UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

SUN FRESH JUICES, INC. Case No. 93-11158 K

Debtor

Damon and Morey seeks fees of $27,863.00 for services as attorney for Trustee, Alan Singer. The U.S. Trustee objects, asking for a reduced award because Damon and Morey has "lumped" every time entry in the application.[1]

What is "lumping" of time entries? It is a stringing together of a series of tasks and assigning or reporting an aggregate total time to the "lump," rather than reporting the actual time spent on each of the tasks performed.

Although these parties would have the Court believe that "lumping" is the issue here, they miss the point. What is at issue under 11 U.S.C.§ 330 is the "reasonableness" of the fee application. If the reasonableness of the fee sought is reasonably in question, then the next question is whether the means are at hand to determine the reasonableness of the request. In any given case, lumping may or may not deny the Court those means. Lumping is not per se "wrong," and lumped time entries do not render a fee request "un"-reasonable, per se.

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[1]In this application, it appears that if only one task is itemized for a lawyer on a given day, it is because that was the only task performed by that attorney on this case on that day.

Rather, lumped entries may be no problem where the total amount requested is clearly reasonable, and that might occur under a multitude of circumstances that are best described by exception. A clearly reasonable request (whether supported by lumped entries or unlumped entries) is one that is devoid of such indicia of possible "un"-reasonableness as: billing for research time, billing for intra-firm consultations, billing travel time at full rates, billing for multiple attorneys working on the same task, billing at "premium" rates for non-premium tasks, billing at attorney rates for non-attorney tasks, billing for services not within the scope of employment, and billing for services supposed to be performed by others.

When any of these (or other bona fide concerns) are present, the reasonableness of the request might reasonably be questioned. Lumping is then a problem only if it denies the Court the means of resolving the question. (If, for example, billing for research time is the basis of the dispute, but all research time was lumped together, then lumping might not be a problem.)

In the application at hand, it seems to the Court that the U.S. Trustee's objection is clearly reasonable -- which is to say, deserving of further inquiry and possible judicial determination -- because the application clearly bills for multiple attorneys working on the same task (as described below), and possibly other legitimate areas of inquiry.

Again, lumping is not itself a basis for objection any

more than assigning all attorney work to the highest priced attorney would, of itself, sustain an objection. The question is "Does the application on its face sustain the applicant's burden?"[2]

Having misconstrued the problem as being "lumping" as such, Damon and Morey claims that its style of lumping is in full accord with local custom and practice; that the U.S. Trustee is asking the Court to change custom and practice at the firm's expense; and that it would violate "due process" to change practice without the protections of Local Rule-making. As applied to this case, the firm's arguments are incorrect, overwrought and disingenuous, bordering on frivolous. And its refusal to acknowledge the validity of the U.S. Trustee's objections and to assist in reaching a fair result, has made needless extra work for the Court in evaluating this fee application.

This experienced firm knows that we do not concern ourselves with lumping that occurs when an attorney handles a number of tasks "simultaneously" or in rapid succession during a solid block of effort on behalf of a single client. The attorney is not expected to stop every few moments and record what he or she

[2]Thus explained, it can be seen that among the countless examples of instances in which lumping would not be a problem is that in which one attorney does all the work (or different attorneys perform separate tasks) and all tasks are clearly necessary and are compensable, and the aggregate fee sought is clearly within the range of experience for cases of similar size and complexity. If most of the time on such an application were lumped, it would probably not draw fire.

did during those few moments. Hence, he or she might make or receive several relevant phone calls while drafting two or three documents, on the same matter, and properly record a "lumped" entry.

Rather, we are concerned with those who ignore the duty (which has been established by a long list of time-honored cases) to maintain contemporaneous time records, instead merely "estimating" the aggregate time spent on a collection of tasks performed at various different points in time. Certainly we do not tolerate lumping for the purpose of deception -- to hide a lawyer's mismanagement of the file, or to hide overbilling, double billing, duplicate work, or padding, churning or other breach of confidence or ethics. Finally, we do have concern with lumping that is a result of ignorance, carelessness or nonchalance. Hence, assigning an aggregate block of time to a number of tasks performed at various times throughout the day can inhibit inquiry into the reasonableness of fees.

Innocent lumping usually does not interfere with this task because attorneys appointed under § 327 usually have other clients and consequently do not always devote large blocks of lumped time to the client at hand -- most time entries on such an attorney's time sheets are not lumped because the day is spent on work for a variety of clients. From the non-lumped entries[3] the

[3]For example, non-lumped entries might evidence the time spent on reviewing a given letter, preparing a given motion,

Court may ascertain that (1) the time-honored duty to maintain contemporaneous time records has not been ignored, and (2) the time typically charged by the attorney to various particular tasks is reasonable.

Even "impermissible" lumping is not a basis for denial of all compensation.[4] The Court's inability to determine the reasonableness of the time charged requires that the Court err on the side of protecting the interests of creditors at whose expense counsel will be paid. Where counsel well-experienced in practice under § 327 engages in "impermissible" lumping, some judges might presume that it is not a consequence of "ignorance, recklessness, or nonchalance," and presume an improper agenda, or at least a disregard for the requirements of law.

Lumping does deny the Court the means to assess reasonableness when, as here, more than one attorney in the firm is assigned to the same task, and this experienced firm certainly knows that.

Here for example, on June 29, 1993, Attorney Diane Piotrowski spent 1.6 hours on a variety of "lumped" matters including "Reviewed International Paper Company's motion to lift

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answering a particular question telephoned-in by the client, conferring with others regarding a given problem.

[4]The failure to maintain appropriate time records is a basis for reduction of fees. Denying all fees should be resorted to only under egregious circumstances.

stay." On July 1, 1993, Attorney Daniel Brown spent 2.4 hours on a variety of "lumped" matters including the very same thing. How much of those 1.6 and 2.4-hour blocks were spent on the International Paper motion? One hour or three?

On July 1, 1993, Brown "began revising opposition" to that same motion and on July 2, 1993 he completed "revisions to opposition" to that motion and Piotrowski "reviewed and revised opposition to motion to lift stay." Brown had spent 7.7 hours in two lumps of activity that included that task, while Piotrowski had spent 4 hours in a "lump" that included that task. How much of the 11.7 combined hours was spent on that opposition?

Then on July 6, 1993, Attorney William Savino spent 4.8 hours on a lump that included "Reviewed motion for stay of relief by Lawrence C. Brown for International Paper Company" as well as a long stream of other matters.

In sum, some portion of 20 hours was spent on International's motion. How much of the 20 hours was so spent? There is no way for me to tell.

Similarly, on June 7, 1993 some sort of stipulation was reached by Savino in Court, and on June 8 he charged the entry: "review of transcript; begin stipulation. .30 hours." On June 9, Attorney James Marvin also "Received and examined transcript of [that same] oral stipulation" as part of a 3.9 hour "lump." On the same day Savino "worked on stipulation" as part of a .90 hour "lump." On June 10, Marvin worked 4.4 hours on a lengthy list of

"lumped" tasks, including "continued drafting written stipulation." On June 11 Marvin spent 2.7 hours in a non-lumped effort of review of the stipulation and preparation of a second draft. On the same day, Savino lumped 1.4 hours on a number of lumped tasks including "worked on stipulation." On July 1, Brown charged 2.4 hours in a lump in which he "reviewed transcript of hearing held on June 7, 1993 regarding stipulation." (After that, I cannot tell whether more than one stipulation was being worked on.) Was the time spent by each of these people reviewing the events of that single hearing reasonable? I cannot tell.

One further example:[5] Although Brown's conduct of a Rule 2004 examination of David Haghani was only a part of a 4.6 hour lump he charged on August 20, 1993, a 3.7 hour lump charged by Piotrowski on September 20, 1993 included her having "reviewed 2004 examination of David Haghani." How much of those 3.7 hours was spent reviewing the exam that was conducted by Brown? It could be 10 minutes or 3 hours.

Where several attorneys are involved, such entries might reflect effective delegation of work. But it might also reflect wholesale disarray in assignment of work and accountability within counsel's firm, which renders the charges "unreasonable." The lumped entries at Bar make it impossible to tell which is at work.

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[5]These examples are taken from only the first few pages of the time sheets supporting this fee application. The balance of the application reflects the same pattern.

Did three out of four attorneys look briefly at the work of the fourth, or did they re-perform that work, or did they charge for further needless review?

My ruling in the IPAC case has been cited by the contesting parties. Typical of the way in which this application's "lumping" differs from that of the application in IPAC are the numerous entries in the present application that lump numerous "telephone conference[s]" on a single day. While IPAC'S counsel only lumped calls and conferences that occurred in succession, and separately itemized similar matters when they occurred in a scattered fashion throughout various points in the day, it is admitted that in the present application, each attorney and paralegal at Damon and Morey has summarized or computed the aggregate time spent each day, and not set forth each unit or "lump" of time spent at each point during the day.

The firm incredibly and disingenuously claims that everybody who practices here does the same thing. (It has regrettably become typical of this otherwise fine firm to whine and cry in this Court that it is being picked on.) It cites applications by other firms which it claims demonstrate that this is so, but to the contrary, the very first page of Exh. A shows two separate entries for "BSZ" (Bruce Zeftel) on July 13, 1990. Exh. B shows many days on which multiple separate entries were made for a single day by the same attorney (Jack Getman). The reply of the

U.S. Trustee points out other defects in the exhibits provided.[6]

Thus, the argument that the U.S. Trustee is attempting to unfairly "change" the long standing practices in this court at the expense of Damon and Morey is frivolous (and the firm's overwrought invocation of "due process" to increase the work of the Court demonstrates its extravagant attitude toward practice in this Court).

The firm's response to the U.S. Trustee's objection reflects not only a lack of "legal judgment," but a lack of "billing judgment."

"Billing Judgment" is the attention a lawyer pays to making a bill palatable to the client in light of the results achieved, and the client's ability or willingness to pay in light of the magnitude of the matter.[7] "Billing judgment" is exercised

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[6]Whether intended to do so or not, the exhibits tended to mislead this Court. The Saperston and Day application in the Kayak case (Exhibit A) did indeed contain much lumping, but it took the U.S. Trustee's letter reply of April 22 to point out that Judge McGuire had indeed cut that application partly because of same. As to the Hodgson, Russ application in the Rapid Transformer case (Exhibit C), Damon and Morey provided me with only two pages; upon examining the Hodgson, Russ application itself I found pages upon pages of "unlumped entries" as to which 4 or 5 or 6 separate entries are made for a single attorney on a single day as to dozens of separate days. Such "selectivity" by Damon and Morey in its offerings smacks of a conscious design to mislead the Court. At the least, it multiplied the Court's work.

[7]My retired colleague, Hon. Beryl E. McGuire, referred to this as a "pro bono element" and was corrected by the District Court on appeal.

by lawyers who hope to retain a client, or at least avoid a grievance. There is little incentive for "billing judgment" in seeking allowances for work done for bankruptcy estates, but most attorneys do exercise it, and the U.S. Trustee performs the commendable but thankless job of confronting those who do not. In nearly all instances in which he raises legitimate objections like these on behalf of the often diffuse "class" of creditors who foot the bill, counsel involved takes the objection "to heart" and re-evaluates the application. This is to say, the attorney then agrees that assessing the reasonableness of the application is indeed impaired, and he or she amends or supplements the request to reflect sound "billing judgment."

The U.S. Trustee's objections here are legitimate, and Damon and Morey raises false arguments "supported" by specious authority.

I have labored long over this 25-page time accounting (with an added 77 paragraphs (18 pages) of prefatory materials). The firm's refusal to negotiate a resolution of the U.S. Trustee's concerns, coupled with the firm's myopic refusal to confess the simple truth that the reasonableness of this fee application cannot be assessed because of the way time has been reported, leaves the Court with a concern as to whether there is some more fundamental defect in the billing process here at issue. I will not labor further in the unproductive vacuum created by Damon and Morey's refusal to provide meaningful time entries.

The application is cut in half without prejudice to submitting supplemental information within 20 days. This is a middle-ground between allowance in full and disallowance in full, which I believe is the only means at hand to protect both Damon and Morey and the creditors at whose expense the firm's fees will be paid.

The U.S. Trustee's objection as to travel time is, in part, a "lumping" objection and is subsumed in the above analysis. (We cannot tell how much time was travel time.)

Damon and Morey's explanation as to duplication of time entries for Mr. Savino and Mr. Brown is acceptable. (It is regrettable, however, that the terms of sale drafted by the firm did not make suitable provisions to avoid what happened here -- both the prevailing bidder and the next bidder backing out of their bids without meaningful penalty.)

Expenses to the firm of $1485.24 are allowed.

It is understood that nothing is to be paid to the firm at this time. It will share pro-rata with other Chapter 11 expenses.

To sum up, lumping is not a problem itself. It is a problem only when some indicator of possible unreasonableness appears in the application, which cannot be resolved because of the way or the extent to which time entries have been lumped. When the U.S. Trustee or other party properly points out the problem, then the applicant should acknowledge the problem and offer a solution,

whether it be more detailed records, a percentage reduction in the application, or at least some further information. Denial, indignation, and pouting will not avail.

SO ORDERED.

Dated: Buffalo, New York
May 6, 1994

/s/Michael J. Kaplan
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U.S.B.J.