**UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

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| **In Re:** | ) | Case No. 03-36662 |
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| Donna M. Theys, | ) | Chapter 13 |
| | ) | |
| **Debtor.** | ) | **JUDGE MARY ANN WHIPPLE** |
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**MEMORANDUM OF DECISION AND ORDER**

The court held a hearing on the application of Debtor's counsel for payment of attorney's fees. The hearing addressed the same issue raised in several other cases heard at or around the same time as the hearing in this case. These applications address the routine practices for payment of fees for Chapter 13 debtor's counsel in the Northern District of Ohio, Western Division.

In each case, Debtor's counsel seeks payment of a total attorney's fee, for services through plan confirmation, of $1200.00, with part of that amount paid pre-petition by Debtor and the unpaid balance to be paid on a priority administrative basis through Debtor's Chapter 13 Plan. Each application seeks the additional sum of $50.00 as reimbursement for costs. Notice of each application and of the hearing on each application was duly and properly given. There were no objections to the applications. The court, however, has an independent statutory obligation to review fees in Chapter 13 cases even in the absence of objection by any party in interest. 11 U.S.C. § 329; *In re Famisaran*, 224 B.R. 886, 897 (Bankr. N.D. Ill. 1998); *see Newman v. Smith (In re Smith)*, 256 B.R. 730, 737 (W.D. Mich. 2000)(dicta); *In re In re Busy Beaver Bldg. Centers*, 19 F.3d 833, 840-41 (3d Cir. 1994)(Chapter 11).

In Chapter 13 cases, payment of fees to debtor's counsel from the estate is governed by 11 U.S.C. § 330(a)(4)(B), which gives the bankruptcy court discretion to determine reasonable and necessary fees for debtor's counsel. *See also* Fed. R. Bankr. P. 2016(a)(establishing procedure for seeking fees from estate). Notwithstanding this provision of the statute, and as one commentator

has noted, there are few bankruptcy issues subject to such wide variation nationwide, court-to-court and even judge to judge as the substance and procedure for payment of debtor's counsel's fees in Chapter 13 cases. 4 Keith M. Lundin, *Chapter 13 Bankruptcy*, § 294.1, at 294-8 (3d ed. 2000). As review of the various judges' procedures posted on this court's website shows, that observation is certainly true within the Northern District of Ohio. Moreover, "[a]lmost every jurisdiction has local rules, general orders or local culture that defines the range of fees that can be routinely charged to represent a debtor in a Chapter 13 case without challenge from the Chapter 13 trustee, the U.S. trustee or the court." *Id*.

In the Northern District of Ohio, Western Division, the Chapter 13 fee process has traditionally been subject to practice established by the two judges. The current practice is that sums of $900.00 or less, for fees,[1] and $25.00 or less, for expenses, are treated as presumptively reasonable amounts under § 330(a)(4)(B) for services through confirmation in routine consumer Chapter 13 cases where the fees are going to be paid, at least in part, through the Chapter 13 plan. Where the total fee proposed and disclosed, pursuant to Fed. R. Bankr. P. 2016(b), is $900.00 or less, the court permits a streamlined fee application process and early filing of the application to allow for approval at or before plan confirmation. *Cf*. Fed. R. Bankr. P. 2016(a); General Order 93-1, *Guidelines.* The application process is streamlined in that counsel is not required, among other things, to itemize in tenths of hours professional time actually spent in rendering services and the expenses actually incurred. *Cf*. General Order 93-1, *Guidelines*, ¶¶ 8-10, at 5-6. Notice of the requested fees is then given to all creditors and parties in interest, with an opportunity for objection. Based on this judge's standard noticing procedure with respect to requested fees, hearings are not routinely held in the absence of an objection by a party in interest or a specific identified concern of the judge's which must be addressed. 11 U.S.C. §102(1);

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[1] The Western Division includes 21 counties in northwest Ohio, covering a large geographical territory. One Chapter 13 Trustee is assigned in this division and all first meetings of creditors are held in downtown Toledo. Round trip travel times from outside the Toledo metropolitan area of Lucas and Wood counties for first meetings and for court appearances, when required, can be as much as three and one half to four hours. Accordingly, this judge's presumptively reasonable fee level for counsel outside the Toledo metropolitan area is $1100 or less to account for the realities and expense of necessary travel time and to preserve debtor access to competent Chapter 13 counsel throughout the division. *Cf. In re: Guidelines for Compensation and Expenses Reimbursement of Professionals ("Guidelines"),* General Order 93-1, United States Bankruptcy Court for the Northern District of Ohio, ¶14, at 7 (travel time compensable at one-half the regular hourly rate). Applicants' office is in downtown Toledo.

*cf*. Fed. R. Bankr.

P. 2002(a)(6). If, however, a case is more complex or involves an ongoing business situation, for example, the option is always available to counsel to file a detailed fee application itemizing time actually spent and seeking a larger fee. *See In re Famisaran*, 224 B.R. at 898 (where requested fee exceeded presumptively reasonable fee amount, fee award reduced to that amount without prejudice to submitting application itemizing time actually recorded for services).

The court acknowledges that there are potential problems with this practice and process. The first and foremost potential problem is that it arguably does not comport with the Sixth Circuit's decision in *In re Boddy*, 950 F.2d 334 (6th Cir. 1991), which is controlling precedent in this judicial circuit with respect to the standards for awarding debtor's attorney's fees in Chapter 13 cases. In *Boddy*, the Sixth Circuit held that the lodestar method is the appropriate method for awarding fees in a Chapter 13 case, just as it is more broadly in other federal litigation.[2] The lodestar method involves determining a reasonable hourly rate for a debtor's attorney and then multiplying that rate by the reasonable hours actually worked on the case. Using the lodestar method requires counsel to keep contemporaneous time records, *In re Newman*, 270 B.R. 845, 848 (Bankr. S.D. Ohio 2001), General Order 93-1,

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[2] The statute has changed since *Boddy* was decided, with Congress' addition of § 330(a)(4)(B) to the Bankruptcy Code effective on October 22, 1994. Now, in contrast to Chapter 7 and 11 cases, this section measures reasonableness of fees in Chapter 13 (and Chapter 12) cases by "the benefit and necessity of services to the debtor" as well as "the other factors set forth" in Section 330, including the traditional lodestar factors relied upon by the Sixth Circuit. And much has changed in the bankruptcy practice environment since *Boddy*. While the Bankruptcy Code and the nature of the legal and factual issues repetitively encountered in routine Chapter 13 consumer cases have otherwise remained relatively unchanged since *Boddy*, the volume of case filings has increased dramatically. At the same time, the practice has become more automated and computer-based, improving productivity and efficiency and accordingly increasing the court's expectations of both from counsel. Specialized bankruptcy document production software programs are now routinely used for repetitive preparation of official bankruptcy forms, reducing document preparation time and simplifying mechanics. For example, the ease and quickness of changing and editing draft documents after review by counsel and clients has been exponentially enhanced. And this court itself is now operating in what is rapidly moving toward a total electronic filing environment, the use of which by counsel will be mandatory effective January 1, 2004. This has completely altered the way documents are received from and transmitted to counsel. The pure lodestar method in this changed and rapidly changing environment would tend to discourage such progress by rewarding more labor intensive manual effort at the same time both the court and clients demand productivity gains from counsel. Time is thus becoming less meaningful and helpful as a measurement of reasonableness insofar as many, but not all, aspects of counsel's legal service to a Chapter 13 or other debtor. *See In re Szymczak*, 246 B.R. 774, 779-781 (Bankr. D. N.J. 2000). On the other hand, a pure flat or maximum fee approach would reward efficiency, reduce administration and promote certainty, but might also sacrifice quality of representation by encouraging some (but not these) lawyers to provide the minimum service that they could get away with instead of the thorough advocacy to which every client is entitled. Hence, we face the growing tension inherent between the traditional lodestar approach and other less mechanical methods for arriving at a reasonable fee for Chapter 13 debtor's counsel in each and every case. That tension has clearly always existed, but it is being exacerbated by the growing use and influence of technology.

*Guidelines*, ¶7, at 4, and to file a detailed fee application itemizing services actually rendered and the time actually spent by counsel in rendering those services, a requirement that this court has effectively relaxed under circumstances where a supportable and principled challenge to the requested fees is perceived as extremely unlikely. General Order 93-1, *Guidelines*, ¶ 7, at 4 (providing that the court may

excuse some professionals from the requirement that detailed contemporaneous time records in six minute increments be kept). So while they are generally acceptable to this judge under local Chapter 13 fee practice in the absence of an objection, the applications at issue do not meet the full standards set forth in Fed. R. Bankr. P. 2016(a) and the General Order 93-1 *Guidelines*, which establish the record framework necessary for applying a traditional lodestar analysis to a particular fee request.

The Sixth Circuit further held in *Boddy* that it was not appropriate to fix a maximum or a normal or a customary fee applicable to all cases. *But see Harman v. Levin*, 772 F.2d 1150(4th Cir. 1985)(appropriate for bankruptcy court *not* to apply a normal lodestar time/hourly rate calculation in Chapter 13 fee determinations). This court does not, however, view the $900.00 figure as a "maximum" or even a "normal" or "customary" fee applicable to *all* cases. Rather this amount is presumptively reasonable in routine consumer cases because, based on any combination of hours of service and hourly rate under a lodestar analysis, this amount or less could not routinely and effectively be challenged as unreasonable. As specified in Fed. R. Bankr. P. 2016(a) and in the General Order 93-1 *Guidelines*, counsel may always file and the court will always entertain, as it must under *Boddy*, a detailed fee application setting forth a greater fee under a lodestar analysis, *see In re Yates*, 217 B.R. 296, 301-02 (Bankr. N.D. Okla. 1998), the burden of proof of the reasonableness of and entitlement to which counsel will bear. *In re Newman*, 270 B.R. at 847; *Famisaran*, 224 B.R. at 898. And within its customary practice, this court always retains the statutory right and obligation, 11 U.S.C. § 330(a)(2), to award less than the amount sought, or to require a detailed fee application in a particular case when there are issues raised either by the court or a party in interest about the reasonableness of a fee due to circumstances such as debtor's particular financial situation, the services rendered or not rendered and the quality of representation of the debtor. *In re Yates*, 217 B.R. at 302 ("The fact that a fee application is not required where counsel seeks lees than $1,300 does not mean that a $1,300 fee is justified in all cases.").

The second potential problem is that a presumptive reasonableness level may naturally tend to become the "market" or "going" rate. *Cf. In re Yates*, 217 B.R. 296, 301 (Bankr. N.D. Okla. 1998). The $900.00 amount is not a minimum fee or maximum fee or, in this judge's view, meant to be the "going rate." Indeed, the court notes that there are competent, reliable, skilled counsel representing Chapter 13 debtors in this court who regularly charge less than $900.00 for

Chapter 13 representation through confirmation in routine consumer cases. The court does not construe the $900.00 amount as the "market rate," and does not believe that it has necessarily become such, as fees ranging down to $650.00 are routinely requested by and approved for competent counsel working in this court division. Notwithstanding the statutory supervision bankruptcy courts must exercise over debtor's attorney's fees, 11 U.S.C. § 329, the market plays, 11 U.S.C. § 330(a)(3)(E), and should play, an important role in establishing fees for Chapter 13 debtors; the court would be loath to do anything in terms of fee procedures that would amount to setting the market or "going" rate. *See Busy Beaver Bldg. Centers*, 19 F.3d at 853-54 (3d Cir. 1994).

The third potential problem is how does a court go about determining what is a presumptively reasonable amount and further, how and how often should such a process and amount be reviewed or changed? *See In re Kindhart*, 160 F.3d 1176, 1178-79 (7th Cir. 1998)(authorizes use of a presumptive review level, but explains that review levels must be flexible over time); *George T. Carlson & Assocs. v. United States Bankruptcy Court (In re Ingersoll)*, 238 B.R. 202, 209 (D. Colo. 1999). After all, "what to one player is a presumptive or routine fee is to another a 'punitive review level.'" Lundin, *supra*, § 294.1, at 294-24.

These points bring us squarely to counsel's fee applications. Except as to two of the cases, all of the applications in issue, including this one, involve routine consumer financial situations. [3] They are routine in that plan confirmation was achieved efficiently, timely and without litigation and without the necessity of counsel attendance at the confirmation hearing. The debtors are generally employed by companies, not self-employed or operating their own businesses. The numbers and types of their creditors and the amounts of debt involved are not substantial or unusual and the assets are basic in type,

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[3] In the cases contemporaneously reviewed by the court seeking $1200.00 in fees, two of them justified, and counsel was awarded, a higher fee due to their complexity as involving business situations, although that was not the basis upon which the fee applications were originally presented to the court by counsel.

number and value – generally a home, appropriate household transportation and other routine personal property for household use.

Each application is the same. They are all summary applications in accordance with the court's customary Chapter 13 fee procedure. They do not record time actually spent or itemize any expenses actually incurred. There is an estimated number of attorney hours anticipated to be rendered for various standard services through confirmation, totaling six, at an hourly rate of

$200.00. The issue is that the applications now seek to raise to $1200.00 the $900.00 amount customarily permitted by the court in a routine consumer Chapter 13 case as presumptively reasonable without the necessity of a detailed fee application filed post-confirmation. Counsel is in effect raising and addressing the third point made above. *Cf. In re Yates*, 217 B.R. at 301. The mechanism by which this increase in the court's presumptively reasonable fee amount is proposed to be implemented, as compared to the multitude of prior fee applications from the same lawyers seeking $900.00 in fees, is by increasing the hourly rate sought from $150.00 as previously charged to $200.00 for the same estimated six hours of time.

Counsel make two arguments. The first argument is that they are entitled to a "raise," due to experience, results and the length of time the presumptively reasonable level has been in place. This argument misconstrues the nature of the $900.00 as a "maximum." As such, it would clearly run afoul of *Boddy*. And as explained above, this amount is not in this judge's view a maximum fee in all cases. If the complexity of a particular case justifies, from counsel's perspective, the additional overhead expense of preparation of a fee application showing that an unusual number of attorney hours was required or that the complexity of the case justifies a higher or particular hourly rate, then the court will always entertain a detailed fee application supporting a larger fee, be it $1200.00 or some other amount.

Counsel's second argument is that a new administrative order setting forth Chapter 13 fee procedures at Cleveland in the Eastern Division of the Northern District of Ohio was adopted effective August 1, 2003. *See* Local Bankruptcy Rule 2083-1. That appears to have been the impetus for the fee requests and review sought here.

The new Cleveland administrative order establishes two fee levels to be awarded without any application, streamlined or not, and without notice to creditors and other parties in interest as would result from an application. One level permits a total fee, including expenses, of $1200 (formerly

$900) or less, irrespective of the amount paid by debtor before the commencement of the case. A second level permits a total fee, including expenses, of up to $1700 (formerly $1200), with a maximum of $500.00 (formerly $300) to be paid before the filing of the petition and the balance to be paid through the plan.

One problem with this argument is that the Cleveland court division serves different territory, a different legal market and a different population base than the Toledo court division.

Another problem with this argument is that the general procedures in Chapter 13 cases followed in this court division are much different than they are at Cleveland. For example, the new Cleveland division fee procedure comes with the requirement that counsel and debtor(s) execute and file an extensive joint rights and responsibilities document. There is much in favor of such a process in terms of documenting in writing the attorney client relationship. But this requirement seems to be responsive to problems that are not routinely experienced in this court, and certainly not with instant counsel. As a result, among other things, more documents and materials must be prepared and filed with the court, adding to the clerk's office quality control function in the electronic filing environment in ways that this judge does not perceive as necessary here. Moreover, the responsibilities of counsel involve duties that are not required in this court division, such as preparation of the plan confirmation order (done here by the Chapter 13 Trustee's office) and representation in at least one "reinstatement" of each of the automatic stay and a case, practices that this court does not recognize as contemplated by the Bankruptcy Code and Rules of Bankruptcy Procedure. And if counsel does not prepare and submit the plan confirmation order, the new administrative order provides for a $200 reduction in fees for counsel. So while the increase in the fee amounts allowed in Cleveland without *any* fee application or notice is a fact that this court has considered in reviewing standard fee procedures in this court, it is still comparing apples to oranges and not one that ultimately recommends to this court an increase in the presumptively reasonable total fee and expense amount of $925.00 on the basis of streamlined fee application procedures.

The court welcomes counsel's efforts. They present an opportunity to review and reconsider this judge's practice, and to validate that it is correct and effective or to change it if is not. *See In re Yates*, 217 B.R. at 301. But having embraced the opportunity, and having carefully reviewed the individual dockets and circumstances of each case before the court, the court finds that the

$1250 in fees and expenses requested are not supported by the record and cannot be allowed in the absence of a detailed fee application setting forth contemporaneous records of time actually spent and itemizing expenses. In other words, the court finds no basis either in the record or in the arguments of counsel for departing from practice and increasing the current presumptively reasonable fee and expense level permitted without a detailed fee application from $925.00 to $1250.00.

This is a practice and procedure that has generally worked well for all involved in the process. From the substantive standpoint, the court finds that the $900.00 fee amount is still presumptively reasonable for necessary services rendered to financially strapped consumer debtors who do not have the cash to pay the entire fee due to counsel up front. *But cf. Ingersoll*, 238 B.R. at 208 (decrying as unreasonably paternalistic toward debtors routine bankruptcy court fee procedures for Chapter 13 debtor's counsel). But it also an amount that does not unfairly impact creditors where, as here, at least part of debtor's counsel's fees will be paid on a priority basis ahead of other creditors under the Chapter 13 plan. *See Busy Beaver Bldg. Centers*, 19 F.3d at 844 (court has obligation to protect estate for the benefit of unsecured creditors); *In re Stromberg*, 161 B.R. 510, 515 (Bankr. D. Colo. 1993); *Famisaran*, 224 B.R. at 897 (observing in less than 100% plan case that every dollar spent by the estate on legal fees for debtor's counsel results in a dollar less for unsecured creditors); *Jenson v. Dunivent (In re Dewey)*, 237 B.R. 783, 788-89 (B.A.P. 10th Cir. 1999). Counsel is competing with other creditors for distribution of plan payments, with counsel to be paid on a priority basis.[4] *See, e.g., In re Oliver*, 222 B.R. 272, 274 (Bankr. E.D. Va. 1998)("Reading sections 1326(a)(2), 503(b)(2) and 330(a)(4)(B) together, we conclude that the debtor's attorney's fees and expenses are administrative expenses which are properly payable...pursuant to section 1326(a)(2)."). *But see In re Busetta-Silvia*, 300 B.R. 543 (Bankr. D.N.M. 2003)(Chapter 13 debtor's attorneys are

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If the $1200.00 in fees were paid by Debtor prior to the commencement of the case, instead of in part through the estate, an application would not have to be filed, as Fed. R. Bankr. P. 2016(a) only applies to entities seeking compensation from the estate. And while the court still has the statutory right and obligation to and does in fact carefully review fees under 11 U.S.C. § 329 and through the Rule 2016(b) fee disclosure process, just as it does in chapter 7 cases where counsel's fees are also not paid by the estate, this judge court would not automatically require disgorgement of any fee over $900.00 as unreasonable under 11 U.S.C. § 329(a). Although *Boddy* is arguably not applicable where compensation is not sought from the estate, such a practice would nevertheless conflict with its clear proscription of a maximum fee for all cases. And the debtor in such a situation has the financial means to pay the negotiated fee, *see In re Ingersoll*, 238 B.R. at 208, while counsel is not then part of the confirmation process and an administrative creditor directly affecting other creditors' rights under the plan.

not entitled to payment through the Chapter 13 plan of any fee for services rendered pre-petition on a priority basis as an administrative expense, only as a general unsecured claim). The fees sought here for payment through the plan have played a role in plan confirmation; the Chapter 13 Trustee's first meeting of creditors worksheet shows they were calculated into the total amount needed to meet plan obligations, which in turn is the basis for the monthly plan payment. Ultimately, a stipulated order increasing plan payments from the originally proposed amount for the maximum 60 month duration of the plan was entered in this case.

From the procedural standpoint, particularly in the current high-volume case filing environment, this custom and practice has promoted administrative efficiency and certainty for the court, for debtor's counsel, for the Chapter 13 Trustee, for Chapter 13 debtors and for Chapter 13 creditors. It is unquestionably advantageous for all involved to know what the fee amount to be paid through the plan is at the early stages of the case, prior to confirmation, because as already noted above the payment of fees through the plan will affect the amount of a debtor's plan payments and accordingly confirmation of the plan. As has been noted, "[a]ttorneys' fees are hard to fix on a case by case basis in Chapter 13 cases." Lundin, *supra*, § 294.1 at 294-17. The process is also efficient in that it eliminates unnecessary administrative overhead for counsel and avoids unnecessary use of court and staff time. While these practical considerations unquestionably cannot override statutory directives, *Boddy*, 950 F.2d at 337(notions of economy of the estate in fixing Chapter 13 counsel's fees repudiated by congress in Bankruptcy Code), the court does not perceive there to be any such irreconcilable conflict in its fee practices under § 330(a)(4)(B) as added to the Bankruptcy Code after *Boddy*.

Apart from the requested change in the court's routine fee procedures, there is no basis in this record to award the fees requested. The burden of proof to show entitlement to the fees requested is on counsel. *In re Newman*, 270 B.R. at 847; *In re Famisaran*, 224 B.R. at 897. The estimated hours of service may or may not have actually been rendered, and are not supported by itemized time entries.[5] *Cf. Szymczak*, 246 B.R. at 794 (estimates that routine Chapter 13 cases can now be handled through confirmation with five hours of attorney time). Further, there is no basis shown for a 33% increase in

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[5] One of the activities for which estimated time is included in each fee application is for attendance at the confirmation hearing, which was not required by this judge due to the lack of creditor contest and the recommendation of the Chapter 13 Trustee in each case supporting confirmation. Attendance is also not required by this judge at claims objection hearings in the absence of a response timely filed by claimant.

counsel's hourly rate. Lacking other evidence of prevailing hourly rates in this market, based on the court's knowledge derived from experience in this and other contexts, hourly rates for representing consumers generally range from $100 to $175. *Cf. Szymczak*, 246 B.R. at 783(Chapter 13 counsel's hourly rate of $185 approved)*; In re Roffle*, 216 B.R.290, 296 (Bankr. D. Colo. 1998)(approves maximum hourly rate for Chapter 13 debtor's counsel of $125); *Bachman v. Laughlin (In re McKeeman)*, 236 B.R. 667, 671-73 (B.A.P. 8th Cir. 1999)(affirmed bankruptcy court fee award at hourly rate of $110 for Chapter 13 debtor's counsel, where $125 requested); *In re Smith*, 256 B.R. at 737-38 (W.D. Mich 2000)(regular hourly rate of $150 for chapter 13 counsel, reduced to $100 for inefficient service in particular

case). And there is nothing in the docket or case file that reveal this case to be more than routine. In accordance with its routine practice with respect to fees, the court will award counsel the total of $925.00 for fees and expenses, with leave for 14 days to file a detailed application supporting the originally requested fees and expenses and to request a further hearing. *Famisaran*, 224 B.R. at 898.

Based on the foregoing,

**IT IS ORDERED** that counsel's Application for Compensation [Doc. #3] is **GRANTED** to the extent that $900.00 is awarded for fees and $25.00 is awarded for expenses, for a total award of $925.00, of which $425.00 may be paid through the Chapter 13 plan as an administrative expense; and

**IT IS FURTHER ORDERED** that counsel is granted 14 days leave to submit an amended fee application supporting the total fees and expenses sought in the original application and to request a further hearing.

/s/ Mary Ann Whipple
**MARY ANN WHIPPLE**
**United States Bankruptcy Judge**