

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE**

IN RE

**ENCAPSULATION INTERNATIONAL, INC.,
Debtor.**

**Case No. 96-31762whb
Chapter 11**

**MEMORANDUM OPINION AND ORDER
ON DEBTOR'S ATTORNEY'S MOTION FOR § 503(b) FEES AND EXPENSES**

JUDGE WILLIAM HOUSTON BROWN

APPEARANCES:

Benjamin S. Dempsey
Attorney for debtor in possession
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Madalyn Scott Greenwood
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Before the Court is the application of Benjamin S. Dempsey, attorney for the debtor in possession, for approval of his fees and expenses under 11 U.S.C. §§ 330(a) and 503(b)(2). The United States Trustee has objected to the allowance of the amounts requested by Mr. Dempsey, and the Court has conducted a hearing on this contested and core matter. 28 U.S.C. § 157(b)(2)(A) and (B); FED. R. BANKR. P. 9014.

The applicable Code section provides that the bankruptcy court “may award to ... a professional person employed under section 327 or 1103–(A) reasonable compensation for actual, necessary services rendered by the ... professional person, or attorney and by any paraprofessional person employed by any such person; and (B) reimbursement for actual, necessary expenses.” 11 U.S.C. § 330(a)(1). Section 503(b)(2) gives such “compensation and reimbursement” administrative expense priority, although in this case, Mr. Dempsey, along with other administrative claimants, has agreed to accept a prorata share of the \$150,000 that is immediately available for administrative claims, with the balance of his fee to be paid in the future as an unsecured claim and as funds become available. *See* Confirmed Amended Joint Debtor-Creditor Plan, Docket Entry 273. As is always true with professional fee requests, the bankruptcy court must determine, on a case-by-case basis, what compensation and expense reimbursement satisfies § 330(a)’s requirements of reasonableness, actuality, and necessity.

The United States Trustee’s objection questions that these standards have been met with the entire amount of Mr. Dempsey’s application, and the Court agrees and will reduce the application, allowing \$83,737.50 in fees and \$3,219.49 in reimbursable expenses.

“[T]he lodestar method of fee calculation is the method by which federal courts should determine reasonable attorney’s fees under federal statutes which provide for such fees.” *Boddy v.*

U.S. Bankruptcy Court (In re Boddy), 950 F.2d 334, 337 (6th Cir. 1991) (citations omitted). The “‘lodestar’ amount is calculated by ‘multiplying the attorney’s reasonable hourly rate by the number of hours reasonably expended.’” *Id.* (quoting *Grant v. George Schumann Tire & Battery Co.*, 908 F.2d 874, 879 (11th Cir. 1990), other citations omitted). Mr. Dempsey’s hourly rate in this fee application is \$125 per hour. The United States Trustee does not object to this rate, and the Court finds it to be reasonable for an attorney of Mr. Dempsey’s experience.

The issue now becomes one of determining the reasonable number of hours to which this rate may be applied, and that is difficult in this case because the application is lengthy and it does not follow exactly the United States Trustee’s guidelines for such fee applications. Mr. Dempsey originally estimated that his fees would be \$15,000, an amount that the Court expected would be too low. The United States Trustee questions how the fee could expand so much to its current request of \$111,650, especially in view of the debtor’s gross sales during the Chapter 11 case of only \$101,082.02. This was, however, a unique case, in that the debtor’s operations were diminished, in part, by disputes with its major purchaser, which became involved in efforts to purchase the debtor’s assets. The confirmed plan focuses upon a sale of all of the debtor’s assets, including a patented process, and the parties anticipate that future operations by the purchaser will be successful enough to satisfy all creditors’ claims. The reasonableness of the debtor’s attorney’s fees, therefore, must be evaluated in light of the confirmed plan rather than in the dimmer light of postbankruptcy sales. Mr. Dempsey rounded his time to .25 increments rather than the .10 increment recommended in the United States Trustee’s guidelines, and the Court agrees that .25 increments are too generous, making it very difficult to determine the reasonable amount of time spent on such tasks as telephone calls. The application was not supplemented by any other “proof” from Mr. Dempsey; thus, other

than the Court's personal awareness of the activity and results in this case, the Court is left with no factual basis to support his .25 incremental rounding. To compound the rounding-up problem, many of the time entries are rather general, such as 1.5 hours on November 6, 1997 for "file review-review trial exhibits, letters re: Balda." It is difficult to place a value on "file review," although the Court is well aware that an attorney must routinely review documents.

The Trustee's objection number 6 questions the benefit to the estate from relatively minor work amounting to 21.5 hours. Some of this work appears to have been necessary, however the amount of time appears to be unreasonable. The Court will, therefore, in its allowance take into account this excessive time.

Similarly, the Trustee's objection number 7 questions what appears to be excessive time for "fairly routine matters." The Court attempts to avoid mere hindsight second-guessing of an attorney's work, being aware that what appears unnecessary now may have appeared otherwise in the exigency of the moment. *In re Washington Manufacturing Co.*, 101 B.R. 944, 956 (Bankr. M.D. Tenn. 1989). Nevertheless, the Court is required to make an independent evaluation of the reasonableness of time devoted, and as with this application unsupported by other proof, the ultimate decision is based often upon the Court's experience with Chapter 11 cases as to what an attorney with similar experience may have charged in both time and rate for a similar case or similar matters within a case.

The Court agrees with the United States Trustee's objection number 9 that \$240 in overhead expense for contract secretarial time in October 1997 is not an allowable expense. Absent proof from the applicant that attorneys in this legal community regularly charge their clients for such contract labor, this Judge, sitting in the Middle District of Tennessee, has not permitted such

charges. See *In re Washington Manufacturing Co.*, 191 B.R. at 960.

After a review of Mr. Dempsey's application, its itemized time and expenses, the United States Trustee's objection, and the totality of circumstances in this case, including the results achieved, the Court finds that Mr. Dempsey's requested fee must be reduced. This reduction is caused, in part, by the applicant's failure to follow the exactitude of the United States Trustee's guidelines, which, although burdensome to the applicant, permit a more informed review by the Trustee, interested creditors and the Court. Mr. Dempsey did an excellent job for the debtor; however, there was time devoted early in the case to plan efforts that were doomed to failure. The Court is aware that litigation strategy was involved and that it was not possible to achieve agreement among the debtor and its principal creditors for some time; but, the time records reveal that some excessive time was devoted to issues that did not benefit the debtor nor anyone but insiders. For example, the time spent concerning Mr. Velander's administrative efforts, which the Court has previously denied, and concerning attempts to force approval of an unexecuted settlement agreement were excessive. There also appears to have been excessive time spent on disclosure statements, when it was obvious through most of this case that the fight should not be over disclosure information but rather how to implement an inevitable liquidation.

The Court finds that a twenty-five percent reduction in the total hours would yield a reasonable number of hours for debtor's counsel in this case: 669.9 hours at \$125 = \$83,737.50 in allowable fees. The Court further finds that the requested expenses should be reduced by the \$240

secretarial overtime charge, resulting in a reimbursement of expenses of \$3,219.49.¹

IT IS THEREFORE ORDERED that the United States Trustee's objection is sustained in part, that the application of Benjamin S. Dempsey is reduced in its fee and expense amounts, and that a final attorney fee of \$83,737.50 and reimbursable expenses of \$3,219.49 are allowed as administrative expenses of this bankruptcy estate. These expenses are to be paid as provided under the order confirming the plan.

SO ORDERED THIS 16TH DAY OF NOVEMBER, 1998.

UNITED STATES BANKRUPTCY JUDGE

¹ The application is called an interim one, although the Court interprets it to be Mr. Dempsey's final application. Assuming that it is a final application, the Court will not question its request for "estimated" telephone and copy charges in September 1998, as the Court assumes that these estimates were for Mr. Dempsey's work to wrap up the confirmed plan.