UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In the matter of:	Case No. 99-51514-WS
JOSEPH EDWARD KLOIAN,	Chapter 7
Debtor.	Hon. Walter Shapero

_____/

ORDER GRANTING FEE APPLICATION OF FRED FINDLING

This matter being before the Court to Determine the Reasonableness of Fred Findling's Fee Petition Pursuant to 11 U.S.C. 330; Applicant's application for compensation of $78,359.22 in attorney fees and costs related to litigation for Debtor; a settlement of the objection of trustee having reduced the attorney's fee to $55,000.00 plus the costs of $647.22, less $10,000.00 previously paid by Debtor as a retainer; Debtor still owing a balance of $45,647.22, the application having been previously opposed by the Debtor and Trustee; the application having been granted in the amount of $45,147.22, after being found reasonable in an opinion and order on February 6, 2002; this Court denying debtor's subsequent motion for reconsideration of the order; Debtor having appealed the Court's Order; the District Court ordering the appeal held in abeyance until the United States Supreme Court reached a decision in Lamie v. United States Trustee; the Supreme Court deciding Lamie v. United States Trustee, 540 U.S. 526, 157 L. Ed. 2d 1024, 124 S. Ct. 1023 (2004); the District Court remanding the appeal to this Court in light of Lamie; this Court issuing an order to set aside its original order granting fees and costs; the Court holding a hearing to consider the only the reasonableness of the fees and costs and allowing parties to file supplemental filings; the Court

having reviewed same including said supplemental filings; in light of the objections of the Debtor, the Court coming to the following conclusions:

(a) the applicable authority (United States Trustee v. Eggleston Works Loudspeaker Co. (In re Eggleston Works Loudspeaker Co.), 253 B.R. 519 (B.A.P. 6th Cir. 2000)), rev'd and rem'd on other grounds, Lamie v U.S. Trustee, 540 U.S. 526, 157 L. Ed. 2d 1024, 124 S. Ct. 1023 (2004), requiring that in such cases any such services must be found to be reasonable and necessary to the administration of the bankruptcy estate for payment to be made; the Court concluding that a careful examination of the application and the time entries indicating that all were truly reasonable and necessary to the administration of the bankruptcy estate and that said services were not substandard and were reasonably calculated to have been performed in order to represent the best interests of Debtor; and

(b) the Order as interpreted by this Court, concludes that payment of the amounts of any fees awarded by this Court is governed by the case of Lamie v. United States Trustee, supra, and therefore are not to be paid from Debtor's estate funds;

(c) the Court having previously determined in its February 6, 2002, opinion and order (opinion attached as Appendix A) that the fees of Fred Findling were reasonable, and the Court not finding any reason to deviate from its previous conclusions;

NOW, THEREFORE, IT IS HEREBY ORDERED that the fees and costs are found to be reasonable and the application is GRANTED in the amount of $45,147.22; and,

IT IS FURTHER ORDERED that the Applicant is limited to seeking and obtaining payment

of said amount from sources other than property of the bankruptcy estate.

APPENDIX A

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re: Case No. 99-51514-WS

JOSEPH EDWARD KLOIAN, Chapter 7

Debtor.

Hon. Walter Shapero

OPINION AWARDING ATTORNEY FEES AND COSTS TO FRED S. FINDLING

This matter is before the Court on the Interim and Final Application For Compensation For Professional Services Rendered and For Administrative Priority Status of Fred S. Findling, an attorney who formerly represented Debtor in post-petition bankruptcy proceedings. The Court will award Mr. Findling $45,000 in attorney fees, and $147.22 in costs, for a total of $45,147.22, because such amounts are reasonable compensation and reimbursement for the actual and necessary services performed and expenses incurred by Mr. Findling in representing Debtor.

I. Facts

Mr. Findling filed an "interim and final" fee application pursuant to 11 U.S.C. §§ 330 and 331[1] for $77,831.25 in fees, and $647.22, in costs, for a total of $78,478.47, for post-petition professional services he rendered to Debtor from January 13, 2000 through July 31, 2000, and

[1]Unless otherwise specified, all statutory references are the B U.S.C. §§ 101-1330.

for administrative priority status for the amounts owing. In his fee application, Mr. Findling detailed the fees and costs for which he sought compensation, and also made some general comments regarding difficulties he allegedly encountered in representing Debtor. Mr. Findling explained that in the bankruptcy, "[Debtor] had been represented by three attorneys, each of whom had withdrawn ... after a short interval of time." (Fee Application at 2 ¶ A.) According to Mr. Findling, when he was retained, Debtor had been without the representation of counsel for in excess of one month, and as a consequence, "the pending matters were in utter confusion and chaos" and "[the] case management was in utter disarray." Id. at 2-3 ¶ F.) Adding to the difficulty posed by this situation, was the fact that Debtor allegedly proved to be difficult to work with. Mr. Findling asserted that Debtor "micro-manage[d]" every aspect of his representation, requiring that all pleadings and correspondence be approved by him before being filed with the Court and/or mailed. According to Mr. Findling, Debtor required him to revise documents many times, significantly increasing the time required to complete any task. (Id. at 2 ¶ C.) Moreover, as Debtor allegedly refused to accept any correspondence by mail, Mr Findling was required to fax all documents to Debtor for his approval. This proved burdensome and time consuming because Debtor's telephone and fax machine shared the same line. As a result, Mr. Findling had to reach Debtor by phone before faxing any document so that Debtor could turn on the fax machine to receive it. (Id. at 2 ¶ D.) Mr. Findling averred that, in spite of these difficulties, "[he] was able to bring the management of [Debtor's] case under control." (Id. at 3 ¶ F.)

Mr. Findling later filed a revised fee application for $77,737 in fees, and $622.22 in costs, for a total of $78,359.22. In the revised fee application, Mr. Findling grouped the services he

performed into five task specific categories (2004 examination; court hearings; creditor claims; general office; and motions) rather than listing them chronologically, to facilitate the Court's determination of whether the services were for the benefit of the estate. Mr. Findling argues that all of the compensation he requested in his revised fee application benefitted the estate because it was for services rendered strictly for bankruptcy matters as opposed to matters that would benefit Debtor personally, such as § 523 claims and state court proceedings. Mr. Findling asserts that his having Debtor submit to a 2004 examination (resulting in time entries in Category 1 of the revised fee application) enabled Trustee to question Debtor about his assets and the locations of those assets and other financial matters. Mr. Findling argues that his objections to creditors' claims (resulting in time entries in Category 3 of the revised fee application) were beneficial to the estate because the purpose of the objections was to limit the money paid out of the estate on account of these claims and to promote compromises, settlement, and resolution of these claims. According to Mr. Findling, the time entries for services rendered in the remaining categories of Court hearings (Category 2), general office (Category 4), and motions (Category 5), were also beneficial to the estate because they concerned only bankruptcy issues, which needed to be addressed and resolved.

Debtor filed objections to both the original and the revised fee applications requesting that the Court deny them in their entirety. In support of his objections to the original fee application, Debtor argued that "there is no factual basis to support [an] award of the requested fees" because (1) Mr. Findling's services were not beneficial to the estate; (2) Mr. Findling violated his ethical duty under Mich. R. Prof 'l Conduct 1.16 to turn over Debtor's file to successor counsel once he had been discharged; and (3) Debtor "has a strong claim for legal malpractice against ... Findling

that greatly exceeds the amount of fees ... Findling is claiming ... [and that] is a complete affirmative defense to the claim for fees." (Debtor's Objection to Fee Application at 9 ¶¶ 10-12.) Additionally, Debtor asserted that "there is no legal basis for [Findling] to be awarded fees from the [the bankruptcy] estate" because § 330(a) only permits payment of fees incurred in Chapter 7 to "a trustee, an examiner, or a professional person employed under §§ 327 and 1103," and Mr. Findling does not fit into any of these categories. (Id. at 9-10 ¶¶ 13-14 (emphasis omitted).) Debtor also argued that under § 503(b), which lists types of claims that are allowable as an administrative expense, there is no provision for attorney fees. Basically, the only factual allegation made by Mr. Findling that Debtor admitted was accurate was "that matters were in a confused state when [Mr.] Findling accepted representation." (Id. at 5 ¶ f.)

In support of his objections to the revised fee application, Debtor incorporated his objections to the original fee application and added some further objections - namely that (1) Mr. Findling's $250 billing rate is unreasonable given that he is not an expert in bankruptcy matters; (2) Mr. Findling's fee application does not comply with Local R. Bankr. P. 2016(b)(10) in that it does not bill by tenths of an hour and it "bunches" multiple tasks into a single time entry; (3) Mr. Findling billed excessive time for the tasks performed; (4) Mr. Findling billed for clerical work; and (5) Mr. Findling's billings for a $400 motion fee and for three $25 motion fees were erroneous. Debtor later backed off from his position that Mr. Findling's billing rate in his fee application is unreasonable, arguing instead: "Mr. Findling's hourly rate is not excessive on its face. However, the fees[] claimed are a product of the hourly rate multiplied by the hours claimed. The hours claimed are excessive because [Mr. Findling] had difficulty in comprehending the issues. The hourly rate cannot be evaluated out of context." (Debtor's

Statement Regarding Hearing on Fee Application of Findling at ¶ 4.) Debtor also asserted that he is entitled to an offset against Mr. Findling's fees because Mr. Findling breached his contract with Debtor and committed legal malpractice. (Id. at ¶ 5.)

Trustee also filed objections to both the original and the revised fee applications. However, Trustee and Mr. Findling resolved Trustee's objections by stipulating to entry of an order providing that Trustee would withdraw his objections to Mr. Findling's fee application if Mr. Findling agreed to accept $55,000 (less a $10,000 retainer Debtor had paid him on January 19, 2000) as full payment for the fees listed in his revised fee application. On April 6, 2001, the Court entered this stipulated order authorizing Trustee to pay $45,000 in fees and $622.22 in costs "upon the presentment of an order overruling or otherwise resolving the Debtor's objections to the Fee Application."

On October 10, 2001, the Court held an evidentiary hearing on Mr. Findling's revised fee application. At the hearing, Debtor argued that multiplying Mr. Findling's hourly rate by the hours he billed would result in a total amount due that was unreasonable given the tasks he performed. Debtor asserted that in order to arrive at a reasonable amount of compensation for Mr. Findling's work, the Court would either have to reduce the amount of hours billed by one third or reduce the rate billed by one half because Mr. Findling was incompetent, slow in performing his work, and had to redo tasks such as the objections to claims more than once.

Debtor argued further, and *for the first time,* that Mr. Findling was not entitled to be paid his fees and costs out of estate funds because the attorney fee agreement, which he entered into with Mr. Findling on January 19, 2000, required Mr. Findling to seek payment directly from Debtor rather than from the estate. To support his position, Debtor read a portion of the attorney

fee agreement into the record which provided: "Client understands that attorney fees for legal representation of Section 523(a) claims, or any other legal matters, may not be paid out of the property of the estate, and are to be personally paid by Client." Debtor alleged that prior to him firing Mr. Findling, Mr. Findling sent his bills directly to him and that this shows that Mr. Findling understood that he was to collect his fees from Debtor personally.

Debtor also argued that, as a matter of law, there is no provision of the Bankruptcy Code that authorizes payment out of estate assets to a Chapter 7 debtor's attorney for post-petition services rendered and this fact also precludes Mr. Findling from collecting his fees and expenses out of estate assets. Moreover, Debtor argued that none of Mr. Findling's services benefitted the estate because they did not result in money being brought into the estate.

In his testimony before the Court, Mr. Findling countered that neither the attorney fee agreement nor the Bankruptcy Code precluded payment of his attorney fees and costs out of the assets of the estate. Mr. Findling explained that he did not handle any § 523(a) claims and therefore the language in the fee agreement precluding payment from the bankruptcy estate for the handling of § 523 claims would not prevent him from receiving his fees from the estate. He explained further that the "any other legal matters" language in the fee agreement referred to the non-bankruptcy state court proceedings and a district court proceeding that were pending, as opposed to the bankruptcy proceedings, for which he was retained to render services. As he did not represent Debtor in any of the state or the district court proceedings and did not bill for services relating to any legal matters other than bankruptcy matters, this language also did not prohibit him from collecting his fees from the estate. Mr. Findling testified that, at the time he and Debtor signed the fee agreement, he explained to Debtor that representing him for

nonbankruptcy legal matters and § 523(a) claims would not benefit the bankruptcy estate, while representing him in bankruptcy matters other than § 523(a) claims would be beneficial to the estate. Because the bankruptcy court would not award fees for services that did not benefit the estate, Mr. Findling explained that if he represented Debtor regarding a § 523(a) claim or one of the nonbankruptcy state court or district matters pending, Debtor would have to be personally responsible for the payment of his fees for these matters. Mr. Findling testified that, at the time Debtor signed the fee agreement, he fully understood this distinction, which was incorporated into the fee agreement. However, as it turned out, Debtor retained other counsel to represent him in the pending state and district court proceedings. Mr. Findling also testified that he drafted the fee agreement.

Additionally, Mr. Findling testified about some of the alleged difficulties he experienced in representing Debtor that he had specified in his initial fee application. Mr. Findling asserted that the significant increase in time required to perform tasks in this bankruptcy case was not caused by any incompetence or lack of skill on his part, but rather was due to Debtor's (1) failure to cooperate in answering questions, disclosing assets, and providing necessary documents and information; (2) insistence on dictating the actual language of all documents filed with the Court and correspondence; (3) demands for multiple and extensive revisions of all documents and correspondence; (4) unwillingness to communicate by mail; (5) inability to handle more than two or three objections to claims a day due to emotional problems; and (6) secreting of assets. Mr. Findling testified that the objections to claims had to be redone because of Debtor's unwillingness or inability to timely provide him with the detailed information he needed to file objections to claims rather than because of any misunderstanding on his part of the facts. Mr.

Findling explained that he was at the mercy of Debtor because only Debtor had knowledge of the facts and he could not "pull the facts out of the air." Thus, according to Mr. Findling, any problem with the objections filed necessarily must be attributed to Debtor because he could include in the objections only those facts that Debtor provided. Mr. Findling stated that he has been a practicing attorney for upwards of forty-five years.

Mr. Findling estimated that two-thirds of the services he rendered, or $50,000, related to filing objections to creditors' claims; one-half of the balance of time spent on the case, or $12,000 to $15,000, related to the 2004 examination and the disclosure or nondisclosure of assets; and the remaining one-half of the balance of time, or $12,000 to $15,000, was spent for Court appearances relating to scheduling matters.

The Trustee also testified at the hearing. He explained that in arriving at the settlement amount in the stipulated order resolving his objections to Mr. Findling's fee application, he reduced Mr. Findling's fees to an amount he felt was reasonable for the services provided. Rather than looking at the time entries line by line, he looked at the broad picture: the total time invested; the hours spent; the hourly rate; and whether the services were of benefit to the estate. Upon being shown Mr. Findling's fee agreement with Debtor, the Trustee stated that he had not seen it before and that consequently, he did not consider it in negotiating the settlement with Mr. Findling. The Trustee opined that the fee agreement was ambiguous as to whether Mr. Findling must look to the estate or the Debtor for payment of his fees.

After the evidentiary hearing, Mr. Finding filed a supplemental brief in support of his application for attorney fees. In the brief, and consistent with his testimony at the evidentiary hearing, Mr. Filing asserted that "[a]t the time of his retention it was contemplated that Fred S.

Findling would provide legal services in both state and bankruptcy court" and "[t]hat is why the fee agreement provided for representation for `other legal matters. '" (Supplemental Br. in Supp. of Application for Attorney Fees at 2.) Mr. Findling alleged further that Debtor later hired another attorney to represent him the pending state court legal matters and therefore the possibility contemplated in the fee agreement did not come to fruition.

Debtor filed a response to Mr. Findling's supplemental brief, in which he categorically denied the all the factual allegations in it. Specifically, Debtor stated that "[i]t never was contemplated that [Mr.] Findling would ever represent the Debtor, nor provide any legal services which were not directly connected with the bankruptcy proceedings." (Debtor's Reply to Findling's Supplemental Brief at 2 ¶B (emphasis in original).) Debtor asserted that "Debtor did not know what section 523(a) claims were - However, [Mr.] Findling made sure Debtor recognized and understood that Debtor was to pay Findling personally and not out of the property of the estate prior to the signing of the fee agreement." (Id. at 2 ¶C.) Debtor noted "[t]hat [Mr.] Findling billed Debtor personally as provided by the fee agreement, and never applied to the Court for his fees until after he was fired." (Id. at 2 ¶D.) Debtor argued that the parties' agreement that "[Mr.] Findling cannot be paid out of the property of the estate, and [is to be] paid personally by Debtor" is evident from "the plain meaning of the fee agreement." (Id. at 1 ¶1.)

At issue is whether the attorney fee agreement and the Bankruptcy Code permit payment from the bankruptcy estate of Mr. Findley's fees and costs for the post-petition services he rendered to Debtor, and if so, what amount of the fees and costs billed in the revised fee application should be allowed.

II. Discussion

A. The Attorney Fee Contract

The threshold issue in this case is whether the fee agreement between Mr. Findling and Debtor precludes Mr. Findling from seeking payment of his fees and costs from the bankrupt estate. In bankruptcy, the rights of parties under a contract are to be determined under the state law. State of Ohio v. Collins (In re Madeline Marie Nursing Homes), 694 F.2d 433, 439 (6th Cir. 1982) (explaining "that [the principle that] state law should generally be used to decide issues regarding property interests--applies equally to contract cases, which would be governed by state law absent the bankruptcy"). In UAW-GM Human Resource Center v. KSL Recreation Corp., 579 N.W.2d 411, 414 (Mich. Ct. App. 1998), the court explained the basic rules of contract interpretation under Michigan law:

> The primary goal in the construction or interpretation of any contract is to honor the intent of the parties. [Courts] must look for the intent of the parties in the words used in the instrument. [Courts do] not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning. The initial question whether contract language is ambiguous is a question of law. If the contract language is clear and unambiguous, its meaning is a question of law. Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact. A contract is ambiguous if its words may reasonably be understood in different ways. Courts are not to create ambiguity where none exists. Contractual language is construed according to its plain and ordinary meaning, and technical or constrained constructions are to be avoided. If the meaning of an agreement is ambiguous or unclear, the trier of fact is to determine the intent of the parties.

Id. (internal quotation marks and citations omitted). In interpreting contract language, Michigan courts must construe any ambiguity or imperfection in the contract "most strongly against the drafter." Stark v. Kent Products, Inc., 233 N.W.2d 643, 645 (Mich. Ct. App. 1975). However, "[i]f there is any difference of opinion as to the significance of the language in which the parties have expressed themselves, it may be reduced to lawful certainty by judicial effort or by the testimony of men familiar with the trade." Id. at 644 (relying on Edgar v. Hewett Grain & Provision Co., 202 N.W. 972, 973-74 (1925)).

The Court concludes that the attorney fee contract is ambiguous as to the intended source of payment of Mr. Findling's post-petition attorney fees and costs. The body of the contract in its entirety reads as follows:

> AGREEMENT is made this day between the undersigned "Client" and Fred S. Findling, of the THE FINDLING LAW FIRM, P.L.C., the undersigned "attorney", to provide legal representation regarding a pending bankruptcy proceeding in the Eastern District of Michigan, under the name of Joseph Edward Kloian, debtor, Case No. 99-51514 WS.
>
> As compensation for his services, Client agrees to pay Fred S. Findling, a retainer of $10,000.00. The hourly rate shall be $250.00 per hour for any work to be performed in said pending bankruptcy proceeding, or any other legal matters.
>
> Client understands that attorney fees for legal representation of Section 523 (a) claims, or any other legal matters, may not be paid out of property of the estate, and are to be personally paid by Client.
>
> Client also agrees to reimburse attorney for all court costs charged to and/or advanced by the attorney, forthwith, including costs of records and depositions.

The first paragraph of the fee agreement makes it clear that the intended scope of Mr. Findling's representation of Debtor is limited to Debtor's pending bankruptcy case. However, in

discussing Mr. Findling's hourly rate, the fee agreement states that the specified hourly rate applies to "said pending bankruptcy proceeding, **or any other legal matters"** thereby introducing the possibility that the scope of Mr. Findling's representation may be expanded. (Emphasis added). Under common rules of English grammar and usage, both the use of the disjunctive conjunction "or" and the word "other" denote that the words separated by "or" reference different and mutually exclusive things. See Webster's New Collegiate Dictionary 325, 806 (1979) (describing the "disjunctive conjunction or" as "expressing an alternative or opposition between the meanings of the words connected," and defining "other" as "being the ones distinct from those first mentioned ... not the same: DIFFERENT ... a thing opposite to or excluded by something else"). Likewise, a common rule of construction is that "terms connected by a disjunctive [should] be given separate meanings, unless the context dictates otherwise." Reiter v. Sonotone Corporation, 442 U.S. 330, 339 (1979) (applying the rule to construe the legislative intent behind language in a statute). Moreover, another rule of construction is to "avoid constructions that would render words or provisions superfluous or meaningless." Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney For The Western District of Michigan, (W.D. Mich. 1999) (relying on Lyons v. Ohio Adult Parole Authority, 105 F.3d 1063, 1069 (6th Cir. 1997) (implicitly overruled in part on other grounds by Lindh v. Murphy, 521 U.S. 320 (1997))) (applying the rule to statutory construction). It follows from these rules that "any other legal matters," at least as used in the referenced sentence, are different from and do not include the "pending bankruptcy proceeding."

However, the phrase "any other legal matters" is used again in the next sentence of the contract in such a way as to render its meaning in this context ambiguous. It is unclear, from the four corners of the agreement, whether the parties intended "any other legal matters" in this

sentence to mean any legal matters other than § 523(a) claims including bankruptcy matters, as Debtor contends, or whether they intended this language to mean any legal matters other than bankruptcy matters, as Mr. Findling asserts.

The fee contract specifies that fees for "section 523 (a) claims, or **any** other legal matters" must be paid directly by Debtor and cannot be paid out of the estate. (Emphasis added). As "any" commonly means "every," see Webster's 51, one possible interpretation of "any other legal matters" in this sentence is that it encompasses all legal matters including bankruptcy matters that are not § 523(a) claims. Under this construction, the fee agreement would mandate that Mr. Findling collect all fees for representing Debtor in any bankruptcy or nonbankruptcy matter alike directly from Debtor, and prohibit him from collecting any fees whatsoever from the bankruptcy estate. This interpretation, while undercut by the meaning of "any other legal matters" in the sentence that precedes it, is supported by the sentence that directly follows it in the next paragraph specifying that Debtor, rather than the estate, is responsible for all court costs. If the parties intended Debtor to be directly responsible for post-petition costs, it is possible that they also intended Debtor to be directly responsible for all fees.

Another possible and much more logical construction, given the structure and progression of the contract, is that "any other legal matters" has the same meaning in both paragraphs two and three denoting all non-bankruptcy matters. It makes no sense that the fee agreement would single out one type of bankruptcy matter (§ 523 claims) and then specify that for that category of bankruptcy matters, Debtor rather than the estate would pay, if all bankruptcy matters were intended to be covered by the "any other legal matters" clause. Under Debtor's interpretation, the "§ 532 claims" language would clearly be superfluous. It also seems odd and inconsistent that the

fee agreement would use "any other legal matters" in the second paragraph to distinguish and exclude bankruptcy matters from the universe of legal matters for which Mr. Findling could represent Debtor, while using the same phrase in the very next paragraph to include bankruptcy matters with all other types of legal matters. If the contracting parties attributed the same meaning to this phrase in both paragraphs, this would explain the need to specify a special category of bankruptcy matters, which, like non-bankruptcy matters, was subject to different payment arrangements than for bankruptcy matters. That the fee agreement designates that Debtor is responsible for the payment of costs is not inconsistent with this interpretation. The different treatment of fees and costs can be explained by the fact that Mr. Findling has to advance monies from his own pocket for expenses Debtor incurs while no money is actually expended when Debtor incurs fees for services.

Given the four corners of the fee agreement, defining "any other legal matters" as nonbankruptcy matters seems more plausible. However, as Mr. Findling drafted the contract, the Court must construe it most strongly against him. Because the language discussing the source for payment for Mr. Findling's attorney fees could also support Debtor's interpretation that all bankruptcy fees must be paid personally by Debtor, the Court will also consider the testimony of the contracting parties to determine their intent.

The Court finds credible Mr. Findley's testimony that the parties intended "any other legal matters" to mean the non-bankruptcy state court and district court proceedings that were pending at the time he was retained, particularly given the fact that he was made aware of these other pending proceedings. Additionally, Mr. Findley's interpretation of this phrase is consistent with the more logical construction of the language of the fee agreement when viewed in its entirety. The

Court also finds logical Mr. Findley's explanation that the reason he differentiated § 523(a) claims from other bankruptcy matters and required Debtor to personally pay any fees associated with them, was because they were not beneficial to the estate. Therefore, the Court would not allow them to be paid with estate assets. The fact that Mr. Findling sent his bills to Debtor prior to filing his original and revised fee application does not undercut Mr. Findling's position. It is to be expected that, regardless of the source of payment of Mr. Findling's fees, Mr. Findling would keep Debtor apprised of the fees he was incurring just as he kept him updated about the substantive details of the case.

On the other hand, the Court finds Debtor's testimony regarding the meaning of the attorney fee contract unpersuasive. Debtor failed to offer any explanation whatsoever as to why the fee agreement would specify a species of bankruptcy matters (§ 523(a) claims), payment for which Debtor was to be personally responsible, if (1) the parties intended Debtor, rather than the bankruptcy estate, to pay for all legal services rendered regardless of whether they related to bankruptcy or nonbankruptcy matters and (2) if the phrase "any other legal matters" included both bankruptcy and nonbankruptcy matters. Debtor also did not explain or acknowledge the fee agreement's distinction between bankruptcy matters and "any other legal matters" in the second paragraph of the contract. The timing of Debtor's allegation that the attorney fee contract precludes payment of Mr. Findling's attorney fees from the bankruptcy estate is also problematic. Debtor filed lengthy objections to both Mr. Findling's original and his revised fee applications, carefully and thoroughly detailing all the reasons why Mr. Findling could not be paid from the bankruptcy estate. Yet, he never mentioned in them that he had agreed with Mr. Findling to personally pay all fees and that this agreement was incorporated into the attorney fee contract. The first time Debtor alleged

the existence of this fee agreement as a basis for denying payment of Mr. Findling's fees from the bankruptcy estate was at the evidentiary hearing. The Court finds it difficult, if not impossible, to believe that, if the contracting parties had in fact, from the outset, agreed to have Debtor pay all attorney fees and had incorporated this agreement into a written contract, Debtor would not have, from the filing of his first objection, argued these facts. After considering the testimony at the evidentiary hearing, the Court is left with the firm impression that, upon reviewing the attorney fee contract, Debtor noted that the language in the contract was susceptible to multiple interpretations due to imprecise drafting, and at that time, and after the fact, decided to allege that the parties had agreed to the construction that supported denying Mr. Findling's request for fees.

Although Mr. Findling, as drafter of the agreement, faced a heavier burden in proving that the parties intended his interpretation of the language to control payment of attorney fees, he has met his burden. The Court finds that Mr. Findling's interpretation of the contract correctly states the intent of the parties in entering into the contract and that nothing in the attorney fee agreement precludes payment of Mr. Findling's fees and expenses out of the bankruptcy estate.

B. The Bankruptcy Code

The next issue is whether any provision of the Bankruptcy Code provides authority for paying Mr. Findling's attorney fees and costs out of the bankruptcy estate. The Court concludes that § 330(a)(1) of the Bankruptcy Code authorizes such payment.

The Court recognizes that there is a split of authority over whether § 330(a)(1), as amended by the Bankruptcy Reform Act of 1994, authorizes payment of post-petition fees and costs to a Chapter 7 or a Chapter 11 debtor's attorney from the bankruptcy estate. See generally Mark D.

Sherrill, Compensability of Debtors' Counsel Under Section 330(a) of the Bankruptcy Code, Norton Bankruptcy Law Advisor, October 2001, at 8-12 (thoroughly analyzing and comparing cases disallowing such payments under § 330(a)(1) with case law permitting such payments). This split arises from the deletion of the phrase "or to the debtor's attorney" from the first of two lists of persons entitled to be paid out of estate assets from the prior version of § 330 by amendments in the Bankruptcy Reform Act of 1994. To oversimply, the line of cases that deny payments for post-petition fees and expenses to a Chapter 7 or a Chapter 11 debtor's attorney generally views this deletion as evincing legislative intent to change the longstanding practice of authorizing these payments. On the other hand, the line of cases that permit such payments conclude that the omission was the result of an inadvertent drafting error rather than the Legislature's intent to preclude payments to attorneys for Chapter 7 and Chapter 11 debtors.

The Court finds persuasive the reasoning in those cases that allow payments of postpetition fees and costs to attorneys for debtors in Chapter 7 and Chapter 11 cases under

§ 330(a)(1) and adopts it as its own. E.g., United States Trustee v. Eggleston Works Loudspeaker Co. (In re Eggleston Works Loudspeaker Co.), 253 B.R. 519 (B.A.P. 6th Cir. 2000) (Chapter 7 consolidated cases); In re Top Grade Sausage, Inc., 227 F.3d 123 (3d Cir. 2000) (Chapter 11); United States Trustee v. Garvey, Schubert & Barer (In re Century Cleaning Services, Inca 195 F.3d 1053 (9th Cir. 1999) (Chapter 7); In re Brierwood Manor, Inc., 239 B.R. 709 (Bankr. D.N.J. 1999) (case converted from Chapter 11 to Chapter 7); In re Miller, 211 B.R. 399 (Bankr. D. Kan. 1997) (Chapter 7); In re Ames Department Stores, Inc., 76 F.3d 66 (2d Cir. 1996) (Chapter 11)). Therefore, the Court finds that § 330(a)(1) authorizes the Court to award Mr. Findling payment out of the bankruptcy estate for the fees and costs he incurred in representing Debtor postpetition,

provided of course that he meets all of the requirements set forth in such provision. Moreover, such fees and costs may be allowed as an administrative expense under § 503(b)(2). This provision provides: "After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title, including ... compensation and reimbursement awarded under section 330(a) of this title." 11 U.S.C. § 503(b)(2).

C. Compensability of Mr. Findling's Fees and Expenses Under The Requirements of Bankruptcy Code

Although § 330(a)(1)(A)-(B) generally authorizes awards to debtors' attorneys of "reasonable compensation for actual, necessary services" and "reimbursement for actual, necessary expenses" out of the bankruptcy estate, particular attorneys seeking compensation must show their fees and costs are eligible for an award under § 330(a). In re Harshbarger, 205 B.R. 109, 112 (Bankr. S.D. Ohio 1996) ("It is the applicant's burden to demonstrate entitlement to fees.") (citing Continental Illinois National Bank & Trust Co. of Chicago v. Charles N. Wooten, Ltd. (In re Evangeline Refining Co.), 890 F.2d 1312, 1326 (5th Cir.1989) and In re Zwern, 181 B.R. 80, 85 (Bankr. D. Colo. 1995)); see also In re Copeland, 154 B.R. 693, 699 (Bankr. W.D. Mich. 1993) (same). Section 330(a)(2) authorizes the Court to "award compensation that is less than the amount of compensation that is requested." Section 330(a)(4)(A)(i)-(ii), precludes the Court from awarding compensation "for ... unnecessary duplication of services; or ... services that were not reasonably likely to benefit the debtor's estate; or ... necessary to the administration of the case." Under this standard, Mr. Findling has shown that he is entitled to an award of $45,000 in fees and $147.22 in costs, for a total of $45,147.22.

1. The "Actual" Requirement

Debtor has not challenged, and from a review of Mr. Findling's fee application, the briefs, the docket entries, and the documents in the Court file, the Court has no reason to question that the fees billed were for services actually rendered. Therefore, Mr. Findling has satisfied his burden on this § 330(a)(1)(A) requirement for an award of fees.

On the other hand, Debtor has asserted that some of the expenses charged were not actually incurred by Mr. Findling. The Court agrees. Mr. Findling billed Debtor $400 for a motion fee incurred on February 15, 2000, which, according to the Court's records, Mr. Findling paid for applying to the Court to convert the Debtor's case from Chapter 7 to Chapter 11 (Check No. 2248). However, the records also indicate that the $400 conversion fee was refunded to Mr. Findling on March 29, 2000. (Check No. 463574 in the amount of $300, and Check No. 463575 in the amount of $100). Therefore this $400 billed expense does not represent an actual expense and should not be paid by Debtor. In addition, Mr. Findling billed Debtor $25 for filing a motion on June 5, 2000, but the Court cannot account for this fee by reference to the Court's fee schedule and the Court's docket. Therefore, this billed expense also should be disallowed. Likewise, the Court cannot account for a $25 expense billed for the April 28, 2000 "filing of court documents" nor a $25 expense incurred on May 8, 2000 for "filing detailed objections with [C]ourt." Deducting all of these expenses from Mr. Findling's billed costs of $622.22 leaves a balance of $147.22 in actual costs.

2. The "Necessary" Requirement

Under the circumstances of this case, there can be no serious doubt that the services Mr. Findling provided were essential. As Mr. Findling attested and Debtor admitted, when Mr. Findling came into the case, "the pending matters were in utter confusion and chaos" and "[the] case management was in utter disarray." Moreover, there were assets that Debtor had failed to disclose.

Mr. Findling (1) was able to help bring structure and order to the case by participating in the development of procedures for the efficient management of the case and the expeditious administration of estate assets; (2) caused Debtor to submit to a 2004 examination, which was instrumental in aiding Trustee to locate undisclosed assets and to effectuate a turnover of those assets; and (3) assumed the responsibility of objecting to proofs of claims and asserting counterclaims, thereby advancing the claims process. Up to that point, Trustee had participated little in the claims process, apparently being actively engaged in finding and obtaining possession of assets of the estate. Therefore, Mr. Findling performed duties akin to what the Trustee's attorney might have had to perform in his absence, and in so doing, advanced the administration of the case. Where a debtor's attorney performs tasks and duties the trustee has not already done, such as litigating claims, he is entitled to be paid for those services. Sherrill, Norton Bankruptcy Law Advisor, at 12. Mr. Findling's testimony concerning the services he rendered in his fee application is consistent with the Court's assessment of the services he performed in the case; namely that the services he rendered basically concerned: (1) filing objections to creditors' claims; (2) the 2004 examination and the disclosure or nondisclosure of assets; and (3) Court appearances relating to scheduling matters. As discussed, all these services were "necessary" and thus Mr. Findling's has satisfied his burden on this § 330(a)(1)(A) requirement regarding fees.

Other than the expenses already discussed, Debtor did not identify any expenses that were unnecessary. Therefore, the Court finds that the remainder of expenses billed were necessary for rendering services to Debtor and should be paid.

3. The "Reasonable" Requirement

Mr. Findling having thus satisfied his burden that his services were "actual" and "necessary," the Court may award him "reasonable" compensation for those services under § 330(a)(1)(A). In determining whether requested compensation is "reasonable" pursuant to § 330(a)(1)(A), bankruptcy courts in the Sixth Circuit must apply the lodestar method of fee calculation. Boddy v. United States Bankruptcy Court, Western District of Kentucky (In re Boddy), 950 F.2d 334, 337 (6th Cir. 1991). Under this method, courts multiply a reasonable hourly rate for the attorney by a reasonable number of hours expended for the services rendered to arrive at a lodestar amount. Id. In applying the lodestar method, courts have discretion to consider other factors that bear on the reasonableness of fees in a particular case and justify either an overall increase or reduction in fees. Id. at 338. However, "[i]n many cases, these factors will be duplicative if the court first determines the lodestar amount because the lodestar presumably subsumes all of these factors in its analysis of the reasonable hourly rate and the reasonable hours worked." Id.; see also Hensley v. Eckerhart, 461 U.S. 424, 434 n. 9 (1983) ("The district court also may consider other factors identified in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974), though it should note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate."). Additionally, § 330(a)(3)(A) lists factors bankruptcy courts must consider in determining whether the compensation is reasonable pursuant to § 330(a)(1)(A).

a. Reasonable Hourly Rate

In applying the lodestar method, the Court first considers the hourly rate of $250 per hour charged by Mr. Findling. The Court finds that Mr. Findling's $250 per hour billing rate

is reasonable, given that (1) he has been a practicing attorney for over forty-five years and throughout the proceedings demonstrated skills commensurate with his experience; (2) such rate is commonly charged by practitioners with similar experience in both bankruptcy and nonbankruptcy cases; (3) the state of the case when Debtor retained Mr. Findling was chaos; (4) this was apparently an undesirable case as shown by, and as a result of, the withdrawal of so many previous counsel; (5) there were significant time restraints and time demands placed on Mr. Findling due to Debtor's emotional problems and Mr. Findling's entry into the case after it had commenced; and (6) the amount of work required to bring Mr. Findling up to date with the file necessarily would preclude him from securing other employment.

b. Reasonable Hours Expended for Services Performed

Having determined that $250 per hour is a reasonable rate, in applying the lodestar method, the Court next considers whether the hours billed are reasonable for the services rendered. On its face, the amount of time billed is more than what would be expected for the services detailed in fee application in the average case. However, a certain increase in hours must be anticipated under the circumstances of this case, where (1) an attorney enters the case after it has begun and must expend considerable time in bringing himself up to date, (2) "the pending matters are in utter confusion and chaos" due to Debtor's lack of representation during a period of time; (3) "[the] case management is in utter disarray"; (4) Debtor suffers from emotional problems, which sometimes impose limits on his ability to assist counsel; and (5) Debtor's books and records are so disorganized or inaccessible as to make actions based on such books and records difficult, time consuming, and complicated. Moreover, after reviewing Mr. Findling's Exhibit A, which compiled some of the written instructions by Debtor for handling various aspects of the case and some of the extensive

handwritten revisions to documents and letters Debtor requested, and after considering the testimony of Mr. Findling at the hearing, which the Court found credible, the documents in the court file, and Mr. Findling's performance in representing Debtor before this Court, the Court finds that the blame for increased billed hours rests primarily with Debtor. The Court also finds, as previously discussed, that Mr. Findling performed valuable services that were necessary to and significantly advanced the administration of the case. Some of the claims to which Mr. Findling objected have since been compromised for amounts less than the claim thereby reducing the amount of money paid out of estate assets. The favorable results obtained, especially given the difficulty and the undesireability of the case, militate in favor of increasing Mr. Finding's compensation. See Hensley, 461 U.S. at 434 ("The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the `results obtained.'") Nevertheless, the results obtained in the terms of money saved, do not justify the total amount billed. Some reduction in hours is thus in order.

However, in determining the amount of hours that are reasonable considering the work detailed, none of the individual line items stand out as being excessive and subject to reduction. Therefore, the Court finds that the better approach is to view the services performed as a whole in light of the benefit to the estate and the time required to perform the necessary services. According to Trustee's testimony, this is the approach he took in agreeing to settle his objection to Mr. Findling's fee application for $55,000. At the $250 per hour billing rate, the settlement translates into 220 hours of billed services or roughly a one-third reduction in the hours billed. The Court agrees with Trustee that 220 hours of billed time is reasonable considering the time required to perform

those services which most benefitted the estate. Multiplying 220 hours by the $250 hourly rate yields $55,000 in reasonable compensation.

4. "Reasonably Likely to Benefit the Debtor's Estate or Necessary to the Administration of the Case"

Moreover, all services that form the basis for the reasonable compensation amount were "reasonably likely to benefit [D]ebtor's estate" or were "necessary to the administration of the case" at the time the services were rendered. Although Debtor argues that no compensation should be paid to Mr. Findling because Mr. Findling's services were of no actual benefit to the estate, having failed to bring any money into the estate, such is not the test under §§ 330(a)(3)(C) and 4(A)(ii)(I)-(II). The Ames court explained that "fee entitlement [is not] contingent upon a showing of actual benefit to the estate" but rather is judged as to the expected benefit to the estate at the time services were rendered. 76 F.3d at 71. As already discussed, having Debtor submit to a 2004 examination was reasonably likely to help Trustee locate assets and provide him with information necessary to carry out his duties; objecting to claims was reasonably likely to result in less money being paid out of the estate due to either disallowance or compromise of the claim; and Mr. Findling's participation in court hearings and status conferences were likely to significantly advance the administration of the case by establishing case management procedures, and resolving issues that moved the case closer to completion. Mr. Findling does not have to show actual benefit to the estate or to the administration of the case to satisfy this requirement, though the benefit to the estate or the result of his services is certainly an important factor in determining reasonable compensation under the lodestar method. Therefore, the amount of reasonable compensation for Mr. Findling determined under the lodestar method need not be reduced based on consideration of §§ 330(a)(3)(C) and 4(A)(ii)(I)-(II).

5. "Unnecessary Duplication of Services"

Although Debtor argues to the contrary, the amount of reasonable compensation for Mr. Findling determined under the lodestar method also need not be reduced under § 330(a)(4)(A)(i) based on "unnecessary duplication of services." Debtor argues that he should not have to pay Mr. Findling for filing objections to proofs of claims because, not only did Mr. Findling have to redo some of them, but substitute counsel also had to revise them because they were deficient. Mr. Findling counters that he is blameless regarding any alleged deficiency in the objections to claims because he could only base them on the flawed information Debtor provided to him. Debtor has admitted that his books and records were disorganized, and that he only wanted to work on one to two objections to claims at any one meeting with Mr. Findling. Additionally, it is undisputed that Mr. Findling had a relatively short time in which to secure the information he needed to file the objections to claims. Given these circumstances, it would not be unreasonable to expect that Mr. Findling would have to revise his timely filed objections once he secured all the relevant information. Even if some of the revisions could be blamed in some way on Mr. Findling, the one-third reduction in legal fees would more than cover Debtor's objections on this basis. This factor does not require any further reduction in fees.

C. Other Miscellaneous Objections

The Court finds Debtor's objections to Mr. Findling's revised fee application not specifically discussed above to be meritless. Therefore, the Court finds not other reason to deny or reduce Mr. Findling's fees.

III. Conclusion

Therefore, pursuant to § 330(a), the Court will award Mr. Findling $45,000 in attorney fees ($55,000 less the $10,000 retainer already paid), and $147.22 in costs, for a total of $45,147.22. Such fees and expenses are to be afforded administrative priority status pursuant to § 503(b)(2). The Court will enter an order consistent with this opinion.

/s/
Walter Shapero
United States Bankruptcy Judge Eastern
District of Michigan