UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

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 Second 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 February 28, 1997. The application seeks payment of professional fees in the amount of $994,775 and reimbursement of expenses in the amount of $66,952 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 April 24, 1997, at which time the Court awarded C&L a provisional award of $400,000. Argument on the application was heard on May 8, 1997, and the matter was submitted for decision 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

On March 29, 1996, chapter 11 petitions were filed in this Court for The Bennett Funding Group, Inc., Bennett Receivables Corp., Bennett Receivables Corp. II, and Bennett Management and Development Corp. ("Bennett Debtors"). On April 18, 1996, the Trustee was appointed for the Bennett Debtors, and on June 21, 1996 the Court entered an order authorizing the retention of C&L as accountant and financial advisor to the Bennett Debtors.

On April 19, 1996, chapter 11 petitions were filed by American Marine International, Inc., and Resort Service Company, Inc. Thereafter, an involuntary case was filed against Aloha Capital Corp., followed by a voluntary filing by The Processing Center, Inc. (collectively, the "Aloha Debtors"). The Trustee's appointment in the Aloha Debtors cases was approved by the

Court on May 15, 1996, and C&L's retention in those cases was approved on July 9, 1996.

The fee application *sub judice* was submitted by C&L for work completed on behalf of the Aloha Debtors during the period from July 16, 1996 through November 30, 1996. On July 25, 1997, after the fee application was filed, the Bennett and Aloha Debtors' cases were substantively consolidated. This Court recently entered a decision addressing C&L's Second Interim Fee Application for the Bennett Debtors. *See In re The Bennett Funding Group, Inc.*, No. 96-61376 (Bankr. N.D.N.Y. August 13, 1997) ("Bennett Fee Decision"). Familiarity with that decision is presumed and it shall be referenced herein to the extent necessary.

According to the detailed narrative supporting the fee application, C&L performed a number of services during this period, including assisting the Trustee in day-to-day activities, review of the Debtors' prepetition books and records, analysis of leases and other potential assets, and preparation of Monthly Operating Reports, Schedules of Assets and Liabilities, and Statements of Financial Affairs.

The fee application contains time entries for work performed on behalf of the specific Aloha Debtors, as well as time entries found in a general "Bennett Bankruptcy" category, which C&L has previously explained contains entries for services which could not be specifically allocated to either the Bennett or Aloha Debtors. Instead, C&L has apportioned a percentage of "Bennett Bankruptcy" fees to the Bennett Debtors and a percentage to the Aloha Debtors. Expenses incurred by C&L are also allocated in this fashion.[1]

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[1] Exhibit E to the application contains a summary of expenses incurred and the amounts allocable to the Aloha Debtors. Due to the magnitude of the actual expense detail and receipt documentation, these documents were included only in Exhibit F to C&L's Second Interim Fee Application for the Bennett Debtors. The Court shall refer to that exhibit as necessary.

The Court did not receive any formal written objections to the fee application *sub judice*.

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.[2] *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. 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.

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[2] 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).

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; *Siegal 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 Second Interim Fee Application for the Aloha Debtors

Initially, the Court finds that a number of entries relate to the performance of what may be viewed as day-to-day activities normally performed by the Debtor. While it is understandable that these tasks may have been assumed by C&L when it was appointed, the basis for billing substantial hourly rates to perform these tasks is less than clear. Other activities relate to tasks which could be performed by secretarial or other qualified administrative personnel. Such

activities include assembling binders and documents to be filed, printing financial statements, coordinating and supervising the binding of reports, printing cover letters, and proofreading and copying documents.

The Court also observed some instances of what appear to be duplicate billing entries. Such entries contain an exact duplicate description of work performed on the same day for the same amount of time. *See, e.g.*, Second Interim Fee Application, at: Goodman, 8/27/96, 8/28/96; Jones, 7/29/96. Without further information, the Court must assume that such entries are inadvertent and therefore shall be disallowed. One instance of travel time at normal hourly rates was noted, and this amount shall be reduced by 50% in accordance with this Court's prior rulings with respect to travel time. *See id.* at Au, 9/24/96. Furthermore, there were billing entries by some professionals which reflect fees for numerous meetings or preparation for meetings. It is the Court's opinion that some of these meetings reflect "getting up to speed" time or represent training time at the expense of the estate. Fees for such entries shall therefore be partially reduced.

Based on the foregoing observations, the Court shall disallow $29,665 from the fees attributable directly to services performed on behalf of the Aloha debtors.

As discussed earlier, C&L also allocated a percentage of the fees attributed to "Bennett Bankruptcy" matters to the Aloha debtors, which in this case is 24.16%. In order to appropriately address reductions in fees in this category, the Court refers to its conclusions in the decision relating to C&L's Second Interim Fee Application for the Bennett debtors. In the Bennett Fee Decision, the Court made a number of reductions in fees, including fees relating to clerical and administrative tasks and fee application preparation. Since the allocation of Bennett Bankruptcy

matters is based on a percentage attribution, the Court shall apply the appropriate percentage reduction found in the Bennett Decision to the Bennett Bankruptcy fees attributable to the Aloha debtors.[3] Reference to the Report of the Fee Auditor addressing C&L's Second Interim Fee Application for the Bennett debtors will be made in order to locate previously challenged entries.

As to administrative tasks in Exhibit D of the Report, the Court disallowed 70% of the fees associated with 46 challenged entries. Of these 46, 31 entries were labeled as "Bennett Bankruptcy" matters for which a 70% reduction was made only to the allocated fees (those fees relating to the Bennett Debtors as opposed to the Aloha Debtors). Therefore, the Court shall make a 70% reduction in fees for those 31 challenged entries only as they relate to the fees allocated to the Aloha Debtors. Based on this formula, the Court disallows $1,499.25 in administrative tasks in the fee application *sub judice*.

Similarly, the Court reduced by 70% entries which were found to be clerical tasks in Exhibit E of the Report. Thirty-seven of the entries related to the "Bennett Bankruptcy" matter, and utilizing the formula discussed above, the Court disallows $1,642.07 in clerical task fees attributable to the Aloha Debtors.

Exhibit F of the Report contained time entries which were related to work performed by C&L staff for the Trustee. The Court noted that many entries appeared to be clerical in nature,

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[3] This shall be accomplished by taking the total unallocated amounts in disallowed or reduced fee entries relating to Bennett Bankruptcy matters and subtracting the total corresponding allocated amounts which were attributable to the Bennett debtors. The resulting figure will represent that portion of fees for disallowed or reduced Bennett Bankruptcy entries which has not been addressed by the Bennett Fee Decision, but for which reductions are due in this Decision relating to the Aloha debtors. Taking the appropriate reduction in each category from the Bennett Fee Decision, the Court will apply the same reduction to Bennett Bankruptcy matter fees which are attributable to the Aloha debtors.

and that it seemed that one employee acted as an administrative assistant to the Trustee during this time. Based on those observations the Court disallowed 50% of the billed fees. An overwhelming majority of these entries were billed to the Bennett Bankruptcy matter. The total amount of fees billed in this Exhibit amounted to 28,822.50, of which 22,954.88 was attributable to the Bennett Debtors. Applying the 50% reduction in fees to the difference between the total amount billed and the amount attributable to the Bennett Debtors, the Court shall disallow 50% of $5,867.62, or $2,933.81.

Based in part on the objections of the Official Committee of Unsecured Creditors and the United States Trustee, the Court reviewed in the Bennett Fee Decision fees which were allegedly incurred for work on day-to-day activities of the Debtors as well as for work on behalf of Resorts Funding, Inc., a non-debtor. After review of a number of categories and exhibits, the Court concluded that a 20% reduction in fees in Exhibits V-1 and V-2 was warranted. Examining those exhibits at this time to determine the fees allocable to the Aloha Debtors, the Court finds that the total unallocated fees for the Bennett Bankruptcy matter in Exhibits V-1 and V-2 amount to $33,453.50, and the amount allocated to the Bennett Debtors amounts to $25,026.57. The difference between these figures, $8,426.93, represents Bennett Bankruptcy matter fees which are allocable to the Aloha Debtors. The Court therefore shall disallow 20% of this figure, or $1,685.39.

In the Bennett Fee Decision the Court also noted the extensive billings related to conferences with non-firm personnel, and indicated that due to what the Court believed was an excessive amount of such conferences, a 30% reduction of fees in this category would be made. Examining Exhibit M of the Report once again, the Court notes a total of $97,790 in unallocated

Bennett Bankruptcy matter fees. The amount of $76,677.14 was allocated to the Bennett Debtors, thus leaving $21,112.86 allocable to the Aloha Debtors. A 30% reduction of these fees results in a disallowance of $6,333.86.[4]

In the Bennett Fee Decision, the Court reviewed a number of exhibits of the Report which categorized activities relating to fee application preparation. Based on a review of the entries in Exhibits DD-2 through DD-8, the Court concluded that $35,000 was a reasonable sum for the activities located therein, and the remaining $240,403.98 in allocated fees was disallowed. However, the total fees billed in these exhibits amounts to $352,288. If the Court were to disallow fees in excess of $35,000 in Exhibits DD-2 through DD-8, an additional $76,884.02 would be disallowed. Instead the Court shall allow C&L to receive an additional $25,000 for these tasks, and thus $51,884.02 shall be disallowed.[5]

Those expenses that were disallowed in the Bennett Fee Decision shall be disallowed in the appropriate amounts as they relate to the Aloha Debtors: Unreceipted expenses, $357; non-compensable expenses, $22.76; overhead, $227.39; overtime transportation, $111.32; amenities, $13.82; tips, $49.89; vaguely described expenses, $11.55; lunches, $572.37

Based on the foregoing, the Court approves C&L's Second Interim Fee Application for the Aloha Debtors in the amount of $899,131.60 in fees and $65,585.90 in expenses. Crediting the Trustee in the cases with the $400,000 provisional award previously granted, C&L shall

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[4] Other than reductions in fees for conference time for matters specifically attributable to the Aloha Debtors, the Court shall not make any further reductions in the unallocated portions of conference time listed in Exhibit M of the Report relating to the Bennett Fee Decision.

[5] The Court notes here that in the decisions addressing the next round of interim fee applications there will be definitive guidelines established for compensation for fee application-related activities.

recover the remaining $499,131.60 in fees and $65,585.90 in expenses.

IT IS SO ORDERED.

Dated at Utica, New York

this 18th day of December 1997

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge