UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.	CASE NO. 96-61376
BENNETT RECEIVABLES CORPORATION	96-61377
BENNETT RECEIVABLES CORPORATION II	96-61378
BENNETT MANAGEMENT AND DEVELOPMENT CORPORATION	96-61379
	Chapter 11
Debtors	Jointly Administered

APPEARANCES:

SIMPSON THACHER & BARTLETT Attorneys for the § 1104 Trustee 425 Lexington Avenue New York, New York 10019	M.O. SIGAL, JR., ESQ. Of Counsel
WASSERMAN, JURISTA & STOLZ Attorneys for the Unsecured Creditors Committee 225 Millburn Avenue Millburn, New Jersey 07041	DANIEL STOLZ, ESQ. Of Counsel
GUY VAN BAALEN, ESQ Assistant U.S. Trustee 10 Broad Street Utica, New York 13501	
SKADDEN, ARPS, SLATE, MEAGHER & FLOM Attorneys for Coopers & Lybrand, L.L.P. 919 Third Avenue New York, New York 10022-3897	MICHAEL COOK, ESQ. Of Counsel
HANCOCK & ESTABROOK, LLP Attorneys for Various Banks 1500 Mony Tower I Syracuse, New York 13202	STEPHEN A. DONATO, ESQ. Of Counsel
BOND, SCHOENECK & KING, LLP Attorneys for Various Banks One Lincoln Center Syracuse, New York 13202	JAMES DATI, ESQ. Of Counsel
COSTELLO, COONEY & FEARON	MICHAEL BALANOFF, ESQ.

Attorneys for Various Banks
205 S. Salina St.
Syracuse, New York 13202

Of Counsel

GREEN & SEIFTER, P.C.
Attorneys for Various Banks
900 One Lincoln Center
Syracuse, New York 13202

VIRGINIA HOVEMAN, ESQ.
Of Counsel

MELVIN & MELVIN
Attorneys for Citrus Bank
220 S. Warren Street
Syracuse, New York 13202

JAMES HOARE, ESQ.
Of Counsel

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 amended First Interim Fee Application of Coopers & Lybrand L.L.P. ("C&L"), accountants and financial advisors to Richard C. Breeden as trustee ("Trustee"), which seeks payment of $1,932,439 in fees and $153,785 in disbursements.[1] This amended fee

[1] C&L initially requested $2,515,054 in fees and $200,149 in expenses in the First Interim Fee Application, which included fees and expenses related to Aloha Capital Corporation, American Marine International, Inc., Resort Services Company, Inc., and The Processing Center, Inc., in addition to fees and expenses for The Bennett Funding Group, Inc. ("BFG"), Bennett Receivables Corporation ("BRC"), Bennett Receivables Corporation II ("BRC-II"), and Bennett Management and Development Corporation ("BMDC"). Collectively, BFG, BRC, BRC-II and BMDC shall be referred to herein as the "above-captioned Debtors."

C&L thereafter submitted "Amendment No.1" to their application, which particularized those fees and expenses related only to the above-captioned Debtors. C&L submitted the amended application because professionals seeking payment for services rendered to above-captioned Debtors are subject to this Court's Order dated October 15, 1996, and the Amended Order dated December 2, 1996, concerning fee applications subject to review by a fee auditor. The fees and expenses reflected in the text of this Decision relate only to the above-captioned Debtors.

application was filed on August 30, 1996, and scheduled for a hearing on September 12, 1996. The hearing was thereafter adjourned until October 10, 1996, and then subsequently adjourned to November 14, 1996, December 12, 1996 and finally to January 9, 1997.

Anticipating the magnitude of the fee applications to be filed in these cases, the Court *sua sponte* filed an Order to Show Cause, dated September 5, 1996 ("OSC"), to consider the appointment of a fee auditor. A hearing was held regarding the OSC on September 26, 1996, and the parties were offered the opportunity to object to the proposed appointment. At the conclusion of the hearing, the parties were invited to submit proposed orders regarding the appointment of a fee auditor by October 4, 1996. After due consideration and sufficient cause appearing for the appointment of a fee auditor, the Court appointed the firm of Stuart, Maue, Mitchell & James, Ltd. ("Fee Auditor"), to function in this capacity in these cases by Order dated October 15, 1996 ("Order").[2]

C&L agreed to delay the hearing on its fee application until the Fee Auditor reviewed the application and issued a report ("Report"). At the hearing on October 10, 1996, however, the Court authorized a temporary award of $1,000,000 in fees and $75,000 in disbursements to C&L while the Fee Auditor completed its Report. The Fee Auditor submitted its Report on C&L's first fee application on November 28, 1996. C&L requested and was granted an extension of time to reply to the findings of the Fee Auditor, and subsequently replied to objections to C&L's fee application filed by the United States Trustee ("UST") and other parties. A hearing was then held

---

[2] This Order was subsequently superseded by an Amended Order Appointing Fee Auditor and Directing Related Procedures and Standards Concerning the Interim Payment of Compensation and Consideration of Fee Application, dated December 2, 1996 ("Amended Order").

at a regular motion term in these proceedings on January 9, 1997, at Utica, New York. The Court reserved decision, opting instead to issue a written Decision due to the importance of the issues involved.[3]

JURISDICTIONAL STATEMENT

The Court has 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 Order appointing the Fee Auditor and the subsequently issued Amended Order were made applicable to all professionals in these jointly administered cases employed or to be employed pursuant to sections 327 or 1103 of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code"). The aforementioned Orders provided the authority and the guidelines for professionals regarding the process to be employed in submitting fee applications to the Fee Auditor and to the Court. In accordance with its responsibilities, the Fee Auditor performed a review and analysis of C&L's amended First Interim Fee Application pursuant to the Amended Order, and submitted a Report in order to assist the Court in its analysis of the fee application. The Fee Auditor

[3] In the interest of judicial economy, sections of this Decision which discuss conclusions of law and their application to fee applications generally are utilized in other Decisions issued concurrently herewith. Due to the large volume of fee applications before the Court and the similarity of issues presented by each, reliance upon research already completed will yield uniformity and economies of scale.

identified various time and expense entries that appeared to violate Court guidelines or that were brought to the Court's attention for further review.

C&L provided specific responses to the Report of the Fee Auditor. C&L initially observed that the Report included many time entries in more than one category, perhaps resulting in erroneous conclusions regarding C&L's compliance with the Court's billing guidelines. In addition, C&L states that it has already reduced by $179,012 fees and $26,922 in expenses which could have been charged to the Debtors in these cases. This was done to "minimize the Debtors' administrative expenses and to avoid time wasting objections (sic) questioning these time and expense charges." *See* C&L's Reply to Report of the Fee Auditor dated December 23, 1996, at 3.

C&L also argues that its appointment in these cases should be effective as of April 18, 1996, rather than April 23, 1996, which is the date on which the application to employ C&L was submitted to the Court. Regarding vague time entries, C&L argues that the entries are sufficient enough to understand the work performed and the benefit to the estates, and that if individual entries are unclear, the fee application as a whole is not. C&L responds that time identified as administrative or clerical tasks by the Fee Auditor is actually time spent on substantive and valuable tasks, or for staffing, engagement planning and project status review, or for essential administrative tasks. Other objections by C&L to the Fee Auditor's Report shall be addressed in the Discussion section of this Decision.

Various objections to C&L's fee application were filed in response to the findings of the

Fee Auditor.[4] The UST primarily objects to compensation for pre-retention fees or expenses, vaguely described conferences and research, administrative or clerical tasks, the overlap of services presumably incurred by over-staffing on these cases, and the excessive "real" blended hourly rate of the attorneys involved. The UST also objects to payment for multiple personnel at the same intra-office conferences, the installation and start-up costs attributable to C&L's computer system and the hours and fees related to its retention and first interim fee application.

The Official Committee of Unsecured Creditors ("Committee") has objected to C&L's billing rates and the percentage of time consumed by partners, directors and managers of the firm on this case, specifically noting that the blended rate of these professionals is $367.35. The Committee has also noted its concern with respect to compensation sought for services rendered prior to C&L's retention, and the amounts attributable to time spent preparing time and expense records and for completing conflicts checks. The Committee further objects to payment for administrative or clerical tasks.

In response to the objections filed by the UST and the Committee, C&L argues that immediate action was needed to limit the potential damage resulting from continued unauthorized access to the Debtors' computer systems and records, and therefore C&L's retention should be approved as of April 18, 1996, since the services it provided to the estates were of significant value. In response to the UST's claim that C&L over-staffed these cases, C&L responds that the decrepit state of the Debtors' financial and management operations necessitated the use of a

---

[4] Objections to C&L's fee application were also filed by various parties prior to the appointment of the Fee Auditor. The Court has reviewed and considered these objections, but will not detail concerns asserted in them in this Decision since they essentially object to areas highlighted by the Fee Auditor or have been otherwise addressed in this Decision.

significant portion of C&L resources. C&L also responds that it has complied with the $250 per hour cap on average hourly rates.

Regarding objections to intra-office conferences, C&L responds that they were necessary to "manage the process; monitor and ensure timely completion of work-product; avoid duplication of effort; unravel the complex and widespread fraudulent activities; and comply with Court deadlines." C&L's Reply to Objections by UST and Committee, dated January 4, 1997, at 20. C&L further responds that not all of the time identified by the UST as computer start-up costs are related to these Debtors and this task. In addition, C&L states that the UST's objection to time spent on retention and the First Interim Fee Application improperly focuses on entries for all Debtor entities, not just the four subject to analysis by the Fee Auditor. Lastly, C&L reiterates its belief that the charges for the detailed conflicts check and the preparation of time and expense records are appropriate. Other arguments by C&L shall be addressed herein.

DISCUSSION

The standard practice of professionals submitting fee applications should be to "make a good faith effort to exclude from a fee request hours that are excessive, redundant or otherwise unnecessary; just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 1939-40, 76 L.Ed.2d 40 (1983) (discussing billing practice in context of statutory attorney fees). This exercise of "billing judgment" is an essential, and as noted above, ethically mandated, component of every fee application submitted to the court.

It is important to note that the Court appreciates and understands a concern shared by many of the fee applicants in these cases regarding the potential for "double disallowance" of certain fees or expenses because they may fall into more than one category of the Fee Auditor's Reports. For example, since a time entry proposed for disallowance as pre-retention billing may also appear on another exhibit which categorizes that entry in a different way, there is a chance that an entry already proposed for disallowance could be criticized again for a different reason in a different category. This would produce an unjust result, and the professionals have themselves indicated that adding the totals in each Fee Auditor category would result in a sum far greater than that requested by the applicants. The Court has reviewed the applications aware of these potential problems. As a result, the Court has made every effort to ensure that no time entry that was disallowed in one category was disallowed again in another. The Fee Auditor provided information indicating the other exhibits in which a particular time entry appears again, and thus the Court was able to cross-reference any disallowed entries to prevent double disallowance.

Unique to the C&L fee application, however, is the issue of allocating the proper percentage of certain time entries to the proper Debtor entities. As noted earlier, C&L initially submitted a fee application which included time entries for work completed on behalf of Debtors other than BFG, BRC, BRC-II and BMDC. Although the amendment submitted by C&L identified those time entries which relate to the above-captioned Debtors, C&L nonetheless incurred fees and expenses which were generally applicable to work completed on behalf of all Debtors. These entries fall under the heading of "Bennett Bankruptcy," and such entries are interspersed throughout the fee application. Based on a calculation submitted by C&L, only

76.83 % of amounts in these entries are attributable to the above-captioned Debtors. It was therefore necessary for the Court to have the Fee Auditor perform additional calculations which would indicate the amount of these entries that are actually attributable to the above-captioned Debtors to ensure that any disallowance of these entries would not overstate the amount properly disallowed.

Although many professionals subject to the fee audit process have stated that the Court need not become enmeshed in a detailed analysis of every item in a fee application, the Court has a responsibility to review the proposals of the Fee Auditor and to make an independent finding regarding the appropriateness of the requested fees and expenses. Based on concerns of parties involved in these cases, and the recognition that some type of fee examiner was necessary to initially review the fee applications submitted in these cases due to the volume and complexity of them, it would be inappropriate for the Court not to consider carefully both the fee applications themselves and the proposals of the Fee Auditor appointed in these cases.[5]

"Nunc pro tunc" appointment

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 Code §§ 330 and 331, which permit the court to award reasonable compensation to a professional employed under Code § 327. Prior to any

[5] The Court notes that the allowance or disallowance in this Decision of certain types or categories of services and expenses requested does not prevent the Court in future fee applications from examining other or re-examining the same types of services and expenses it has allowed or disallowed herein.

award of interim or final compensation, however, a professional's employment must be approved formally 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 the Second Circuit, this "*per se*" rule prohibiting payment to professionals for services rendered to the estate prior to approval by the court has been applied strictly. *See, e.g., Futuronics Corp. v. Arutt, Nachamie & Benjamin (In re Futuronics Corp.)*, 655 F.2d 463, 469 (2d Cir. 1981), *cert. denied*, 455 U.S. 941, 102 S.Ct. 1435, 71 L.Ed.2d 653 (1982); *Smith v. Winthrop, Stimson, Putnam & Roberts (In re Sapphire Steamship Lines, Inc.)*, 509 F.2d 1242, 1245-46 (2d Cir. 1975); *General Motors Acceptance Corp. v. Updike (In re H.L. Stratton, Inc.),* 51 F.2d 984, 988 (2d Cir. 1931), *cert. denied*, 284 U.S. 682, 52 S.Ct. 199, 76 L.Ed. 576 (1932); *In re Robotics Resources R2, Inc*., 117 B.R. 61, 62 (Bankr. D.Conn. 1990); *In re French*, 111 B.R. 391, 394 (Bankr. N.D.N.Y. 1989); *In re Ochoa*, 74 B.R. 191, 195-96 (Bankr. N.D.N.Y. 1987); *In re Cuisine Magazine, Inc.,* 61 B.R. 210, 216-17 (Bankr. S.D.N.Y. 1986); *Hucknall Agency, Inc. v. Nanni (In re Hucknall Agency, Inc.)*, 1 B.R. 125, 126-27 (Bankr. W.D.N.Y. 1979). Enforcement of such a strict rule enables the court to examine any potential conflicts of interest that a professional may have prior to the rendering of services, *see Futuronics*, 655 F.2d at 469, thereby avoiding the emotional pressure to award fees which can arise if services have already been rendered. *See In re Rogers-Pyatt Shellac Co.*, 51 F.2d 988, 992 (2d Cir. 1931). It also

discourages volunteer services and maintains control of costs to the estate by avoiding payment for services which may not otherwise have been authorized. *See In re Eureka Upholstering Co*., 48 F.2d 95, 96 (2d Cir. 1931); *245 Assocs*., 188 B.R. at 749; *Sapolin Paints*, 38 B.R. at 817.

Despite the apparent rigidity and harsh consequences of the *per se* rule, certain exceptions have been recognized. In situations where a professional seeks payment for services performed prior to the order of appointment, courts have considered *nunc pro tunc*[6] appointments as a vehicle to authorize payment for such services. *See, e.g., Fanelli v. Hensley (In re Triangle Chemicals, Inc.)*, 697 F.2d 1280, 1289 (5th Cir. 1983); *Cohen v. United States (In re Laurent Watch Co., Inc.)*, 539 F.2d 1231, 1232 (9th Cir. 1976); *In re King Elec. Co., Inc.*, 19 B.R. 660, 663 (Bankr. E.D.Va. 1982). *Nunc pro tunc* orders effectively subvert the *per se* rule, however, and therefore they are generally disfavored in this Circuit. *See Futuronics*, 655 F.2d at 469; *245 Assocs*., 188 B.R. at 750 (citing *In re Corbi*, 149 B.R. 325, 333 (Bankr. E.D.N.Y. 1993) and *In re Rundlett*, 137 B.R. 144, 146 (Bankr. S.D.N.Y. 1992)); *In re Northeast Dairy Co-Op Federation, Inc*., 74 B.R. 149, 154 (Bankr. N.D.N.Y. 1987).

There are, however, limited exceptions to this rule. This Court has recognized the "excusable neglect" or "unavoidable hardship" exception to the *per se* rule. *See Ochoa*, 74 B.R. at 195 ("The only recognized exception to the Second Circuit's 'per se' rule is the concept of 'excusable neglect'"); *Northeast Dairy,* 74 B.R. at 155 ("It appears the only recognized exception to the harsh result occasioned by application of the 'per se' rule is 'excusable neglect' or

---

[6] As observed by some courts, use of the term "*nunc pro tunc*" in relation to applications by professionals seeking appointment prior to the date on record is not exactly proper. *See In re Jarvis*, 53 F.3d 416 , 418 n.2 (1st Cir. 1995); *In re Singson*, 41 F.3d 316, 318-19 (7th Cir. 1994). For the purpose of this Decision, however, the Court will adhere to the practiced usage in this Circuit of the Latin phrase "*nunc pro tunc*" to refer to such applications.

'unavoidable hardship'"); *see also In re Amherst Mister Anthony's Ltd.*, 63 B.R. 292, 294 (Bankr. W.D.N.Y. 1986) (recognizing exception)

Excusable neglect generally has been defined as "the failure to timely perform a duty due to circumstances which were beyond the reasonable control of the person whose duty it was to perform," *see Beneficial Fin. Co. v. Manning (In re Manning)*, 4 BCD 304, 305 (Bankr. D.Conn. 1978), such as when a party fails to meet an obligation due to unique or extraordinary circumstances. *See Northeast Dairy*, 74 B.R. at 155; *In re Waterman Steamship Corp*., 59 B.R. 724, 727 (Bankr. S.D.N.Y. 1986); *see also Robotics Resources R2*, 117 B.R. at 62; *In re Brown*, 40 B.R. 728, 731-32 (Bankr. D.Conn. 1984).

As noted by the court in *In re 245 Associates, LLC*, 188 B.R. 743 (Bankr. S.D.N.Y. 1995), however, the United States Supreme Court had occasion to interpret the term "excusable neglect" in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership,* 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), as that term is used in Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") regarding late claims. *245 Assocs*., 188 B.R. at 751. In *Pioneer*, the Supreme Court expanded the definition of "excusable neglect" to include "inadvertence, mistake, or carelessness." *Pioneer*, 507 U.S. at 338; 113 S.Ct. at 1495. While acknowledging that the extension of the *Pioneer* definition of excusable neglect regarding late claims to *nunc pro tunc* employment applications does not necessarily follow, Bankruptcy Judge Stuart M. Bernstein nonetheless held in *245 Associates* that the *Pioneer* standard should be applied to employment applications.[7] *245 Assocs*., 188 B.R. at 751; *see also In re Singson*, 41

[7] *But see In re Franklin Sav. Corp*., 181 B.R. 88, 89 (Bankr. D.Kan. 1995) (finding that *Pioneer* does not apply to *nunc pro tunc* employment applications); *In re Berman*, 167 B.R. 323, 324 (Bankr. D.Mass. 1994) (same).

F.3d 316, 319-20 (7th Cir. 1994) (applying *Pioneer* standard to *nunc pro tunc* employment applications). The court found that authorization of a *nunc pro tunc* application would be allowable in cases where the applicant does not have a conflict of interest and demonstrates excusable neglect under the more liberal *Pioneer* test. *245 Assocs*., 188 B.R. at 752.

In fact, a seemingly more liberal approach to *nunc pro tunc* employment applications than that found in *245 Associates* is found in *In re Piecuil*, 145 B.R. 777 (Bankr. W.D.N.Y. 1992), which was decided prior to *Pioneer*. In *Piecuil*, Chief Bankruptcy Judge Michael J. Kaplan reviewed Second Circuit case law regarding application of the *per se* rule and concluded that in almost every early Circuit case out of which the rule grew, there were alternate grounds to deny appointment of the professional even if timely application had been made. Judge Kaplan instead formulated the following test: "It is to say that the applicable case law permits the Court, as a court of equity, latitude to grant relief where the failure to file a timely application has been explained, and the explanation has been found reasonable." *Piecuil*, 145 B.R. at 783 (footnote omitted); *see also In re Rainbow Press of Fredonia*, 197 B.R. 428, 429 (Bankr. W.D.N.Y. 1996) (Bucki, J.) (expressly agreeing with test formulated in *Piecuil*); *In re Corbi*, 149 B.R. 325, 333 (Bankr. E.D.N.Y. 1993) (same).

While this Court does not advocate punctilious application of the *per se* rule, boundaries regarding its use must necessarily be drawn. To the extent, if any, that *Piecuil* and its progeny expand the rule regarding *nunc pro tunc* employment applications beyond the *245 Associates* court's incorporation of the *Pioneer* standard, this Court respectfully declines to follow such test.[8]

---

[8] The Court notes that it does not expressly pass on the propriety of extending *Pioneer's* expanded definition of "excusable neglect" to *nunc pro tunc* employment applications, as the applicant herein satisfies the more restrictive definition of excusable neglect that the Court has

As noted in this Court's Decision in *In re Household Merit, Inc.*, No. 94-62969 (Bankr. N.D.N.Y. Apr. 14, 1995), the excusable neglect exception should not be expanded to the point where the exception swallows the rule itself. *Id.* at 6.

Turning to the case *sub judice*, the fee application of C&L seeks, *inter alia*, appointment *nunc pro tunc* to April 18, 1996, rather than April 23, 1996, the date on which the Trustee submitted C&L's employment application for approval by the Court. As observed by Simpson, Thacher & Bartlett ("STB"), counsel to the Trustee in these cases, two days of this intervening five-day period were on a weekend, and the Trustee himself was appointed only late in the day on Thursday, April 18, 1996. Upon review of STB's First Interim Fee Application, the Court observes that STB began work on the application to hire C&L as accountant and financial advisor to the Trustee on April 19, 1996, continued that work throughout the weekend, and submitted the application on the Tuesday following the Trustee's appointment. Due to the large size and complex and interlocking nature of the Bennett cases, it is understandable that C&L had to perform a sufficient conflicts check of its own large client base prior to submitting its application for employment. C&L was also awaiting completion of its employment application by STB as counsel to the Trustee. In the meantime, the potential existed for a precipitous loss of assets and information from the Bennett companies. Immediate action was necessary to limit potential losses, and C&L should not be penalized for actions taken pre-appointment, especially since there was an insignificant delay in submitting the application for employment in light of the intervening weekend, and since C&L, like STB, entered this case only after bankruptcy petitions had already been filed. Under the standard that this Court has used in its prior decisions relating

---

utilized in prior Decisions.

to *nunc pro tunc* employment applications, C&L has satisfied the test of excusable neglect, in that the failure to submit the application was beyond the reasonable control of C&L in light of the unique and extraordinary circumstances presented by these cases and its employment.[9] It is this Court's opinion, however, that C&L's employment should not be authorized prior to April 19, 1996, as little argument can be made that it should receive payment for actions taken even prior to the Trustee's appointment and approval. Therefore, fees prior to April 19, 1996, shall be disallowed in the amount of $24,803.11.[10]

Duplicate Billing Entries

The Fee Auditor identified three entries which were potentially duplicates of other billing entries. Based on corrections made by C&L in their reply to the Fee Auditor's Report, however, the Court finds that there were no duplicate billing entries.

Vague Documentation of Services

It is well settled that the bankruptcy court has an affirmative obligation to examine fees and expenses requested 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.

---

[9] The Court stresses the unique circumstances of these cases, the need for immediate action by C&L to move to protect the estates, and the relatively insignificant delay in submitting the application for employment.

[10] This amount takes into account the peculiarity of considering only 76.83 % of those entries which are entitled "Bennett Bankruptcy" in the Fee Auditor's Report, as discussed earlier in this Decision. Further deductions herein shall also be calculated according to this peculiarity, although no additional notation of it shall be made other than reference to "allocated" fees and expenses.

W.D.Ky. 1991). It is also true that the court may award compensation only for actual and necessary services and expenses under Code § 330(a), and that the burden of proving that services rendered were actual and necessary, and that the compensation sought is reasonable, rests with the applicant. *See Brake v. Tavormina (In re Beverly Mfg. Corp.)*, 841 F.2d 365, 370 (11th Cir. 1988); *In re Ward,* 190 B.R. 242, 245 (Bankr. D.Md. 1995); *In re Navis Realty*, 126 B.R. 137, 145 (Bankr. E.D.N.Y. 1991). To meet this burden, the applicant must support its request for fees and expenses with specific, detailed and itemized documentation. *See In re Poseidon Pools of America, Inc*., 180 B.R. 718, 729 (Bankr. E.D.N.Y. 1995); *In re Gold Seal Prods. Co., Inc*., 128 B.R. 822, 827 (Bankr. N.D.Ala. 1991); *see also J.F. Wagner's Sons Co*., 135 B.R. at 267 (stating that professionals have burden of providing adequate description of services and expenses to allow court to make finding of reasonableness). Interim fee applications submitted pursuant to Code § 331, like the C&L application at issue herein, 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).

In cases where the time entry is too vague or insufficient to allow for a fair evaluation of the work done and the reasonableness and necessity for such work, the court should disallow compensation for such services. *See Poseidon*, 180 B.R. at 730; *J.F. Wagner's*, 135 B.R. at 267; *Gold Seal Prods*., 128 B.R. at 828. A court should be able to determine from the fee entries themselves the legal issues involved, the difficulty of the issues and the resolution or results obtained for the estate. *See Navis Realty*, 126 B.R at 142; *In re Lafayette Radio Electronics Corp*., 16 B.R. 360, 361 (Bankr. E.D.N.Y. 1982). Without such detailed entries it is difficult, if

not impossible, to "make a fair evaluation of the time expended, the nature and need for the service, and the reasonable fees to be allowed." *Hensley v. Eckerhart*, 461 U.S. 424, 441, 103 S.Ct. 1933, 1943, 76 L.Ed.2d 40 (1983) (Burger, C.J., concurring).

For example, time entries for telephone calls must indicate the parties involved and the purpose and length of the conversation. *See In re NRG Resources, Inc*., 64 B.R. 643, 653 (W.D.La. 1986)*; Poseidon*, 180 B.R. at 730. Entries such as "telephone call with Mr. X" is an insufficient description of service, *see Navis Realty*, 126 B.R. at 143; *In re R&B Institutional Sales, Inc*., 65 B.R. 876, 881 (Bankr. W.D.Pa. 1986), as such entries fail to "indicate the function, substance, necessity or benefit of the call with sufficient particularity to permit the court to evaluate whether or not the service is compensable." *In re Office Prods. of America*, 136 B.R. 964, 977 (Bankr. W.D.Tex. 1992). As the burden of proof to show that services rendered were necessary, appropriate and reasonable is on the applicant, *see id*. at 976; *In re Pettibone Corp*., 74 B.R. 293, 299 (Bankr. N.D.Ill. 1987), it is not the court's responsibility to recognize or assume that a vague time entry meets these requirements. Those entries that are made vague intentionally to protect privileged or confidential material should be noted appropriately, such as by the word "Redacted," and such information should be available to the Court for *in camera* review if the need should arise.

Likewise, time entries for either intra-office or other conferences must denote sufficient information for the court to determine whether the service provided and the fees charged were necessary and reasonable. *Office Prods. of America*, 136 B.R. at 976. At a minimum, such entries should indicate the participants and the nature and purpose of the conference. *See Navis Realty*, 126 B.R. at 143; *Pettibone*, 74 B.R. at 301. While this Court recognizes the need for

intra-office conferences, such time spent must be justified. *See Office Prods. of America*, 136 B.R. at 977. It is also an accepted principle that generally no more than one attorney may bill for time spent in intra-office conferences or meetings absent an adequate explanation. *See Poseidon*, 180 B.R. at 731; *In re Adventist Living Ctrs., Inc.*, 137 B.R. 701, 716 (Bankr. N.D.Ill. 1991); *Office Prods. of America*, 136 B.R. at 977; *In re Environmental Waste Control,* 122 B.R. 341, 347 (Bankr. N.D.Ind. 1990)*; In re Wiedau's, Inc.*, 78 B.R. 904, 908 (Bankr. S.D.Ill. 1987).

The Court reviewed C&L's fee application and the Report regarding intra-office conferences together with time entries classified as status conferences by the Fee Auditor. This review revealed that C&L often bills for more than one professional attending the same intra-office conference. For example, the Court noted one meeting with at least fourteen professionals in attendance with billing rates ranging from $115 to $205 per hour or more. *See* Report of C&L's First Interim Fee Application, at exhibit R, pages 10-11. Reference to exhibit R of the Report which identifies entries for status conferences, also reveals many entries described as: "met with staff to discuss engagement status" and "attended C&L meeting to discuss status and planning." Such meetings to discuss the status of the engagement occur many times each week, and although the Court understands that the complexity and difficulty of the financial problems in these cases requires consultation with other in-house professionals, there appear to be an inordinate amount of meetings to discuss the organization of the work that must be done. In addition, and perhaps more importantly, such time entries are extremely vague and offer no information as to what was discussed or what benefit it presented to the estates. Time records which denote merely that a conference was held are insufficient. *See In re Baldwin-United Corp.*, 45 B.R. 381, 382 (Bankr. S.D.Ohio 1984). Many of the time entries in this exhibit also

appear in exhibit N of the Report, which details time entries characterized by the Fee Auditor as intra-office conferences which, as previously discussed, contain billings for more than one professional attending the same conference with no detail as to the necessity for multiple billing. Due to the overlap, the Court deems it appropriate to focus on exhibit N rather than exhibit R, and shall reduce by 30% the amount listed in exhibit N of the Report. Thus, of the $155,446.20 categorized by the Fee Auditor as intra-office conferences, the court shall disallow 30% of this figure, or $46,633.86, based on multiple billing for attending such conferences and vague descriptions of services at these meetings. Future fee applications should support the need or appropriateness of billing for multiple professionals attending intra-office conferences in order to be considered for full compensation.

Regarding the detail necessary to prevent disallowance for vague time entries, the Court does not seek to impose an excessively burdensome reporting requirement on the professionals in these cases. However, entries such as the following are clearly insufficient: "Breakfast with W. Fedorich"; "Discussed cars, atrium rental payments and maintenance, and boats"; "Held discussions with the SEC"; "Met with L. Stephenson of ST&B"; "Attended planning meeting"; and "Discussed information presented in July 8th meeting." *See* Report, at exhibit C. These descriptions leave unanswered many basic questions, such as "with whom?" or "for what purpose?" Adding these details is clearly not burdensome, and such basic information is a prerequisite for consideration for compensation. Without this information, the Court can make no finding as to the reasonableness and necessity of such services.

C&L argues that in evaluating the fee application, the Court should consider the "overall effort required to meet the needs of the Court, the Trustee, and the extraordinary circumstances

of these cases," and that in light of the complexity and time pressure of these cases, the fee application as a whole provides ample evidence of the nature of C&L's services. *See* Reply of C&L to Report of the Fee Auditor, dated December 23, 1996, at 11. These considerations do not justify inadequate or improper fee entries, however. The Court does not approach the fee applications as though unfamiliar with the details and needs of these cases, and where possible the professionals were given the benefit of doubt, although this magnanimity shall be curtailed during review of future fee applications in these cases.

The Court finds that a minimum of $6,890 of time entries in exhibit C of the Fee Auditor's Report titled "vaguely described conferences" are so vaguely described as to provide no insight as to the value or need for such services, and therefore this amount of vaguely described conferences shall be disallowed. The Court shall make no deductions for vague time entries in exhibits D or E, based on the prior deduction for vague conferences and multiple billing at conferences. Nonetheless, sufficient description of services is anticipated in future fee applications.

Multiple Attendance at Events

While the Fee Auditor identified a significant amount of entries reflecting multiple attendance at events, the Court is aware that the magnitude and diversity of work involved in sorting through the financial web encountered in these cases would be difficult, if not impossible, for just one or two professionals to address properly. It is clear that a number of professionals may be needed at various events due to their familiarity with different portions of these cases, and

therefore no deduction shall be made.[11] As with every other area, however, professionals are expected and required to exercise billing judgment, and where possible they should make every effort to reduce the attendance or staffing on matters.

Clerical or Administrative Tasks

As noted by Bankruptcy Judge Leif M. Clark in *In re Office Products of America, Inc.*,136 B.R. 964 (Bankr. W.D.Tex. 1992), some courts have found that non-legal work performed by an attorney which could have been accomplished by non-legal employees more economically should not be compensated at the attorney's regular rate. *Id.* at 977 (citing *In re Wiedau's*, 78 B.R. at 908-09; *In re Pettibone*, 74 B.R. at 303). This Court has previously held that secretarial time is generally an overhead expense that is factored into an attorney's hourly rate, and as such is not separately compensable. *See In re Command Servs. Corp*., 85 B.R. 230, 233 (Bankr. N.D.N.Y. 1988). Since that decision, the Third Circuit Court of Appeals rendered its decision in *In re Busy Beaver Building*, 19 F.3d 833 (3d Cir. 1994), which indicated that clerical services may indeed be compensable when performed by an attorney or paralegal, although perhaps at a lower rate. *Id.* at 849. The court stated that the proper focus of inquiry is whether non-bankruptcy attorneys typically charge for such services when performed by an

[11] The seeming inconsistency of this sentence with the rationale for deductions made for intra-office conferences is more apparent than real. The Court deems it generally inappropriate for multiple professionals to bill time at intra-office conferences unless such billing is justified. In addition, many of the time entries for intra-office conferences offered little detail of any benefit to the estates, and their frequency led the Court to believe that there was overlap of services. Therefore a reduction of only 30% of such fees is deemed more than justified.

attorney or paralegal, "and the rates charged and collected therefor." *Id.*[12] The court derived this test by relying on its analysis of the plain meaning of Code § 330. *See id.* at 848. In a comprehensive and well-reasoned fee application decision in *In re Poseidon Pools of America, Inc.*, 180 B.R. 718 (Bankr. E.D.N.Y. 1995), however, Bankruptcy Judge Marvin Holland observed that the Third Circuit appears to have interpreted Code § 330(a) to *require* compensation for such services if non-bankruptcy attorneys typically charge their clients for them. *Poseidon*, 180 B.R. at 745. He noted that mandating some level of compensation for services which are clerical in nature is clearly contrary to the plain meaning of Code § 330(a). *Id*. at 746 n.23. Instead, Judge Holland found that the better analysis of Code § 330(a) is that it grants the court discretion to award reasonable compensation even if such services are actual and necessary.[13] *Id*.

Even *Busy Beaver* recognized that some services performed at some firms by paralegals may not be compensated. *See Busy Beaver*, 19 F.3d at 855. Perhaps the reason that the Third Circuit held that the proper focus of compensation is not on *what* service is performed but rather on *by whom* it is performed, thus affecting the *rate* of compensability and not compensability *vel non*, is that if an attorney is spending time performing tasks which are arguably clerical, which to this Court seems more properly classified as overhead and thus incorporated into the billing rate of the professional, these services would in effect go completely uncompensated. This is so

---

[12] This test essentially focuses on the "market" created by consumers of legal services where the professional practices.

[13] "Thus, under the literal interpretation of 11 U.S.C. § 330(a), even where a court finds that a particular service is actual and necessary it has discretion in determining to award compensation for such service. To hold otherwise would be to read and interpret the word 'may' in 11 U.S.C. § 330(a) as 'shall' or 'must.'" *Poseidon*, 180 B.R. at 746 n.23.

because if clerical services are included in the professional's billing rate, such services should not be separately billed; however an attorney or paraprofessional performing such tasks would not be able to bill anything, and thus no fee would be generated out of which clerical services could be covered. For example, if an attorney spent an hour faxing documents or mailing letters, the task itself should be classified as clerical and not billed because it is subsumed within the hourly rate charged by the attorney. If the attorney cannot bill something for that hour of time, however, there is no fee out of which overhead can be allocated.

Returning to the argument that professionals should be compensated at market rates for market services, the Court observes that the Third Circuit may not have considered the possibility that many of the clients which comprise the "market" for large firms in major cities may have neither the time nor the incentive to scrutinize legal services and their corresponding fee charges, and thus certain markets may not always reflect the concerns of cost-conscious clients who nonetheless seek able and well-respected counsel. Indeed, one reason why some consumers of legal services may not have the incentive to closely examine the items and rates for which they are charged is that, unlike a bankrupt estate, they may be able to pass the cost of legal services on to their clients or customers. In bankruptcy cases, every dollar spent on legal services is a dollar less for the prepetition creditors. *See In re Spanjer Bros., Inc.*, 203 B.R. 85, 90 (Bankr. N.D.Ill. 1996); *In re Allied Computer Repair, Inc.*, 202 B.R. 877, 885-86 (Bankr. W.D.Ky. 1996); *In re Hotel Assocs., Inc*., 15 B.R. 487, 488 (Bankr. E.D.Pa. 1981) . It is the opinion of this Court that bankruptcy courts must not become slaves to the prevailing "markets," and thus be prevented from making any judgments as to the necessity of services performed and the reasonableness of the fees charged. If the courts were placed in such a position, Code § 330(a)(1)(A) effectively

would be written out of the Bankruptcy Code, and professionals would need only submit their fee application with an explanation that their market compensates them for such services at the requested amounts. Congress has not chosen to relieve the bankruptcy courts of their duty to review fee requests, and thus such an interpretation of the market theory must necessarily fail.

Regardless of the differing interpretations of Code § 330(a), however, the fee applicant must still meet,

> its burden which exists independent of Busy Beaver Building of showing . . . that the majority of firms in this district regularly (a) charge clients for clerical services at the rates charged by the [fee applicant], and (b) disclose to their clients that they are being charged for clerical services at professional or paraprofessional rates. Moreover, this Court is not able to take judicial notice that the practice of charging professional or paraprofessional rates for clerical services is common and acceptable in the legal "market" because we have no reason to think that such practice exists.

Poseidon Pools, 180 B.R. at 746. Even if clerical services are held to be compensable, if such services are rendered by an attorney or paralegal,

> an applicant has the burden of providing the court with information such that a court can determine whether it was necessary for the clerical service to have been performed by an attorney or paralegal as opposed to being performed by a paralegal or secretary, respectively. Where this burden is not met a court cannot conclude that the clerical service was "necessary" and therefore compensation for such service is not warranted.

Id.

Thus, it is necessary for the applicant to carry its burden of proof regarding the reasonableness and necessity of clerical services performed by attorneys and paraprofessionals as the applicant must in every other area of its fee application.

While the above discussion appears to apply to attorneys and paralegals, the Court finds that such standards apply equally to other professionals retained pursuant to Code §§ 327(a). The

Court has reviewed each page of the entries classified as administrative tasks, and has kept in mind an argument made by a law firm subject to the audit procedure in these cases, and that is that although some entries may appear to be clerical in nature, the service provided actually required the skill of a paraprofessional or professional. Based on this argument, the Court acceded to the allowance of many entries which might otherwise have been classified as clerical. In keeping with this logic, and for fair administration of these cases, the Court has reviewed entries listed as administrative or clerical by granting C&L the benefit of doubt where possible.

The estate must be considered a reasonably prudent and cost-conscious consumer of legal services, as this is what we would expect of any consumer of services or goods. With this in mind, and with the independent responsibility imposed upon it by the Bankruptcy Code, the Court reviews fee applications to determine whether the applicant seeks "reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person . . . . " 11 U.S.C. § 330(a). Initially, the Court notes that entries for "Performed administrative duties related to the engagement" and "Obtained a bulletin board for the C&L conference room" clearly require no discussion as to why they do not merit an award of compensation at professional rates. In addition, the Court must question entries and the attendant fees for the following services: "Copied contracts for ST&B," $348.50 for 1.7 hours of work; "Planned and arranged flight and hotel accommodations for engagement staff," $598.51 for 3.8 hours of work; "Requested and received via fax confidentiality agreement with P. Gray, potential hire," $27.66 for three-tenths of one hour of work; "Organized BFG loan documents alphabetically and by loan number," $702 for 3.9 hours of work. There is no room in the budget of a bankrupt estate, or for that matter, the

budget of any reasonably prudent consumer of quality professional services, for the charges attributable to the above tasks, which can and should be performed more economically by clerical staff.

Upon review of the entries categorized as administrative or clerical, the Court observed a reduction of time entries for tasks that would be considered administrative or clerical as C&L moved further into the case. Nonetheless, there exist entries for services which, if compensable, should not be compensable at the rates for which they were billed, since they are clerical or administrative in nature, and therefore the Court shall reduce by 15% the total allocated amount of $113,471.55 categorized as administrative tasks. This results in a deduction of $17,020.73.

Preparation of Fee Applications

Under Code § 330(a), "[a]ny compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application." 11 U.S.C. § 330(a)(6). It is generally accepted that reasonable compensation is appropriate for time spent preparing a fee application. *See, e.g., Braswell Motor Freight Lines, Inc. v. Crutcher, Burke & Newsom (In re Braswell Motor Freight Lines, Inc.*), 630 F.2d 348, 351 (5th Cir. 1980); *Office Prods. of America*, 136 B.R. at 977; *CF & I Fabricators,* 131 B.R. at 483; *Pettibone*, 74 B.R. at 304. Compensation for such work yields incentive "to engage in a comprehensive review of the time expended and the value thereof," perhaps resulting in a discount of the amount billed. *See Pettibone*, 74 B.R. at 304. In fact, since preparation of detailed fee applications for the bankruptcy court's review is a prerequisite to payment, which no doubt can consume valuable and substantial time depending on the magnitude of the fee application, it seems that it would be

unduly burdensome and unfair to require that professionals go completely uncompensated for such a task. *See In re NuCorp Energy, Inc*., 764 F.2d 655, 659 (9th Cir. 1985); *Rose Pass Mines, Inc. v. Howard*, 615 F.2d 1088, 1093 (5th Cir. 1980). It is proper, however, for the bankruptcy court to examine the amount and value of time spent preparing the application, *see Office Prods. of America*, 136 B.R. at 977, and reasonable limits may be placed on compensation for such work. *Pettibone*, 74 B.R. at 304.

The Court observes that the Fee Auditor has separated time entries regarding preparation of fee and employment applications into three separate categories. The first category, labeled GG-1 by the Fee Auditor, contains time entries such as "Set up the billing system on approach," "Drafted retention affidavits for ACC, RSC, AMI, TPC and Cordoba entities," and "Edited the retention affidavits." *See* Report, at exhibit GG-1. This category also contains entries relating to preparation of the actual fee application. The allocated total billed for this category is $26,709.07. This amount is not unreasonable for these services and therefore no disallowance shall be made.

Exhibit GG-2 of the Report indicates entries regarding conflicts checks performed by C&L. As noted by C&L in their Reply to the Fee Auditor's Report, the Court specifically required C&L to perform a more detailed conflicts check than that initially submitted, which eventually involved investigation of more than 20,000 "name matches" which C&L had to investigate. Allocated fees of $50,909.01, however, shall not be fully compensated. The Court notes that had C&L, or any other professional seeking approval for appointment by this Court, discovered an unavoidable conflict of interest, that professional would likely receive *no compensation at all* for their time spent performing a conflicts check. Acknowledging this fact,

the Court shall allow only reasonable compensation to the approved professionals in these cases for performing this task. The Court has found that the amount of $10,249.50 sought by STB for performing a conflicts check is reasonable. While the sum of $50,909.01 sought by C&L is deemed unreasonable, the Court observes from C&L's fee application that its conflicts check was an on-going process, since C&L continued to identify additional potential conflicts as it progressed through the first interim fee period. The examination of these potential conflicts was clearly large in scope, and as indicated, was specifically requested by the Court. Therefore, the Court shall disallow only $25,000 of the $50,909 sought for this task. The Court stresses its characterization of the conflicts check as a task, rather than as a service to the estates.

Exhibit GG-3 of the Report must be addressed separately. Of concern to this Court is a fee application which bills for intermittent time entries of "prepared detailed time and expense report" or the like every few days for each professional, at times billing over one and one-half hours to complete such task at a substantial hourly rate. This type of notation is more appropriately documented or noted simultaneously as the work is completed, or as soon thereafter as possible, in order to avoid the task and attendant time of going back and reviewing work completed during the prior days in order to memorialize the efforts of the professional on behalf of the estates. A brief but sufficient explanation of the parties, subject matter and substance of a particular service can be noted in less than one to two minutes for eventual compilation in a fee application, and the client should not be billed for this. While some courts have noted that the preparation of a fee application does not benefit the estate and therefore should not be compensable, *see, e.g., In re Wilson Foods Corp*., 36 B.R. 317, 323 (Bankr. W.D.Okla. 1984) (opposing any award of compensation for time spent preparing and supporting fee applications);

In re Liberal Market, Inc., 24 B.R. 653, 661 (Bankr. S.D.Ohio 1982) ("[M]atters regarding the computation of an attorney fee is not a 'service rendered' on behalf of a debtor, but instead an expense of doing business which should not be chargeable to a debtor's estate"), this Court agrees with other courts which allow reasonable compensation for preparing the fee application itself because it is required by the bankruptcy court. This Court will not, however, compensate professionals for describing their time spent benefitting the estate as they perform their services. Clearly, keeping contemporaneous time records of time spent furthering the estate's interest is not itself of any benefit to the estate; rather, it is a benefit to the professional or paraprofessional and their firm, since without such information, firms would be unable to prepare the fee application, thus prohibiting an award of compensation for that time. *See In re Gillett Holdings, Inc.,* 137 B.R. 475, 487-88 (Bankr. D.Colo. 1992) (stating that time spent keeping contemporaneous time records is not compensable)*; CF & I Fabricators*, 131 B.R. at 483-84 (same)

Therefore, based on the above reasoning, and based on the prior award in exhibits GG-1 for services related to preparation of the fee application, the Court shall disallow the entire allocated amount of $62,486.85, despite occasional entries that relate to other services in addition to time and expense reporting or setting up the billing system.

Hourly Rates Charged by Professionals

A generally accepted starting point for determining the compensation due to a professional who bills on an hourly basis is to multiply the hours worked by the rate that the professional charges. *See In re Drexel Burnham Lambert Group, Inc.*, 133 B.R. 13, 17 (Bankr.

S.D.N.Y. 1991). This method of determining a professional's compensation is commonly referred to as the "lodestar method." Regardless of the outcome of the lodestar calculation, however, the court must still examine the professional's time records in order to determine whether all of the time billed should be compensated at the stated hourly rate. *Id.*

The Court examines the fee applications of the professionals in these cases well aware of the fact that the notion of economy of administration when dealing with a bankrupt estate was the prevailing spirit under the Bankruptcy Act, but that this notion was abandoned during the enactment of the Bankruptcy Code in 1978. *See In re Ames Dept. Stores, Inc*., 76 F.3d 66, 71 (2d Cir. 1996); *Drexel*, 133 B.R. at 18-20; *In re Cena's Fine Furniture, Inc*., 109 B.R. 575, 583 (E.D.N.Y. 1990); *In re Nine Assocs., Inc*.,76 B.R. 943, 945 (S.D.N.Y. 1987). Instead, Congress explicitly decided that compensation for services rendered by professionals under title 11 would be "at the same rate as the attorney or other professional would be compensated for performing comparable services other than in a case under title 11." *Drexel*, 133 B.R. at 19 (quoting statement of Sen. DeConcini, 124 Cong. Rec. S17,406 at 6511). This approach relies on the "market" of comparable legal services to assist in determining the level of compensation to be awarded, the purpose of which was to attract competent professionals to bankruptcy practice. *See Drexel*, 133 B.R. at 19-20; *see also In re RBS Indus., Inc.*, 104 B.R. 579, 582 (Bankr. D.Conn. 1989). As recently stated by the Second Circuit, based upon those services that a reasonable lawyer or law firm would render in similar circumstances, if services are reasonably likely to benefit the estate, they should be compensable. *See Ames Dept. Stores*, 76 F.3d at 72.

Based on some objections to fee applications filed in these cases, there is a concern that the hourly rates charged by some of the professionals in these cases are excessive. Understanding

the complexity and magnitude of these cases, however, it was deemed acceptable to hire professionals from outside of this geographic area to assist with these cases. This is not to suggest that professionals of the required caliber are not available in this area, but rather is more indicative of the necessity for extensive resources to resolve these complex issues in an expedited fashion. Such professionals bill their time at a higher rate according to the market in which they practice, and it would be unduly burdensome and unfair to expect that they accept the appointment to represent the estates at rates billed by the "local" market, while still incurring the costs and overhead of their particular geographic market. This does not mean that the Court is powerless to control fees billed by out-of town professionals. Some of the professionals in these cases with comparatively high billing rates have agreed to cap their blended hourly rate at $250 per hour. Such concessions represent constructive efforts to reduce the cost of legal services to the estates in these cases. Furthermore, this Court has previously recognized the propriety of higher professional billing rates where out-of-town professionals are necessarily employed. *See, e.g., 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). The hourly fees charged by C&L are not unusual for a professional firm of its size located in a major metropolitan city, and thus no reduction in hourly fees shall be made.[14]

Importantly, however, the Court does not concede that every service and expense for which an out-of-town professional firm bills and receives compensation for in its market is

---

[14] The Court has observed, however, that a significant portion of time spent on this case has been allocated to members of C&L whose hourly rates are higher than that of lower level members. The Court makes this observation merely to suggest that C&L review the needs of these cases to ensure that the time of more experienced professionals is being utilized economically.

compensable as of right. As discussed earlier, such a holding would effectively enervate Code § 330(a) and the Court's responsibility to review fee applications to determine the reasonableness of actual and necessary services, since the only showing a professional would have to make is that it bills its non-bankruptcy and/or its own geographic market clients for the rates and services submitted, thus mandating that they be compensated accordingly for such work based on Congress' adoption of the market theory of compensation for attorneys in bankruptcy matters.

Computer System

Upon review of time entries categorized by the Fee Auditor as billings related to the computer system, the Court recognizes that many of these entries likely relate to services which enable C&L to access the Debtors' computer systems and the information stored therein. It appears to the Court that such work is necessary for the proper performance of C&L's duties in these cases.

There are other entries which relate to the installation and operation of the computer billing system. Such entries are not compensable for the same reason that time entries for detailing time and expense records were disallowed: such services are of no benefit to the estates. Professionals shall receive reasonable compensation for the preparation of the fee application itself, but not for noting, implementing, or administering the billing systems needed to keep track of time spent benefitting the estates. Therefore, the amount of $5,722.01 shall be disallowed as time related to implementing and administering the billing system.

Travel Time

As stated by the Court in the Amended Order regarding the fee application process dated December 2, 1996, travel time will be compensable at one-half normal rates unless the Court is satisfied that work was performed during travel. C&L has acknowledged that three of the four billing entries identified as non-working travel time were mistakenly billed and has agreed to accept reduction therefor. This results in a deduction of $293.88 in allocated fees.

Security

Although the UST has questioned the relevance and necessity for security related services performed by C&L, review of this category Fee Auditor's Report indicates that a significant portion of these security services relate to protecting computer terminals and preventing outside or unauthorized access to them. Such services are clearly necessary and beneficial to the estates, and therefore no deductions shall be made.

Pre-retention Expenses

Based on the effective retention date of April 19, 1996, the allocated pre-retention expenses amount to $1,507.08, and therefore this amount shall be disallowed.

Unreceipted Expenses

In response to the Fee Auditor's findings, C&L submitted substantial additional material to document requested expenses. Of the total unreceipted expenses allocable to these cases ($21,652.28), the Court finds only $3,315.54 in allocated expenses for which a receipt was required, but was not provided. Therefore, this amount shall be disallowed.

Other Expenses

Regarding overtime meals and transportation, C&L further justified the expenses in this category, and therefore only $24.77 shall be disallowed. According to the Amended Order, expenses for lunch meals shall not be reimbursable, and therefore lunch expenses in the amount of $990.48 shall be disallowed. C&L has acknowledged that certain expenses such as dry cleaning, amenities, alcoholic beverages and movies are not compensable, and has agreed to accept a reduction for these expenses in the aggregate amount of $463.95.

CONCLUSION

The preparation and submission of fee applications and the review by the Court thereof are understandably burdensome but necessary tasks, and one can readily understand the difficulty of such tasks merely by observing the sheer volume and size of the fee applications, Fee Auditor Reports, replies, responses and objections submitted in these cases. Such applications are a necessary part of representation of bankrupt estates, however, and as amply stated by Bankruptcy Judge Jack B. Schmetterer,

> [t]he fee application and hearing thereon are the Applicant's opportunities to meet its burden of proof. Careful preparation of its application with supporting affidavits can meet that burden. Applicant has no basis to complain about any "adversarial" questioning by the Court seeking to carry out its responsibilities upon reading the application. Any judgment disallowing certain fees is a finding that applicant has failed to meet its burden of proof as to those fees.

In re Pettibone Corp., 74 B.R. 293, 300 (Bankr. N.D.Ill. 1987). Any concern as to an applicant's right to a hearing has been satisfied by the opportunity to respond formally to the findings of the

Fee Auditor with whatever additional proof or explanation the professional wished to add to its fee application as specifically granted in the Order dated October 15, 1996 and the Amended Order, dated December 2, 1996. In addition, oral argument regarding the fee applications was heard by the Court on October 10, 1996, and January 9, 1997, at regular motion terms in these proceedings. Furthermore, professionals have supplemented their applications with rebuttals and replies to objections by other parties to these cases, and therefore it cannot be said that professionals have not been given their "day in court" in regard to their fee applications. *See Busy Beaver*, 19 F.3d at 845-46 (indicating necessity for an applicant's right to a hearing prior to disallowance). Any further allowance of time to supplement or argue the fee applications, other than that specifically allowed by the Court, would "overwhelm already swollen calendars." *See id*. at 846. As noted by the Court at the hearings on January 9, 1996, the fee application process should not take on a greater and separate life of its own in these already heavy and complex proceedings.

In summary:

Total of allocated requested fees and expenses:	$2,086,224.00
Disallowances:	
Pre-retention fees	- 24,803.11
Intra-office conferences	- 46,663.86
Vaguely described conferences	- 6,890.00
Administrative/clerical tasks	- 17,020.73
Preparation of time/expense records	- 62,486.85
Reduction for conflicts check	- 25,000.00
Computer system	- 5,722.01
Travel time	- 293.88
Pre-retention expenses	- 1,507.08
Unreceipted expenses	-

3,315.54

Other non-compensable expenses	- 463.95
Total allowed fees and expenses	$1,892,056.99
Prior temporary fee award on 10/10/96	-1,000,000.00
Prior temporary disbursement award on 10/10/96	- 75,000.00
Remaining balance of allowed fees and expenses	$ 817,056.99

Based on the foregoing, it is

ORDERED that the fees and expenses requested by C&L in its amended First Interim Fee Application shall be disallowed as detailed above; and it is further

ORDERED that payment of the remaining balance of allowed fees and expenses totaling $817,056.99, and any amounts still due and owing on the prior temporary award, shall not be made from encumbered assets of these estates.

Dated at Utica, New York

this 5th day of February1997

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge