UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE: CASE NO. 3: 11-bk-2827-JAF

JULASE INCORPORATED, CHAPTER 11
d/b/a STRUCTURAL STEEL
OF BREVARD,

Debtor.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came before the Court upon Final Fee Application for Allowance and Payment of Compensation and Reimbursement of Expenses to Brett A. Mearkle as Counsel for the Debtor (Doc. 84)(the "Fee Application") and the Objection to the [Fee Application] (the "Objection to the Fee Application") filed by the United States Trustee (the "Trustee"). Mr. Mearkle seeks total fees in the amount of $15,110.00 and expenses in the amount of $310.50. The Court conducted a hearing on the matter on August 29, 2012 and elected to take the matter under advisement. Upon the evidence and the applicable law, the Court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

The First Case

On January 11, 2011 Julase Incorporated ("Julase") filed a voluntary petition under chapter 7 of the Bankruptcy Code in the Jacksonville Division of the Middle District of Florida. The case was assigned case number 3:11-bk-153 (the "First Case"). Julase was not represented by an attorney. On January 13, 2011 the Court entered an order of impending dismissal, notifying Julase of the requirement, pursuant to Local Rule

1074-1, that a corporation appear through an attorney and directing Julase to retain an attorney within fourteen days, failing which the Court would dismiss the case (Doc. 8).

On February 3, 2011 the Court dismissed the case based upon Julase's failure to retain an attorney (Doc. 22). On February 8, 2011 the Chapter 7 Trustee filed Motion for Reconsideration of Order Dismissing Case without Prejudice and/or Allowance of Trustee's Compensation and Notice of Hearing (Doc. 24). The Motion for Reconsideration indicated that Wells Fargo had turned over $9,083.16 from Julase's checking account to the Chapter 7 Trustee. The Chapter 7 Trustee sought to have the Court continue administration of the case, or alternatively, allow him to retain his statutory fee of $1,658.32 from the proceeds prior to returning the remainder to Julase. On March 2, 2011 the Court conducted a hearing on the Motion for Reconsideration and on March 9, 2011 entered Order Setting Aside Order Dismissing Case without Prejudice for the Limited Purpose of Awarding Fees to Chapter 7 Trustee (Doc. 26).

On March 30, 2011 Brett A. Mearkle ("Mr. Mearkle") filed Motion to Convert Case to Chapter 11 on behalf of Julase (Doc. 28). On that same day Mr. Mearkle filed Statement Pursuant to Rule 2016(B) Federal Rules of Bankruptcy Procedure (the "2016 Statement"). The 2016 Statement indicated that Julase had retained Mr. Mearkle to represent it. The 2016 Statement also indicated that the agreed minimum fee for the representation, subject to court approval, was $15,000.00, of which $7,500.00 had been paid and that Mr. Mearkle's firm had tendered $740.00 for the conversion fee.

On April 1, 2011 Mr. Mearkle filed an amended application seeking to be employed as counsel for Julase Nunc Pro Tunc to the Conversion Date and for Approval of Earned on Receipt Retainer (Doc. 36). The Employment Application indicated that

Julase and Mearkle had agreed to a minimum fee for representation in the amount of $15,000.00, $7,500.00 of which had been paid and that $740.00 had been earmarked for the filing fee required to convert the Chapter 7 case to a Chapter 11 case. On April 14, 2011 the Court denied the Motion to Convert to Case to Chapter 11 without prejudice to Julase filing a new Chapter 11 case (Doc. 40).

The Instant Case

On April 18, 2011 Julase filed the instant voluntary Chapter 11 case and was represented by Mearkle (the "Instant Case"). The Instant Case was filed in the Orlando Division of the Middle District and was originally assigned case number 6:11-bk-5598-ABB. On April 19, 2012 the Instant Case was transferred to the Jacksonville Division and reassigned to the undersigned. The Instant Case was assigned case no. 3:11-bk-2827-JAF. Notwithstanding the reassignment, on April 20, 2011 in the Instant Case the Orlando Bankruptcy Court entered Notice of Administrative Order Establishing Initial Procedures in Chapter 11 Cases in the United States Bankruptcy Court of the Middle District of Florida (the "Notice of Administrative Order") bearing case number 6:11-bk-5598-ABB. On that same day in the Instant Case this Court entered the Notice of Administrative Order bearing case number 3:11-bk-2827-JAF.

On April 27, 2011 Mr. Mearkle filed Statement Pursuant to Rule 2016(B) Federal Rules of Bankruptcy Procedure (the "2016 Statement") in the Instant Case (Doc. 23). The 2016 statement indicated that "the agreed minimum fee for this representation, subject to Court approval, is $15,000.00. $7,500.00 has been paid, and the firm has tendered $1,039.00 for the filing fee." On that same day Mr. Mearkle filed an application seeking to be employed as counsel for Julase nunc pro tunc to the petition date and

seeking approval of an earned on receipt retainer (the "Employment Application")(Doc. 24). The Employment Application indicated that Julase and Mr. Mearkle had agreed to a minimum fee for representation in the amount of $15,000.00, $7,500.00 of which had been paid and that $1,039.00 had been earmarked for the Chapter 11 filing fee.

The Refund in the First Case

On April 27, 2011 the Chapter 7 Trustee filed an affidavit in the First Case attesting that the balance of funds in the estate account in the amount of $7,424.93 had been disbursed to Julase (Trustee's Ex. 2; Doc. 42). The Trustee issued a refund check, which was dated April 27, 2011 and was paid to the order of "Julase Incorporated c/o the Law Office of Brett A. Mearkle, P.A." (Trustee's Ex. 3). On April 29, 2011 Mr. Mearkle deposited the refund check into his trust account (Trustee's Ex. 3). Despite having received and deposited the refund check, Mr. Mearkle did not file a supplemental 2016 statement in the Instant Case.

Other Significant Events in the Instant Case

On December 12, 2011 the Trustee filed a Motion to Dismiss or Convert Case to Chapter 7, the bases of which were Julase's failure to file a case management summary, to pay quarterly fees, and to file a Chapter 11 plan and disclosure statement. The Court scheduled a hearing on the Motion to Dismiss or Convert for January 10, 2012. On the day of the hearing Julase filed a case management summary. Ms. Julianna Groot, an attorney with Mr. Mearkle's firm, appeared at the hearing on the Motion to Dismiss or Convert, which lasted less than fifteen minutes. On January 11, 2012 the Court entered Order Conditionally Denying [the Trustee's] Motion to Dismiss or Convert Case to Chapter 7. Among other things, the Order Conditionally Denying [the Trustee's] Motion

to Dismiss or Convert to Chapter 7 required Julase to timely file all monthly operating reports, i.e. on or before the 21st of the month following the reporting period.

On February 13, 2012 Julase filed a Chapter 11 Plan and Disclosure Statement (Docs. 62, 63). On February 14, 2012 the Court entered Order Conditionally Approving Disclosure Statement, Scheduling Hearing on Final Approval of Disclosure Statement and Confirmation of Plan of Reorganization, Fixing Time for Filing Fee and Other Administrative Expense Applications, Fixing Time for Filing Acceptance or Rejections of Plan, Deadline for Filing Claims, and Objections to the Disclosure Statement and to the Confirmation of the Plan (the "Order Conditionally Approving Disclosure Statement and Setting Confirmation Hearing"). The Order Conditionally Approving Disclosure Statement and Setting Confirmation Hearing set a hearing for final approval of the Disclosure Statement and confirmation of the Chapter 11 Plan for March 14, 2012 (Doc. 64).

On February 29, 2012 the Trustee filed Objection to Confirmation of Debtor's Plan of Reorganization and Final Approval of [Julase]'s Disclosure Statement (the "Objection to Confirmation and Disclosure") (Doc. 67). The Objection indicated, among other things, that the feasibility of the plan could not be examined because Julase had failed to provide projections or a pro forma for its post-confirmation plan payments and business operations. The Objection also indicated that the Disclosure Statement was not adequate because Julase had failed to provide supporting information such as projections for its future income and expenses.

On March 6, 2012 Mr. Mearkle sent an e-mail to Ms. Kelso, attorney for the Trustee, attached to which was a "safe harbor" letter and the beginning draft of a motion

for sanctions pursuant to Rule 9011 related to the Objection to Confirmation and Disclosure. (Trustee's Ex. 25). The "safe harbor" letter demanded that the Trustee immediately withdraw the Objection to Confirmation and Disclosure and stated in pertinent part:

> My strong suggestion is that you withdraw your Objection immediately upon your receipt of this correspondence or before the ballots in this case are revealed to all other parties, because, if you fail to do so, the Office of the United States Trustee may be held responsible for all damages, including payment to all the Debtor's creditors in full … [Y]our Objection is duplicative of the disclosure statement but written under color of Federal law, accusatory in tone by reference to "violations", and filed bearing your signature, i.e., a representative of the United States Department of Justice Office of the United States Trustee Program … [Y]ou should be expected to know that the provisions of 11 U.S.C. § 1129 cannot ever be "violated", but rather, either met or not met. Characterizing the operative plan in this case as "violating" provisions of the Bankruptcy Code is nothing short of a veiled attempt to defeat confirmation when you have no stake in the case one way or another … The factual contentious (sic) forming a basis for your Objection is not likely to have any evidentiary support, investigation into which, in any event, you may not have the authority to undertake… Your action in choosing to file your Objection is a facially sanctionable, and indeed a deplorable, event—if the purpose for which I am supposed to deduce is to "maintain the integrity of the bankruptcy system" when nothing occurring during this confirmation process implicates such integrity—*but only my integrity* (emphasis in original).

(Id.) The Trustee did not withdraw and, in fact, prosecuted the Objection to Confirmation and Disclosure at the March 14, 2012 hearing. The Court sustained in part and denied in part the Trustee's Objection to the Disclosure Statement and continued the confirmation hearing to May 23, 2012.

On April 2, 2012 the Court entered order Approving Disclosure Statement and Setting Confirmation Hearing (the "Disclosure Statement Order")(Doc. 71). The Disclosure Statement Order approved the Disclosure Statement subject to Julase filing, within thirty days, a pro forma indicating Julase's projected income and expenses including payments under the Chapter 11 Plan and required Mr. Mearkle serve the pro forma within 30 days on all creditors and file a certificate of service indicating compliance. The Disclosure Statement Order also required Mr. Mearkle to file a fee application within thirty days of the date of the Disclosure Statement Order. Finally, the Disclosure Statement Order required Julase to filed a ballot tabulation 96 hours prior to the continued confirmation hearing.

On April 25, 2012 Ms. Groot sent a Request for Production of Documents to Ms. Kelso (the "Document Request")(Tr.'s Ex. 25). The Document Request sought "any and all pro formas indicating [Julase's] projected income and expenses including payments under the Plan that you [have] in your possession, whether generated by you or some other party" and "all documents or evidence which you intend to use in support of your Objection to Confirmation." (Tr.'s Ex. 25).

On May 3, 2012, the 31st day following the entry of the Disclosure Statement Order, Julase filed Motion for Extention (sic) of Time to File Pro-Forma (Doc. 75), seeking an extension until May 7, 2012 to file the required pro forma. By order dated May 4, 2012 the Court granted the requested extension (the "Pro Forma Extension Order")(Doc. 77).

On May 21, 2012 the Trustee filed a Supplemental Objection to confirmation of the Plan and final approval of the Disclosure Statement (Doc. 80) asserting that, despite

the requirements of the Disclosure Statement Order and the Pro Forma Extension Order, Julase had failed to file the requisite pro forma indicating its projected income and expenses under the plan and to file a certificate of service indicating that all creditors had received the historical information and the pro forma. Additionally, the Supplemental Objection indicated that Mr. Mearkle had not filed a fee application and that Julase had not filed the requisite ballot tabulation.

On May 23, 2012, the day of the scheduled confirmation hearing, Julase filed the ballot tabulation and a Response in Opposition to the Trustee's Objection to Confirmation (the "Response"). The Response asserted that the Trustee's objection to confirmation raised no issues affecting the bankruptcy system as a whole. The Response also sought to have the objection to confirmation overruled on the basis that the Trustee refused to participate in discovery despite having initiated a contested matter by objecting to confirmation.[1]

On that same day Mr. Mearkle filed the Fee Application. The Fee Application disclosed, for the first time, Mr. Mearkle's receipt of the $7,424.93 refund from the First Case. The Fee Application does not contain a Chapter 11 Fee Application Cover Page, does not itemize the time spent per project category, and lumps together a number of activity descriptions.

On May 23, 2012 the Court conducted the continued confirmation hearing. The Court overruled the Response and permitted the Trustee to be heard. Because Julase had failed to comply with the requirements set forth in the Disclosure Statement Order and

[1] Attached to the Response was a letter dated May 1, 2012 from Charles Sterbach, the Assistant United States Trustee, to Ms. Groot in response to the April 25, 2012 Document Request. The letter asserted, among other things, that, pursuant to 28 C.F.R. Subpart B, employees of the Department of Justice are

the Pro Forma Extension Order, the Court denied confirmation. On June 4, 2012 the Court entered Order Continuing Confirmation Hearing and Requiring Compliance (the "Order Requiring Compliance")(Doc 91). The Order Requiring Compliance required Julase on or before fifteen days from the date of the [May 23, 2012] hearing: 1) to file historical information regarding Julase's operations during Chapter 11; 2) to file a pro forma detailing Julase's projected income and expenses including payments under the Plan; and 3) to serve the historical information and the pro forma on all creditors and file a certificate of service indicating compliance. The Order Requiring Compliance provided that the Court would schedule another confirmation hearing if Julase provided the required information.

On June 6, 2012 Julase filed the pro-forma and the historical information. On June 28, 2012 the Trustee filed the Objection to the Fee Application. On July 2, 2012 the Court conducted another confirmation hearing and confirmed the Plan of Reorganization. The Court also scheduled a final evidentiary hearing on the Fee Application. On July 17, 2012 the Court entered Order Confirming Chapter 11 plan.

The Trustee objects to the Fee Application on a number of bases. First the Trustee asserts that Mr. Mearkle's failure to file an amended 2016 to disclose his receipt of the refund check from the First Case in the Instant Case warrants disgorgement of the entire $7,424.93. Second, the Trustee points out that the Fee Application fails to comply with Local Rule 2016-1(c)(2). Third, the Trustee contends that it is unclear whether the entries were created contemporaneously with the work performed. Finally, the Trustee

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prohibited from testifying and/or producing documents without prior written permission from designated officers of the Department.

argues that many of the fees set forth in the Fee Application are excessive, unnecessary, and/or unreasonable and should not be compensated out of the estate.

At the evidentiary hearing on the Fee Application Mr. Mearkle testified that he believed the affidavit filed by the Chapter 7 Trustee in the First Case was actually filed in the Instant Case and provided notice that he had received the funds. Specifically Mr. Mearkle stated: "I noticed it was a Judge Funk case. It may be inadvertent. I don't know. I don't know why I didn't file a supplement 2016, but I thought that this document was filed in the new case, in the case we're talking about now. The check was negotiated by me. I simply—the only thing I can think of is that I thought this affidavit was residing on the docket as showing the world that I received $7,424." Mr. Mearkle also conceded at the evidentiary hearing that the Fee Application is based upon reconstructed time records rather than contemporaneously created ones.

Conclusions of Law

Mr. Mearke's Failure to Disclose Receipt of the Refund Check Does not Warrant Disgorgement

Section 329(a) of the Bankruptcy Code requires a debtor's attorney to disclose any compensation paid or agreed to be paid for any services rendered or to be rendered in contemplation of or in connection with a bankruptcy case. Federal Rule of Bankruptcy Procedure 2016, which implements this requirement, requires a debtor's attorney to file and submit to the United States Trustee the statement required by § 329. The duty to disclose extends to payments received by a debtor's attorney within one year prior to the bankruptcy filing and for all payments received during the pendency of the case. In re Whaley, 282 B.R. 38, 41 (Bankr. M.D. Fla. 2002).

The determination of whether to impose a penalty and, if so, the nature and extent of the penalty, for the violation of a rule for which neither the rule nor the Bankruptcy Code mandates a sanction is within the bankruptcy court's discretion. In re Citation Corp., 493 F.3d 1313, 1321-1322 (11th Cir, 2007)(remanding case to bankruptcy court to determine whether professional violated Rule 2014 and, if so, whether court should penalize professional for violation). That having been said, it is clear that a bankruptcy court should deny all compensation to an attorney who exhibits a willful disregard of his fiduciary obligations to fully disclose the nature and circumstances of his fee arrangement under § 329 and Rule 2016. In re Downs, 103 F.3d 472, 479 (6th Cir. 1996). Moreover, a number of courts, including one in this division, have either held or stated in dicta that negligent or inadvertent omissions do not vitiate the failure to disclose under § 329 and that even a negligent or inadvertent failure to disclose is sufficient to deny all fees. See Neben & Starrett, Inc. v. Chartwell Fin. Corp. (In re Park-Helena Corp.), 63 F.3d 877, 882 (9th Cir. 1995)(upholding bankruptcy court's finding that failure to disclose was willful but stating that "even a negligent or inadvertent failure to disclose fully relevant information may result in a denial of all requested fees"); In re Smitty's Truck Stop, Inc., 210 B.R. 844, 849 (10th Cir. B.A.P. 1997)(recognizing that bankruptcy court did not make specific finding that failure to disclose retainer was in bad faith or in an effort to conceal but holding that even negligent or inadvertent failure to disclose is sufficient to deny all fees); Keller Fin. Servs. of Fla., Inc., 248 B.R. 859, 895 (Bankr. M.D. Fla. 2000)(requiring disgorgement of undisclosed approximate $1.3 million retainer based upon "purposeful calculation" and more than a "simple technical breach" but

stating that "no exceptions are to be made based upon inadvertency, slip-shoddiness or good faith" for inadequate disclosures).

Other courts have declined to adopt a strict liability approach. In Vergos v. Mendes & Gonzales, PLLC (In re McCrary & Dunlap Construction Co., LLC, 79 Fed.Appx. 770, 780 (6th Cir. 2003) the appeals court remanded the case to the bankruptcy court for a determination of whether the failure to disclose a retainer was a technical violation or a willful, intentional act manifesting callous disregard for the Code and Rules. The court stated, "while a bankruptcy court does not abuse its discretion if it denies all compensation where, through mere negligence, an attorney fails to satisfy the requirements of the Code and Rules, a 'technical breach' of the Code and Rules generally warrants a sanction far more lenient than full disgorgement and denial of all compensation." In In re Central Fla. Metal Fabrication, Inc., 207 B.R. 742 (Bankr. M.D. Fla. 1997) the court held that it had the discretion to deny or reduce fees based upon a failure to disclose fee arrangements but declined to require disgorgement for a "technical violation" of Rule 2016. While the Court finds it has the discretion to require full disgorgement and denial of all compensation for all inadequate Rule 2016 disclosures, including those resulting from negligence or inadvertence, the Court declines to adopt such a strict liability approach. The Court finds that the better reasoned approach is one, which evaluates the circumstances in the particular case before it.[2]

The Court finds that Mr. Mearkle's failure to file a supplemental 2016 was negligent but not willful. Although Mr. Mearkle testified that he believed the affidavit filed in the First Case was actually filed in the Instant Case and provided notice to the

[2] Any professional asserting that the failure to disclose a payment was the result of negligence or inadvertence would bear the burden of proving such a defense.

world that he received the refund, the Court finds such an explanation to be an after the fact justification rather than an explanation of what actually occurred. The Court finds that what actually occurred, as is evident from the record in this case with respect to a number of other matters, is that Mr. Mearkle negligently and inadvertently failed to file a supplemental 2016 Statement. The Court will not require Mr. Mearkle to disgorge any portion of the $7,424.93 based upon his failure to file a supplemental 2016 statement. The Court turns to the Trustee's remaining objections.

The Fee Application Contains a Number of Entries that Are Excessive, Unnecessary and/or Unreasonable and Should not be Compensated out of the Estate

Section 330 of the Bankruptcy Code governs the compensation of officers of the estate and provides that a court may award "reasonable compensation for actual, necessary services." 11 U.S.C. § 330(a)(1)(A). The Trustee argues that the following fees are excessive, unnecessary, and/or unreasonable and should not be compensated out of the estate: 1) $450.00 in fees for the filing of a motion to convert from Chapter 7 to Chapter 11 in the Instant Case because no motion to convert was filed in the Instant Case; 2) fees in the amount of $1,430.00 related to the Motion for Sanctions and Document Request directed at the Trustee; 3) $1,290.00 in fees related to the response to the Trustee's Motion to Dismiss; 4) $300.00 in fees related to preparing and filing the Motion to Extend Time to File Pro-Forma and the proposed Order; 5) $270.00 in fees related to: a) reviewing a notice of appearance for purposes of CM/ECF and reviewing a notice of reassignment of case to the Jacksonville Division ($60.00); b) reviewing an order granting relief from the automatic stay ($120.00); and c) reviewing a hearing proceeding memo ($90.00); 6) $200.00 in fees for a legal assistant to prepare and mail

out the Order Conditionally Approving Disclosure Statement; 7) $900.00 in fees for future services; and 8) excessive attorney rates of $1,390.00. The Court will address each category in turn.

Mr. Mearkle seeks $450.00 in fees related to the preparation and filing of the Motion to Convert. The Trustee asserts, and the Court agrees, that because no motion to convert was filed in the Instant Case, the fees should not be allowed. Mr. Mearkle seeks $1,430.00 in fees related to the Motion for Sanctions and Document Request directed at the Trustee. The Trustee asserts, and the Court agrees, that the services were unnecessary and provided no benefit to the estate. Accordingly, they will not be allowed.

Mr. Mearkle seeks fees of $1,290.00 for 4.3 hours related to the Trustee's Motion to Dismiss or Convert, including: 1) $150.00 to review the Motion to Dismiss or Convert; 2) $30.00 to review the notice of hearing on the Motion to Dismiss or Convert; 3) $1,050.00 to prepare for and attend the hearing on the Motion to Dismiss or Convert, to prepare and file the case management summary, and to meet with his client via telephone regarding the Motion to Dismiss or Convert; and 4) $60.00 to review the Order Conditionally Denying [the Trustee's] Motion to Dismiss or Convert to Chapter 7. The Trustee contends that the fees are unreasonable. As the Court previously indicated, Ms. Groot, not Mr. Mearkle, appeared at the hearing on the Motion to Dismiss or Convert, which lasted less than fifteen minutes. The Court finds that a reasonable time for the tasks that Mr. Mearkle did in fact perform is two hours.

Mr. Mearkle seeks fees of $300.00 for 1 hour related to preparing and filing the Motion for Extension of Time to File Pro Forma and the proposed order. The Court finds

that a reasonable time for preparing the Motion, which is a half page in length, and the proposed order, which is four sentences, is .5 hours.

Mr. Mearkle seeks fees totaling $270.00 for .9 hours to review a notice of appearance and notice of reassignment of case, to review a routine order granting relief from the automatic stay, and to review a hearing proceeding memo for a hearing he attended the prior day. The Court finds that a reasonable time to perform those tasks is .3 hours.

Mr. Mearkle seeks fees totaling $200.00 representing 2 hours for his legal assistant to mail out the Order Conditionally Approving Disclosure Statement and Setting Confirmation Hearing, a ballot, and a copy of the plan and disclosure statement to the fourteen creditors in the case and to file a certificate of service. The Trustee asserts that two hours is not a reasonable time to perform these tasks and that the tasks are clerical tasks for which Mr. Mearkle should not bill a legal assistant rate. The Court finds that one hour is a reasonable time to mail out the package to 14 creditors. The Court does not find fault with Mr. Mearkle billing the task at a legal assistant rate.

Mr. Mearkle seeks fees totaling $900.00 representing three hours to prepare and mail out the confirmation order and to prepare a motion for final decree. The Court finds that 1 hour is a reasonable amount of time to prepare and mail out the confirmation order. As of now, Mr. Mearkle has not prepared a motion for final decree. To the extent that he seeks fees for that service, he must file a supplement to the Fee Application.

Finally, the Trustee asserts that Mr. Mearkle's $300.00 hourly rate is excessive based upon customary rates in the Jacksonville Division in light of his experience and performance. A reasonable hourly rate is the prevailing market rate in the relevant legal

community for similar services by lawyers of reasonably comparable skills, experience, and reputation. Blum v. Stenson, 465 U.S. 886-896 n.11 (1984). The applicant bears the burden of producing satisfactory evidence that the requested rate is in line with the prevailing market rate. NAACP v. City of Evergreen, 812 F.2d 1332, 1338 (11th Cir. 1987). Based upon his performance in this case, the Court finds that a reasonable hourly rate for Mr. Mearkle is $250.00 and a reasonably hourly rate for Ms. Groot is $200.00.

Mr. Mearkle Failed to Maintain Contemporaneous Time Records and Did not Comply with Local Rule 2016(c)(2)

Under federal law attorney's fees are awarded based upon the lodestar method of computation. See Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-718 (5th Cir. 1974). In determining whether an attorney's fee is reasonable, a court must determine the lodestar, the product of the number of hours reasonably expended and a reasonable hourly rate. John Deere Co. v. Deresinski (In re Deresinski), 250 B.R. 764, 768 (Bankr. M.D. Fla. 2000)(citations omitted). The Eleventh Circuit has held that contemporaneous time records are not indispensable where there is other reliable evidence, such as testimony and secondary documentation, to support a claim for attorney's fees. See Jean v. Nelson, 863 F.2d 759, 772 (11th Cir. 1988)(citing Johnson v. Univ. College of Univ. of Ala. in Birmingham, 706 F.2d 1205, 1207 (11th Cir. 1983)). However, "where reconstructed records become a mere guess by the applicant, it is difficult, if not impossible, for a reviewing court to make an independent evaluation as to what fees are actual, necessary and reasonable based upon a record sufficiently detailed and accurate to support that evaluation." In re Evangeline Ref. Co., 890 F.2d 1312, 1327 (5th Cir. 1989). It is, and has been, the Court's experience that reconstructed time records are unreliable. It is for this reason that in applying the lodestar method, this Court

requires contemporaneous time records detailing the dates, amount, and specific services provided. See In re Nibbelink, 403 B.R. 113, 122 (Bankr. M.D. Fla. 2009) (citing In re Newman, 2003 WL 751327 *3 (Bankr. M.D. Fla. February 18, 2003).

While there may be a rare circumstance under which evidence other than contemporaneous time records would be sufficiently reliable to support a claim for attorney's fees, this case does not present that circumstance. As made clear by the foregoing discussion, a number of the reconstructed entries in this case reflect excessive time for the services actually rendered as well as memorialize events, such as the filing of a motion to convert and Mr. Mearkle's attendance at the hearing on the motion to dismiss or convert, that did not occur in the Instant Case. Accordingly, the Court finds that the reconstructed time records are not sufficiently reliable to support a claim for the total amount requested.

Finally, the Fee Application does not comply with Local Rule 2016(c)(2). The Fee Application does not contain a Chapter 11 Fee Application Cover Page as required by 2016(c)(2)(i)(1), does not itemize the time spent per project category as required by 2016(c)(2)(i)(2), and lumps together a number of activity descriptions in contravention of 2016(c)(2)(i)(4).

Calculation of Fee to Which Mr. Mearkle is Entitled

If Mr. Mearkle had maintained contemporaneous time records, he would be entitled to total fees in the amount of $9,800.00 calculated by adding the following: 31.6 hours at a rate of $250 per hour for Mr. Mearkle's time ($7,900.00); 12.8 hours at a rate of $100 per hour for paralegal Keni Valdez' time ($1,280.00); 2.2 hours at a rate of $100 for legal assistant Meghan Carter's time ($220.00); and 2 hours at a rate of $200.00 for

attorney Julianna Groot's time ($400.00). However, because Mr. Mearkle failed to maintain contemporaneous time records and the reconstructed records are not sufficiently reliable, the Court finds it appropriate to reduce the $9,800.00 by an additional 20% or $1,960.00, leaving a total fee award of $7,840.00.

Conclusion

Mr. Mearkle's negligent and inadvertent failure to disclose the post-petition retainer he received in this case does not warrant disgorgement thereof. However, the Fee Application contains a number of entries that are excessive, unnecessary and/or unreasonable and should not be compensated out of the estate. Additionally, Mr. Mearkle did not maintain contemporaneous time records and did not comply with Local Rule 2016(c)(2). Accordingly, Mr. Mearkle is entitled to a total fee award of $7,840.00. The Court will enter a separate order consistent with these Findings of Fact and Conclusions of Law.

DATED this 26 day of December 2012 in Jacksonville, Florida.

/s/

JERRY A. FUNK
United States Bankruptcy Judge

Copies Furnished To:

Brett A. Mearkle, Attorney for Debtor
Jill Kelso, United States Trustee