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 Wasserman, Jurista & Stolz, P.C. ("WJS"), attorneys for the Official Committee of Unsecured Creditors in these cases, which seeks payment of $161,704.50 in fees and $20,278.74 in disbursements.[1] The fee 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, however, 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

[1] WJS noted in its Reply to the report of the fee auditor hired in these cases that the cover sheet of its fee application contained a computational error. The corrected amounts as requested by WJS are reflected above in the text.

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]

WJS 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 $80,000 in fees and $12,000 in disbursements to WJS while the Fee Auditor completed its Report. The Fee Auditor submitted its Report of WJS's first fee application on December 23, 1996. WJS was then given an opportunity to respond to the findings of the Fee Auditor, and filed a reply on January 3, 1997. 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 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.

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 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 WJS'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.

WJS provided specific responses to the findings of the Fee Auditor. WJS acknowledged that the total requested fees as listed on the cover sheet of their fee application was incorrectly totaled, and amended their application to reflect the addition of $1,000 to their requested fees. Thus, the total of fees and expenses requested by WJS is $161,704.50 and $20,278.74, respectively. WJS also acknowledged that their fee application erroneously contained $7,143 in double-billed time entries, and has agreed to accept reduction of its fee award by such amount.

In response to the Fee Auditor's finding of $1,125 of unitemized fees, WJS explains that such fees represent time expended preparing the fee application itself. Like other professionals in these cases, WJS also seeks compensation for pre-retention billings and expenses incurred on May 1, 1996, in light of the extraordinary circumstances that existed, arguing that the services rendered were necessary and that they benefitted the estate. In addition, WJS has responded to the Fee Auditor's characterization of certain time entries as "vague" by providing additional detailed information regarding those entries. Upon re-examination of the entries in this category, however, WJS has identified three which were improperly billed, and therefore has agreed to a reduction of $684 to adjust for these entries.

WJS asserts that due to the large volume of calls and legal pleadings that flow into its office, it is necessary that the attorneys meet on a daily basis to discuss these matters and to apportion responsibility for them. Regarding entries labeled by the Fee Auditor as administrative or clerical tasks, WJS asserts that none of the services so labeled are in fact clerical in nature.

Regarding intra-office conferences and review of correspondence, WJS argues that in light of the complexity and size of these cases, the fees requested in these categories are reasonable and the services performed were necessary. WJS also argues that $308.16 of unreceipted expenses are for telephone calls for which they do not receive an allocated bill. Lastly, WJS asserts that a charge of $1,013.35 for a meeting at an airport hotel was necessary due to unexpected circumstances and the need to work around the travel plans of many different parties.

The objections to WJS' fee application, which were received prior to issuance of the Report by the Fee Auditor, primarily focused on the concern that none of the fees requested be

paid out of the assets of the secured creditors, or that there was no showing that any unencumbered assets existed from which payment could be made.[4]

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

[4] Objections to the First Interim Fee Application of WJS were filed by Costello, Cooney & Fearon, LLP, and Bond, Schoeneck & King, LLP, as attorneys for various banks, on September 30, 1996, and October 3, 1996, respectively.

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.[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

[5] 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 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 strictly applied. *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'"); *In re Northeast Dairy Co-Op Federation, Inc.,* 74 B.R. 149, 155 (Bankr.

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[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.

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 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 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*

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[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).

court's incorporation of the *Pioneer* standard, this Court respectfully declines to follow such test.[8] 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.

The extraordinary circumstances that WJS relies upon to justify *nunc pro tunc* employment are that it was required to devote significant time to these cases immediately due to their volatile nature, and that this time was necessary in light of the large motion calendar pending on May 2, 1996, in these cases. Although WJS performed services on April 29 and April 30, 1996, they seek *nunc pro tunc* appointment only to May 1, 1996, rather than May 2, 1996, the effective date of their employment. While WJS asserts that the services it performed on May 1, 1996, were necessary and essential services which benefitted the estate, as noted earlier this is not grounds for approving *nunc pro tunc* appointment. *See Sapolin*, 38 B.R. at 817. The Court does find, however, that the circumstances surrounding WJS' employment were unique and extraordinary, in that WJS was brought into the cases after the bankruptcy petitions had already been filed, and that WJS had to prepare rather suddenly for a significant motion calendar looming on May 2, 1996. The request for appointment as of May 1, 1996, rather than May 2, 1996, is accepted, as WJS has satisfied the test of excusable neglect through unique and extraordinary circumstances. *Nunc pro tunc* appointment is therefore justified.

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[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 utilized in prior Decisions.

Duplicate Billing Entries

As acknowledged by WJS, there were various time entries which were mistakenly double-billed, and therefore WJS has agreed to accept reduction of its fees by the amount of $7,143.

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 WJS 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 In re Navis Realty, Inc*., 126 B.R 137, 142 (Bankr. E.D.N.Y. 1991); *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).

Review of WJS' fee application and the Report regarding intra-office conferences reveals that WJS does not routinely bill for more than one attorney attending an intra-office conference. Although the Court is aware of the need for detailed discussions between attorneys involved in these complex cases at various points, routine billing by two or more attorneys for every consultation regarding issues or projects in these cases generally will not be compensated. Fee applications which seek payment for more than one professional attending an intra-office conference or meeting should support the need or appropriateness of such billing in order to be considered for full compensation. Since WJS' fee application reveals very few multiple billing

entries for the same intra-office conferences, no deductions shall be made.

The Court does not seek to impose an excessively burdensome reporting requirement on the professionals in these cases, however sufficient description of services is expected. After examining the additional detail provided by WJS regarding time entries categorized by the Fee Auditor as vaguely described conferences, the Court will disallow only $684, which represents time entries mistakenly billed to these cases.

Multiple Attendance at Events

While the Fee Auditor identified a number of entries reflecting multiple attendance at events, the Court is aware that the magnitude and diversity of work involved in representing the unsecured creditors in these cases is substantial. Clearly, a single attorney cannot be fully versed with the myriad of adversary proceedings, motions and issues in these cases, thereby requiring multiple attendance at events, and therefore no deduction in this category shall be made. 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 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 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.[10] *Id*.

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

[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.

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 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.

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).

Despite the claim of WJS that none of the time entries labeled as administrative or clerical tasks are truly clerical tasks, this Court finds it difficult to understand why it would require a person who bills $140 per hour to call a parking company at an airport, or to make phone calls in order to obtain the weekly calendar. Such services are clearly more economically performed by secretarial staff. With the Third Circuit's analysis regarding compensation of such tasks when performed by a professional or paraprofessional in mind, the Court shall deny $200 in requested fees 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 of Utah, Inc.,* 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 information obtained from the Fee Auditor and the reply of WJS, the sum of $1,125 was billed for the preparation of WJS' fee application. This amount is not unreasonable, and therefore no disallowance shall be made.

Press Contacts and Review

The Fee Auditor noted time entries amounting to $1,728 relating to press contacts and review. Due to the nature of these cases and the large number and wide dispersion of creditors involved, the Court finds that the media contacts by WJS may "assist interested parties in understanding the case and may reduce the number of inquiries received by Court personnel." *In re Wabash Valley Power Association, Inc.*, 69 B.R. 471, 480 (Bankr. S.D.Ind. 1987). Therefore, the Court finds that the time and fees related to the service are reasonable and no deductions shall be made. This should not be construed, however, as an endorsement for establishing an extensive media relations effort.

Unreceipted Expenses

Under the Amended Order, only travel and meal receipts totaling more than $25 need to be submitted. WJS' argument that the courts before which it usually appears do not require actual receipts for expenses is of no moment, as the Amended Order of this Court expressly required such documentation Thus, the sum of $94.85 shall be disallowed as unreceipted meal or travel expenses over $25.

Other Expenses

The Court observes that the sum of $7.75 was billed for office overhead/local transportation. Such expenses are not compensable and therefore shall be disallowed. Regarding photocopy charges, WJS bills $.20 per page while the Court allows for $.15 per page. The amount of excess photocopy charges based on this difference amounts to $1,517.45, which shall

be disallowed. WJS' argument that the Local Rules of the Northern District of New York allow for $.20 per page overlooks paragraph 9(g) of the Amended Order, wherein the Court stated that the terms of the Amended Order control in instances where there is a conflict with the Local Rules.

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. WJS billed $1,088.25 for Federal Express charges without submitting any explanation of the necessity for such services. No deduction for these charges shall be made, although 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.

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, 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	$181,983.24
Disallowances:	
Duplicate billing entries	- 7,143.00
Vaguely described conferences	- 684.00
Administrative or clerical tasks	- 200.00
Unreceipted expenses	- 94.85
Overhead/local transportation	- 7.75

Excess photocopy charges	- 1,517.45
Total allowed fees and expenses	$172,336.19
Prior temporary fee award on 10/10/96	- 80,000.00
Prior temporary disbursement award on 10/10/96	- 12,000.00
Remaining balance of allowed fees and expenses	$80,336.19

Based on the foregoing, it is

ORDERED that the fees and expenses requested by WJS 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 $80,336.19, 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 6th day of February 1997

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge