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:

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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 Baker & Botts, L.L.P. ("B&B"), special counsel to Richard C. Breeden as trustee in these cases ("Trustee"), which seeks payment of $104,208 in fees and $12,613.70 in disbursements.[1] This fee application was filed on November 1, 1996, and scheduled for a hearing on December 12, 1996. The hearing was thereafter adjourned until January 9, 1997.

[1] After issuance of the Report of B&B's First Interim Fee Application by the Fee Auditor appointed in these cases, B&B reduced its fee request to $102,533.50 and also agreed to reduce its disbursements request by $58.79. Reference to the last page of B&B's Reply to the Report of the Fee Auditor, dated January 2, 1997, reflects the modified fee request but fails to reflect a reduction of $58.79 in the disbursements request as evidenced on page 17 of the Reply. The Court shall consider this an oversight. Thus, in accordance with B&B's voluntary reduction, the disbursements request should be $12,554.91. These reductions shall be detailed further herein. The summary at the end of this Decision shall indicate the initial amount requested by B&B in its First Interim Fee Application and shall identify the various voluntary and other reductions.

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.[2]

B&B agreed to delay the hearing on its fee application until the Fee Auditor reviewed the application and issued a report (" Report"). The Fee Auditor submitted its Report of B&B's first interim fee application on December 23, 1996. B&B was then given an opportunity to reply to the findings of the Fee Auditor and objections to B&B's fee application filed by the United States Trustee ("UST") and other parties. A hearing was then held 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

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[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").

[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 during the initial interim fee application period. 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.

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 Amended Order were made applicable to all professionals in these jointly administered cases employed or to be employed pursuant to section 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 B&B's 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 identified various time and expense entries that appeared to violate Court guidelines or that were brought to the Court's attention for further review.

B&B provided specific responses to the Report of the Fee Auditor. Initially, B&B indicates that the Court specifically granted it leave to seek *nunc pro tunc* appointment in an Order dated July 12, 1996. In furtherance of this endeavor, B&B argues that it should be compensated for services rendered prior to the firm's formal retention, since the circumstances surrounding its employment satisfy the prevailing "excusable neglect" standard justifying *nunc pro tunc* employment.

B&B also objects to the Report because it "focuses on individual items without reference to either the context in which they appear in the Application materials or the background of Baker & Botts' representation." Reply of B&B to Report of the Fee Auditor, dated January 2, 1997, at 2. Specifically, B&B argues that this improper focus resulted in a number of time entries being classified as vague by the Fee Auditor.

Regarding the assertion that B&B did not bill non-working travel time at reduced rates, B&B states that it did in fact reduce the compensation it seeks for travel time by $1,680 as indicated on page 13 of its fee application. In addition, B&B objects to the categorization of a number of entries as administrative or clerical tasks, arguing that some of the time entries in this category are not clerical in nature.

Other points objected to by B&B include, *inter alia*, questions regarding time spent in intra-office conferences, conferences with non-firm personnel, review of correspondence and pleadings, and fees incurred by persons billing less than ten hours. Regarding unreceipted expenses, B&B submitted additional documentation for consideration by the Court.

Three objections to B&B's fee application were filed in response to the findings of the Fee Auditor. The UST specifically recommends a "holdback" against fees awarded in order to await completion of the projects detailed in the application. The UST also recommends against awarding fees for vaguely described conferences, multiple attendance at intra-office conferences, an excessive amount for services related to B&B's retention as special counsel, and *nunc pro tunc* fees and disbursements.

The Official Committee of Unsecured Creditors ("Committee") has objected to B&B's fee application because of a concern that B&B is seeking compensation for work performed on

behalf of non-debtor entities. Like the UST, the Committee also objects to compensation for services rendered prior to the effective date of B&B's retention, and for vague time entries. In addition, the Committee objects to compensation for administrative or clerical tasks, and the amount sought for retention matters. Lastly, the Committee states that it cannot assess the value of services rendered in pursuit of extending the bar date and for filing a proof of claim in the Mississippi bankruptcy proceedings for which B&B was retained.

The objection filed by Green & Seifter, P.C., expresses a concern that the funds from which B&B are seeking reimbursement are funds which are either owned by or subject to the liens of approximately 200 banks known as the Crawford Banks.

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.

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.[4]

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[4] 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.

"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 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*[5] 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).

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[5] 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.

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'"); *In re Northeast Dairy Co-Op Federation, Inc.,* 74 B.R. 149, 155 (Bankr. N.D.N.Y. 1987) ("It appears the only recognized exception to the harsh result occasioned by application of the 'per se' rule is 'excusable neglect' or '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 has generally 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 388; 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 that the *Pioneer* standard should be applied to employment applications.[6] *245 Assocs*., 188 B.R. at 751; *see also In re Singson*, 41 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* case 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).

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[6] *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).

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. 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 B&B seeks, *inter alia*, appointment *nunc pro tunc* to April 23, 1996, rather than May 28, 1996, the date on which the Trustee submitted B&B's employment application for approval by the Court.[7] Like the other professionals appointed in these cases, B&B asserts that the failure to submit its application for employment at an earlier time was due to extraordinary circumstances, and more specifically that it had to perform work on an emergency basis in order to protect the Trustee's interests. Specific work that B&B alleges was performed on an emergency basis includes extensions of an impending May 18, 1996 claims bar date and other hearing and trial dates in the Mississippi cases, as well as work related to obtaining necessary documents.

Unlike the other professionals appointed in these cases, however, the delay in submission of B&B's application for appointment by the Court was significant. The Court references three examples of professionals in these cases seeking *nunc pro tunc* appointment: two of the professional firms submitted their applications within four and five days after their engagement

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[7] In an Order dated July 12, 1996, the Court approved B&B's retention as of May 28, 1996.

by the Trustee, and as noted in the Decisions issued relating to those applications, two of those intervening days occurred on a weekend. Furthermore, it was clear that in addition to the immediate need for their services, they also had to conduct significant conflicts checks in order to satisfy that precondition to employment. The third professional firm which sought appointment *nunc pro tunc* sought appointment effective as of May 1, 1996, rather than May 2, 1996. This firm, like B&B, also alleged the need for immediate and significant services to be performed in order to be prepared for a large hearing calendar scheduled for May 2, 1996. In light of these essentially insignificant delays, the request of B&B for *nunc pro tunc* appointment to a date 35 days prior to the effective date of their appointment is significant. While the Court recognizes that there was a need to act quickly and under difficult circumstances in order to protect the interests of the Trustee, and ultimately of the estates, such time constraints and difficulties do not justify a delay of 35 days in seeking appointment. Nor has B&B convinced the Court that the failure to submit its application was due to circumstances beyond its reasonable control. Thus, B&B does not meet the standard of excusable neglect that this Court has utilized in prior cases.

Even if the Court were to accept the argument that B&B's request for *nunc pro tunc* employment should be judged under the expanded definition of excusable neglect from *Pioneer*, B&B would still fail to qualify. As stated earlier, *Pioneer* broadened the definition of excusable neglect to include inadvertence, mistake or carelessness in the context of Fed.R.Bankr.P. 9006(b)(1) regarding late claims, *see Pioneer*, 507 U.S. at 338, 113 S.Ct. at 1495, and support exists for extending this expanded definition to *nunc pro tunc* employment applications. *See,*

e.g., Singson, 41 F.3d at 319-20; *245 Assocs*., 188 B.R. at 751.[8] In *Pioneer*, the Supreme Court stated that since Congress had not provided any guidance regarding the types of neglect which would be considered excusable, the determination would be an equitable one, taking into consideration "all relevant circumstances surrounding the party's omission." *Pioneer,* 507 U.S. at 395, 113 S.Ct. at 1498. These circumstances include the danger of prejudice to the debtor, the length of the delay as well as its potential impact on the judicial proceedings, the reason for the delay and whether it was within the reasonable control of the movant, and whether the movant acted in good faith. After review of the fee application, reply to the Fee Auditor's Report and the oral argument heard on January 9, 1997, the Court finds that the significant delay in submitting the application for employment undermines B&B's request for *nunc pro tunc* employment. Although this Court has accepted from other professionals the rationale that the need for immediate services warranted leniency in the consideration of whether *nunc pro tunc* employment was appropriate, those other professionals relied on delays which were very limited in scope. Like B&B, the other professionals had strong arguments for the need to perform services immediately, but also recognized the need to submit their respective employment applications timely. As indicated by counsel for B&B at oral argument there was no real neglect on the part of B&B, but rather the employment application was not considered a priority in light of other services which the firm felt required performance first. The delay was clearly within the control of B&B, and significant delays such as the one at issue have the potential for enervating the protections of the *per se* rule followed in the Second Circuit, which include avoidance of the

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[8] *But see In re Franklin Sav. Corp.*, 181 B.R. 88, 89-90 (Bankr. D.Kan. 1995) (stating that *Pioneer* definition of excusable neglect does not apply to *nunc pro tunc* employment applications); *In re Berman,* 167 B.R. 323, 324 (Bankr. D.Mass. 1994) (same).

emotional pressure to award fees after services have already been rendered in the absence of approval by the court, and discouragement of volunteer services and services which might not otherwise have been authorized. In addition, the requirement that a professional who will eventually seek payment from the estate must timely file its application for employment will allow the court, that professional, and any other interested parties the opportunity to examine whether there is a conflict of interest or other disqualifying factor presented by the professional. B&B is a highly respected firm that was chosen by the Trustee in part for its experience in bankruptcy practice. Therefore it cannot be said that B&B did not understand the significance of securing court approval of their employment. Thus, *nunc pro tunc* employment of B&B back to April 23, 1996, is inappropriate.

The Court is willing, however, to grant B&B *nunc pro tunc* appointment as of May 21, 1996, rather than May 28, 1996, based on the fact that B&B completed its Affidavit in support of its application on May 20, 1996 and sent it to counsel for the Trustee by overnight mail on that date. The delay of seven additional days on the part of the Trustee to complete his Affidavit in support of B&B's employment and file the Order to Show Cause for an Order to employ B&B is unexplained, and in this case the Court will not hold B&B responsible for this additional delay. Therefore, B&B's employment is approved as of May 21, 1996. Thus, fees amounting to $26,542.50 shall be disallowed as being incurred prior to the effective date of employment.

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. 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.)*, 841F.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 B&B 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. The 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" are insufficient descriptions of services, *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; *I n 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).

After review of B&B's fee application and the Report regarding vaguely described conferences, the Court acknowledges that some of the entries classified as such become clearer when reviewed in context with other services provided during those specific time periods. Some entries, however, are simply too vague despite reference to other portions of the time entry. Of the total of $3,322 categorized in exhibit D of the Fee Auditor's Report as vaguely described conferences, $1,631.50 has already been disallowed as pre-retention fees. The Court shall make no further deduction in this category or for vague document drafting in exhibit E, but adds that in the future B&B must make efforts to ensure that fee entries sufficiently describe the service performed, the substance of the matter and the parties involved.

Regarding intra-office conferences listed in exhibit N of the Report, the Court observes that despite the fact that the Fee Auditor has properly classified over $9,000 of time entries in this category, instances of more than one professional billing for the same intra-office conference is the exception rather than the rule. The Court makes note of this observation to remind all interested parties that simply because an activity has been categorized in a particular fashion by

the Fee Auditor, it does not necessarily mean that disallowance of such activity is proper. The Court shall make no additional deductions in exhibit N of the Report.

Reference to exhibit F of the Report reveals many time entries which on their face are very vague, yielding little information as to the nature or subject of the services performed. Of the $7,124.50 in fees listed in this category, $2,642.50 has already been disallowed as pre-retention fees. The Court shall further reduce the remaining amount of $4,482 by 25%. Thus, the Court shall deduct $1,120.50 in other vaguely described tasks.

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, and therefore has not disallowed all time entries which could be classified as vague pursuant to the standards noted earlier. 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. Nonetheless, sufficient description of services is expected.

Multiple Attendance at Events

The Fee Auditor identified only a limited amount of entries reflecting multiple attendance at events. As the Court has noted in other fee decisions in these cases, the complexity of the issues involved at times requires the attendance of more than a single professional at an event. The few instances of multiple attendance by professionals at B&B are reasonable, and no deduction shall be made. As a general rule, 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.

B&B's Retention

The Court observes that fees in the amount of $8,798 and $797 were incurred relating to the retention of B&B and for a creditor's conflicts check, respectively. This Court has allowed reasonable fees relating to these services, however the fees charged for the retention of B&B comprise a significant percentage of the total of fees and expenses requested. Therefore, the Court shall reduce these fees by 30%, as an award greater than this amount is not reasonable given the purpose of the activity billed for, which is to enable B&B to be employed in order to perform services on behalf of the Trustee for the estates. This deduction amounts to $2,639.40. Since the amount of $1,272 has already been disallowed as pre-retention billing, only an additional $1367.40 shall be deducted.

Travel Time

The Fee Auditor identified in exhibit G of the Report four billing entries describing travel which appear to have been billed at the individuals' normal billing rates. These time entries amount to 9.2 hours with $1,778 in associated fees. B&B has responded to this finding by stating that it has reduced the compensation it seeks by 8.7 hours with $1,680 in associated fees, and has stated that it is in compliance "with the controlling guidelines on travel time." *See* B&B's Reply to the Report of the Fee Auditor, dated January 2, 1997, at 7. These figures clearly do not offset each other exactly, and it is unclear how B&B arrived upon the reduction in hours and fees it has claimed. No deduction shall be made, but future fee applications must clearly identify that non-

working travel time is billed at one-half normal hourly rates.

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 attorney or paralegal, "and the rates charged and collected therefor." *Id.*[9] The court derived this test by relying on its analysis of the plain meaning of Code § 330. *See id*. at 848. In the 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 as a result of deferring to the "market" in which a professional practices, the Third

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

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.2. 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.[10] *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 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

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[10] "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.

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 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*., 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 to 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.

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).

The Court reviewed B&B's fee application with these very important guidelines in mind. In addition, B&B replied that many of the entries classified as administrative or clerical by the Fee Auditor required professional judgment and legal skills, and thus required performance by a professional or paraprofessional. Upon review of the time entries in this category, the Court agrees that exhibit I of the Report contains entries which may not properly be classified as administrative or clerical. B&B has agreed to accept reduction of its fees in this category by $1,589. In addition, other entries in this category were already considered in the category labeled "Other vaguely described tasks." Therefore, other than time entries disallowed as pre-retention entries and the $1,589 reduction B&B has agreed to accept, the Court shall make no further disallowances in this category.

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.

According to the Fee Auditor, billing entries which relate to the actual preparation of the fee application total $564.50. This amount is deemed reasonable and shall not be disallowed.

Other Voluntary Fee Reductions

B&B acknowledges an $85.50 variance between the fees set forth in the billing statements which were part of its fee application and the amount requested in its fee application, and has agreed to accept reduction of its fees by that amount.

Pre-retention Expenses

According to exhibit Z of the Report, there are $1,077.27 in pre-retention expenses. This figure was based upon the May 28, 1996, appointment date approved by this Court's Order dated July 12, 1996, rather than the *nunc pro tunc* employment date of May 21, 1996, granted by this Decision. It is unclear from the documentation submitted whether any portion of the $1,077.27 should be allowed. The Court shall disallow this amount as pre-retention expenses, however

B&B may submit additional information regarding whether a part of this amount should be allowed based upon the *nunc pro tunc* employment date.

Unreceipted Expenses

Under the Amended Order, only travel and meal receipts totaling more than $25 need to be submitted. B&B submitted additional documentation detailing expenses, however failed to submit copies of receipts for expenses for which receipts are required. Therefore the following items shall be disallowed: June 19-20, 1996, airfare - $1,177; cab fare - $75.50; hotel - $113; lunch and tip - $19.50 (disallowed because lunch expenses are non-compensable. *See* Amended Order, at ¶10(n)); unknown - $20 (disallowed because a completely unidentified expense in the context of travel and lodging shall be deemed as for amenities and thus non-compensable under ¶10(o) of the Amended Order); and business meals - $27.60. *See* Report, at ex. AA, for detail regarding unreceipted expenses.

Other Expenses

The Fee Auditor also identified one other entry for lunch in the amount of $12.50, expenses in the amount of $36.84 for stationery and supplies and unspecified expenses in the amount of $19.45. B&B has agreed to accept reduction of its expenses by these amounts.

Regarding the use of overnight delivery services, the Court has stated that such costs will be compensable at actual cost where shown to be necessary, and that such costs would not be routinely reimbursable. *See* Amended Order, at ¶ 10(g). B&B billed $1,215.12 for overnight delivery charges without submitting any explanation of the necessity for such services. No

deduction shall be made, although the Court notes that without supporting information, the Court cannot determine the necessity of such service or the savings to the estates, if any, represented by the use of overnight delivery. *See Environmental Waste Control*, 122 B.R. at 349 (disallowing excessive use of overnight mail service). Future applications should identify the necessity of such services and the savings to the estates in the form of lower messenger or other delivery fees.

Holdback of Compensation

As noted in *In re Child World*, 185 B.R. 14 (Bankr. S.D.N.Y. 1995), courts often may "holdback" a portion of interim allowance to a fee applicant pending a final review of the fees and disbursements paid to the professional. *Child World*, 185 B.R. at 18. In some instances, the court may not be able to assess the necessity or the benefit of services rendered prior to some type of resolution of the issues handled by the fee applicant. The court retains the authority to adjust the final allowance if the services rendered were ultimately deemed unnecessary, however, and thus one way to address this concern is to be satisfied "that a sufficient balance will remain outstanding to assure the possibility of an offset for any amount which is not finally allowable." *In re City Mattress, Inc.,* 174 B.R. 23, 27 (Bankr. W.D.N.Y. 1994).

The Court is satisfied that there will be a sufficient amount outstanding in the second interim fee application based upon work already completed to address this issue in more detail in the next fee award decision. The Court anticipates that there will be further detail regarding the results of B&B's efforts in that fee application, and thus a more accurate analysis of the benefit of B&B's services may be obtained.

Regarding the concern of the Committee that it is not clear from B&B's fee application that compensation is not being sought for work performed on behalf of non-debtor entities, the Court must agree. B&B will be required to assure this Court and all interested parties that the services for which they seek compensation are performed on behalf of the proper debtor entities. This concern shall likewise be addressed in the next fee award decision, and B&B will be required to identify the debtors on whose behalf services were performed, both on the first and all future interim fee applications.

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 B&B's fee application was heard by the Court on January 9, 1997, at a regular motion term 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, 1997, 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 requested fees and expenses	$116,821.70
Disallowances:	
Pre-retention fees	- 26,542.50
Other vaguely described tasks	- 1,120.50
Administrative or clerical tasks	- 1,589.00
Retention of B&B	- 1,367.40
Variance in requested fees	- 85.50
Pre-retention expenses	- 1,077.27
Unreceipted expenses	- 1,372.60
Other expenses	- 58.79
Total allowed fees and expenses	$83,608.14

Based on the foregoing, it is

ORDERED that the fees and expenses requested by B&B in its First Interim Fee

Application shall be disallowed as detailed above; and it is further

ORDERED that payment of the remaining balance of fees and expenses totaling $83,608.14 shall not be made from encumbered assets of these estates.

Dated at Utica, New York

this 21st day of February 1997

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge