

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ALASKA**

In re:

MARTECH USA, INC.,

Debtor.

Case No. A93-00889-DMD
Chapter 7

**Filed On
7/3/12**

**MEMORANDUM ON FINAL FEE APPLICATION
OF WILLIAM ARTUS**

Pending before the court is the final application for allowance of fees and costs filed by the trustee's attorney, William Artus. Mr. Artus's employment as the trustee's general counsel was authorized by the court on December 22, 2004 (Docket No. 2949). His pending application covers the time period from December 14, 2004, through May 31, 2012. He requests an allowance of fees in the amount of \$33,960.00 and costs in the sum of \$973.18, for a total award of \$34,933.18.

Kay Hill, Assistant United States Trustee ("UST") has filed an objection to the final fee application. She asks the court to disallow \$7,344.00 of Mr. Artus's requested fees, on four grounds. First, the UST objects to the allowance of any fees requested for services performed prior to the date Mr. Artus's employment was approved by the court. Second, the UST asks that the fee award be reduced because Mr. Artus's fee itemization does not comply with AK LBR 2016-1(c) or United States Trustee Guidelines. Third, the UST contends Mr. Artus has billed an unreasonable amount of time for the preparation of a motion. Finally, the UST argues that the time billed by Mr. Artus for his preliminary review of the 1,600+ claims filed in this case should be disallowed because an attorney cannot be compensated for performing duties allocated to the trustee under 11 U.S.C. § 704(a).

The bankruptcy court may, in accordance with 11 U.S.C. § 330(a), award a professional employed by a trustee “reasonable compensation for actual, necessary services rendered,” as well as “reimbursement for actual, necessary expenses.”¹ The court may award a professional less than what has been requested.² In evaluating the reasonableness of a final fee award, the bankruptcy court may also reconsider and modify any interim fee awards which have been entered.³ Further, § 330 mandates that the court disallow compensation requested for services which were not “reasonably likely to benefit the debtor’s estate” or “necessary to the administration of the case.”⁴ A reasonable fee allowance may be determined by considering the following factors:

First, were the services authorized? Second, were the services necessary or beneficial to the administration of the estate at the time they were rendered? Third, are the services adequately documented? Fourth, are the fees requested reasonable, taking into consideration the factors set forth in § 330(a)(3)? Finally, [did] the professional exercise[] reasonable billing judgment[?]⁵

¹ 11 U.S.C. § 330(a)(1).

² 11 U.S.C. § 330(a)(2).

³ *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 858 (9th Cir. 2004).

⁴ *Id.*, citing 11 U.S.C. § 330(a)(4)(A).

⁵ *Strand*, 375 F.3d at 860, citing *Roberts, Sheridan & Kotel, P.C. v. Pergen Brunswig Drug Co. (In re MEDNET, MPC Corp.)*, 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000).

Looking to the first factor – whether the services were authorized – this court approved Mr. Artus’s employment as the trustee’s general counsel on December 22, 2004.⁶ In Mr. Artus’s final fee application, he asks for compensation for 2.1 hours of work, or \$504.00, for serviced performed prior to the date the court authorized his employment as the trustee’s general counsel.⁷ It has long been settled in this district that *nunc pro tunc* approval of a professional’s fees “should be limited to situations in which ‘exceptional circumstances’ exist.”⁸ To establish the existence of exceptional circumstances, a fee applicant “must (1) satisfactorily explain [his] failure to receive prior judicial approval; and (2) demonstrate that [his] services benefitted the bankrupt estate in a significant manner.”⁹ Mr. Artus has not

⁶ Order Granting App. by Trustee for Authority to Employ and Appoint Attorney Under General Retainer, entered Dec. 22, 2004 (Docket No. 2949). Prior to this date, Mr. Artus had been authorized to perform work for the trustee as special counsel, in two fairly narrow capacities. On June 9, 1995, this court approved Mr. Artus’s employment as attorney for the trustee on a contingent fee basis (Docket No. 1932), to pursue the recovery of preference claims and other pre-petition claims belonging to the estate. On February 9, 1996, this court approved Mr. Artus’s employment as special counsel for the trustee, *nunc pro tunc* to March 29, 1995 (Docket No. 2208). In his special counsel capacity, Mr. Artus was to be compensated on an hourly basis for assisting the trustee in collecting prepetition accounts receivable and contract claims and in investigating the trustee’s right to recover payments made to chapter 11 professionals. Over the course of this proceeding, Mr. Artus has been awarded more than \$470,000.00 in fees for the services he has provided in these two capacities, with the most recent award occurring on January 18, 2005, when an order authorizing the payment of fees earned pursuant to the contingent fee agreement was entered (Docket No. 2961).

⁷ At the hearing, Mr. Artus suggested that these fees could be allowed notwithstanding the fact that the services preceded court approval because of earlier court orders approving his employment by the trustee on a contingent fee basis or as special counsel (*see n.6 supra*). However, the 2.1 hours at issue here were for services wholly unrelated to his employment in these other capacities.

⁸ *Atkins v. Wain, Samuel & Co. (In re Atkins)*, 69 F.3d 970, 974 (9th Cir. 1995), *citing Okamoto v. THC Fin. Corp. (In re THC Fin. Corp.)*, 837 F.2d 389, 392 (9th Cir. 1988). Similarly, AK LBR 2016-1(c)(1)[C](ii) provides that, absent “exigent circumstances,” fees are not recoverable for services performed prior to the date a professional’s employment is authorized.

⁹ *Atkins*, 69 F.3d at 974.

satisfied either prong of this test. Further, a professional cannot recover fees “for services rendered in preparing the trustee’s application to authorize [the professional’s] employment.”¹⁰ From my perspective, the fees Mr. Artus has billed for conferring with the trustee about substituting into this case as the trustee’s general counsel and preparing the pleadings related to his substitution are not recoverable from the estate. The other limited services which Mr. Artus provided prior to the authorization of his employment will also be disallowed because the exceptional circumstances standard has not been satisfied. A total of \$504.00, for services performed from December 14, 2004, through December 21, 2004, will be disallowed.¹¹

Another factor for the court to consider in determining a fee award is whether the professional’s services have been adequately documented. In this district, fee applicants must separately itemize each service rendered with sufficient description to permit the court to make this determination.¹² Further, the UST Guidelines for reviewing applications for compensation require a fee applicant to arrange his time and service entries by project categories.¹³ Although his services were separately itemized, Mr. Artus’s initial fee

¹⁰ AK LBR 2016-1(c)(1)[C](i).

¹¹ The court recalls that it has, over the course of time, disallowed a portion of Mr. Artus’s requested fees on the same ground in other cases in which he has represented a trustee. In light of this fact, and considering Mr. Artus’s many years of bankruptcy practice, it is not inclined to overlook his failure to obtain preapproval of his fees in this instance.

¹² AK LBR 2016-1(c)(3).

¹³ 61 Fed. Reg. 24890 (May 17, 1996); 28 C.F.R. Part 58, Appendix. These Guidelines may be found at: http://www.justice.gov/ust/eo/rules_regulations/guidelines/index.htm.

application did not group his requested fees by project category. After objection by the UST, he filed a revised billing statement that divided his fees into four groups. At the hearing on his fee application, Mr. Artus argued that he should not be penalized for failing to categorize his fees because he had cured this infraction at no charge to the estate. The UST nonetheless requested that two hours of time, or \$480, be disallowed to encourage Mr. Artus's future compliance with the project category requirement.

The UST guideline regarding project categories benefits the court, the UST, and other interested parties in evaluating the reasonableness of a fee request. However, the guideline is simply that – a guideline, and it may be dispensed with in smaller chapter 7 cases where a professional's assistance is confined to one or two limited areas for which a nominal amount of fees is being requested. In such cases, a professional's fee application typically includes a fee itemization of no more than a page or two.

The UST's project category guideline is indispensable, however, in chapter 11 cases and in larger chapter 7 cases, and should be followed by professionals seeking fees in such cases. Here, Mr. Artus's fee itemization consists of seven pages, in small font and single-spaced. This is precisely the type of itemization that requires project categorization. As experienced bankruptcy counsel, Mr. Artus is presumably well aware of the UST Guidelines. The UST has noted that this is not the first time he has failed to categorize fees in a larger chapter 7 case.¹⁴ Because Mr. Artus has persistently failed to comply with the

¹⁴ See United States Trustee's Obj. to Final Appl. for Payment of Attorney Fees and Costs, filed June 11, 2012 (Docket No. 3178), at 2-3.

UST Guidelines, I feel that some form of penalty is appropriate. However, I will make this penalty prospective. If Mr. Artus fails to follow the UST Guidelines and the requirements of AK LBR 2016-1(c)(3) in any future fee application he files in this district, the court will automatically deduct two hours of time from the requested fees, regardless of whether Mr. Artus subsequently files a corrected fee application. Other professionals employed under § 330 routinely meet these requirements. I can see no reason to excuse Mr. Artus's compliance.

In evaluating a fee application, the court must also consider whether the requested fees are reasonable under the factors set forth in § 330(a)(3). These factors include “the time spent on such services,” and “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 The UST contends Mr. Artus billed an unreasonable amount of time for preparing a one-page motion to authorize disbursements *nunc pro tunc* and a six-page supporting memorandum.¹⁶ A total of 8.1 hours, or \$1,944.00, was billed for this project and the UST argues that three hours of time, or \$720.00, would be a more appropriate charge. At the hearing, Mr. Artus stated that the billed time included his research regarding the disbursements for which *nunc pro tunc* approval was sought. However, his fee itemization reflects that he also billed 3.05 hours of time on April 2 and 3, 2012, to confer

¹⁵ 11 U.S.C. § 330(a)(3)(A), (D).

¹⁶ The motion (Docket No. 3168) was filed to obtain court approval of payments the trustee made to six professionals during the course of his administration of the chapter 7 case.

with the trustee regarding “final account information needed” and to “discuss orders for some disbursements,” and billed 1.6 hours of time on April 6, 2012, to confer with Mr. Featherly regarding several disbursements and to review information in preparation for the trustee’s final report. This is an additional 4.65 hours, or \$1,116.00, for conferences and research which, at least in part, generated the information needed to prepare the motion. In light of this, I agree with the UST that the amount of time billed for preparation of the motion was excessive. I will disallow 2 hours of time billed towards this project, or \$480.00.

The final factor the court should consider in awarding fees is whether the professional exercised reasonable billing judgment. This factor comes into play when considering the UST’s final ground for objecting to Mr. Artus’s fee application. The UST asks for disallowance of 21.4 hours, or \$5,136.00, for the time Mr. Artus spent on reviewing the 1,600+ claims filed in this case. The UST says compensation should not be awarded for this work because it is a trustee duty pursuant to 11 U.S.C. § 704(a)(5). At the hearing, Mr. Artus responded that he performed this duty because his client requested it, and that his services were necessary because the trustee required a legal analysis as to which claims were administrative expenses.

I agree with the UST that the initial claim review in a case should be performed by the trustee himself. Legal analysis by a professional would be permissible, and compensable, after this “first cut” was made by the trustee and the claims which were readily categorized had been identified. Given the age of this case and large number of claims that have been filed, however, it is also reasonable to assume that the trustee would require

significant assistance from his counsel to sort many of the claims into proper categories. This time would be in addition to any time that might be billed by a professional for prosecuting objections to claims on behalf of a trustee.

Here, Mr. Artus has billed a total of 9.4 hours, or \$2,256.00, for a preliminary review of all the claims filed. He has also billed a substantial amount of time for further review to determine which claims are administrative claims, and for reviewing the claims in the Clerk's Office. Due to the age of this case, all 1,652 of the claims are in paper format, making the claim review process tedious and time consuming. I will allow the time Mr. Artus has billed on October 6, 12 and 15, 2011 for his review and analysis of the claims. However, I feel that the 9.4 hours of time he billed on August 11, 2011, for a preliminary review of the claims should be disallowed. Further, I will disallow the 4.0 hours, or \$960.00, he billed on November 22, 2011, and December 6, 2011, for filing corrective entries as to claim objections that he prepared. The estate should not be billed for such docketing errors.

The court has disallowed a substantial portion of Mr. Artus's requested fees. It recognizes, however, that Mr. Artus has performed some additional work for the estate after the filing of his final fee application,¹⁷ and that he will likely perform additional limited services for the estate until its conclusion. It will therefore credit Mr. Artus with 2.0 hours of additional time for services provided in the wrap-up of this case, to be set off against the

¹⁷ See *Ex Parte* Motion to Approve Form of Notice re Final Report, filed July 2, 2012 (Docket No. 3183).

fees disallowed herein. In light of the foregoing, Mr. Artus's final fee application will be allowed as follows:

| | |
|--|--------------------|
| Fees requested: | \$33,960.00 |
| Services provided prior to court approval: | <504.00> |
| Unreasonable amount of time: | <480.00> |
| Preliminary claim review: | <2,256.00> |
| Correction of docketing errors: | <960.00> |
| Credit for "wrap-up" services: | 480.00 |
| Total Fees Allowed: | \$30,240.00 |

All of his requested costs, \$973.18, will be allowed. An order will be entered consistent with this memorandum.

DATED: July 3, 2012

BY THE COURT

/s/ Donald MacDonald IV
DONALD MacDONALD IV
United States Bankruptcy Judge

Serve: W. Artus, Esq.
M. Mills, Esq.
K. Battley, Trustee
U. S. Trustee
Hon. Herb Ross (courtesy copy)
ECF Participants per NEF

07/03/12