

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

THE BENNETT FUNDING GROUP, INC.

Debtors

CASE NO. 96-61376

Chapter 11

Substantively Consolidated

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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 considers herein the Third Interim Fee Application of Coopers & Lybrand, LLP (“C&L”), accountant and financial advisor to Richard C. Breeden as trustee in these cases (“Trustee”), filed on June 30, 1997. The application seeks payment of professional fees in the amount of \$180,359 and reimbursement of expenses in the amount of \$11,122 pursuant to sections 330 and 331 of the United States Bankruptcy Code (11 U.S.C. §§ 101-1330) (“Code”) and Rule 2016 of the Federal Rules of Bankruptcy Procedure. A preliminary hearing on the

application was held on August 12, 1997, at which time the Court awarded C&L a provisional award of \$100,000 in fees and \$5,000 in expenses. The matter was retained by the Court for further consideration as to the balance of any interim fee award on that date.

### JURISDICTIONAL STATEMENT

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

### FACTS AND ARGUMENTS

The Court previously entered two Memorandum-Decisions, Findings of Fact, Conclusions of Law and Order (“Memo-Decisions and Orders”) in the jointly administered case in connection with C&L’s first two fee applications. Familiarity with those two Memo-Decisions and Orders is presumed and they will be referenced herein only to the extent necessary.

The fee application *sub judice* was submitted by C&L for work completed solely on behalf of the Aloha Debtors during the period from December 1, 1996 through April 30, 1997. On July 25, 1997, the Bennett and Aloha Debtors’ cases were substantively consolidated.

According to the detailed narrative supporting the fee application, C&L performed a number of services during this period, including business operations and analysis, case administration, bank settlements, litigation consulting, taxes, fraud investigation/review, asset analysis and fee employment/application.

C&L points out that the number of its personnel dedicated to this assignment on a full time basis has declined steadily since January 1997 to the point where none of its personnel is working exclusively on these cases. C&L further notes that it has voluntarily reduced its billing for the period covered by the instant application by \$20,779 in fees and \$4,188 in disbursements.

### DISCUSSION

A bankruptcy court has an affirmative obligation to examine fees and expenses even if no objection has been made. *See In re Ferkauf, Inc.*, 42 B.R. 852, 853 (Bankr. S.D.N.Y. 1984), *aff'd*, 56 B.R. 774 (S.D.N.Y. 1985); *In re Copeland*, 154 B.R. 693, 697 (Bankr. W.D. Mich. 1993); *In re J.F. Wagners & Sons Co.*, 135 B.R. 264, 266 (Bankr. W.D. Ky. 1991). Code § 330 requires that authorized professionals demonstrate that their services were actual, necessary and reasonable, and it is the Court's duty to independently examine the reasonableness of the fees requested.<sup>1</sup> *See In re Keene Corp.*, 205 B.R. 690, 695 (Bankr. S.D.N.Y. 1997); *In re Spanjer Bros., Inc.*, 191 B.R. 738, 747 (Bankr. N.D. Ill. 1996); *Ferkauf*, 42 B.R. at 853. Accounting firms rendering services in a bankruptcy case must also meet this standard. *See In re Kenneth Leventhal & Co.*, 19 F.3d 1174, 1177 (7th Cir. 1994). The applicant bears the burden of proving that the services rendered were actual and necessary and that the compensation sought is reasonable. *See Brake v. Tavormina (In re Beverly Mfg. Corp.)*, 841 F.2d 365, 370 (11th Cir.

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<sup>1</sup> Interim fee applications submitted pursuant to Code § 331 are judged under the same standards as final applications under Code § 330. *See In re CF & I Fabricators of Utah, Inc.*, 131 B.R. 474, 482 (Bankr. D. Utah 1991); *In re RBS Indus., Inc.*, 104 B.R. 579, 581 (Bankr. D. Conn. 1989).

1988); *In re Navis Realty*, 126 B.R. 137, 145 (Bankr. E.D.N.Y. 1991).

Reasonable fees are in part determined by calculating the “lodestar” figure, which is derived by multiplying the number of hours reasonably expended by a reasonable hourly rate. *See Blanchard v. Bergeron*, 489 U.S. 87, 94, 109 S. Ct. 939, 944-45, 103 L. Ed.2d 67 (1989); *Luciano v. Olsten Corp.*, 109 F.3d 111, 115 (2d Cir. 1997); *Cruz v. Local Union No. 3 of the Int’l Bhd. of Elec. Workers*, 34 F.3d 1148, 1159 (2d Cir. 1994); *In re Drexel Burnham Lambert Group, Inc.*, 133 B.R. 13, 17 (Bankr. S.D.N.Y. 1991). The lodestar amount should be comparable with rates prevailing in the district in which the court sits for similar services by professionals of reasonably comparable skill, experience and reputation. *See Blum v. Stenson*, 465 U.S. 886, 896 n.11, 104 S. Ct. 1541, 1547 n.11, 79 L. Ed.2d 891 (1984); *Olsten Corp.*, 109 F.3d at 115; *Polk v. New York State Dep’t of Correctional Servs.*, 722 F.2d 23, 25 (2d Cir. 1983). An exception to the standard of compensating out-of-town professionals at rates prevailing in the district may be found when such professionals are necessarily employed. *See In re Victory Markets, Inc.*, No. 95-63366, slip op. at 6 (Bankr. N.D.N.Y. Nov. 7, 1996); *In re ICS Cybernetics, Inc.*, 97 B.R. 736, 740 (Bankr. N.D.N.Y. 1989) (recognizing exception but finding no substantial disparity between rates charged in Buffalo, New York as compared to Syracuse, New York); *In re S.T.N. Enters., Inc.*, 70 B.R. 823, 843 (Bankr. D. Vt. 1987) (indicating that in complex cases of national scope, rates of nationally prominent, out-of-state firms may apply). The Court has already indicated that C&L’s billing rates may be applied in this case. *See In re The Bennett Funding Group, Inc.*, No. 96-61376, slip op. at 31 (Bankr. N.D.N.Y. February 5, 1997). However, C&L has agreed to cap its blended hourly rate at \$250 per hour, and C&L must still demonstrate that the compensation requested is reasonable and that its services were actual, necessary and reasonable.

Determination of the lodestar figure does not end the inquiry of whether fees are reasonable. *See Hensley v. Eckerhart*, 461 U.S. 424, 433-34, 103 S. Ct. 1933, 1939-40, 76 L. Ed.2d 40 (1983). A fee application is to be examined by the court with a consideration of the value of the work performed to the client's case. *See DiFilippo v. Morizio*, 759 F.2d 231, 235 (2d Cir. 1985). If the expenditure of time is deemed to be unreasonable, such hours should be eliminated from the lodestar calculation. *See Hensley*, 461 U.S. at 434, 103 S. Ct. at 1939-40. In calculating a fee computation, the court may make an across-the-board reduction in the amount of hours billed based upon a finding of excessive or unreasonable hours. *See In re "Agent Orange" Prod. Liab. Litigation*, 818 F.2d 226, 237-38 (2d Cir. 1987); *New York Ass'n for Retarded Children v. Carey*, 711 F.2d 1136, 1146 (2d Cir. 1983); *see also U.S. Equal Employment Opportunity Commission v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1288 (7th Cir. 1995); *Ohio-Sealy Mattress Manuf. Co. v. Sealy, Inc.*, 776 F.2d 646, 658 (7th Cir. 1985). Furthermore, the lodestar figure may be reduced for over staffing and duplicative or inefficient work. *See Agent Orange*, 818 F.2d at 237; *Siegel v. Merrick*, 619 F.2d 160, 164 n.9 (2d Cir. 1980). Across-the-board percentage reductions are appropriate to use in cases where fee applications are voluminous and numerous. *See Agent Orange*, 818 F.2d at 238. In such cases, "no item-by-item accounting of the hours disallowed is necessary or desirable." *See id.* (citing *Ohio-Sealy*, 776 F.2d at 658).

With the foregoing principles in mind, the Court shall address the services provided and the fees requested in C&L's Third Interim Fee Application for the Aloha Debtors.

The Third Interim Fee Application represents a significant reduction in time devoted to the Aloha Debtors' cases. As indicated C&L notes that "no Coopers employee is presently

working exclusively on the engagement.” (See Third Interim Fee Application at ¶ 49).

C&L also notes that it has voluntarily reduced the Third Interim Fee Application from 754 hours, \$201,138, to 713 hours, \$180,359. (See Third Interim Fee Application at ¶ 54). It has also voluntarily reduced its billings for costs and expenses by \$4,188. (*Id.* at ¶ 55). Nevertheless, there are entries in C&L’s time records which the Court finds questionable within the guidelines imposed by Code § 330. The Court notes that between December 5, 1996 and January 6, 1997, two C&L individuals, Manny Alas, a partner, and Rob Darefsky, a director, billed \$6,759.50 in reviewing and analyzing the Debtors’ October and November 1996 operating reports. In addition, C&L seeks an additional \$1,330 for time consumed by Alas and Paul Atkins, also a C&L partner, discussing the continued employment of a “J. Root,” presumably an employee of one of the Aloha Debtors.

Also, in the Third Interim Fee Application, the Court notes that two members of the C&L staff are performing functions that do not appear to be altogether essential to the assigned task. Both Narendra Ganti and Matthew Shelhorse appear to primarily review and analyze the work of others. Between the two their time represents 242.6 hours, commanding fees of \$54,585, or approximately 30% of the entire Interim Application. The Court is unable to accept the need for such expensive oversight, either of data provided by the Aloha Debtors or the work performed by other members of the C&L staff.

Accordingly, the Court will reduce the Atkins, Alas, Darefsky fee allocation by 50% or \$4,044.75 and the Ganti, Shelhorse fee allocation by 25% or \$13,646.25.

Finally, the Court notes that the third Interim Fee Application contains approximately \$16,000 for services related to preparation of fee applications. C&L points out that in order to

bring these fees within a so-called "5% cap," it has voluntarily reduced its fees by \$6,616. However, as indicated in this Court's Memorandum-Decision, Findings of Fact, Conclusions of Law and Order dated April 13, 1998 ("Memo-Decision of April 13, 1998"), which determined C&L's Third Interim Fee Application in the Bennett cases, the Court will approve only 3% of the amount requested for the preparation and defense of a particular fee application. Here the allowed amount would be \$480, resulting in a further fee reduction for services rendered in connection with preparation of fee applications of \$8,900.<sup>2</sup>

Turning to C&L expenses, the Court again acknowledges a voluntary reduction of \$4,188 "representing the unbilled cost for telephone, copying, facsimile and postage, as well as a voluntary cap on expenses incurred by Coopers Staff." (See Third Interim Application at ¶ 55). C&L does, however, seek reimbursement of \$11,122.

The Court notes that as in the case of its Third Interim Fee Application in the Bennett cases, there are unreceipted expenses allocated to the Aloha cases in the sum of \$449.86. Thus, the Court will make that single adjustment to C&L's expenses.

Based on the foregoing, the Court approves C&L's Third Interim Fee Application for the Aloha Debtors in the amount of \$153,768 in fees and \$10,672.14 in expenses. Crediting the Trustee in the cases with the \$105,000 provisional award previously granted, C&L shall recover the remaining \$53,768 in fees and \$5,672.14 in expenses.

IT IS SO ORDERED.

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<sup>2</sup> As indicated in the Memo-Decision of April 13, 1998, the Court would consider a supplementary request by C&L for reimbursement of the reasonable attorney's fees of outside counsel retained to represent it in connection with this Third Interim Application.

Dated at Utica, New York

this 12th day of June 1998

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge