

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ALOHA CAPITAL CORPORATION
AMERICAN MARINE INTERNATIONAL, LTD.
RESORT SERVICE COMPANY, INC.
THE PROCESSING CENTER

Debtors

CASE NO. 96-61934
96-61829
96-61830
96-61977

Chapter 11
Jointly Administered

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court has before it the First Interim Fee Application of Simpson Thacher & Bartlett (“STB”), counsel to Richard C. Breeden as trustee in these cases¹ (“Trustee”), which seeks

¹ C&L’s fee application requests compensation for work completed on behalf of the following jointly administered debtors: Aloha Capital Corp. (“ACC”), American Marine International (“AMI”), Resort Services Co., Inc. (“RSC”), and The Processing Center, Inc. (“TPC”). For purposes of identification in this Decision, these debtors shall be referred to

payment of \$124,859 in fees and \$597 in disbursements. This fee application was filed on February 3, 1997 and scheduled for a hearing on March 27, 1997. The hearing was adjourned until April 24, 1997, at which time the Court heard oral argument and granted STB a provisional award of \$50,000 in order to allow an in-depth review of the fee application prior to the award of an interim fee under section 331 of the Bankruptcy Code (11 U.S.C. §§ 101-1330) (“Code”). The matter was submitted for decision on April 24, 1997.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this matter pursuant to 28 U.S.C. §§ 1334(b) and 157(a), (b)(1) and (b)(2)(A) and (O).

FACTS AND ARGUMENTS

The Trustee’s appointment in the Aloha Debtors’ cases was approved by the Court on May 15, 1996. On May 22, 1996, the Trustee filed a motion on notice to employ STB as counsel in these cases. A hearing on the application was held on June 6, 1996, and the order appointing STB was received on June 19, 1996 and signed by the Court on June 21, 1996. STB seeks payment of fees and expenses incurred as of May 14, 1996 through November 3, 1996.

The United States Trustee (“UST”) objects to the fee application of STB on a number of grounds. One objection is that the application fails to comply with the UST Guidelines for

collectively as the “Aloha Debtors.”

reviewing fee applications. The UST also argues that STB should not be compensated for fees and expenses incurred prior to May 22, 1996. In addition, the UST identified a number of line-item objections, including fees related to administrative overhead and fees which appear excessive in light of the services provided. Lastly, the UST argues that the Fee Auditor appointed in the Initial Debtors² cases should be appointed in the Aloha Debtors cases in order to address possible overlap of services and to assist in the analysis of the overall benefit of STB's services.

STB requests compensation for services and expenses incurred as of May 14, 1996, arguing that the circumstances of these cases required the performance of certain tasks on an emergency basis which took precedence over the preparation and filing of a retention application. STB asserts in the fee application that these circumstances were beyond its control and, therefore, *nunc pro tunc* appointment to May 14, 1996 is justified. STB further asserts that the blended rate for all professionals and paraprofessionals who rendered services during the first interim fee period was \$177.36, and that approximately 6.5% of the time billed was attributable to members of the firm, as compared to 33.3% for associates and 60.2% for paraprofessionals. STB also responded to the concerns of the UST in a response filed on April 23, 1997. In that response, STB asserts that the UST Guidelines are non-mandatory in nature, and that nonetheless the fee application contains substantially all of the information referred to by the Guidelines. STB also addressed the individual concerns of the UST, which shall not be restated here.

² The "Initial Debtors" include The Bennett Funding Group, Inc., Bennett Receivables Corp., Bennett Receivables Corp. II, and Bennett Management and Development Corp.

DISCUSSION

Code § 327(a) authorizes a trustee to employ one or more professionals, including attorneys and accountants, with the bankruptcy court's approval. 11 U.S.C. § 327(a). Authority for compensating such professionals is found in sections 330 and 331 of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code"), which permit the court to award reasonable compensation to a professional employed under Code § 327. Prior to any award of interim or final compensation however, a professional's employment must be formally approved by the bankruptcy court. This approval generally must occur before any compensable services are rendered to the estate. *See In re Rainbow Press of Fredonia*, 197 B.R. 428, 429 (Bankr. W.D.N.Y. 1996); *In re 245 Assocs., LLC*, 188 B.R. 743, 749 (Bankr. S.D.N.Y. 1995); *In re Sapolin Paints, Inc.*, 38 B.R. 807, 817 (Bankr. E.D.N.Y. 1984). This is true regardless of whether any pre-approval services were rendered in good faith and were beneficial to the estate. *See Sapolin*, 38 B.R. at 817.

In ruling on STB's first interim fee application for the Initial Debtors, the Court continued to recognize only the "excusable neglect" or "unavoidable hardship" exception to the "per se" rule in the Second Circuit which requires court approval of a professional prior to the performance of any compensable services to a debtor. *See In re the Bennett Funding Group, Inc.*, No. 96-61376, slip op. at 10-14 (Bankr. N.D.N.Y. Feb. 5, 1997) (hereinafter referred to as "Memorandum-Decision dated February 5, 1997"). In that Decision, however, the Court found that STB satisfied the exception due to the unique and extraordinary circumstances of the cases and in light of the relatively insignificant delay in seeking Court approval. *See id.* at 13. In contrast there was a delay of more than a week after the Trustee was appointed before the

application to employ STB was filed with the Court. In addition to this delay, the Court finds that the unique and extraordinary circumstances regarding STB's employment in the Initial Debtors cases did not exist in the Aloha Debtors cases. By April 26, 1996, all four Aloha Debtors were in bankruptcy, and STB was already heavily involved in unraveling the complex web of relationships by virtue of its work relating to the Initial Debtors. Part of the rationale justifying STB's *nunc pro tunc* appointment in the Initial Debtors cases was that STB had to take immediate action after the Trustee's appointment was approved by the Court on April 18, 1996 in order to preserve the rights and interests of the estates. STB's appointment was relatively sudden and it was forced to address many issues on an emergency basis. By the time the Trustee's appointment was approved in the Aloha Debtors cases, almost one month later, he should have been prepared to submit a retention application without delay. The Trustee was no doubt aware of his intention to retain STB as counsel in the Aloha Debtors cases since it was already performing work on behalf of the Initial Debtors. In light of the foregoing, the Court cannot find that STB satisfies the excusable neglect or unavoidable hardship exception to the "*per se*" rule in the Second Circuit. *See* Memorandum-Decision dated February 5, 1997, at 10-11.

The Court will authorize STB's employment as of the date that the application seeking their employment was first filed with the Court, however, rather than on the date the Order approving their appointment was signed. Therefore, STB's employment is effective as of May 22, 1996, and work performed and expenses incurred on behalf of the Aloha Debtors prior to this date shall not be compensable.

After reviewing the time entries in the fee application, the Court finds that the amount of \$9,886.50 represents billings for services prior to May 22, 1996, and therefore this amount shall

be disallowed from the fee request. In addition, the Court has located fees amounting to more than \$22,000 for services which arguably should be more properly categorized as administrative or clerical. The Court does recognize, as it did in a prior Decision relating to STB's interim fee application for the Initial Debtors, that some services which may appear clerical on their face actually demand skilled paraprofessional attention, and thus total disallowance of such services would be improper. *See* Memorandum-Decision dated February 5, 1997, at 23. Therefore, the Court shall disallow \$11,000 in fees which are clerical or administrative in nature.

Although preparation of fee applications is a compensable service, *see id.* at 25, reasonable limits may be placed on compensation for such work. The Court shall allow \$1,500 for the preparation of the fee application, and the remainder of \$586 shall be disallowed. In addition, the sum of \$1,562.50 shall be disallowed based on duplication of services through multiple attendance at events.

Lastly, the sum of \$30 shall be disallowed from the requested expenses as wordprocessing is not a separately compensable service. *See* Memorandum-Decision dated February 5, 1997, at 24.

Regarding STB's compliance with the UST Guidelines, the Court finds that STB has substantially complied with the requirements set forth therein. The Court does agree that project categories are not set forth in the application, however, and that such categories are of assistance to the Court when reviewing fee applications. As noted by STB, in accordance with the Order appointing the Fee Auditor in the Initial Debtors cases, STB began recording time in project billing categories as of November 4, 1996. Without passing upon STB's contention that the UST Guidelines are not mandatory, future fee applications will comply with the project billing format,

and the Court will not require that STB classify work in project categories prior to the date of this Order unless good cause is shown in the future as to why such classification is essential in these cases.

Based on the foregoing, it is

ORDERED that the fees and expenses requested by STB in its first interim fee application for the Aloha Debtors are disallowed as detailed above, and are allowed in the amount of \$101,824 in fees and \$567 in expenses; and it is

ORDERED that the above allowed fees shall be reduced by \$50,000 based upon the provisional awards already granted to STB by the Court at the hearing on April 24, 1997; and it is further

ORDERED that payment of the allowed fees and expenses, including any unpaid portion of the abovementioned provisional awards, shall not be made from encumbered assets of these estates.

Dated at Utica, New York

this 7th day of May 1997

STEPHEN D. GERLING
Chief U. S. Bankruptcy Judge