



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
April 05, 2018

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * *

In re:)	Case No. 16-14155-MKN
)	Chapter 11
C & S COMPANY, INC.,)	
)	Date: March 21, 2018
Debtor.)	Time: 9:30 a.m.

**ORDER ON FIRST AND FINAL APPLICATION FOR AWARD OF
COMPENSATION TO DAVID J. WINTERTON & ASSOC., LTD.¹**

On March 21, 2018, the court heard the First and Final Application for Award of Compensation to David J. Winterton & Assoc., Ltd. (“Fee Application”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On October 28, 2008, a voluntary Chapter 11 petition was filed by C & S Company, Inc. (“Debtor”), commencing Case No. 08-22706-MKN (“First Case”). The officers and shareholders of the Debtor were Brad Lindburg and Stacey Lindburg (“Lindburgs”). Debtor was represented by the law firm of Shumway Van Law, Chtd. (“Shumway Firm”).

On February 18, 2009, the Lindburgs filed a joint Chapter 11 petition as individuals, commencing Case No. 09-12129-MKN. They were represented by the law firm of David J. Winterton & Associates, Ltd. (“Winterton Firm”). No plan of reorganization was proposed in

¹ In this Order, all references to “ECF No.” are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “FRBP” are to the Federal Rules of Bankruptcy Procedure.

1 the case, and on March 27, 2012, the Lindburgs' Chapter 11 proceeding was dismissed.

2 On May 16, 2012, the Lindburgs filed another Chapter 11 petition as individuals,
3 commencing Case No. 12-15833-MKN ("Second Lindburg Case"). They again were
4 represented by the Winterton Firm. And again, their Chapter 11 proceeding was dismissed
5 without a plan being confirmed.

6 On November 15, 2012, a Chapter 11 plan of reorganization was confirmed in the
7 Debtor's First Case.

8 On May 30, 2014, an order was entered granting the Shumway Firm's motion to
9 withdraw as counsel for the Debtor in the First Case.

10 On November 6, 2014, the Office of the United States Trustee filed a motion to dismiss
11 the First Case based on the Debtor's failure to obtain new counsel and its failure to pay post-
12 confirmation fees and charges.

13 On December 15, 2014, an order was entered dismissing the First Case.

14 On July 28, 2016, Debtor commenced the above-captioned Chapter 11 proceeding
15 ("Second Case"). (ECF No. 1). The bankruptcy petition was filed by the Winterton Firm, which
16 filed a disclosure of compensation. (ECF No. 5).

17 On August 11, 2016, Debtor filed a motion to extend the deadline to file schedules
18 ("Schedules") and related documents. (ECF No. 16).

19 On August 31, 2016, the Winterton Firm filed a motion for authorization to be employed
20 as bankruptcy counsel for the Debtor ("Employment Application"). (ECF No. 25).²

21 On September 14, 2016, Schedules and related materials were filed by the Debtor. (ECF
22 No. 41). On its co-debtor Schedule "H," the Debtor listed the Lindburgs as co-obligors with
23 respect to almost all of the significant claims set forth on Schedules "D" and "E/F."

24
25
26 ² The Employment Application was filed on August 31, 2016, but it did not seek approval
27 of counsel's employment *nunc pro tunc* to the bankruptcy petition date. See Atkins v. Wan,
28 Samuel & Co. (In re Atkins), 69 F.3d 970, 974 (9th Cir. 1995)(discussing conditions that should
be considered in permitting retroactive employment of a professional). See also In re Groth
Bros. Oldsmobile, Inc., 635 Fed.Appx. 365 (9th Cir. 2015)(affirming denial of retroactive
employment of Chapter 11 counsel).

1 On September 29, 2016, the Debtor filed its statement of financial affairs. (ECF No. 55).

2 On October 7, 2016, an order was entered granting the Winterton Firm's Employment
3 Application. (ECF No. 62).

4 On March 13, 2017, the Winterton Firm filed a proposed Chapter 11 plan of
5 reorganization ("Proposed Plan"). (ECF No. 143). The Winterton Firm also filed a proposed
6 disclosure statement ("Proposed Disclosure Statement") to accompany the Proposed Plan. (ECF
7 No. 144).

8 On March 14, 2017, the Winterton Firm filed an objection to the claim of the Federal
9 Deposit Insurance Corporation ("FDIC"). (ECF No. 148).

10 On March 24, 2017, the Lindburgs commenced yet another Chapter 11 proceeding,
11 denominated Case No. 17-11451-MKN ("Third Lindburg Case").³ This time, they are
12 represented by the law firm of Stephens Gourley & Bywater.

13 On April 7, 2017, an order was entered directing a Chapter 11 trustee to be appointed in
14 the instant case. (ECF No. 162).

15 On April 17, 2017, an order was entered approving the appointment of Randy Sugarman
16 to serve as Chapter 11 trustee ("Chapter 11 Trustee"). (ECF No. 173).

17 On April 17, 2017, the Winterton Firm filed a motion to clarify or reconsider the order
18 directing the appointment of a Chapter 11 trustee. (ECF No. 175).

19 On May 8, 2017, the Chapter 11 Trustee filed an application to approve employment of
20 the law firm of Garman Turner Gordon LLP as bankruptcy counsel. (ECF No. 210).

21 On May 10, 2017, the Chapter 11 Trustee stipulated with the Debtor that the former
22 would comply with all applicable federal and state laws necessary to maintain the contractor's
23 license and designations required to continue operations of the Debtor's business. (ECF No.
24 218). On May 12, 2017, an order was entered approving that stipulation. (ECF No. 219).

25 On May 25, 2017, the Winterton Firm filed the monthly operating report ("MOR") for
26

27 ³ The Lindburgs' co-debtor Schedule "H" and creditor Schedule "E/F" indicate that they
28 are co-debtors with C & S Company on the disputed claims of the FDIC in the amount of
\$1,400,000 and the disputed claim of Merchants Bonding Company in the amount of \$898,000.
(Third Lindburg Case ECF No. 25).

1 the period ending March 31, 2017. (ECF No. 222).

2 On June 13, 2017, the Chapter 11 Trustee filed the MOR for the period ending April 30,
3 2017. (ECF No. 233).

4 On October 20, 2017, the Chapter 11 Trustee filed an objection to the claim of Western
5 Insurance Company. (ECF No. 300).

6 On October 20, 2017, the Chapter 11 Trustee filed a proposed Chapter 11 plan of
7 reorganization and accompanying disclosure statement. (ECF Nos. 302, 303).

8 On February 1, 2018, the Winterton Firm filed the instant Fee Application. (ECF No.
9 356). By this application, the Winterton Firm seeks compensation for services performed from
10 July 29, 2016 through January 31, 2018, in the amounts of \$103,050 as attorney's fees and
11 \$817.15 as costs advanced. Attached to the application are copies of two billing statements
12 dated July 28, 2016, and February 1, 2018. The first billing statement encompasses the
13 prepetition period from May 19, 2016, through July 28, 2016. The second billing statement
14 encompasses the postpetition period from July 29, 2016 through January 29, 2018. The Fee
15 Application was noticed to be heard on March 7, 2018. (ECF No. 357).

16 On February 21, 2018, the Chapter 11 Trustee filed an objection ("Objection") to the Fee
17 Application. (ECF No. 369).

18 On February 26, 2018, the Winterton Firm filed a reply ("Reply") to the Objection. (ECF
19 No. 372).⁴

20 The hearing on the Fee Application was continued to March 21, 2018, whereupon
21 counsel appeared and presented oral argument.

22 **APPLICABLE LEGAL STANDARDS**

23 Professionals who perform services for a debtor in possession cannot be compensated
24 unless the services were previously authorized by a court order. See *In re Capitol Litho Printing*

25 _____
26 ⁴ Attached to the Reply are 85 pages consisting of unauthenticated copies of various
27 emails, correspondence, subcontracts, state court materials, and bankruptcy filings. These
28 materials apparently are offered to establish that the Winterton Firm provided services after it
was employed to resolve a cash collateral dispute with the IRS and to assist the Chapter 11
Trustee in preserving the Debtor's contractor's license after the trustee was appointed.

1 Corp., 573 B.R. 771, 774-75 (Bankr. D.Ariz. 2017). Section 330 provides that the court may
2 award to a professional person employed under Section 327 reasonable compensation for actual,
3 necessary services rendered by the professional person and reimbursement for actual, necessary
4 expenses. 11 U.S.C. § 330(a)(1)(A)-(B). “The court may, on its own motion or on the motion of
5 the United States Trustee, the United States Trustee for the District or Region, the trustee for the
6 estate, or any other party in interest, award compensation that is less than the amount of
7 compensation that is requested.” 11 U.S.C. § 330(a)(2). Moreover, Section 330(a)(3) provides
8 that:

9 In determining the amount of reasonable compensation to be awarded to . . . [a]
10 professional person, the court shall consider the nature, the extent, and the value
of such services, taking into account all relevant factors, including —

11 (A) the time spent on such services;

12 (B) the rates charged for such services;

13 (C) whether the services were necessary to the administration of, or
beneficial at the time at which the service was rendered toward the
completion of, a case under this title;

14 (D) whether the services were performed within a reasonable amount of
time commensurate with the complexity, importance, and nature of the
problem, issue, or task addressed;

15 (E) with respect to a professional person, whether the person is board
certified or otherwise has demonstrated skill and experience in the
bankruptcy field; and

16 (F) whether the compensation is reasonable based on the customary
17 compensation charged by comparably skilled practitioners in cases other
than cases under this title.

18 11 U.S.C. § 330(a)(3)(A)-(F).

19 Section 330(a)(4), however, provides that “[t]he court shall not allow compensation for
20 (i) unnecessary duplication of services; or (ii) services that were not – (I) reasonably likely to
21 benefit the debtor's estate; or (II) necessary to the administration of the case.” 11 U.S.C. §
22 330(a)(4)(A)(i)-(ii)(I and II). In Smith v. Edwards & Hale, Ltd. (In re Smith), 317 F.3d 918 (9th
23 Cir. 2002), abrogated on other grounds by Lamie v. United States Trustee, 540 U.S. 526 (2004),
24 the court observed that “[u]nder [S]ection 330(a)(4)(A), a bankruptcy court may award
25 compensation if the services rendered were not unnecessarily duplicative and if the services
26 rendered were both reasonably likely to benefit the debtor’s estate and were necessary for the
27 administration of the case.” Id. at 926. The Smith court acknowledged that Section 330
28 “[e]xpressly contemplate[d] compensation for preparation of fee applications.” Id. at 927, citing

1 11 U.S.C. § 330(a)(6).

2 **DISCUSSION**

3 The court has reviewed the billing statements attached to the Fee Application, as well as
4 the history of the proceedings in this case. The court also has considered the objections
5 presented by the Chapter 11 Trustee, and the written and oral arguments of counsel. Based on
6 this record, the court concludes that the Winterton Firm should be allowed professional fees and
7 reimbursement of costs advanced in the amounts set forth below.

8 As an initial matter, the court must deny any fees or costs incurred prior to August 31,
9 2016. The Employment Application was not filed until August 31, 2016, and did not seek
10 authorization to be employed *nunc pro tunc* to the date of commencement of the Chapter 11
11 proceeding.⁵ Similarly, the court will deny any fees and costs incurred after April 17, 2017,
12 when the Chapter 11 Trustee was authorized to administer the bankruptcy estate.⁶

13 For the period August 31, 2016, through April 17, 2017, the billing statements reflect
14 professional fees incurred in the total amount of \$76,835. The Fee Application attempts to
15 summarize the Winterton Firm's services into nine different categories but does not explain
16 which of the billing entries fall into the particular categories. See Fee Application at 9:16 to
17 10:16.⁷ Because the categories do not identify the particular billing entries, the categories also
18 may include the period prior to August 31, 2016, as well as the period after April 17, 2017.

19
20 ⁵ The total amount of the professional fees billed for the period prior to August 31, 2016,
21 is \$12,645. The costs billed for that period are \$7.91. Those amounts are disallowed.

22 ⁶ On February 9, 2018, the Chapter 11 Trustee filed an application for compensation for
23 services commencing April 17, 2017. (ECF No. 363). The billing statement accompanying the
24 instant Fee Application lists the total amount of professional fees billed by the Winterton Firm
25 for the period after April 17, 2017, as \$13,570, plus costs in the amount of \$65.00. After that
date, however, the bankruptcy estate was administered by the Chapter 11 Trustee, and no order
was entered authorizing the Winterton Firm to represent the Chapter 11 Trustee.

26 ⁷ For example, the Fee Application represents that attorney Winterton billed 24.0 hours in
27 the category "Administration" but the billing statement does not specify which time entry is
28 encompassed by that category. Attorney Winterton also billed 69.4 hours in the category of
"Cash Collateral Issues and Depositions," but the billing statement includes entries describing a
mixture of services, as well as services performed prior to August 31, 2016.

1 There is no declaration or affidavit from the Debtor’s principals attesting that they have reviewed
2 the billing statements as designated representatives of the debtor in possession. Surprisingly,
3 there also is no declaration or affidavit from the Winterton Firm’s principals attesting that the
4 billing statements accurately reflect the professional services actually performed on behalf of the
5 debtor in possession. From an evidentiary standpoint, there is a limited basis to award the
6 compensation requested. Nonetheless, the court has considered the substance of the fee request.

7 The Chapter 11 Trustee does not object to the time expended by the professionals with
8 the Winterton Firm, nor to the hourly rates charged. Moreover, the Chapter 11 Trustee does not
9 object generally to the nine categories used in the Fee Application or the number of hours of
10 professional services allegedly included in each category. Instead, the Chapter 11 Trustee
11 objects to the quality and necessity of the services rendered, and therefore, the benefit of the
12 professional services to the bankruptcy estate at the time the services were provided.

13 In particular, the Chapter 11 Trustee raises five specific objections to the Fee
14 Application. First, he argues that any requested fees should be reduced by at least twenty-five
15 percent due to counsel’s failure to properly prepare the bankruptcy petition and schedules. See
16 Objection at 6:1-11. Second, the Chapter 11 Trustee maintains that a highly litigated cash
17 collateral dispute with the FDIC arose because of the deficient preparation of the schedules and
18 monthly operating reports. See id. at 6:13 to 7:16. Third, he argues that compensation for any
19 unspecified “trustee issues” is not supported by the record in the case.⁸ See id. at 7:18 to 8:7.
20 Fourth, the Chapter 11 Trustee argues that the Winterton Firm filed an improvident objection to
21 the FDIC claim because it had not familiarized itself with the treatment of the FDIC claim in the
22 First Case. See id. at 8:9-21. Finally, he maintains that the Winterton Firm’s Proposed Plan was
23 unconfirmable because it misunderstood the FDIC claim as well as a claim from another
24 significant creditor arising out of the First Case. See id. at 8:23 to 10:2. Out of the entire
25 \$103,050 in professional fees requested in the Fee Application, the Chapter 11 Trustee argues

27 ⁸ The Winterton Firm’s request includes a summary category entitled “Trustee Issues” to
28 claim \$7,680 in attorney’s fees and \$225 in paralegal fees, totaling \$7,905. See Fee Application
at 10:1-16.

1 that the amount of \$92,230 should be disallowed. From the remaining \$10,820 of professional
2 fees requested, the Chapter 11 Trustee seeks a further reduction of twenty-five percent, resulting
3 in a final, total allowance of \$8,115. See id. at 109-14. In other words, the Chapter 11 Trustee
4 objects to approximately ninety-two percent of the professional fees requested.

5 In response, the Winterton Firm explains that deficiencies in the Schedules occurred
6 because it was not the Debtor's bankruptcy counsel in the First Case and that the Second Case
7 was filed on an emergency basis due to a seizure of the Debtor's bank account by the Internal
8 Revenue Service ("IRS"). See Reply at 3:28 to 4:23. The Winterton Firm argues that an actual
9 cash collateral dispute existed because of the competing lien claims to the Debtor's assets
10 asserted by the IRS and FDIC. Id. at 4:26 to 7:7. The firm concedes, however, that the objection
11 to the FDIC claim should not have been filed and that \$6,020 of counsel's requested fees should
12 be disallowed. See Reply at 8:5-9.⁹ The Winterton Firm also asserts that it assisted the Chapter
13 11 Trustee in maintaining the Debtor's contractor's license. Id. at 2:5 to 3:24 and 7:13 to 8:3.
14 Finally, the Winterton Firm argues that their Proposed Plan includes settlements with the IRS as
15 well as with the Dean and Penny Brunner 1985 Trust, along with a proposed treatment of the
16 FDIC claim. Id. at 8:11 to 10:7.

17 The court gives little weight to counsel's explanation for the deficiency in the Schedules
18 prepared on behalf of the Debtor. That the IRS seizure of bank accounts necessitated the filing
19 of a skeleton Chapter 11 petition on an emergency basis does not explain the failure to accurately
20 prepare the Debtor's Schedules thereafter. Moreover, the Winterton Firm represented the
21 Debtor's principals, i.e., the Lindburgs, in two prior Chapter 11 proceedings, and therefore, had
22 familiarity with the financial circumstances and access to the Debtor's information.¹⁰ That this
23 deficiency and misunderstanding of the claims may have brought about the dispute with the IRS
24 and the FDIC is at least plausible. Finally, the court notes that regardless of classification and
25

26 ⁹ The Reply does not identify the time entries in the billing statements that would support
27 disallowance of this amount.

28 ¹⁰ In fact, the Winterton Firm's former clients, the Lindburgs, are shown as co-obligors of
the Debtor's Schedule "H."

1 treatments of particular creditors, the Proposed Plan is misguided on its face. In discussing the
2 feasibility of making the payments required by the Proposed Plan, the Proposed Disclosure
3 Statement submitted by counsel stated as follows: “Based on the rental proceeds of the Debtor’s
4 rental properties, there should be enough cash on hand to make the required payments under the
5 Plan.” See Proposed Disclosure Statement at 15:17-19 (emphasis added). Inasmuch as the
6 Debtor is a contractor whose assets do not include any “rental properties” at all, see id. at 6:19-
7 23, the feasibility analysis in the Proposed Disclosure Statement is both misleading and
8 insufficient, and apparently was obtained from a document filed by the Winterton Firm in a
9 different Chapter 11 case.¹¹

10 While it appears that the Debtor may emerge from Chapter 11 through the reorganization
11 plan proposed by the Chapter 11 Trustee, there is little to suggest that the bankruptcy estate
12 received a benefit from a significant portion of the services billed by the Winterton Firm at the
13 time the services were performed. As previously mentioned, the Fee Application attempts to
14 summarize the firm’s services by placing them into nine separate categories, but it does not
15 identify which billing entry falls into which category. See discussion at 6 and note 7, supra.
16 Also as previously mentioned, the Chapter 11 Trustee seeks to slash the professional fees
17 requested by approximately ninety-two percent. See discussion at note 7, supra.

18 Ordinarily, the court would not apply an across-the-board percentage reduction approach.
19 There is danger in doing so because it can be both over-inclusive and under-inclusive.¹² In view
20 of the categories used by the Winterton Firm, the Chapter 11 Trustee’s lack of objection to those
21 categories, and the Winterton Firm’s failure to identify the billing entries applicable to those

23 ¹¹ A comparison of the Proposed Disclosure Statement to the language of the Proposed
24 Plan does not clarify the feasibility analysis. The Proposed Plan submitted by the Winterton
25 Firm on behalf of the Debtor only specifies that the plan will be funded by cash flow and
monthly income from the business. See Proposed Plan at 16:4-9.

26 ¹² Arriving at a fixed percentage to reduce a fee request is no less difficult than arriving at
27 a fixed percentage to grant a fee request. See, e.g., Nilsen v. York Cnty., 400 F. Supp. 2d 266,
28 277 n.30 (D.Maine 2005) (determining an appropriate percentage for attorneys fees paid out of a
common fund without simply resorting to the judge’s gut instinct, e.g., “a fee ‘Gestalt,’ as it
were.”).

1 categories, however, the court concludes that a percentage reduction approach is appropriate in
2 this matter.

3 For the \$76,835 of professional fees billed between August 31, 2016 and April 17, 2017,
4 the court concludes that the ninety-two percent reduction requested by the Chapter 11 Trustee is
5 excessive.¹³ This is because at least some of the fees sought by the Winterton Firm do not appear
6 to be unreasonable. For example, the fees sought for communications with the client (\$2,440),
7 as well as the meeting of creditors and initial debtor interview with the UST (\$5,370), see Fee
8 Application at 9:19, 9:24 and 10:10, are not unreasonable. Likewise, the amount sought for the
9 firm's Fee Application are reflected in the billing statement entries for January 10, 16, and 29,
10 2018, for total fees of \$1,475. That amount also is not unreasonable. Moreover, the conclusion
11 is somewhat inescapable that the services of the Winterton Firm managed to keep the Debtor
12 afloat, and its primary creditors at bay, long enough for the Chapter 11 Trustee to propose a plan
13 of reorganization that may bring this proceeding to a successful conclusion. Under these
14 circumstances, the court concludes that a percentage reduction of fifty percent represents an
15 appropriate assessment of the value of the service provided by the Winterton Firm during the
16 applicable period.

17 **IT IS THEREFORE ORDERED** that the First and Final Application for Award of
18 Compensation to David J. Winterton & Assoc., Ltd., Docket No. 356, be, and the same hereby is,
19 **GRANTED** in the amount of \$38,417.50 for professional fees and \$809.24 as reimbursement of
20 costs advanced.

21
22 Copies sent to all parties via CM/ECF ELECTRONIC FILING

23
24 ###

25
26 _____
27 ¹³ The ninety-two percent reduction was from the original request of \$103,050. The
28 disallowance of fees billed prior to August 31, 2016, and after April 16, 2017, comes to \$26,215.
That disallowance already represents approximately twenty-five percent of the original request.
A further disallowance of ninety-two percent of the \$76,835 figure would be approximately
\$70,688, leaving a balance of \$6,146.80.