

OCT 01 2004

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA**

U.S. BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

1			
2			
3			
4	In re:	)	Chapter 11
5	ZANE GREY DEVELOPMENT, L.C.,	)	No. 2:03-BK-12907-JMM
6	<u>Debtor.</u>	)	Adv. No. 2:04-ap-00818-JMM
7	ZANE GREY DEVELOPMENT, L.C.,	)	<b>MEMORANDUM DECISION RE: § 506 ATTORNEYS' FEES DISPUTE</b>
8	Plaintiff,	)	
9	vs.	)	
10	DIANA M. IRWIN,	)	<b>(Under advisement since September 16, 2004)</b>
11	<u>Defendant.</u>	)	

A hearing was held on September 16, 2004, to determine the amount of a secured creditor's claim. The secured creditor, Diana Irwin, was represented by Timothy Barnes; the Debtor was represented by Peter Gennrich. After considering the totality of the evidence, the court now rules.

**A. BACKGROUND FACTS**

The issues, at the beginning of the trial, related to the principal, interest, taxes, and attorneys' fees attributable to a fully secured debt. However, at trial, the parties stipulated that the first three items were agreed to be:

21	Principal, interest, and taxes (through 09/30/2004)	\$71,769.23
22	Foreclosure costs	<u>3,469.40</u>
23		\$75,238.63

1 After this stipulation, the issues were narrowed to one: what is the reasonable amount of attorneys' fees  
2 to be added to the above sum, representing an expense incurred that was caused by the Debtor's admitted  
3 default and its filing of the instant Chapter 11 case?

4 The creditor submitted three exhibits, all being the billings submitted by the three law  
5 firms that have represented her in this case. No testimony from any of the attorneys who worked on the  
6 case was presented either orally or in writing.

7 This bankruptcy proceeding commenced on July 23, 2003. The secured creditor's legal  
8 representation began on August 11, 2003. The period of representation for which compensation is sought  
9 ran from August 11, 2003, to and through August 31, 2004. The general information, concerning this  
10 representation, is:

<u>Law Firm</u>	<u>Ex.</u>	<u>Period of Representation</u>	<u>Hours</u>	<u>No. of Attys</u>	<u>Fees Charged</u>
Mohr Hackett	10	August 11, 2003 - April 7, 2004	106	5	\$12,154
Allen & Sala	11	April 22 - April 30, 2003	4	1	666
Timothy Barnes	12	May 4 - August 31, 2004	54	1	9,959
TOTALS			<hr/> 164		<hr/> \$22,779

11  
12  
13  
14  
15  
16  
17  
18  
19 This bankruptcy case has proceeded in a relatively routine fashion. It is a small case, in  
20 terms of chapter 11, involving a small parcel of investment raw land. The secured creditor's principal  
21 balance is only \$31,964.74 (Ex. 31). It began originally as a \$40,000 promissory note (Debtor's Ex. 1).

22 The Debtor's plan, confirmed on September 16, 2004, calls for the full payoff of the  
23 secured debt within 90 days after the plan's effective date. This payoff is to be accomplished either  
24 through a new loan or the principal's infusion of capital. If this does not occur, the secured creditor may  
25 conclude its duly-noticed trustee's sale, and all stays are lifted.



1 In measuring reasonableness of fees, numerous judicial philosophies combine to assist a  
2 court. In addition to a judge's own experience, a court can draw upon the "lodestar" method (lawyer time  
3 multiplied by an hourly rate), application of the twelve *Johnson* factors,<sup>1</sup> and a host of other judicial  
4 comments upon the subject. *See, generally, In re Pettibone Corp.*, 74 B.R. 293 (Bankr. N.D.Ill. 1987).

5 A case, which is generally cited for setting forth "twelve rubics" for a trial court to  
6 consider, in its determination of what constitutes a reasonable fee, is *Johnson v. Georgia Highway*  
7 *Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). Those twelve factors, however, are not "self-actuating:  
8 simply to articulate those twelve factors ... does not itself conjure up a reasonable dollar figure in the  
9 mind of the district judge." *In re Jensen-Farley Pictures, Inc.*, 47 B.R. 557 (Bankr. Utah 1985)(quoting  
10 from *In re Casco Bay Lines*, 25 B.R. at 754). As Judge Allen noted in *Jensen-Farley*:

11 In general, the statutory factors under Section 330 and the Johnson factors  
12 consist of three components: (1) the quantity factor, comprised of  
13 documented time at customary billing rates; (2) the quality factor,  
14 comprised of the competency of the representation, taking into account the  
novelty and difficulty of the issues presented, the skill required, the time  
constraints, and the personal qualifications of the applicant; and (3) the  
result factor, comprised of the actual results achieved in the case.

15 *Id.* at 587.

16 In the case of *In re Casco Bay Lines, Inc.*, 25 B.R. 747 (Bankr. 1st Cir. 1982), the  
17 Bankruptcy Appellate Panel for the First Circuit stated that a court's initial approach, in determining a  
18 reasonable fee, is to multiply the number of hours reasonably expended on the case by a reasonable  
19 hourly rate. This is known as the "lodestar fee setting approach." However, as the *Casco Bay Lines*  
20 court stated, it is the quality of representation and the results that are most significant in determining the  
21 amount of the fee:

22 It is under the heading "quality of representation" that a bankruptcy court  
23 should particularly consider the results of the attorney's participation in the  
24 bankruptcy proceeding, and the benefit to the estate to see if circumstances  
25 warranted adjustment of the lodestar figure. Where an attorney's services  
have produced particularly exceptional benefits for the estates, an upward  
adjustment of the lodestar may be warranted to compensate for an hourly

---

26 <sup>1</sup> *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5<sup>th</sup> Cir. 1974).

1 rate that turned out to be overly conservative. Similarly, if a high-priced  
2 attorney performs at a competent but undistinguished manner, a decrease  
in the hourly rate would be warranted.

3 *Id.* at 756.

4 The trial court has discretion in awarding what it considers to be a reasonable fee. A  
5 court's discretion "means a sound discretion ... exercised not arbitrarily or willfully, but with regard to  
6 what is right and equitable under the circumstances and the law, and directed by the reason and  
7 conscience of the judge to a just result." *In re AWECO, Inc.*, 725 F.2d 293, 298 (5th Cir. 1984) (review  
8 of bankruptcy approval of a compromise application).

9 The First Circuit said in *Boston and Maine Corp. v. Moore*, 776 F.2d 2, 9 (1st Cir. 1985):

10 To determine the number of hours "reasonably" spent, as well as in setting  
11 a "reasonable" hourly rate, a court must review the work to see whether  
12 "counsel substantially exceeded the bounds of reasonable effort," ... and  
13 should dis-allow hours that were "duplicative, unproductive, excessive, or  
otherwise unnecessary.

14 These general principles are applicable when a secured creditor seeks to charge its  
15 expenses against its debtor, and when it relies on its contract and § 506(b).

16 Here, Ms. Irwin, a fully-secured creditor in first lien position on the Debtor's principal  
17 asset, has claimed \$22,779 for fees associated with the protection of her interest. The Debtor disputes  
18 these amounts. This being the case, the court must determine if the fees and costs are reasonable, in order  
19 to be allowed as part of the creditor's secured claim. 11 U.S.C. § 506(a).

20 In *In re Masnorth Corp.*, 36 B.R. 335, 339 (Bankr. N.D. Ga. 1984), the Court bluntly  
21 noted:

22 While Midland [the secured creditor] is free to assert all bona fide claims  
23 before the Bankruptcy Court, Midland is not necessarily entitled to saddle  
24 the debtor with all the attorney's fees and expenses incurred so as to  
impede the debtor's ability to reorganize.

25 Ms. Irwin is a fully secured creditor whose current delinquencies will be cured and fully paid under the  
26 plan of reorganization. The plan provides for payment of the full amount of the debt, as well as the

1 claimed attorneys' fees and costs, the latter being subject to the determination of this court as to their  
2 reasonableness.

3  
4 **C. AN ANALYTICAL LOOK AT THE ATTORNEYS' FEES**

5  
6 Considerations of fairness, results obtained, difficulties encountered, novelty of issues  
7 presented, and time and experience of those involved must all be weighed.

8  
9 **1. Mohr Hackett Time Breakdown**

10  
11 The billing records, submitted by the Mohr Hackett firm to the secured creditor, were  
12 admitted as Irwin Ex. 10. The total hours added up to 106, but the time sheets totaled only 78.6 of billed  
13 time and 7.8 of "no charge" or unbilled time. Those two figures add up to 86.4 hours, thus leaving a gap  
14 of 20.4 hours unaccounted for. The court's review of Ex. 10 also revealed that certain gaps exist in the  
15 chronological data, indicating that some pages may have been omitted from the exhibit.

16 No attorneys for Mohr Hackett testified as to why it was necessary to expend 106 hours  
17 on what essentially amounted to nothing more than calculating interest on a \$31,964.74 principal balance,  
18 adding taxes thereto, monitoring the bankruptcy case, and negotiating a method for the payoff of this  
19 senior lien. In general, it appears that the work expended by the firm far exceeded what was reasonably  
20 necessary to accomplish such a relatively simple task. The case was internally overworked, and to now  
21 attempt to charge to the Debtor, under this note, with Mohr Hackett's billed fees of \$12,154 is  
22 unreasonable.

23 As best as the court was able to decipher, the Mohr Hackett time breaks down into the  
24 following categories:

1	1	Client interviews; discussions with client; letters or memos to client	8.1
2	2	Fact gathering	7.2
3	3	Strategy and planning	2.3
4	4	Drafting own pleadings	11.1
5	5	Reviewing others' pleadings and filings	3.2
6	6	Legal research	4.3
7	7	Stay relief pleadings	7.3
8	8	Preparation for, attendance at, strategic planning about, and reports re the § 341 meeting	5.6
9	9	Discussions/correspondence re conducting a new trustee's sale	2.2
10	10	Preparation for, attendance at, strategic planning about, and reports regarding the court-initiated case management meeting	5.9
11	11	Research, discussions, and analysis concerning interest issue (simple or compound)	9.0
12	12	Continuance of existing trustee's sale	0.3
13	13	Holbrook trial against Rhoten (non-bankruptcy issues)	1.9
14	14	Review letters from others	0.5
15	15	Preparation of Ulrich affidavit	3.0
16	16	Calculations re note payoff	2.6
17	17	Letters to or conferences with adverse parties	4.1
18			
19			
20			

21 Client interviews, fact gathering, strategy, and planning accounted for 17.6 hours. In a  
22 note and deed of trust case, this phase should have consumed, at most, 5.0 hours. (Items 1, 2, and 3.)

23 Drafting pleadings, a stay relief motion and a response to the § 506 motion, apparently  
24 consumed 22.7 hours (Items 4, 6, and 7). This was also extremely high. About 4.0 hours for this work  
25 would be reasonable.  
26

1 Consuming 5.6 hours to "strategize" for attendance at a § 341(a) meeting and another 5.9  
2 hours for attending a court-initiated case management hearing was a needless waste of time and money.  
3 Neither matter was a contested proceeding. Each matter should have taken one hour apiece, for a total  
4 of 2.0 hours. (Items 8 and 10.)

5 Discussions and correspondence concerning the selection and commencement of a new  
6 trustee's sale, when one was already in process, was similarly a needless waste of time (Item 9). Thus,  
7 the 2.2 hours associated with that task will not be assessed against the Debtor. Discussion concerning  
8 the continuance of the existing trustee's sale (Item 12) of 0.3 is reasonable, as trustee's sales may be  
9 continued from time to time without violating the automatic stay. *See In re Roach*, 660 F.2d 1316 (9th  
10 Cir. 1981).

11 One of the principal bones of contention, throughout this case, was whether the promissory  
12 note (Debtor's Ex. 1) bore interest at a simple or compounded rate. On this legal research, the firm billed  
13 9.0 hours, which included numerous discussions and analyses between attorneys and client. The court  
14 notes that about half an hour worth of research by a brand new attorney would have quickly revealed that,  
15 in the absence of a specific provision in the note concerning compounding, a note bears interest only at  
16 the simple rate. *See, e.g., Mastro v. Witt*, 39 F.3d 238 (9th Cir. 1994); *Nation v. W.D.E. Elec. Co.*, 454  
17 Mich. 489, 563 N.W. 2d 233 (1997); *Lincoln Lumber Co. v. Fowler*, 248 Neb. 221, 553 N.W. 2d 898  
18 (1995); *Campbell v. Lake Terrace, Inc.*, 111 Nev. 1329, 905 P. 2d 163 (1995); *Stovall v. Illinois Central*  
19 *Gulf R. Co.*, 722 F.2d 190 (5th Cir. 1984) (called into doubt on other grounds by statute as stated in,  
20 *Preferred Risk Mut. Ins. Co. v. Johnson*, 1998 WL 854680 (Miss. 1998). This issue is far from novel,  
21 and is a well-settled principle. Thus, for this task, the court will allow 1.0 hour. (Item 11.)

22 The court notes that Mohr Hackett spent 1.9 hours discussing matters concerning the  
23 Irwins' claim in Navajo County Court over an alleged conversion of property against Craig Rhoten  
24 (Item 13). That matter was unrelated to the note issues, and will be disallowed in its entirety.

1           Conferences with the opposing party's counsel and correspondence concerning ongoing  
2 matters appeared to take about 4.6 hours (Items 14 and 17). This amount of time appears reasonable, and  
3 will be allowed.

4           Calculation of the note's payoff took 2.6 hours. Had simple interest been calculated  
5 initially, as it should have been, and taxes and foreclosure fees added, this job should have taken about  
6 one hour. (Item 16.)

7           The review of pleadings filed by others (Item 5) took 3.2 hours, while preparation of the  
8 Ulrich affidavit (Item 16) took 3.0 hours. The court feels that allowing 3.0 for both of these items is  
9 generous. Thus, 3.0 will be allowed, giving secured creditor's counsel the benefit of the doubt.

10           Thus, the Mohr Hackett firm should have reasonably spent 20.9 hours, rounded to 21,  
11 instead of the 106 hours billed to the secured creditor. It appears that the attorney in charge of this case  
12 was Kevin C. McCoy. His rate was \$150 per hour. Mr. McCoy spent the vast bulk of the time on this  
13 matter.

14           Based on the evidence presented, and the court's familiarity with this case, the court  
15 concludes that the Mohr Hackett portion of the bill to be charged to the Debtor should be 21.0 hours at  
16 \$150 per hour, for a total of \$3,150.

17  
18           **2. Allen & Sala Time Breakdown**

19  
20           In April 2004, Mr. McCoy left Mohr Hackett and moved the file to Allen & Sala. From  
21 that location, he only sent one bill, Irwin's Exhibit 11. In that one month, he billed 3.8 hours to the Irwin  
22 file. The only significant thing accomplished was to appear at a preliminary hearing on Ms. Irwin's  
23 motion for stay relief, at which he did not prevail. The balance of the month was spent in discussions  
24 with adverse counsel and in updating his clients. The court will allow 2.0 hours at \$150, or \$300 for  
25 these efforts.

1                   **3.     Timothy H. Barnes Time Breakdown**

2  
3                   Apparently, at the end of April 2004, Mr. McCoy was relieved by Ms. Irwin of his  
4 responsibilities as counsel. In his place, Timothy H. Barnes became substitute counsel.

5                   Mr. Barnes, through August 31, 2004, spent 54 hours on the Irwin matters, and has  
6 generated a bill to the Irwins of \$9,959. (Irwin Ex. 12.)

7                   First, it should be pointed out that the court is acutely aware of how a lawyer, new to a  
8 case, must attempt to ascertain what went on before his involvement, review files, re-collect data, and  
9 do whatever is required to bring himself up to date on a case with a long history. However, as necessary  
10 as that effort may be, such effort is not chargeable to the adverse party. It is not within the adverse party's  
11 control that prior counsel did such an unproductive job that eventually his clients sought to relieve him.  
12 Therefore, Mr. Barnes' efforts, necessary to familiarize himself with the case, are not compensable as  
13 "reasonable attorneys' fees." That cost must be borne entirely by the secured creditor.

14                   Mr. Barnes' compensable time is related only to a review of reasonableness after assuming  
15 that he was completely current and "up to speed" on the matters as they existed on May 4, 2004, his first  
16 day on the job.

17                   Mr. Barnes did not testify or explain his daily billings, but submitted them for the court's  
18 review. (Exhibit 12.) Accordingly, as with the Mohr Hackett billings, the court has completely and  
19 carefully reviewed them, and breaks the Barnes' work into the following general categories of time:

- 20  
21                   A       Duplication of Effort or Excessive Time: Review                   26.9  
22 existing files, pleadings, and statutes; legal research and  
23 discussions re interest issues; substitution of counsel  
24 pleadings; strategy; conferences with client re file  
25 review; obtaining files from, and conferences with,  
26 previous attorneys re update on case; fact-gathering;  
discussions re non-promissory note issues concerning  
Navajo County lawsuit; other unrelated matters (i.e.,  
sale of Scottsdale property, removal action); and  
calculation of balance due.

1	B	<u>Motion to Dismiss</u> : Conferences with client; strategy	18.2
2		and planning; research and preparation of pleadings;	
3		correspondence with client.	
4	C	Monitor and review ongoing court proceedings and	3.6
5		court appearances as needed (exclusivity); planning for	
6		other court activity (i.e., 2004 examination); disclosure	
7		statement and plan	
8	D	Conferences and correspondence with opposing counsel	5.5
9		re ongoing matters, including settlement issues;	
10		depositions; communication; and preparation.	
11	E	Conferences with client re future strategy.	1.1

12 The court will now discuss its reasoning concerning each of the five subcategories listed  
13 above. It must also be emphasized that Exhibit 12 was submitted on the billings only, and no person  
14 offered testimony as to how each "lumped" entry was broken down, or the need for such services.  
15 Consequently, the court carefully reviewed each item and made its own assessment of the time associated  
16 with each sub-entry, in order to arrive at the time estimates set forth above.

17 As for Item A, which the court considers excessive or duplication of effort, the court again  
18 notes that while it was the secured creditor's choice and right to change counsel mid-stream, it is  
19 unreasonable to charge the Debtor, under the promissory note's attorneys' fees clause, with such  
20 duplication of effort. The secured creditor must bear all of that load. Consequently, all 26.9 hours in that  
21 category will be disallowed.

22 Item B concerns the 18.2 hours devoted to the preparation of a motion to dismiss. While  
23 the strategy had tangential merit, the time spent was excessive. The law in this area is now well-  
24 developed, in both this Circuit and in the treatises. An experienced practitioner such as Mr. Barnes  
25 should have devoted no more than 4.0 hours for all aspects of this motion, once he had brought himself  
26 up to speed as to the background. Thus, 4.0 hours will be allowed for this effort.

As for Item C, the court believes that the matters recited therein should not reasonably  
have consumed more than 2.5 hours. Thus, only that amount will be allowed.

1           Communications with opposing counsel concerning the bankruptcy issues should have  
2 taken about half the time, and, therefore, the court will allow 2.8 hours for those endeavors. (Item D.)

3           Finally, while noting that the last category is probably also overlapped and included, to  
4 some degree, in the above categories, the court will nonetheless allow 1.1 hours for these client  
5 communications. (Item E.)

6           Thus, Mr. Barnes will be allowed 10.4 hours at his hourly rate of \$210 per hour, for a total  
7 amount of \$2,184.<sup>2</sup>

8  
9           **D. GENERAL COMMENTS, FINDINGS, AND CONCLUSIONS**

10  
11           On balance, and looking at the case in its overall proportion, the court finds and concludes  
12 that the total creditor's bill, sought to be charged to the Debtor, is unreasonably high. This is not to say  
13 that the work was not done, but it appears to be excessive for the work that actually had to be done, and  
14 the time it should have taken to do it.

15           In this case, the court finds that the issues were neither complex nor novel. Indeed, they  
16 were quite routine. The court cannot accept that such efforts - for a secured creditor's single-minded  
17 purpose of either gaining stay relief, or confirmation or denial of a reorganization plan providing for its  
18 payoff, would cost almost \$23,000. Frankly, the issues and intensity of this case did not rise to such  
19 level. The creditor overworked the case beyond the boundaries of fairness.

20           The court appreciates the creditor's need for specialized bankruptcy assistance, and is  
21 sensitive to it. However, considering the entire record in this matter, the court is left with the clear  
22 impression that the time spent by the secured creditor's professionals was excessive. Translated into  
23 § 506 terms, then, the charges are not "reasonable." To the extent that a creditor wishes to expend such  
24 resources, that is a business decision, which it is free to make. However, a creditor may not run the

---

25  
26           <sup>2</sup> Mr. Barnes did not present evidence regarding any time devoted to the case after  
August 31, 2004.

1 engine at full throttle and expect its borrower to pay the entire fuel bill. For these reasons, the total  
2 amount of the fee award to Ms. Irwin is \$5,484, which is made up of the following:

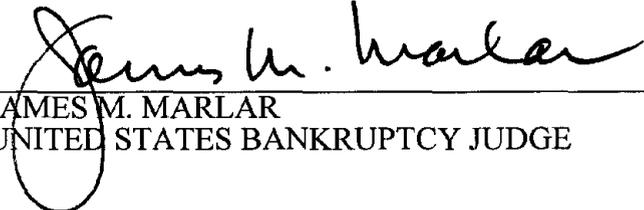
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

Mohr Hackett	21.0 hours	\$ 3,150 total fees
Allen & Sala	2.0 hours	\$ 150 total fees
Timothy H. Barnes	<u>10.4 hours</u>	<u>\$ 2,184 total fees</u>
TOTALS	33.4 hours	\$ 5,484 total fees

**E. RULING**

A separate order will be entered that resolves this final issue. If a more complete judgment concerning all of the issues is necessary, counsel for the Debtor shall lodge one within ten (10) days.

DATED: October 1, 2004.

  
\_\_\_\_\_  
JAMES M. MARLAR  
UNITED STATES BANKRUPTCY JUDGE

1 COPIES served as indicated below this 1st  
day of October, 2004, upon:

2 Timothy H. Barnes PLC  
3 4350 East Camelback Rd., Suite B240  
Phoenix, AZ 85018-0001  
4 Email [tim@timbarneslaw.com](mailto:tim@timbarneslaw.com)  
Attorneys for Defendant

5 Peter M. Gennrich  
6 Jaburg & Wilk, PC  
7 7047 E. Greenway Pkwy, #140  
Scottsdale, AZ 85254  
8 Email [pmg@jaburgwilk.com](mailto:pmg@jaburgwilk.com)

9 U.S. Trustee  
P.O. Box 36170  
Phoenix, AZ 85067-6170  
10 U.S. Mail

11 By   
12 Judicial Assistant