

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: §
§
JOHN JOSEPH PICO, § CASE NO. 01-35708-RCM-11
§
DEBTOR. §

MEMORANDUM OPINION AND ORDER

Simon, Warner & Doby, L.L.P. (SWD), counsel for John J. Pico, the debtor in possession, moves the court for approval of interim compensation and reimbursement of expenses under 11 U.S.C. §331. Mel T. Nelson and Metro Auto, Inc., oppose the application. The court conducted an evidentiary hearing on the application on August 31, 2001.

Under §331 of the Bankruptcy Code, the court may award interim compensation for the debtor in possession's attorneys. The court applies the standards of §330(a) of the Code to determine reasonable interim compensation for actual, necessary services rendered and for reimbursement for actual, necessary expenses.

To determine reasonable compensation, the court must determine the "nature and extent of the services supplied by" the attorneys. 11 U.S.C. §330(a)(3); In re First Colonial Corp., 544 F.2d 1291, 1299 (5th Cir. 1977). The court must also assess the

value of those services in relation to the customary fee and the quality of the legal work. These two factors comprise the components for the lodestar calculation. See Cobb v. Miller, 818 F.2d 1227, 1231 (5th Cir. 1987). Generally, the lodestar is calculated by multiplying the number of hours reasonably expended by reasonable hourly rates. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). The court may then adjust the compensation based on the factors of §330(a)(3) and (4) and Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). Blanchard v. Bergeron, 489 U.S. 87, 91-92, 94-95 (1989). The Johnson factors may be relevant for adjusting the lodestar calculation but no one factor can substitute for the lodestar. Id. Rather, the lodestar shall be presumed to establish a reasonable fee with adjustments made when required by specific evidence. Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 478 U.S. 546, 563-65 (1986). In this assessment, "any work performed by legal counsel on behalf of a debtor must be of material benefit to the estate." In the Matter of Pro-Snax Distribs., Inc., 157 F.3d 414, 426 (5th Cir. 1998).

SWD applies for interim compensation of \$49,830.50.

Recognizing that the court can make only an interim assessment of the lodestar factors, SWD requests that the court limit its interim award to 80% of that amount. In contrast, Nelson and Metro Auto urge the court to disallow certain fees and then to

award 60-70% of the remainder on an interim basis.

The hourly rates charged by the attorneys and paralegal on this application fall within the prevailing rates in the Dallas and Fort Worth markets for similar services of attorneys and paralegal persons of reasonably comparable skill, experience, and reputation. Missouri v. Jenkins, 491 U.S. 274, 286 (1989). The court therefore finds, on an interim basis, that the hourly rates are reasonable.

Turning to the hours expended, the largest component of the application, approximately \$22,461 worth of time, was devoted to the debtor's venue disputes with Nelson and Metro Auto. Of the several tasks covered by this application, basically only the venue litigation has been completed and is thus susceptible to assessment. Accordingly, the court analyzes that work in some detail. The court makes an interim percentage assessment of the other categories of work covered by this application.

The record reflects that the venue matter had been hotly and well litigated. Nevertheless, its outcome did not necessarily result in a material benefit for the bankruptcy estate. Rather, as the parties recognize, the outcome of the dischargeability dispute between Pico and Nelson will have the material impact on the bankruptcy estate. If Pico does not prevail on the dischargeability dispute, then SWD concedes that the case will likely convert to a case under Chapter 7 of the Bankruptcy Code.

If this conversion occurs, then there is little likelihood of payment of Chapter 11 administrative expenses, regardless of the venue. That realization should have tempered the requested level of compensation for the venue dispute. Therefore, within the context of the case as a whole, the \$22,461 allocated to the venue dispute is excessive.

The debtor had the right to defend his venue selection. SWD had an obligation to advocate its client's position. However, the costs to the bankruptcy estate of that litigation must be kept in perspective to the material issues in the case. Simply put, SWD over-charged for the venue litigation. The case law articulates the factors for the court to consider on motions to transfer venue of a case and of an adversary proceeding. The court applies those factors to the facts of the case. The facts of this case were readily assessable by counsel. Thus, the litigation involves presenting the evidence to the court and then applying that evidence to the factors. Having reviewed the record of the case, the application, the testimony of Robert Simon, and the recommendations of Nelson and Metro Auto, the court finds the following times to be reasonably necessary for the venue litigation: for Robert Simon, at \$225 an hour, 2 hours to gather the basic facts, 4 hours to prepare written pleadings and arguments, 3 additional hours to separately prepare adversary pleadings and arguments, 9 hours to prepare for the hearings, 9

hours to appear at the hearings, and 1 hour to prepare for closing arguments, for a total of 28 hours, which equates to \$6,300. For Simon's associate, 4 hours to research the venue factors for the case and 2 hours to research the venue factors for the adversary proceeding, for a total of 6 hours, which equates to \$960. The total time reasonably necessary for the venue dispute is \$7,260.

The court does not fault SWD for the time it incurred. But counsel's time to prepare for a matter to counsel's satisfaction does not necessarily equate to time that may reasonably be billed to the client. As this court recognizes from its own experience, often counsel prepares with more time than either the benefits or the assignment can support in actual billable fees. Counsel must exercise reasonable billing judgment at the conclusion of a matter. Here, reasonable billing judgment should have resulted in the voluntary reduction in fees to a level more commensurate with the dispute and the work reasonably necessary to apply well established factors to the easily ascertainable facts of the case. That process may have presented a close question for adjudication, but not an expensive question to present.

The court therefore allows, under the lodestar analysis, interim compensation of \$7,260 for the venue work.

Of the remaining, approximately \$27,369.50 requested, Nelson and Metro Auto object to certain work, but the court finds that a

determination, other than on a percentage allowance, cannot be made on this interim application. Nelson and Metro Auto complain about redacted entries. The percentage allowance protects the estate and defers consideration until a final application when the redactions may be removed. Nelson and Metro Auto also complain about work concerning Pamela Pico and the automatic stay. SWD responds that they will not seek compensation for that work. The percentage allowance thereby preserves that matter. Nelson and Metro Auto complain about the charge for preparing this application. The Bankruptcy Code requires the application. Consequently, the court allows the reasonable time spent on its preparation. However, counsel charged attorney rates of \$225 for clerical work of assembling exhibit notebooks. That work, totaling \$270, must be charged at paralegal rates, if not actually subsumed by counsel's hourly rate. Missouri v. Jenkins, 491 U.S. at 288. Therefore, that amount is disallowed.

The court determines that 70% of the remaining work should be allowed on an interim basis.

Accordingly, the court allows \$7,260 for the venue work. The court disallows charges for the venue work above that allowance. The court disallows \$270 for work improperly charged at counsel rates. Of the remaining \$27,099.50 requested, the court allows 70%, which equals \$18,969.65, and defers the balance to a final application. The court therefore allows interim

compensation of \$26,299.65 (\$7,260 + \$18,969.65).

With regard to actual, necessary expenses, SWD amended its application at the hearing to request \$146 for facsimiles, instead of the \$730 originally requested. The revised amount is consistent with this court's guidelines. See General Order No. 7 (Bankr. N.D. Tex. Dec. 21, 2000) (regarding guidelines for compensation for professionals for early disposition of assets in Chapter 11 cases). SWD withdraws its request for reimbursement of a lunch expense of \$37.20 and amends its cash deposition request to \$2.82. The revised expenses were actual, necessary expenses. Counsel represents that the per page charges follow the court's guidelines. Contrary to Nelson and Metro Auto's arguments, the expenses are not overhead items subsumed by counsel's hourly rate. The court grants reimbursement of \$2,462.51.

Based on the foregoing,

IT IS ORDERED that Simon, Warner & Doby, L.L.P., is awarded interim compensation of \$26,229.65 and reimbursement of expenses of \$2,462.51, for a total interim award of fees and expenses of \$28,692.16.

Signed this _____ day of September, 2001.

Steven A. Felsenthal
United States Bankruptcy Judge

