

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

HOTEL SYRACUSE, INC.

Debtor

CASE NO. 90-02921

Chapter 11

APPEARANCES:

SHAW, LICITRA, PARENTE,
ESERNIO & SCHWARTZ, P.C.
1010 Franklin Avenue
Garden City, New York 11530

STUART I. GORDON, ESQ.
Of Counsel

HAROLD P. GOLDBERG, ESQ.
Attorney for Creditors' Committee
1408 W. Genesee Street
Syracuse, New York 13202

RICHARD CROAK, ESQ.
Office of U.S. Trustee
10 Broad Street
Utica, New York 13501

MENTER, RUDIN & TRIVELPIECE, P.C.
Attorneys for Manufacturers
Hanover Trust Co.
500 South Salina Street
Syracuse, New York 13202

JEFFREY DOVE, ESQ.
Of Counsel

HISCOCK & BARCLAY, ESQS.
Attorneys for City of
Syracuse, et al
Financial Plaza
Syracuse, New York 13202

ROBERT BARRER, ESQ.
Of Counsel

ANTHONY J. FAZIO, ESQ.
Attorney for Niagara Mohawk
Power Corporation
300 Erie Boulevard W. A-3
Syracuse, New York 13202

STEPHEN D. GERLING, U.S. Bankruptcy Judge

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

The Court considers herein pursuant to 11 U.S.C. §330, the Application for Third and Final Allowance ("Final Application") filed by Shaw, Licitra, Parente, Esernio & Schwartz, P.C. ("Shaw, Licitra"), Debtor's attorneys, filed June 14, 1993.

The Final Application seeks a fee of \$667,995 and reimbursement of expenses in the sum of \$41,638.67 for the period October 1, 1991 through May 18, 1993. Additionally, the Final Application sought a fee of \$50,000 for

anticipated fees and expenses for the period May 19, 1993 through the effective date of debtor's Plan of reorganization.¹ Shaw, Licitra also seeks final approval of compensation sought by way of its Second Interim Application in the sum of \$245,665, plus disbursements of \$19,349.23. That compensation was previously withheld pursuant to the Memorandum-Decision, Findings of Fact, Conclusions of Law and Order dated October 7, 1992 ("October 7, 1992 Order").

Finally, Shaw, Licitra seeks payment of the unpaid balance of its First Interim Fee Application which this Court approved by Order dated May 10, 1991. The unpaid balance is \$69,336.25.

A hearing on the Final Application took place at a motion term of this Court held at Syracuse, New York on June 29, 1993.

The only objection to the Final Application was filed by the United States Trustee ("UST").

FACTS

Shaw, Licitra was appointed to act as Debtor's counsel by virtue of an Order executed by the Honorable Cornelius Blackshear, United States Bankruptcy Judge, on November 13, 1990, with appointment effective October 26, 1990.

This Chapter 11 case, after a stormy and litigious history, finally reached its goal, a confirmed Plan of Reorganization, on June 17, 1993.

As indicated, this is Shaw, Licitra's Third and Final Fee Application and if approved, will result in total compensation to that firm for its services rendered in connection with the Chapter 11 case during the period October 26, 1990 through June 22, 1993 in an amount of approximately one million dollars.

ARGUMENTS

The UST raises several objections to the Final Application. First,

¹ On June 25, 1993, Shaw, Licitra filed a Supplemental Affidavit in which it requested an actual rather than an anticipated fee of \$122,487.50 and disbursements of \$6,928.26 covering the so-called Final Period from May 19, 1993 through June 22, 1993.

the UST contends that he was given less than twenty days notice of the Final Application and has been unable to adequately review an application of this magnitude. In this regard, the UST seeks an evidentiary hearing on the Final Application. Second, the UST notes that Shaw, Licitra is billing its travel time at its full hourly rate rather than at one-half the hourly rate, as permitted by this Court. Third, the UST objects to Shaw, Licitra's "lumping" of its services under one time entry, which appears to include office meetings involving several Shaw, Licitra attorneys, all of whom separately bill for their meeting time.

Finally, and perhaps most significantly, the UST contends that Shaw, Licitra is still billing the Debtor's estate for services rendered to Debtor's principal, Joseph M. Murphy, Sr., in violation of this Court's prior Order of October 7, 1992.

Shaw, Licitra has responded to the UST's objections by pointing out that it complied with this Court's Order of June 2, 1993, which among other things, fixed June 29, 1993 as the date for a hearing on the Final Application and required Shaw, Licitra to give notice of the hearing by June 3, 1993, even though the actual Final Application was not filed with the Clerk of this Court until June 14, 1993, in accordance with the June 2nd Order.

In response to the UST's travel time objection, Shaw, Licitra concedes that its travel time from Court is compensable at one-half its hourly rate, but in travelling to Court, presumably by air, it should be permitted its full hourly rate since that time was spent preparing for whatever hearing or meeting its attorneys were attending. Consequently, Shaw, Licitra has voluntarily reduced its total unapproved fee request by \$18,250, which represents travel time from Court at one-half of the applicable hourly rate.

Shaw, Licitra defends its billing for several partners and associates attending the same meetings by pointing to the difficulty encountered with the case, and the almost constant litigation involving the Debtor. In its defense, it asserts that every effort was made to delegate matters to junior associates.

Lastly, Shaw, Licitra contends that in accordance with this Court's October 7, 1992 Order, it has not personally represented Joseph M. Murphy, Sr. Additionally, Shaw, Licitra points out that even though Murphy may have personally benefitted from the Debtor's reorganization, the Plan was

overwhelmingly accepted by Debtor's creditors.

DISCUSSION

While all of the UST's objections to the fee application have merit, the Court will focus only on the objections which it concludes might mandate an adjustment in the Final Application.

The timely notice objection would appear to be negated by Shaw, Licitra's compliance with the Court's June 2, 1993 Order. Additionally, the Court concludes that no purpose beneficial to creditors would be served by an evidentiary hearing to scrutinize the Final Application. The Court believes that it is able to pass upon the merits of the Final Application with the documentation presently before it.

With regard to the travel time billing, the Court believes that Shaw, Licitra's voluntary reduction of some \$18,250 for travel time from Court is appropriate and the Court will make no further adjustment for travel time.

The UST's objection to Shaw, Licitra's practice of billing for meeting time of several of its partners and associates is generally well taken and has been embraced by this Court in other Chapter 11 cases on the strength of In re Adventist Living Centers, Inc., 137 B.R. 692, 697 (Bankr. N.D.Ill. 1991). However, the Court, in its review of Shaw, Licitra's time records, does not conclude that the various participants in the numerous meetings could be said to be "passive participants in so-called "up-date conferences", in light of the continuous and diverse litigation that has been a hallmark of this case from mid-1991 onward. Thus, the Court will make no adjustment with regard to the allegedly "passive" meeting time.

The Court does, however, agree with the UST that within the Final Application, Shaw, Licitra seeks compensation for services that were of direct benefit to Joseph M. Murphy, Sr. and Joseph M. Murphy, Jr., and should have been provided by the Murphys' personal attorneys.

Such services are those that relate to the preparation of a stock purchase agreement negotiated between Murphy, Sr. and the so-called Bennett group, as well as the consulting agreements between both Murphys and the Bennett

group. An examination of the contemporaneous time records of Shaw, Licitra reveals that particularly during the period early March 1993 to mid-May 1993, both partners and associates were holding conferences and drafting and re-drafting the aforementioned agreements.

While it might be argued that the Debtor was the indirect beneficiary of these agreements because they were essential to the ultimate "take-over" of the Debtor by the Bennett group, pursuant to the confirmed Plan of Reorganization, the agreements nevertheless directly benefitted the Murphys and the negotiation of those agreements should have been handled by the Murphys' personal attorneys and the services billed to them by those attorneys, particularly in light of this Court's direction in its October 7, 1992 Order regarding a conflict of interest. Such fees are an inappropriate expense of the Debtor and should not be borne by it or its creditors, even though Shaw, Licitra points out that since this is not a so-called "pot" plan, unsecured creditors will not be adversely affected by its fees.

The Court will disallow a total of 100.55 hours which have been billed at the varying hourly rates of partners, J. Stanley Shaw, and Stuart I. Gordon, associates Ann Marie Curd, and Sonya Lorge, and Victor G. Beaudat, of counsel. Such disallowance results in a fee reduction of \$22,312.50.

Further, the Court notes an error in the total hourly computation for the same period. Shaw, Licitra computes the total of all hours for the period at 2,998.75 hours, while the actual time records reflect a total of 2,896.55 hours, or a difference of 102.2 hours. Since the Court is unable to determine the source or sources of the additional undocumented hours, without examining the day by day documented total of each member of the firm, and then comparing it to the total claimed hours for each member or associate of the firm, the Court will simply apply a "blended" rate of \$195.00 per hour to those undocumented hours and further reduce the final application by \$19,929.00.

To summarize with regard to the foregoing, the Court will reduce that portion of the Final Application that covers the period October 1, 1991 through May 18, 1993 by a total of \$60,491.50 (\$18,250 + \$22,312.50 + \$19,929.00).

Turning to the reimbursement of expenses, the UST contends that the Final Application does not comply with Rule 17(b) of the Local Rules of this

Court which requires specific itemization of disbursements. A review of the disbursement record supporting the period October 1, 1991 through May 18, 1993, appears, with one exception, to itemize expenses adequately. With regard to the category "Photocopies" for which Shaw, Licitra seek reimbursement of \$15,601.03, there is a less than complete indication that the photocopy expense is reimbursable pursuant to Local Rule 17(b)(3). It appears, however that on June 24, 1993 Shaw Licitra filed Appendix D to the Final Application entitled "Revised Summary of Disbursements" in which an adequate explanation of "Photocopies" is provided and the Court will not deny reimbursement.

Thus, the Court will approve full reimbursement of all expenses for the period October 1, 1991 through May 18, 1993 in the sum of \$41,638.67.

Turning to the Supplemental Affidavit in support of the Final Application filed by Shaw, Licitra on June 25, 1993, the Court notes that the it was intended to supersede that portion of the Final Application that sought an estimated fee of \$50,000 for services to be rendered after May 19, 1993 and through June 22, 1993. As indicated, the Supplemental Affidavit reflects an actual fee for the latest time period of \$122,487.50, together with \$6,928.26 in disbursements.

Upon review of the time records attached to the Supplemental Affidavit, the Court will approve a fee of \$122,487.50 and will approve full reimbursement of expenses in the sum of \$6,928.26.

Finally, the Court is asked to approve Shaw, Licitra's Second Interim Fee Application ("Second Application") which it refused to fully consider, as explained in its Order of October 7, 1992. In that Order, this Court concluded that a very real conflict of interest existed in that Shaw, Licitra was representing both the Debtor and Joseph M. Murphy, Sr., personally; that such dual representation had not been adequately disclosed to creditors and that such a conflict might result in a denial of the Second Application entirely and disgorgement of any fees already paid. This Court then ordered Shaw, Licitra to "immediately cease all representation of Murphy, Sr., either individually or on behalf of any entity of which he is a principal, officer, director, stockholder or partner, excepting, of course, the Debtor herein." (See Order of October 7, 1993 at pg. 11). Thereafter, Shaw, Licitra provided the Court with purported

proof that it was no longer representing Murphy, Sr. personally.

In addition, to the conflict of interest concern, the Court also withheld approval of the Second Application due to a pending motion for summary judgment in an adversary proceeding and a pending motion by the UST to dismiss or convert the Chapter 11 case.

While the Court does not believe that the end result ever justifies use of improper means, it appears that none of the creditors, with the exception of the UST, who also raised the conflict of interest objection to the Second Application, sought to reiterate that objection at the June 29, 1993 hearing on the Final Application, presumably due to the successful confirmation of the Debtor's Reorganization Plan.

The Court notes that Shaw, Licitra has had a difficult time throughout this case in distinguishing representation of the Debtor from representation of Murphy, Sr., even as late as the spring of 1993, when it was negotiating Murphy's stock purchase agreement and consulting agreements with the Bennett group.

The Court must conclude, however, that upon a hindsight review of the long and stormy history of this Chapter 11 case, it does not appear that Shaw, Licitra's conduct was such that it rendered legal services that were at odds with the best interest of the Debtor and its creditors, though those services may have also benefitted the Murphys personally. Thus, the Court finds no basis to require a denial of compensation sought by way of the Applications presently before the Court nor the disgorgement of compensation previously approved as a consequence of any dual representation.

With regard to the Second Application, however, the Court finds the objection of the City of Syracuse and others to the payment for services rendered in connection with the action commenced against it and others, in the District Court, to be valid. The Order of this Court dated September 11, 1991, which authorized that action to be commenced and appointed Shaw, Licitra to commence it, clearly provided for a one-third contingency fee.

Thus, the Court will reduce the Second Application by \$5,065 for services rendered in connection with that action which was ultimately dismissed by the District Court. The Court also notes an additional 9 hours or \$1,575

included in the Final Application period attributable to the same litigation and those hours are likewise disallowed. The Court makes no adjustment to disbursements incurred in connection with that action.

Shaw, Licitra seeks some \$19,349.23 in reimbursement of expenses in connection with the Second Application which the Court will approve in their entirety.

The last request before the Court on June 29, 1993 asked the Court to direct payment of the unpaid balance of Shaw, Licitra's First Interim Allowance, which was approved by Order dated May 10, 1991. While the Court believes any such direction to the Debtor to be superfluous in light of its May 1991 Order, it will in fact direct the Debtor to pay the \$69,336.25 unpaid balance of that award.

To summarize, the court approves the fee and disbursement requests of Shaw, Licitra as follows:

<u>Second Interim Application</u>	<u>Fee</u>	<u>Disbursements</u>
(3/1/91 - 9/30/91)	\$240,600.00	\$19,349.23
<u>Third & Final Application</u>		
(10/1/91 - 5/18/93)	\$605,928.50	\$41,638.69
<u>Supplemental Affidavit</u>		
(5/19/93 - 6/18/93)	\$122,487.50	\$ 6,928.26
	\$969,016.00	\$67,916.16

IT IS SO ORDERED.

Dated at Utica, New York
this day of August, 1993

STEPHEN D. GERLING
U.S. Bankruptcy Judge

