SO ORDERED.

SIGNED this 03 day of December, 2007.

JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:

BRIAN WESLEY LOY
JODI LYNN LOY,

Debtors.

Case No. 07-41333
Chapter 13

ORDER REQUIRING SOUTH & ASSOCIATES TO TAKE ACTION BY DECEMBER 14, 2007 ON ITS RULE 2016 APPLICATION

On October 25, 2007, GMAC Mortgage, LLC, through its counsel South & Associates, filed a Secured Creditor's Rule 2016 Fee Application.[1] That Fee Application generically described the work that had been done by counsel, but did not specifically itemize the time that had been incurred, or by whom and at what hourly rate. The creditor sought $275 plus $75 "for the preparation and filing of this Rule 2016 Application...." The firm sent notice of the application, and set it for an objection by November 14, 2007. No one objected.

On November 16, 2007, counsel submitted an order to approve the fee application. By that

---

[1]Doc. 15.

date, however, this judge had prepared for the November 16, 2007 docket, on which five similar fee applications were set for hearing because of objections filed thereto.[2] The objections in those cases all noted that the required itemization had not been filed, making it impossible to determine if the fee sought was, in fact, reasonable. The Court thus requested that such an itemization be provided in the *Loy* case. That itemization was ultimately filed on November 28, 2007.[3]

The itemization reflected total paralegal time of 1.3 hours at $50 per hour, and total attorney time of .3 hours, at $175 per hour, for a total of $117.50. The Court has now reviewed the proposed order, which instead seeks $275 plus $75 for preparation of the application. In light of that itemization, and also in light of the information the Court has learned on November 30, 2007, at the hearing on similar applications, the Court declines to approve that order.

On November 30, 2007, the Court conducted a hearing on four cases where the Trustee objected to nearly identical Secured Creditor's Rule 2016 Fee Applications.[4] In each of those cases, South & Associates, a Kansas City law firm that represents many mortgage creditors in this Court, had filed an application for pre-confirmation attorney fees that it claimed it had incurred in performing some or all of these listed tasks: reviewing schedules, the petition, and the Chapter 13 plan, preparing the proof of claim, opening a new file and reviewing the note and mortgage, and "ongoing monitoring of Debtor(s)' case and Creditor's interest." None of the 2016 Fee Applications

---

[2]The objections scheduled to be heard on November 16, 2007, were in the following cases: *In re Reed*, 07-40835, *In re Shackelford*, 07-40994, *In re Lehman*, 07-41235, *In re Rome*, 07-41277 and *In re Hadsall-Cole*, 07-41282. Counsel for the creditor asked that the hearings be continued to a status conference, and they were continued to November 30, 2007.

[3]Doc. 19.

[4]A fifth hearing was scheduled for that date in *In re Reed*, Case No. 07-40835, but counsel for the creditor, Homeowners, in that case, announced that she was withdrawing that fee application. For that reason, counsel for Debtors did not appear, and the Court did not hear specific argument on that matter.

contained any kind of itemization of who performed which services, at what hourly rate. The fees requested for nearly identical services ranged from $125 (plus another $75 for preparing the application) to $350 (plus $75 for preparing the application) for what South & Associates has admitted is typically the same work.

At the hearing, the Court learned for the first time that South & Associates was not basing its fee application on the actual time it was spending on the generically described tasks, but was instead basing its fee application solely on who its client was, and the amount it could contractually charge that client for its services.[5] In other words, its negotiated fee to perform these services for Homecoming is $350, so in cases involving Homecoming, the fee requested was at that rate. Similarly, if the client was GMAC, the fee requested was $275. If the client was Countrywide, it was $125, and if it was Midland Mortgage, it was $75.

At the hearing, South & Associates admitted that Fed. R. Bankr. P. 2016 requires that the fee applicant "file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested." It further ultimately admitted that the amount it bills a discrete client for services is not the appropriate measure of the fee the Court should award under Rule 2016; instead, the proper measure is reimbursement of fees for the reasonable time expended, at a reasonable hourly rate, assuming the creditor is entitled to it under

[5]The response filed by South & Associates to each objection in the five cases took the form of a "Supplemental Breakdown to Its Rule 2016 Fee Application." This was essentially an itemization of time incurred, based on a re-created history, since South & Associates apparently typically works on a contract basis with its mortgagee clients (in non-litigation matters). The Court noted in two of the cases, South & Associates sought fees for reviewing the pertinent Chapter 13 plan, even though the fee application seeking that fee was filed before the plan was ever filed. *See* Case Nos. 07-41271 and 07-41277. Accordingly, the "re-creation" contained a significant error in two of the cases. Because this creditor would be entitled to have local counsel review a discrete Chapter 13 plan, in light of the "creative" plan language this Court has seen some debtors' attorneys insert regarding home mortgages, and in light of local rules in each judicial District with which mortgagees must comply, the Court did not disallow the amount ultimately related to reviewing the plans. This is one problem inherent in electing not to keep contemporaneous time records.

the terms of its mortgage, and assuming the creditor is over-secured. Unfortunately, that is not the basis on which all of these fee applications were made.

In preparing for the hearing held November 30, 2007, the Court asked the Clerk's Office to determine if this judge had signed any other orders granting a Rule 2016 Fee Application submitted by South & Associates since August 1, 2007—the approximate time period this judge first remembers seeing these kind of fee applications. The Court has signed several, and because they sought differing amounts, the Court assumed, when signing them, that was because the work required in each case varied significantly.[6] These applications also did not at first cause this Judge any concern because there had been no objection by any party in interest, including the Trustee or any debtor's attorney.[7]

The Court obviously has an independent duty to evaluate the reasonableness of fees, even when no objections to an application for compensation have been filed.[8] Although the Court did sign the pertinent orders, it was done under the presumption that movant's counsel would not knowingly file a motion with the Court, or submit an order to the Court, that was based on improper legal grounds. The Court is reluctant to *sua sponte* set aside the orders in the prior cases, because

---

[6]The Court signed orders allowing the following amounts in the following cases: $350 in *In re Gifford*, Case 07-40731, $425 in *In re Isabell*, Case 07-40736, $425 in *In re Gomez*, Case No. 07-40781, $425 in *In re Bradley*, Case No. 07-41036, and $425 in *In re Reynolds*, 07-41060. The Court notes that in two of those cases (07-40736 and 07-41060), the Court has also signed agreed conditional relief from stay orders allowing an additional $800 and $650 in attorney fees, respectively. A list of all the cases in which Rule 2016 Fee Applications have been filed in this Court, since August 1, 2007, were put into the record at the November 30, 2007 hearing as Exhibit 1.

[7]The Court is well aware that because the debtor may end up having to pay his attorney to challenge even an unreasonable creditor's fee, as well as the creditor's attorney fee, because of the terms of the mortgage instruments allowing such charges to protect the mortgagee's interest in an oversecured note, there is a significant monetary disincentive for debtors' counsel to object. Fortunately for this Court and these debtors, the Chapter 13 Trustee opted to object in the four cases heard on November 30, 2007 so this practice could be brought to light.

[8]*See In re Tahah,* 330 B.R. 777, 780-781 (10th Cir. BAP 2005) (noting that "[i]t is well-established that bankruptcy courts have a duty to independently evaluate the propriety of the compensation requested under § 330.").

of the teachings of the Tenth Circuit Court of Appeals in *Dow v. Baird,*[9] but because no order has been entered in this case, the Court does not hesitate to take action.

As a result of the admission by South & Associates that it did use an incorrect legal basis to seek fees in the cases heard on November 30, 2007, the Court will require that South & Associates take one of the following three actions in this case, by **December 14, 2007**:

1. South & Associates will either withdraw the Rule 2016 application, with prejudice, or

2. South & Associates will set this motion for hearing on the appropriate miscellaneous Chapter 13 docket (and include with the notice, as an exhibit, the assignment of the note and mortgage to this creditor from Lehman Brothers, FSB, to whom Town & Country Bank assigned their interest in at least the note, since that assignment does not appear on the Proof of Claim); or

3. South & Associates will upload a revised Order Granting Rule 2016 Fee Application, reciting the amount of the original fee application and that it was overstated, and that the Court should actually award only $117.50 for the work, plus an additional $75 for preparation of the application and order, for a total fee award of $192.50. South & Associates will also upload a copy of the assignment of the note and mortgage to this creditor, since that assignment does not appear on the Proof of Claim.

IT IS, THEREFORE, ORDERED that South & Associates will, by **December 14, 2007**, either withdraw its Rule 2016 application, or issue a notice of hearing for its Rule 2016 application

---

[9] 389 F.2d 882, 884 -85 (10th Cir. 1968) (holding that the only errors in a judgment which a district court may correct of its own initiative are those sanctioned by Rule 60(a), that is, formal errors arising from clerical mistakes and from oversight or omission. Other errors, such as those enumerated in Rule 60(b) can be corrected only on motion by a party in interest). *Dow* would not prevent a party in interest, such as a debtor or the Chapter 13 Trustee, from filing such a motion, however, and placing the issue properly before the Court, nor would it prevent South & Associates from taking action on its own to seek correction of any orders entered.

for the next miscellaneous Chapter 13 docket for which twenty days' notice can be provided, or upload a revised Order awarding a total fee of $192.50.

IT IS FURTHER ORDERED that South & Associates will henceforth assert fees for all services rendered in all cases, not at the amount it bills the pertinent client, but at a reasonable amount based on the actual time incurred for the required services, whether it be in a Proof of Claim, a 2016 fee application, an agreed Conditional Order Granting Relief from Stay, or any other similar pleading or document. Furthermore, if there are any motions (for which objections have not already been entered and a hearing established) with the same defects pending, the Court strongly urges South & Associates to take immediate action along the lines contained in this decision.

# # #