed.[17] The Court also hopes that its citation to a few cases in this order will give guidance as to how the Court views many of these issues.

Finally, the Court will note that it disagrees with the Debtor's contention that a state court (where some of the attorney time was expended) should decide the reasonableness of the time spent on state court matters. I disagree. I believe I am

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[15] *Cf.*, *Centennial Archaeology, Inc. v. AECOM, Inc.,* 688 F.3d 673, 683 (10th Cir. 2012).

[16] *See* Fed. R. Civ. P. 26(b)(5)(A).

[17] It would be very helpful if counsel could jointly present a list of which entries remain in dispute prior to the hearing (both as to whether a redaction is appropriate and whether the fee sought is reasonable).

capable of determining the reasonableness of those fees, and doing so in one forum will avoid potential delay.

IT IS, THEREFORE, ORDERED that Central provide to this Court and Debtor an amended privilege log, in full compliance with Fed. R. Civ. P. 26(a)(5), by December 7, 2012. In addition, counsel for both parties should meet prior to December 13, 2012 to winnow both the redaction dispute and the reasonableness dispute for court presentation.

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