

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

NOV 10 1998
JED G. WEINTRAUB,
CLERK OF COURT
WESTERN DISTRICT OF TENN.

In re

AVN Corporation,

Case No. 98-20098-L

Chapter 11

Debtor.

MEMORANDUM

On May 27, 1998, AVN Corporation, filed an "Application for Compensation of Attorney" seeking payment of attorney fees for services rendered by Larry D. Austin, P.C. The United States Trustee and Sentinel Trust Company filed separate objections to the fee application on June 19, 1998.

This Court conducted a hearing in this contested matter on October 19, 1998, pursuant to Fed. R. Bankr. P. 9014. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A). The following Memorandum contains the Courts findings of fact and conclusions of law. *See* Fed. R. Bankr. P. 7052.

I. FINDINGS OF FACT

An order approving the employment of Larry D. Austin to represent AVN Corporation in its Chapter 11 bankruptcy was signed on January 15, 1998. The terms of employment provided for an hourly rate of \$185.00. At the time of employment, a retainer of \$4,900.00 was received by Mr. Austin from a source other than the Debtor. This is the first application for compensation in this case. The time period covered by the application is January 6, 1998, the date of filing, through May 21, 1998. Mr. Austin has requested \$15,530.75 for professional fees and \$332.95 for reimbursement

of expenses.

The United States Trustee and Sentinel Trust Company filed separate objections to Mr. Austin's application for compensation. The U.S. Trustee bases her objection on a lodestar analysis. The Trustee argues that the Court should focus on the second step in the lodestar analysis, i.e., whether an enhancement or reduction of the fee is warranted in light of the results in the case. The U.S. Trustee proposes that Mr. Austin be reimbursed for all expenses incurred (\$332.95), be allowed to keep the \$4,900.00 retainer, and be compensated an additional \$4,318.45, yielding sixty percent (60%) of the total compensation sought.

Sentinel Trust Company, the only creditor in this bankruptcy case, argues that the services provided by Mr. Austin worked to the benefit of the interests of the officers and insiders of the Debtor, and not for the creditors or the estate as a whole. Sentinel asserts that the Court must consider, as a threshold inquiry, whether the fees and expenses set forth in the Application for Compensation were of benefit to the Debtor's estate. According to Sentinel, such an inquiry should be separate and apart from any consideration of whether the fees and expenses were reasonable, or whether the services were of high, medium, or low quality.

At the October 19, 1998, hearing, the Court approved a \$5,000.00 partial payment of Mr. Austin's fees. The payment, which includes the original retainer, represents that portion of time expended in complying with the statutory obligations of filing AVN Corporation's bankruptcy petition, i.e., completing the petition and schedules, preparing the matrix, claims administration, and attending the first meeting of creditors.¹ The remaining balance represents services rendered in

¹ The calculations below indicate the balance remaining on Mr. Austin's first application for compensation after the partial payment:

connection with the Debtor's opposition to a motion for relief from stay filed by Sentinel Trust. The \$10,863.70 remainder was taken under consideration by the Court to determine whether the Debtor's estate received any benefit, or would have been reasonably likely to receive any benefit, from Mr. Austin's representation in those proceedings.

II. CONCLUSIONS OF LAW

A. Statutory Provisions

11 U.S.C. § 330(a)(1)(A) states that a court may award "reasonable compensation for actual, necessary services." Although discretionary, this provision is limited by the mandate of § 330(a)(4)(A)(ii) which states that "the court shall not allow compensation for . . . unnecessary duplication of services; or services that were not reasonably likely to benefit the debtor's estate; or necessary to the administration of the case."

B. Interpretation of § 330(a)(4)

1. Benefit Necessary to Award Compensation

The dictates of § 330(a) require professional services be both supplied to and beneficial to the estate in order to be compensable. *In re Allied Computer Repair, Inc.*, 202 B.R. 877, 886 (Bankr. W.D. Ky. 1996). "[U]nless the services performed produce a demonstrable benefit to the estate, § 330 does not authorize the court to award compensation." *Id.* (citing *Rubner & Kutner v. United*

Professional Fees Requested:	\$ 15,530.75
Expenses Requested:	\$ 332.95
<u>Total Compensation Requested:</u>	<u>\$ 15,863.70</u>
Partial Payment:	\$ < 5,000.00 >
<u>Remainder under submission:</u>	<u>\$ 10,863.70</u>

States Trustee (In re Lederman Enters., Inc.), 997 F.2d 1321 (10th Cir. 1993)). See also *Jensen v. United States Trustee (In re Abraham)*, 221 B.R. 782 (B.A.P. 10th Cir. 1998) (“The discretion of a bankruptcy court to award compensation is limited by the court’s determination that the services were reasonably likely to benefit the debtor’s estate.” (citing 11 U.S.C. § 330(a)(4)(A)(ii)(I))).

The *Allied* court found that the basic test of recovery “requires the applicant to demonstrate that his or her services made a beneficial contribution to the estate or to the creditors.” Other courts have held similarly. In *In re Roger J. Au & Son, Inc.*, 114 B.R. 482 (Bankr. D. Ohio 1990), Judge James Williams approved a reduction in a fee request by the Chapter 11 debtor’s attorney. The court held that “[a]s counsel for the debtor, [he] is under a duty to investigate and pursue every avenue which may inure to the debtor’s benefit. But, the options and avenues chosen must, in some capacity, benefit the estate.” *Id.* at 486. The court found it appropriate to reduce by one-half the number of hours billed by the attorney for work which the court concluded, “produced no tangible or direct benefit to the estate.” *Id.* See also, *In re Keene Corp.*, 205 B.R. 690, 696 (Bankr. S.D.N.Y. 1997)(Bankruptcy court may reduce or disallow a request for professional fees if the underlying services conferred no real benefit on the estate.); and *Andrews & Kurth, L.L.P. v. Family Snacks, Inc., (Matter of Pro-Snax Distrib., Inc.)*, No. 97-11128, 1998 WL 685377 at *11 (5th Cir. Oct. 20, 1998)(Any work performed by legal counsel on behalf of a debtor must be of material benefit to the estate.).

2. What Constitutes Benefit to the Estate?

It appears well-settled that services that benefit the estate include those incurred in assisting the debtor in performing his or her obligations under the Bankruptcy Code. *In re Woodward East*

Project, Inc., 195 B.R. 372, 374 (Bankr. E.D. Mich. 1996). The *Woodward* Court explained:

The allowance to the bankrupt's attorney ordinarily covers only work done in promoting the administration of the estate and in assisting the bankrupt to perform his duties, such as drafting and filing the petition, drafting and filing the schedules, attendance at the first meeting, and other services in furtherance of the winding up of the proceedings.

Id. at 374-75 (quoting 2 COLLIER ON BANKRUPTCY ¶ 330.04[3], at 330-40 (Lawrence P. King ed., 15th ed. 1996)). “Accordingly, fees are not awarded for services performed for the benefit of the debtor’s principals.” *Id.* at 374. (citing *Randolph v. Scruggs*, 190 U.S. 533, 539, 23 S. Ct. 710, 712-13, 47 L. Ed. 1165 (1903)). *See also, In re Spanjer Bros., Inc.*, 203 B.R. 85 (Bankr. N.D. Ill. 1996)(Fees for debtor’s attorney are properly payable out of estate assets when a commensurate benefit is provided to the estate, but not for services which personally benefit only Chapter 7 or 11 debtor.).

Judge George Paine, in an opinion bearing some similarity to the instant case, considered a fee application filed by the Chapter 11 trustee’s attorney for his assistance in prosecuting the debtor for bankruptcy crimes. The issue before the court was whether the attorney’s services in connection with the criminal prosecution were necessary to the administration of the estate or beneficial to the estate. The court found that the attorney’s participation in the criminal process did indeed promote the bankruptcy process or administration of the estate under the provisions of the Code and such services could be charged against the estate. *See In re Holder*, 207 B.R. 574 (Bankr. M.D. Tenn. 1997).

In *Holder*, the debtor filed a voluntary petition under Chapter 11 in July 1991. He operated as debtor-in-possession for three months at which time a Chapter 11 trustee was appointed. The

trustee and his attorney confronted a “daunting task” of analyzing the assets belonging to the estate, which was complicated by the debtor’s continued misstatements, misleading conduct, and use of the Fifth Amendment privilege against self-incrimination. In addition, the debtor made numerous pre- and post-petition transfers of estate property to his daughter, conducted transactions in his daughter’s name, and commingled business funds with money allegedly belonging to his daughter. *Id.* at 575.

In considering the fee application, the court analyzed the concept of “benefit to the estate” under § 330(a)(4). *Id.* at 583. “The concept of ‘benefit to the estate’ is not restricted to an economic dollar for dollar interpretation.” *Id.* (citing *Spanjer*, 203 B.R. at 90). The court quoted a 1992 opinion by Judge Barliant:

‘benefit to the estate’ is not necessarily limited to an economic approach along the line that a dollar’s worth of services must directly benefit the estate and bring a cash dollar into the estate in order to justify allowance of such dollar in cash compensation. . . . Other factors besides the economic impact on the estate of actions taken should be considered in the ‘benefit to the estate’ analysis.

Id. at 584 (quoting *In re Lifschultz Fast Freight, Inc.*, 140 B.R. 482, 488 (Bankr. N.D. Ill. 1992) and citing *In re Coastal Nursing Center Inc.*, 162 B.R. 918, 920 (Bankr. S.D. Ga. 1993)(“Section 330 is broader than merely those hours which confer an economic benefit on an estate . . .”); *In re Brandenburger*, 145 B.R. 624, 628 (Bankr. D.S.D. 1992)(no intent evident that “benefit to the estate” was meant only to encompass monetary benefit); *Automatic Medical Analysts v. Pearl (In re HCS Corp.)*, 59 B.R. 307, 309 (Bankr. S.D. Cal. 1986)(absence of monetary benefit to the estate is not determinative)).

When deciding whether the estate received any a benefit from the attorney’s services, the court in *Holder* stated that “one important consideration is whether the services rendered ‘promoted

the bankruptcy process or administration of the estate in accordance with the practice and procedures provided under the Bankruptcy Code and Rules for the orderly and prompt disposition of the bankruptcy cases and adversary proceedings.” *Id.* (citing *Spanjer*, 203 B.R. at 90). The court concluded that the Chapter 11 trustee’s attorney’s participation in the prosecution of the debtor for bankruptcy crimes did promote the bankruptcy process or administration of the estate under the provisions of the Code and the bankruptcy process was encouraged through the cooperative relationship between the trustee’s attorney and the United States. *Id.*

Other courts have ruled similarly. *See Keene*, 205 B.R. at 696 (When determining whether attorney services conferred a benefit to the estate, the court should consider what services a reasonable lawyer or legal firm would have performed in the same circumstances.); *In re Kusler*, 224 B.R. 180, 184 (Bankr. N.D. Okla. 1998)(court should consider whether professional’s services promoted bankruptcy process in accordance with practices and procedures provided under the Code); and *In re Ewing*, 167 B.R. 233, 235 (Bankr. D. N.M. 1994)(Additional services that are compensable are those that either protect or increase available assets or decrease debtor’s indebtedness, and may comprise investigation, negotiation, and/or litigation in attempts to recover or collect assets or reduce liabilities.).

3. Services Not Benefitting the Estate

While there is no exhaustive list of actions or services that do not provide a benefit to the estate, the court in *Canatella v. Towers (In re Alcala)*, 918 F.2d 99, 102 (9th Cir. 1990), suggested that where an attorney consistently maintains positions adverse to those of the trustee and files claims which in effect benefit the debtor, such actions neither benefit the estate nor are they necessary for its proper administration. “[The debtor’s attorney] rendered his services for the benefit

of the debtors, and took positions throughout all the proceedings that were adverse to the interests of the estate rather than for its benefit. These services [are] not compensable under section 330 of the Bankruptcy Code.” *Id.* at 104.

Likewise, as the *Woodward* and *Holder* Courts mentioned, services performed for the benefit of the debtor’s principals or work that does not promote the administration of the estate or assist the debtor-in-possession in performing his duties would not be compensable under § 330. *See also, In re Ogden Modulares, Inc.*, 207 B.R. 198, 200 (Bankr. E.D. Mo. 1997)(Fees for legal services that benefit other entities such as the debtor’s officers, directors, principals, or shareholders are not compensable from estate assets. “Fees for these services are payable by the entity that received the benefit.”(citing 11 U.S.C. § 1107)).

C. Analysis Under § 330

Various methods have been employed by courts in their approach to the benefit test. Some courts, for example, utilize the test as the initial step in determining whether the professional is entitled to the requested compensation, while others require a thorough lodestar analysis and then use the benefit test to allow for any reduction or enhancement of fees.

The Sixth Circuit in *Boddy v. United States Bankruptcy Court, Western District of Kentucky (In re Boddy)*, 950 F.2d 334, 337 (6th Cir. 1991), adopted the lodestar method of fee calculation for bankruptcy cases. The lodestar approach, however, analyzes only the reasonableness of the requested compensation, offering no method for determining whether the professional provided compensable services.

Recognizing the above issue, the Tenth Circuit, in a 1993 opinion, held that the benefit test should be the threshold question in determining allowable compensation. In *Rubner & Kutner v.*

United States Trustee (In re Lederman Enterprises, Inc.), 997 F.2d 1321 (10th Cir. 1993) the Tenth Circuit concluded that a court must determine whether an attorney's services actually rendered a benefit to the estate prior to undertaking an analysis of the reasonableness of attorney's fees. The court stated:

[The lodestar] analysis, however, determines only the 'reasonableness' of counsel's fees, not its entitlement. The Bankruptcy Code itself sets out the standard to be used in determining counsel's eligibility for compensation. . . . An element of whether the services were 'necessary' is whether they benefitted the bankruptcy estate. Because the beneficial nature of legal services must be determined before a reasonableness inquiry may even be conducted the district court and bankruptcy courts did not err in identifying the appropriate legal standard.

Id. at 1323 (internal citations omitted).

Under the Tenth Circuit's approach, entitlement is initially addressed through the benefit test. If the services are compensable, then the reasonableness of the request is then analyzed under lodestar. See *In re Reconversion Tech., Inc.*, 216 B.R. 46, 52 (Bankr. N.D. Okla. 1997)(court first found services compensable and then determined reasonableness using lodestar factors). See also, *Kusler*, 224 B.R. at 184 (The threshold issue for a bankruptcy court, in ruling on a fee application, is whether the services rendered by the applicant actually benefitted the estate; unless the court determines that a benefit was conferred upon the estate, the inquiry goes no further, and the fees are not compensable. (citing *Reconversion Tech.*, 216 B.R. at 52)); *Ewing*, 167 B.R. at 235 ("If the services do not provide a benefit, they are not to be compensated regardless of the reasonableness of the amount sought."); and *Keene*, 205 B.R. at 696 (section 330(a) contains two separate criteria, and before determining the reasonableness of the service, the court must make a threshold inquiry into its necessity. "The majority of courts hold that a service is 'necessary' if it benefits the

estate.”)(citing *Lederman*, 997 F.2d at 1323; *Allied Computer Repair*, 202 B.R. at 886; and *In re Engel*, 190 B.R. 206, 209 (Bankr. D. N.J. 1995)).

Based on the foregoing, the Court holds that the proper analysis for determining whether professional services are compensable requires an initial inquiry of entitlement using the benefit test. If such services were reasonably likely to benefit the estate, then the reasonableness of the request should then be analyzed under lodestar. *See Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)(explanation of lodestar analysis).

In the instant case, the remaining fees and expenses were incurred as a result of the Debtor’s opposition to the motion for relief from stay filed by Sentinel Trust. Although the Debtor bore the burden of proof on all issues except lack of equity, no proof was offered by the Debtor. Such a posture could not reasonably be likely to provide a benefit to the bankruptcy estate. This is not to say that compensation would be denied in any case in which the debtor-in-possession is not successful in defending a motion for relief from stay. In most cases, the estate will benefit by counsel’s efforts to retain property for the purpose of reorganization. In this case, however, where the debtor-in-possession offered no proof, the hearing required unnecessary expenditures by the moving creditor and was not reasonably likely to benefit the estate.

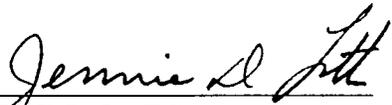
This bankruptcy case is a two-party dispute between the Debtor and Sentinel Trust. There are no unsecured creditors. The singular purpose for the filing of this petition was to delay Sentinel Trust in foreclosing upon the collateral securing its claim in the case. As the above cases illustrate, the Code requires professional services provide some benefit, or be reasonably likely to provide some benefit to the estate, monetarily or otherwise, in order for such efforts to be compensable. The Court recognizes Mr. Austin to be a very capable and professional bankruptcy practitioner. In this

however, Mr. Austin's efforts benefitted the Debtor's principals, but not the estate. Without a benefit to the estate, Mr. Austin's services may not be compensated by funds from the estate. Such fees are properly payable by the entity that received the benefit of Mr. Austin's representation.

III. Conclusion

The Court finds that the estate did not benefit, nor could it have reasonably been likely to benefit from Mr. Austin's services in connection with the automatic stay litigation. Such services instead benefitted Mr. Namer and the insiders of AVN Corporation. Absent such benefit to the estate, the Code provides that the Court is without discretion to allow the compensation.

BY THE COURT:



JENNIE D. LATTA
United States Bankruptcy Judge

Dated: November 10, 1998

- Motion Order Other
 - Entered on the Court docket on 11-10-98 and ~~mailed to~~ mailed to
 - Debtor(s), Debtor(s) Attorney, Trustee
 - Servicing by Court
 - Certificate of Mailing to Matrix
 - For servicing by Movant,
 - L. Austin
- By: R. Standberry, Deputy Clerk