UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ALOHA CAPITAL CORPORATION	CASE NO. 96-61934
AMERICAN MARINE INTERNATIONAL, LTD.	96-61829
RESORT SERVICE COMPANY, INC.	96-61830
THE PROCESSING CENTER	96-61977
	Chapter 11
Debtors	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 Coopers & Lybrand L.L.P.

("C&L"), accountants and financial advisors to Richard C. Breeden as trustee in these cases[1] ("Trustee"), which seeks payment of $564,181 in fees and $44,898 in disbursements. This fee application was filed on August 30, 1996 and scheduled for a hearing on October 10, 1996. C&L agreed to adjourn the hearing until the fee auditor appointed in the related Bennett Funding Group bankruptcy completed its review of fee applications in those jointly administered cases.[2] At the October 10, 1996 hearing, however, the Court awarded C&L provisional fees and expenses on this application in the amounts of $200,000 and $20,000, respectively. The hearings on the fee applications were thereafter adjourned until January 9, 1997, and the Court reserved decision in order to fully examine those fee applications which were subject to review by the fee auditor as well as those which were not.

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).

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[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 collectively as the "Aloha Debtors."

[2] The Bennett Funding Group bankruptcy referred to above includes the following debtors: The Bennett Funding Group, Inc. ("BFG"), Bennett Receivables Corp. ("BRC"), Bennett Receivables Corp. II ("BRC-II"), and Bennett Management and Development Corp. ("BMDC"). For purposes of identification in this Decision, these debtors shall be referred to collectively as the "Initial Debtors."

FACTS AND ARGUMENTS

The Trustee's appointment in the Aloha Debtors' cases was approved by the Court on May 15, 1996. On May 29, 1996, the Trustee filed an application on notice to employ C&L as financial advisor in these cases. A supplemental affidavit of Thomas E. Lumsden, dated June 14, 1996, was subsequently filed with the Court. A hearing on the application was held on June 20, 1996, and an order was thereafter submitted on July 9, 1996, which the Court signed the same day. C&L seeks payment of fees and expenses incurred as of April 19, 1996 through July 15, 1996.

The United States Trustee ("UST") objects to the requested fees and expenses of C&L on a number of grounds. One objection is that C&L performed work on behalf of the Securities and Exchange Commission, the Federal Bureau of Investigation and the United States Attorney, and that such work is related to the criminal investigations of these various law enforcement agencies, which is beyond the scope of C&L's employment and is not necessary to the administration of the estate. Regarding expenses, the UST objects to payment for clerical work such as answering phones and monitoring fax machines, along with other various expenses including lodging expenses greater than one hundred dollars per night in Syracuse, New York.

Objections were also filed by various banks. Some of the concerns asserted in these objections were that C&L's hourly rates are excessive in comparison to the rates charged by other accounting firms in Central New York, that the compensation sought should not be made from any encumbered funds in which the banks claim a security interest, and that C&L has not shown the benefit to the estates of many of its services, nor has any benefit inured to the banks.

C&L responds that its billing rates were properly disclosed to all parties in interest and that it should not be limited to local rates, but rather it should receive compensation in accordance with its customary market rates. C&L further argues that its application clearly details the amount, nature and extent of the work it performed, and that it generally complied with the UST Guidelines. C&L also states that it only seeks compensation from unencumbered assets.

C&L has addressed the issue of whether it should be entitled to compensation prior to the effective date of the Court's retention order, stating that it had to start performing critical, emergency services for the Trustee from the beginning of these cases. Furthermore, C&L argues that it promptly applied to the Court for retention but that the Court scheduled hearings on the Trustee's application several weeks after it was filed. In light of this C&L asserts that any delay in retention was not the fault of the firm and, therefore, it should be compensated for the work performed prior to July 9, 1996, the effective date of its retention.

DISCUSSION

Many of the issues presented by C&L's fee application for the Aloha Debtors were raised and addressed in the Decision relating to C&L's first interim fee application for the Initial Debtors. *See In re The Bennett Funding Group, Inc.*, No. 96-61376, slip op. at 1 (Bankr. N.D.N.Y. Feb. 5, 1997) (hereinafter referred to as "Memorandum-Decision dated February 5, 1997"). One issue is that in addition to work completed on behalf of ACC, AMI, RSC and TPC, C&L's fee application for the Aloha Debtors includes a general category of work labeled "Bennett Bankruptcy." According to C&L, this category consists of work completed which

could not be attributed to any particular family of debtors, and therefore C&L allocated a percentage of the total fees in this category to each family of debtors. Of the $466,759.60 billed in this category, 22.43% of this amount, $104,694.18, has been attributed to the Aloha Debtors.[3] Therefore, the Court shall apply this percentage to any disallowances made in this category in order to avoid multiple disallowances of the same fees.

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 C&L'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* Memorandum-Decision dated

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[3] The remainder is allocated as follows: Initial Debtors - 76.83%; Cordoba Corporation debtor - .73%.

February 5, 1997, at 11-12. In that Decision, however, the Court found that C&L 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 14-15. In contrast there was a delay of two weeks after the Trustee was appointed before the application to employ C&L was submitted to the Court. In addition to this delay, the Court finds that the unique and extraordinary circumstances regarding C&L'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 the Trustee's appointment was approved on May 15, 1996. At that time, C&L was already heavily involved in sorting through the web of financial transactions and relationships by virtue of its work relating to the Initial Debtors. Part of the rationale justifying C&L's *nunc pro tunc* appointment in the Initial Debtors cases was that C&L had to take immediate action to prevent unauthorized access to computers and records by Bennett family members and former employees, and both the Trustee and C&L were being exposed to these complex cases for the first time. This is not the situation in the Aloha Debtors cases. The Trustee was no doubt aware of his intention to use C&L as financial advisor in the Aloha Debtors cases since it was already performing detailed investigative work on behalf of the Initial Debtors. A delay of two weeks in submitting the application seeking Court approval of C&L while work was being performed on behalf of the Aloha Debtors is significant, and the Court cannot find that C&L 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 11-12.

C&L correctly points out that the hearing on its employment application was not held until June 20, 1996. The order appointing C&L was only received on July 9, 1996, on which date

the Court officially and formally approved C&L's employment in the Aloha Debtors cases. In light of the necessary delay resulting from giving notice of the application, the Court generally will authorize employment as of the date that the application seeking employment is first submitted to the Court, rather than on the date the order is signed. Thus, C&L's employment is effective as of May 29, 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 for the four specific Aloha Debtors, the Court finds that the amount of $90,124 represents billings for services prior to May 29, 1996 and therefore this amount shall be disallowed from the fee request. In addition, the Court finds that there are billings in the general "Bennett Bankruptcy" category which are prior to May 29, 1996, of which 22.43% are attributable to the Aloha Debtors cases. The total amount of billings in this category prior to May 29 is $214,341.80, and 22.43% of this amount, $48,076.87, shall be disallowed from the fee request.

After further review of the individual time entries for the four Aloha Debtors, the Court finds that fees amounting to $17,382.50 represent vague time entries, clerical or administrative services, and time spent detailing time and expenses. Such time entries shall be disallowed in accordance with this Court's holdings in the Decision relating to C&L's first interim fee application. *See* Memorandum-Decision dated February 5, 1997, at 16-17, 16-26, 28-29; *see also In re Poseidon Pools of America, Inc.*, 180 B.R. 718, 730, 746 (Bankr. E.D.N.Y. 1995) (discussing compensability of vague time entries and administrative services); *In re Gillett Holdings, Inc.*, 137 B.R. 475, 487-88 (Bankr. D.Colo. 1992) (discussing fees related to keeping contemporaneous time records).

C&L did not attribute expenses to the individual estates for the Initial Debtors, Aloha Debtors, or the Cordoba Corporation debtor. Instead, C&L submitted a single exhibit of expenses entitled "Bennett Bankruptcy." As with the similarly labeled fee category, entries in this exhibit are allocated by percentage to the different families of debtors. The percentage of expenses in the exhibit allocable to the Aloha Debtors is 22.43%. As discussed earlier, C&L's employment in the Aloha Debtors cases is effective as of May 29, 1996. Therefore, 22.43% of the expenses incurred prior to that date are properly denied. After review of this exhibit, the Court has located expenses totaling $84,237.69 incurred prior to May 29, 1996, and 22.43% of this amount, $18,894.51, shall be disallowed.

Regarding the concern of the UST that work performed by C&L on behalf of various federal agencies was beyond the scope of its employment, the Court deems it appropriate to reserve judgment on whether these services were necessary and actually benefitted the estates until a later point in time when the scope and results of the work performed by C&L is more fully developed.

The issue regarding the rates charged by C&L as compared to rates charged by local accounting firms was addressed in the Decision relating to C&L's first interim fee application in the Initial Debtors' cases. The Court found that C&L's employment was sought based on the complexity and magnitude of these cases and the need for extensive resources to resolve the issues presented in an expedited fashion. Based on this, it would be unduly burdensome on the firm to accept the appointment to represent the estates at "local" market rates while still incurring the costs and overhead of its particular geographic market. Therefore, C&L shall not be required to accept local rates in seeking compensation for time spent benefitting the estates.

Although there are other issues that could be addressed in the fee application, no further deductions shall be made.

Based on the foregoing, it is

ORDERED that the fees and expenses requested by C&L in its first interim fee application for the Aloha Debtors are disallowed as detailed above, and are allowed in the amount of $408,597.63 in fees and $26,003.49 in expenses; and it is

ORDERED that the above allowed fees and expenses shall be reduced by the sums of $200,000 in fees and $20,000 in expenses based upon the provisional awards already granted to C&L by the Court at the hearing on October 10, 1996; 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

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge