

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:)	Chapter 7
)	
NET 2000 COMMUNICATIONS,)	
INC., et al.)	
)	
Debtors.)	Case No. 01-11324 through
<hr/>)	01-11334 (MFW)

OPINION¹

Before the Court is the Third and Final Fee Application of Morris, Nichols, Arsht & Tunnel ("MNAT") as Counsel for the Debtors during their chapter 11 case and the Objection of the Operating Telephone Company Subsidiaries of Verizon Communications, Inc. ("Verizon") thereto. For the reasons set forth below, we sustain the objection in part and grant the fee application in part.

I. FACTUAL BACKGROUND

On November 16, 2001, Net 2000 Communications, Inc. ("the Debtor") filed a voluntary petition under chapter 11 of the Bankruptcy Code. As part of its initial filings, the Debtor sought an order approving procedures for determining whether utilities were adequately protected under section 366. Objections to that motion were filed, inter alia, by Verizon

¹ This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, which is made applicable to contested matters by Federal Rule of Bankruptcy Procedure 9014.

which asserted that, because the Debtor was in arrears for pre-petition services and used a significant amount of services from Verizon on a monthly basis, the Debtor's suggestion that Verizon was adequately protected merely by the provision of an administrative claim was unsupportable. The Debtor acknowledged that its business was entirely dependent on services provided by Verizon and agreed to a stipulation providing for current payments which was approved by the Court. Pursuant to the stipulation, the Debtor agreed to pay Verizon \$971,940.83 semi-monthly for current services (with a reconciliation process to be done bi-monthly). (Exhibit V-42.) The Stipulation also provided that, if the Debtor requested that any of its accounts be disconnected, it would comply with the termination procedures contained in the contracts. The Stipulation was approved by the Court on December 6, 2001.

In the interim, on November 19, 2001, the Debtor filed a motion for approval of bid procedures in conjunction with a proposed sale of its assets to Cavalier East LLC ("Cavalier"). The bid procedures were approved and an auction held on December 17, 2001, which failed to attract any other bidders. On December 19, 2001, Verizon filed an objection to the sale asserting that the effect of the sale was to assume and assign to Cavalier the executory contracts between Verizon and the Debtor without curing defaults as required by section 365.

A hearing to consider approval of the sale to Cavalier was held on December 27, 2001. At that time, we overruled Verizon's objection, because both the Debtor and Cavalier confirmed that the contracts with Verizon were not being transferred. At the sale hearing, Verizon also requested that the Court determine that its contracts were deemed rejected. We denied that request as well, stating that we assumed the Debtor would file a prompt motion to reject the Verizon contracts. An Order approving the sale to Cavalier was entered on January 10, 2002.

Notwithstanding our statement at the sale hearing on December 27, 2001, the Debtor did not file a prompt motion to reject the Verizon contracts. As a result, on January 18, 2002, Verizon filed an Emergency Motion to hold the Debtor and Cavalier in contempt of court. In its Motion, Verizon asserted that, in fact, the contracts had been assumed and that Cavalier was receiving services from Verizon under those contracts. Therefore, Verizon asserted that the Debtor should be required to cure the defaults on those contracts. After a hearing on the Emergency Motion, we denied the motion and again held that the contracts had not been assumed and assigned.²

It was not until February 12, 2002 (after closing on the

² We did, however, require that Cavalier send letters to customers and regulatory agencies correcting misinformation it had disseminated in prior correspondence regarding the assets it had acquired from the Debtor.

sale of the assets to Cavalier) that the Debtor filed its motion to reject the Verizon contracts. That motion was granted on April 12, 2002. The Order provided that the rejection was effective retroactively to the date the Motion had been filed (February 12, 2002) for the assets conveyed to Cavalier. However, the Order provided that, as to the remaining assets ("the Northern Assets")³, the rejection would be effective on April 15, 2002.

After the sale to Cavalier was approved, numerous issues arose regarding that sale. Specifically, a dispute arose between the Debtor and Cavalier regarding representations the Debtor had made. As a result, at closing the Debtor agreed to a reduction of \$1.6 million in the \$25 million purchase price. Only the Lenders⁴ (who consented) were advised of this reduction. The Court, the Official Unsecured Creditors Committee ("the Committee") and other creditors were not advised of this reduction, and the Court did not approve it.

Subsequently, a dispute arose between the Debtor and Cavalier regarding whether the Northern Assets had been sold to Cavalier. Although the asset purchase agreement approved by the

³ The Northern Assets consisted of the Debtor's customers in New York, New Jersey, Massachusetts, and Rhode Island.

⁴ The Lenders include Toronto Dominion (Texas), Inc., Barclays Bank PLC, First Union National Bank, Goldman Sachs Credit Partners, LP, IBM Credit Corporation, RFC Capital Corporation, Royal Bank of Canada, and Nortel Networks.

Court excluded the Northern Assets from the assets sold to Cavalier, the Debtor asserted that they had been sold. Cavalier denied that it had bought the Northern Assets, even though on January 10, 2002, it conveyed those assets to Broadview Networks, Inc., for \$3 million. (Exhibit V-30.)

On April 11, 2002, the Debtor filed a motion to convert the case, which was granted on May 13, 2002. Michael Joseph ("the Trustee") was appointed the chapter 7 trustee. Subsequently, the Trustee filed complaints against Verizon disputing its asserted administrative claims and against Cavalier seeking return of the Northern Assets or the proceeds therefrom. The Trustee also pursued litigation which had been commenced by the Committee against the Lenders asserting, inter alia, that the price reduction to which the Lenders had agreed must reduce their secured claim and may not be paid from recoveries designated for unsecured creditors. Ultimately, all the litigation was settled by the Trustee.

On June 24, 2002, MNAT filed its Third and Final Fee Application seeking final fees of \$564,409.50 and expenses of \$144,112.12 for services rendered as counsel to the Debtor in the chapter 11 proceeding. Verizon filed an objection to those fees. A hearing was held on July 24, 2002. The matter is ripe for decision.

II. JURISDICTION

This Court has jurisdiction over this matter, which is a core proceeding pursuant to 28 U.S.C. §§ 1334 & 157(b)(2)(A), (B) & (O).

III. DISCUSSION

A. Review of Fee Applications Generally

The Bankruptcy Court has an independent duty to review fee requests of all professionals retained in a chapter 11 case to assure that the services rendered were necessary and appropriate and that the fees requested are reasonable. See, e.g., In re Busy Beaver Building Centers, Inc., 19 F.3d 833, 841 (3d Cir. 1994). The court "must protect the estate, lest overreaching attorneys or other professionals drain it of wealth which by right should inure to the benefit of unsecured creditors." Id. at 844.

Under section 330(a), the court may award "reasonable compensation for actual, necessary services rendered" by the attorney and by other professionals "based on (i) the nature of the services, (ii) the extent of the services, (iii) the value of the services, (iv) the time spent on the services, and (v) the cost of comparable services in non-bankruptcy cases." Busy Beaver, 19 F.3d at 840. "[T]he court shall not allow compensation for-- (i) unnecessary duplication of services; or (ii) services

that were not-- (I) reasonably likely to benefit the debtor's estate; or (II) necessary to the administration of the case." 11 U.S.C. § 330(a)(4)(A). The applicant bears the burden of proving that the fees and expenses sought are reasonable and necessary. See, e.g., Zolfo, Cooper & Co. v. Sunbeam-Oster Co., Inc., 50 F.3d 253, 261 (3d Cir. 1995).

"[T]he Court must conduct an objective inquiry 'based upon what services a reasonable lawyer or legal firm would have performed in the same circumstances'." In re Cenargo Int'l, PLC, 294 B.R. 571, 595 (Bankr. S.D.N.Y. 2003) (quoting In re Ames Dep't Stores Inc., 76 F.3d 66, 72 (2d Cir. 1996)).

A "judge's experience with fee petitions and his or her expert judgment pertaining to appropriate billing practices, founded on an understanding of the legal profession, will be the starting point for any analysis." Busy Beaver, 19 F.3d at 854. The court should then consider any evidence submitted with the application or at a hearing. Id.

Analytically, section 330(a) sets up a two-tiered test for determining whether and in what amount to compensate bankruptcy attorneys. First, the court must be satisfied that the attorney performed actual and necessary services. Second, the court must assess a reasonable value for those services. In re Gencor Industries, 286 B.R. 170, 176-77 (Bankr. M.D. Fla. 2002).

B. Verizon's Objections

Verizon objects to the final fees requested by MNAT because it asserts that many of the actions taken by counsel for the Debtor were not necessary and did not benefit the estate. Specifically, Verizon argues that an inordinate amount of time was spent by counsel for the Debtor fighting with Verizon over whether its contracts were assumed and assigned to Cavalier. All of that could have been avoided, Verizon asserts, if counsel had simply advised the Debtor to reject the Verizon contracts promptly. Thus, Verizon argues, these unnecessary services should not be paid from the estate. See, e.g., In re Old South Transportation Co., Inc., 134 B.R. 660, 664 (Bankr. M.D. Ala. 1991) (denying fees to counsel in opposing motion to compel debtor to assume or reject lease, when attorney knew debtor was financially unable to assume it).

While normally we would not charge a debtor's counsel with the obligation to determine whether a contract should be assumed or rejected, in this instance we conclude that MNAT should have counseled the Debtor to reject the Verizon contracts sooner. Since substantially all the assets of the Debtor were being sold, the Verizon contracts were of no further use to the Debtor after closing. The Debtor and its counsel knew that the contracts were executory and that assumption or rejection was an issue at least as early as December 19, 2001, when Verizon filed its objection

to the sale. Debtor's counsel also was on notice that a rejection motion should be filed promptly when the Court (in denying the Verizon request for an order deeming its contracts rejected) stated at the sale hearing on December 27, 2001, that it assumed the Debtor would follow the appropriate procedure to reject the contracts.

Nonetheless, the Debtor's counsel did not file the rejection motion until February 12, 2002. That failure resulted in extensive and unnecessary litigation with Verizon. The estate should not be charged with the fees of counsel for the Debtor that are unnecessary. We will therefore disallow all fees sought by MNAT in the dispute with Verizon that were incurred between December 27, 2001, and February 12, 2002, as reflected on Exhibit A attached hereto. Those fees total \$36,001.

We also believe that additional reductions are mandated because of actions taken, or deferred, by MNAT. Specifically, we will reduce MNAT's fees to the extent that they charged for services relating to the dispute over whether Cavalier bought the Northern Assets. As noted above, the Northern Assets were excluded from the asset purchase agreement and the Order approving the sale to Cavalier. Nonetheless, the Debtor (through MNAT) took the position that the assets had been sold. This again resulted in unnecessary litigation that was ultimately settled. While we will not surcharge MNAT for any costs the

estate incurred as a result of that settlement, we certainly will not allow fees for MNAT's services litigating that issue. Thus, we will disallow \$2,047 in fees for those services, as reflected on Exhibit B hereto.

Verizon also argues that, as a result of the delay in filing the motion to reject, additional administrative expenses of \$2.9 million were incurred by the estate. These represent additional administrative expenses due to Verizon that the estate incurred under the stipulation for adequate protection for the period between the sale hearing and the rejection of the contracts. Verizon asserts that MNAT should be responsible for these additional costs because of its lack of diligence.

We decline to surcharge MNAT with those costs for several reasons. First, the Verizon claim for administrative expense has been contested by the Debtor and the Trustee and ultimately compromised. To the extent of the settlement, the estate must have received a benefit from Verizon for those services and its counsel should not be asked to pay that expense. Second, the Debtor and Trustee have not sought to recover any fees from MNAT for the Verizon expenses and, therefore, we are not inclined to consider doing so on this record.

IV. CONCLUSION

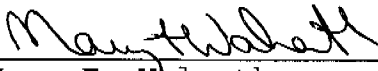
For the reasons set forth above, the Third and Final

Application of Morris, Nichols, Arsht & Tunnel ("MNAT") as
Bankruptcy Counsel for the Debtors and Debtors-in-Possession for
Allowance of Compensation for Actual, Reasonable and Necessary
Services Rendered and for Reimbursement of all Actual, Reasonable
and Necessary Expenses Incurred for the Period November 16, 2001,
through May 13, 2002, will be granted in part only.

An appropriate order is attached.

BY THE COURT:

Dated: September 17, 2004



Mary F. Walrath
United States Bankruptcy Judge

EXHIBIT A
Disallowed Entries from 12/27/01 - 2/12/02

1st Interim Fee Application

Individual	Date	Hours
RJD	12/28/01	6.8

2d Interim Fee Application

Individual	Date	Hours
MGB	1/11/02	0.1
MGB	1/11/02	0.1
MGB	1/14/02	0.1
MGB	1/16/02	0.1
MGB	1/16/02	0.1
MGB	1/17/02	0.2
MGB	1/17/02	0.1
MGB	1/17/02	0.1
MGB	1/17/02	0.1
MGB	1/17/02	0.1
MGB	1/18/02	0.1
MGB	1/18/02	0.2
MGB	1/18/02	0.1
MGB	1/18/02	0.2
MGB	1/18/02	0.3
MGB	1/18/02	0.2
MGB	1/18/02	0.1
MGB	1/18/02	0.5

Individual	Date	Hours
MGB	1/21/02	0.1
MGW	1/21/02	0.7
MGW	1/21/02	1.1
MGB	1/22/02	0.1
MGB	1/22/02	0.1
MGB	1/22/02	0.2
MGB	1/22/02	0.2
MGB	1/22/02	0.1
MGW	1/22/02	0.9
MGW	1/22/02	0.2
MGB	1/23/02	0.1
MGB	1/23/02	0.1
MGB	1/23/02	1.4
MGB	1/23/02	0.1
MGW	1/23/02	1.4
MGW	1/23/02	1.7
MGW	1/23/02	1.7
MGW	1/23/02	1.8
MGB	1/24/02	0.1
MGB	1/24/02	0.1
MGB	1/24/02	0.5
MGB	1/24/02	0.1
MGB	1/24/02	0.1
MGW	1/24/02	0.7
MGW	1/24/02	0.7
MGB	1/25/02	0.6
MGB	1/25/02	0.1

Individual	Date	Hours
MGB	1/25/02	0.2
MGB	1/25/02	0.1
MGB	1/25/02	0.8
MGB	1/25/02	0.1
MGW	1/25/02	1.3
MGW	1/25/02	1.7
MGW	1/25/02	0.6
MGW	1/25/02	1.4
MGW	1/25/02	0.3
MGB	1/28/02	0.4
MGB	1/28/02	0.1
MGB	1/28/02	0.5
MGB	1/28/02	0.1
MGB	1/28/02	1.0
MGB	1/28/02	0.2
MGB	1/28/02	0.1
MGB	1/28/02	0.1
MGW	1/28/02	0.7
MGB	1/29/02	0.1
MGB	1/29/02	0.1
MGB	1/29/02	0.1
MGB	1/29/02	0.1
MGB	1/29/02	0.1
MGB	1/29/02	0.1
MGB	1/29/02	0.1
MGB	1/29/02	0.3
MGB	1/29/02	0.7

Individual	Date	Hours
MGB	1/29/02	0.1
MGB	1/29/02	0.3
MGB	1/29/02	0.2
MGB	1/29/02	0.1
MGW	1/29/02	1.3
MGB	1/30/02	0.4
MGB	1/30/02	0.4
MGB	1/30/02	0.2
MGB	1/30/02	0.1
MGB	1/30/02	0.1
MGB	1/30/02	0.1
MGB	2/1/02	0.1
MGB	2/1/02	8.3
MGB	2/2/02	7.5
MGB	2/3/02	2.1
MGB	2/4/02	0.1
MGB	2/4/02	0.3
MGB	2/4/02	0.2
MGB	2/4/02	1.8
MGB	2/5/02	6.5
MGB	2/5/02	0.1
MGB	2/5/02	0.1
MGB	2/6/02	0.1
MGB	2/6/02	0.1
MGB	2/6/02	0.1
MGB	2/6/02	0.1
MGB	2/6/02	0.8

Individual	Date	Hours
MGB	2/7/02	0.6
MGB	2/7/02	0.2
MGB	2/7/02	0.1
MGB	2/7/02	0.1
MGW	2/7/02	0.4
MGB	2/8/02	7.7
MGB	2/11/02	0.1
MGB	2/11/02	0.4
MGB	2/11/02	0.1
MGB	2/11/02	0.1
MGB	2/11/02	0.1
MGB	2/11/02	0.3
MGB	2/11/02	0.1
MGB	2/11/02	0.3
MGB	2/11/02	0.6
MGB	2/11/02	0.1
MGB	2/11/02	0.1
MGW	2/11/02	0.6
MGW	2/11/02	1.0
MGB	2/12/02	0.3
MGB	2/12/02	0.2
MGB	2/12/02	0.1
MGB	2/12/02	0.2
MGB	2/12/02	0.3
MGB	2/12/02	0.2

3d Interim and Final Fee Application

Individual	Date	Hours
RJD	1/2/02	0.2
RJD	1/6/02	0.8
RJD	1/7/02	0.2
RJD	1/16/02	0.3
RJD	1/17/02	0.8
RJD	1/18/02	0.2
RJD	1/18/02	0.1
RJD	1/21/02	4.0
RJD	1/22/02	0.4
RJD	1/22/02	0.2
RJD	1/23/02	1.7
RJD	1/24/02	1.3
RJD	1/25/02	0.5
RJD	1/27/02	0.7
RJD	1/28/02	0.8
RJD	1/29/02	0.2
RJD	1/29/02	0.5
RJD	1/30/02	0.2
RJD	1/31/02	0.6
RJD	2/1/02	2.0
RJD	2/2/02	6.5
RJD	2/5/02	5.0
RJD	2/6/02	0.1
RJD	2/7/02	1.1
RJD	2/11/02	1.2
RJD	2/11/02	0.2
RJD	2/12/02	0.3

Total Disallowed Fees

<u>Individual</u>	<u>Hours</u>		<u>Rate</u>	<u>Value</u>
RJD	36.9	x	\$385	\$14,206.50
MGB	54.9	x	\$305	\$16,744.50
MGW	20.2	x	\$250	<u>\$ 5,050.00</u>
	Total Reduction:			\$36,001.00

Exhibit B
Fees Relating to Northern Assets Dispute
3d Interim and Final Fee Application

Individual	Date	Hours
MGB	3/12/02	0.2
MGB	3/12/02	0.2
MGW	3/12/02	0.5
MGW	3/13/02	0.5
MGB	3/14/02	0.8
MGB	3/15/02	0.2
MGW	3/15/02	0.6
MGB	3/18/02	1.2
MGB	3/18/02	0.2
MGB	3/19/02	0.2
MGB	3/19/02	0.1
MGB	3/20/02	0.1
MGB	3/25/02	0.1
MGB	3/27/02	0.1
MGB	3/27/02	0.1
MGB	3/27/02	0.1
MGB	3/27/02	0.1
MGB	3/28/02	0.1
MGB	3/28/02	0.1
MGB	3/28/02	0.1
MGB	3/29/02	0.1
MGB	3/29/02	0.1
MGB	3/29/02	0.4
MGB	3/29/02	0.1
MGB	3/29/02	0.2

Individual	Date	Hours
MGB	3/29/02	0.2
MGB	4/1/02	0.1
MGB	4/1/02	0.1
MGB	4/4/02	0.1

Total Disallowed Fees

<u>Individual</u>	<u>Hours</u>	<u>Rate</u>	<u>Value</u>
MGB	5.4	x \$305	\$1,647.00
MGW	1.6	x \$250	<u>\$ 400.00</u>
Total Reduction:			\$2,047.00

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:) Chapter 11
)
NET 2000 COMMUNICATIONS,)
INC., et al.)
)
Debtors.) Case No. 01-11324 through
01-11334 (MFW)

ORDER

AND NOW this 17th day of September, 2004, upon consideration of the Third and Final Application of Morris, Nichols, Arsht & Tunnel ("MNAT") as Bankruptcy Counsel for the Debtors and Debtors-in-Possession for Allowance of Compensation for Actual, Reasonable and Necessary Services Rendered and for Reimbursement of all Actual, Reasonable and Necessary Expenses Incurred for the Period November 16, 2001, through May 13, 2002, and the Objection of the Operating Telephone Company Subsidiaries of Verizon Communications, Inc. ("Verizon") thereto, and for the reasons set forth in the accompanying Opinion, it is hereby

ORDERED that the fee application of MNAT is GRANTED IN PART; and it is further

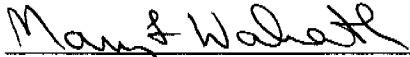
ORDERED that fees in the amount of \$38,048 shall be DISALLOWED for the reasons stated in our Opinion; and it is further

ORDERED that MNAT shall be allowed final fees in the amount of \$526,361.50 and expenses in the amount of \$144,112.12; and it

is further

ORDERED that the compensation allowed hereby, to the extent not already been paid in the chapter 11 case, shall be paid by the Trustee only when other chapter 11 administrative expenses are paid.

BY THE COURT:



Mary F. Walrath, Chief Judge
United States Bankruptcy Court

cc: Bradford J. Sandler, Esquire¹

¹ Counsel shall distribute a copy of this Opinion and Order to all interested parties and file a Certificate of Service with the Court.

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