IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	:	
RICCI INVESTMENT COMPANY, a Utah corporation; INLAND OIL PRODUCTS, INC.; MONROVIA OIL PRODUCTS, INC.; and SALINA INVESTMENT COMPANY, INC.	:	Bankruptcy Number 93B-23895
	:	Chapter 11
Reorganized Debtors.	:	[Substantively Consolidated Estate]

MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART VAN COTT, BAGELY, CORNWALL & McCARTHY'S THIRD AND FINAL VERIFIED APPLICATION OF TRUSTEE'S COUNSEL FOR ALLOWANCE OF INTERIM AND FINAL COMPENSATION AS AN ADMINISTRATIVE EXPENSE

In this contested matter, the proponents of a confirmed chapter 11 plan object to the fee application filed by the chapter 11 trustee's attorneys. The objection raises issues regarding the the chapter 11 trustee's business judgment versus the attorney for the trustee's legal judgment, whether certain tasks performed by the trustee's attorneys were beneficial to the estate, and the impact of a violation of Fed. R. Bankr. P. 3016(a) on the allowance of fees.

FACTS

The history of this substantively consolidated estate and related proceedings is convoluted; but, an abbreviated version helps place the legal issues in perspective. Henry J. and Beth Ricci managed B.R.& F., LC (BRF).[1] BRF owned the controlling interest in Ricci Investment Company, Inc. (Ricci), eventually the debtor herein.[2] Ricci and its wholly owned subsidiaries, Metro Oil Company (Metro), Salina Investment Company (Salina), Inland Oil Products, Inc. (Inland) and Monrovia Oil Products, Inc. (Monrovia), were engaged in the operation of several service stations and convenience stores. Henry J. and Beth Ricci's son-in-law, Jon Muehlberger (Muehlberger),[3] was president of Ricci, and also president of Salina, Inland and Monrovia. Ricci owned and operated some of its service stations, and Inland operated the service stations owned by Salina and Monrovia. All of the subsidiaries relied on Ricci for general administration.

In July of 1993, Ricci filed a petition for relief under chapter 11 of the Bankruptcy Code. As a result of allegations of mismanagement, an examiner was appointed and an examiner's report issued in May of 1994. The examiner's report asserted that Ricci and its subsidiaries had engaged in potentially fraudulent transfers and that these transfers had been used as a vehicle to hinder and delay creditors. The examiner's report recommended among other things that: 1) a trustee be appointed for Ricci, 2) that Metro, Salina and Monrovia be substantively consolidated with Ricci, and 3) that Ricci and its subsidiaries

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[1] BRF (Beth Ricci Family) is a Utah limited liability company. BRF was also a claimholder against this estate.

[2] BRF owned 87% of Delta Oil Company, and Delta Oil Company in turn owned 100% of Ricci. The remaining 13% of Delta Oil Company was publicly held.

[3] John Muhlberger was married to Becky Joan Ricci Muhlberger.

comply with environmental regulations, including those related to removing, replacing and/or upgrading underground storage tank systems for petroleum products.

W. LaMonte Robison (Trustee) was appointed as Ricci's chapter 11 trustee in June of 1994. When the Trustee was appointed, BRF continued to control the Ricci subsidiaries, and the Trustee controlled Ricci. The Trustee concluded this division of management, assets and liabilities hindered reorganization. Therefore, on motion of the Trustee and over the objection of BRF and the Ricci family, the Court approved the consolidation of three subsidiaries (Inland, Monrovia and Salina[4]) into the Ricci estate (Consolidated Debtors) by Order entered January 23, 1995 (Consolidation Order).[5] The Consolidation Order effectively divested Muehlberger of management of Salina, Inland and Monrovia. The Trustee operated the Consolidated Debtors and attempted to generate sufficient cash flow to maintain and remediate the Consolidated Debtors' assets until a plan of reorganization could be confirmed. He also assessed environmental compliance and remediation requirements and closed and/or sold some of the Consolidated Debtors' properties.

The Trustee employed Van Cott, Bagley, Cornwall & McCarthy (Applicant) as his attorneys in June of 1994. The Applicant assisted the Trustee, among other things, in his assessment of bankruptcy and environmental issues, and in maintaining the estate's compliance with applicable environmental regulations. Gerald H. Suniville (Suniville) was Applicant's lead counsel primarily responsible

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[4] An involuntary petition was filed against Metro on September 28, 1993, resulting in adjudication and eventual closure as a no-asset chapter 7 case.

[5] The Consolidation Order ruled that the Bankruptcy Code as it existed prior to the Bankruptcy Reform Act of 1994 would govern the administration of the Consolidated Debtors. The Court made this ruling because Ricci was filed prior to enactment of the Bankruptcy Reform Act of 1994, but the assets and liabilities of Inland, Monrovia and Salina were made a part of the Ricci estate after October 22, 1994, the effective date of the Bankruptcy Reform Act of 1994.

for bankruptcy issues. Bradley R. Cahoon (Cahoon), who specialized in environmental and underground tank storage law, addressed federal and state underground storage compliance issues for operating tank systems and for closure of tank systems no longer in use. Cahoon also assisted the Trustee in negotiating and drafting sales documents, advised the Trustee regarding concerns of governmental entities on environmental compliance issues, ensured that the Trustee and the Consolidated Debtors' estate would not incur environmentally related fines or penalties or lose insurance protection, and eventually assisted in drafting a disclosure statement and plan. It was important for Suniville, as the lead attorney, to keep abreast of the environmental issues in the case. In many instances it was necessary for both Cahoon and Suniville to be present at meetings regarding the sale and/or cleanup of various parcels of estate property because it was impossible to separate bankruptcy from environmental issues.

The Trustee also employed TR Tech as his environmental consultants in September of 1994. TR Tech assisted the Trustee by providing technical field work and by preparing and obtaining approval for closure plans on certain properties. The evidence shows that the Applicant and TR Tech were accomplishing different tasks and the Court finds that work performed by Cahoon and TR Tech, although complimentary, was not duplicative.

The Ricci family caused a plan and disclosure statement to be filed on February 17, 1995 on behalf of BRF and Western States Investments, L.C. (Western States)[6] (collectively the Proponents) for the Consolidated Debtors. The plan provided for the discharge of the Trustee and the reinstatement of the Ricci family into management responsibilities over the Consolidated Debtors, but did not provide for

[6] Western States is a Utah limited liability company licensed on January 1, 1995. Its owners are Joan Muehlberger and Beth Ricci.

sufficient funding upon confirmation to satisfy the claims of creditors. The Trustee opposed the plan, and the disclosure statement was never approved.

The Consolidated Debtors' estate included, among other assets, a fraudulent conveyance claim against BRF for the transfer of properties from Ricci to BRF on the eve of bankruptcy. In early July 1995 the Trustee filed an avoidance action against BRF and related entities pursuant to 11 U.S.C. § 546(a). The Trustee also filed a complaint against Muehlberger for a preferential transfer seeking approximately $25,000 pursuant to 11 U.S.C. §§ 547 and 550.

Once the Trustee filed the adversary proceedings and a motion for a preliminary injunction, the Consolidated Debtors' case picked up speed and intensity. The Trustee, Applicant, Proponents and their counsel met to discuss a potential global resolution of both adversary proceedings and the chapter 11 case. The Trustee indicated he generally would support a plan of reorganization that provided for the payment of all administrative, priority and unsecured creditors in full on the effective date, leaving secured creditors and environmental regulatory authorities to protect their own interests. Because of the factual complexity of the adversary proceeding against BRF, and the Proponents' representation that the Proponents may propose a plan of reorganization as outlined by the Trustee, the Trustee suspended prosecution of the adversary proceedings and supplied the Proponents information to assist them in drafting a disclosure statement and plan.

The Proponents filed a second consolidated chapter 11 disclosure statement and plan of reorganization (Proponents' Disclosure Statement and Proponents' Plan) on October 4, 1995. The Proponents' Disclosure Statement and Plan provided, among other things, for $900,000 in funding by Utco

Associates, Ltd. (Utco), a private lender, and for the reorganized debtor to be managed by Leland Martineau (Martineau), an accountant whose clientele included both Utco and BRF. Under a longstanding agreement between Utco and Martineau, a 20% loan origination fee to be paid by BRF would be shared on a 60% / 40% split between Martineau and Utco. The Utco loan was to be collateralized by liens on certain property, including assets allegedly improperly transferred from Henry J. Ricci to BRF.

On November 13, 1995, the Applicant, on behalf of the Trustee, filed the Trustee's Objection to Disclosure Statement Filed in Connection with Second Consolidated Plan of Reorganization Proposed by Western States Investment, L.C. and B.R.&F., L.C. dated October 3, 1995 (Trustee's Objection to Proponents' Disclosure Statement). The Trustee objected to the Proponents' Disclosure Statement in part due to "inaccuracies and/or lack of information concerning the proponents' description of the environmental aspects of this case and the necessary means to correct the same," and attached a memorandum from Cahoon to Suniville, addressing the issues in detail. Trustee's Objection to Proponents' Disclosure Statement at p. 2, ¶ 3, and exhibit "A," attached thereto. The Trustee also objected to the Proponents' Disclosure Statement asserting that the "proponents of the Plan should clarify the sources and amounts of funds necessary to fund the proposed Plan of Reorganization," and attached a "schedule of the administrative, priority unsecured and unsecured claims that the proponents propose to pay at confirmation, together with the business payables at approximately December 20, 1995." *Id*. at p.3, ¶ 4, and exhibit "C," attached thereto. Thus, the Trustee's Objection to the Proponents' Disclosure Statement enumerated environmental concerns on a site-by-site basis and contained a brief claims analysis.

On December 4, 1995, the Court approved a modified version of the Proponents' Disclosure Statement. The Court fixed January 12, 1996 as the last day for filing and serving written objections, acceptances or rejections of the Proponents' Plan.

While the Proponents were moving forward with reorganization efforts, the Trustee, with the assistance of the Applicant, was negotiating a sale of two parcels of real property situated in Grand Junction, Colorado (Grand Junction Properties) to Westec Fruita, Inc. (Westec). On October 13, 1995, the Applicant, on behalf of the Trustee filed the Trustee's Motion for Authority to Sell Real Property of the Estate, not in the Ordinary Course of Business, Free and Clear of Liens, Notice of Terms of Sale and Notice of Hearing (Grand Junction Motion). The Grand Junction Motion sought Court approval for the sale of the Grand Junction Properties to Westec for $287,000 on an "as is" basis free and clear of all liens and encumbrances pursuant to the provisions of 11 U.S.C. § 363(f). The Grand Junction Motion contained the following representation:

> With respect to Paragraph 21(b) contained in Exhibit "B" to the Contract, it is the intention of this Contract that the presence of hazardous materials upon the property, if any, in a quantity not acceptable to buyer **shall be remedied by the seller** with [in] a reasonable period of time and such reasonable period of time depends upon the type and quantity of such hazardous materials. It is further intended as a part of this agreement that in the event the investigation reveals the presence of hazardous property in a quantity not acceptable to buyer then, and in that event the parties may enter into an escrow agreement substantially similarly [sic] to the escrow agreement attached to Exhibit "B," providing that the purchase funds shall be used to pay the cost of responding to and cleaning up such hazardous materials by and pursuant to the protocols, procedures and regulations of the State of Colorado and local fire and health departments. However, in no event shall Buyer be obligated to pay any sums for remediation in excess of the purchase funds tendered at closing.

Grand Junction Motion at pp. 4-5 (emphasis added). A hearing on the Grand Junction Motion was held November 16, 1995 and the Court approved the sale of the Grand Junction Properties over the objection of the Proponents[7] by an order entered December 1, 1995 (Grand Junction Order).

The evidence shows that the sale of the Grand Junction Properties did not take place according to the terms authorized by the Court pursuant to the Grand Junction Motion. Theodore Thatcher (Thatcher) of TR Tech testified that the Trustee did not remedy the presence of hazardous material on the Grand Junction Properties as set forth in the Grand Junction Motion, but that Westec, itself, performed remediation according to the terms of an escrow agreement drafted by the Applicant between December 13, 1995 and January 10, 1996 (Escrow Agreement). Suniville testified that the Grand Junction Order did not authorize a change that would permit the buyer rather than the seller to clean up the property. Neither the Applicant nor the Trustee sought Court authorization to change the terms of the sale of the Grand Junction Properties as authorized by the Court. Thatcher's testimony indicated that charges have been asserted against the escrow by Westec that may be improper and excessive, and that it may be a conflict to have Westec perform "in-house" remediation and then bill the escrow. The evidence does not indicate

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[7] On November 13, 1995, the Proponents filed an Objection to Trustee's Motion for Authority to Sell Real Property (Objection to Grand Junction Motion) evidencing a concern regarding the possible consumption of the sales proceeds to pay remediation costs. The Proponents' Objection to Grand Junction Motion stated:

> The [Grand Junction] Motion and contract permit the purchaser to determine whether hazardous materials are located on the property and whether such hazardous materials are acceptable to the purchaser. If not, the estate must escrow funds to be used to pay the costs of responding to and cleaning up hazardous material. There is no estimation of the likelihood that hazardous material is located on the property, that some portion (or perhaps all) of the proceeds of sale will be used to perform the estates [sic] duties with respect thereto or the time involved in cleaning up the property.

Objection to Grand Junction Motion at pp.2-3.

the monetary effect, if any, of the unauthorized change because the issues related thereto have not been resolved.

While events in the Consolidated Debtors' case proceeded, on April 18, 1995, Henry J. Ricci filed a chapter 7 case that was assigned to a different Judge. Once the Proponents' Disclosure Statement was approved by this Court, the Henry J. Ricci trustee determined that the terms of the Proponents' Plan would impair his ability to pursue collection of what be believed to be fraudulent transfers from Henry J. Ricci to Beth Ricci and BRF because he believed the proposed $900,000 loan to fund the Proponents' Plan would encumber the transferred properties and interests. The Henry J. Ricci trustee filed a complaint on December 14, 1995 against the Proponents, and others, alleging that Henry J. Ricci made avoidable transfers to BRF and that the Proponents intended to use these transferred assets to secure loans to fund the Proponents' Plan. The adversary proceeding included a motion for a temporary restraining order, for a preliminary injunction and for the appointment of a receiver over the Proponents' assets.

The Court in the Henry J. Ricci case granted the relief sought on December 14, 1995 by issuing an ex-parte temporary retraining order. On December 23 1995, a receiver was appointed over the property and business activities of the Proponents and the Proponents, Beth Ricci, Becky Joan Ricci Muehlberger and their officers, agents, servants, employees and attorneys were enjoined from dissipating, selling, encumbering, concealing or otherwise disposing of any of their real or personal property.

The parties believed the December 23, 1995 Order prevented the Proponents from encumbering collateral to fund the Proponents' Plan. They also believed, to varying degrees, that the December 23, 1995 Order prevented the Proponents from moving their Plan toward confirmation. The

Trustee, Applicant, Proponents, Proponents' receiver, Henry J. Ricci trustee, and others discussed settlement possibilities that would undo the effect of the Court's December 23, 1995 Order between late December of 1995 and early January 1996. However, by mid-January no approved resolution had been reached.

On January 12, 1996, the deadline fixed by the Court, the Applicant filed on behalf of the Trustee the Trustee's Objection to Confirmation of Amended Second Consolidated Plan of Reorganization Proposed by Western States Investment, L.C. and B.R.&F., L.C. (Trustee's Objection to Confirmation). The Trustee Objected to Confirmation of the Proponents' Plan on the general grounds that it was not economically feasible, that confirmation of the Proponents' Plan may lead to liquidation or the need for further financial reorganization and that the Proponents' Plan may have been proposed by means forbidden by law as a result of the injunction. Trustee's Objection to Confirmation at p.2., ¶ 2. The Trustee listed (among others) himself as a potential witness to testify about economic and environmental feasibility and listed TR Tech as a potential witness to testify about environmental matters. *Id*. at p.3. ¶ 10.

Also on January 12, 1996, the United States Environmental Protection Agency (EPA) and the Utah Division of Environmental Response and Remediation (DERR) filed a Joint Objection of the United States of America on Behalf of the Environmental Protection Agency, and the Utah Department of Environmental Quality, Division of Environmental Response and Remediation, to Amended Second Consolidated Plan of Reorganization Proposed by Western States Investments and BR&F, L.C., dated December 3, 1995 (Joint Objection). The Joint Objection asserted, in part, that the Proponents "have not and cannot demonstrate that the reorganized debtors will be able to comply with applicable environmental

laws. Several of the stations are currently in noncompliance, and . . . the Proponents have failed to recognize and to provide for a method of correcting this noncompliance." Joint Objection at p.3 ¶ 3. On January 22, 1996, the Applicant, on behalf of the Trustee, filed a Trustee's Response to Joint Objection to the B.R. &F. Plan of Reorganization filed by the EPA and DERR (Trustee's Response to Joint Objection.)

The Trustee responded to the Joint Objection generally as follows:

> The trustee understands and therefore asserts that the primary purpose of the Joint Objection was to alert the court to the ongoing and potential environmental matters which the reorganized debtor must necessarily address as part of the confirmation process. The trustee believes and therefore asserts that such a concern is and should be addressed by the appropriate parties, such as the EPA and the DERR. Nevertheless, the nature and terms of such Joint Objection may indicate to the court that the trustee is not satisfactorily fulfilling his duties with regard to the environmental issues inherent in this case. The trustee believes and therefore asserts that he has fully cooperated with the environmental regulatory authorities and their personnel in promptly and satisfactorily addressing all environmental matters that must be addressed by the estate during his tenure as trustee. In fact, the trustee asserts that he has utilized funds generated in connection with the estate for the purpose of addressing such environmental issues, at the expense of other equally deserving administrative claims, such as the trustee, accountant for the trustee, counsel for the trustee, the environmental consultant for the trustee and the examiner and his professionals.

Response to Joint Objection at pp. 2-3, ¶ 3. Confirmation of the Proponents' Plan was scheduled for February 1, 1996. Thus by January 25, 1996, the Applicant had drafted three comprehensive pleadings, complete with exhibits. All three of these pleadings addressed environmental response issues and one of them indicated that the Trustee had reviewed claims filed in the Consolidated Debtors' case.

On January 16, 1996, less than a week prior to filing the Trustee's Response to Joint Objection, the Trustee instructed the Applicant to commence preparation of a Trustee's disclosure

statement and plan.[8] The Trustee believed that time was of the essence because the Trustee was concerned that conversion of the Consolidated Debtors' case to chapter 7 was imminent and would not be in the best interest of the Consolidated Debtors' estate or its creditors. The Trustee testified that the Consolidated Debtors' estate had cash flow problems and operated on a "hand to mouth" basis in spite of receiving $162,000 on January 6, 1996 from the sale of the Grand Junction Property. The Trustee also testified that around mid-January 1996, he believed there was a "strong chance" that the Proponents' Plan would not be confirmed given the appointment of a receiver over the Proponents' assets, because of Martineau's asserted conflict of interest involving Martineau's fee splitting arrangement, the concern that Utco would not provide sufficient funding for the Proponents' Plan,[9] and other problems the Trustee believed had to be resolved before the Proponents' Plan could be confirmed.[10]

Although progress was made toward resolving some of these issues, many remained, and it was not until February 21, 1996 that the Trustee received clarification that the Consolidated Debtors' assets were not to be used to collateralize loans to be used to settle the Henry J. Ricci estate. The Trustee's Disclosure Statement Dated February 16, 1996 and Trustee's Plan of Reorganization Dated February 16, 1996 (Trustee's Disclosure Statement and Plan) were filed on February 16, 1996, approximately on month

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[8] The Third and Final Verified Application of Trustee's Counsel for Allowance of Interim and Final Compensation as an Administrative Expense (Application) indicates the Applicant "beg[an] preparation of trustee's disclosure statement" on January 6, 1996. Application at exhibit "A" (entry for Suniville dated 1/6/96).

[9] Utco's general partner testified at the preliminary injunction hearing in the Henry J. Ricci case that he would not fund the proposed loan as long as a receiver remained over the Proponents' assets.

[10] Generally, the Trustee was concerned that the projected time lines to sell estate assets, projected cash flows, and the treatment of environmental cleanup set forth in the Proponents' Plan were not realistic. In addition, the following had filed timely objections to confirmation of the Proponents' Plan: Internal Revenue Service, Salt Lake County, EPA, DERR and Western Bank. The Trustee was also concerned that the Utah State Tax Commission would not accept its treatment under the Proponents' Proposed Plan, despite the lack of a filed objection.

after the Applicant received instructions from the Trustee to file the documents. At no time between January 16 and February 16, 1996, did the Applicant inform the Trustee that filing a Trustee's Plan would violate Fed. R. Bankr. P. 3016.

The Proponents' confirmation hearing in the Consolidated Debtors' case was noticed for February 1 and 2, 1996. On motion of the Proponents' receiver,[11] the confirmation hearing was continued to March 8 and 11, 1996 to give the Proponents time to resolve issues related to the appointment of a receiver over the Proponents' assets that were to collateralize the loan needed to fund the Proponents' Plan.

After the Applicant commenced drafting the Trustee's Plan and Disclosure Statement but before filing them, the Proponents and the Henry J. Ricci trustee signed a settlement stipulation (Stipulation) resolving the adversary proceeding filed in the Henry J. Ricci chapter 7 case on January 25, 1996. The Stipulation was filed with the Court on January 29, 1996, but not approved by the Court until a hearing on February 26, 1996.

The Proponents filed a motion to strike the Trustee's Plan and Disclosure Statement on February 22, 1996 asserting a violation of Fed. R. Bankr. P. 3016(a). The motion to strike was not heard because on March 8, 1996, the Proponents' Plan was confirmed, terminating the appointment of the Trustee and reinstating the Proponents in control of the Consolidated Debtors. The Trustee's concerns, existent in mid-January, were not finally resolved until the Court approved the Stipulation in the Henry J. Ricci case on February 26, 1996, until the collateral that was to secure the Utco loan was clarified on

[11] The motion was filed January 12, 1996. The hearing was held January 24, 1996 and continued to January 29, 1996. The Court eventually entered an order continuing the confirmation on February 2, 1996.

February 21, 1996, and until Utco finally committed full funding for the Proponents' Plan immediately prior to the confirmation hearing.

After confirmation, the Applicant assisted in an orderly transition of control of the assets of the estate from the Trustee to the Reorganized Debtors. The Applicant turned over work files that the Applicant first reviewed to determine confidentiality under Rule 1.6 of the Rules of Professional Conduct, and to protect written privileged communications between the Applicant and the Trustee, some of which included confidential matters related to Ricci family members. The process of reviewing work files prior to their surrender was prudent and necessary, and the time spent thereon was not excessive given the adversarial circumstances of the case.

The Application

On April 25, 1996, the Applicants filed the Third and Final Verified Application of Trustee's Counsel for Allowance of Interim and Final Compensation as an Administrative Expense (Application) seeking $106,476 in fees and $5,119.85 in costs for October 1, 1995 through April 24, 1996, and for final approval of previously allowed applications.[12] The Application was not drafted to reflect project billing. Therefore, to aid in resolution of the issue presented herein, the Court Ordered the Applicant to amend the Application by breaking out the Applicant's assessment of the time spent in various categories. In compliance therewith, the Applicant submitted a Supplement to the Application (Supplement). It attached exhibit "A" that itemized the fees associated with preparation of the Trustee's Disclosure Statement and Plan that totaled $18,901.50 (of which $4,704.00 was attributable to preparing

[12] Applications approved by the Court were in the amount of $84,867.67 and $99,082.85 in fees and costs, for a total prior allowance of $183,950.52.

exhibit "D" attached to the Trustee's Disclosure Statement and Plan and $2,757.50 of which was attributable to a review of claims) and exhibit "B" that itemized the fees associated with environmental services performed for the estate that totaled $21,010.55. Two other exhibits itemized $1,424 in time spent preparing and turning over documents to the Proponents and $2,128 of Suniville's time spent in preparing various fee applications.

The Proponents object to the Application on several grounds.[13] First the Proponents object to fees incurred in connection with drafting and filing the Trustee's Disclosure Statement and Plan as producing no benefit to the estate because, among other things, they were never approved nor confirmed, they were filed in violation of Fed. R. Bankr. P. 3016 and the Applicant should have known the Proponents' Plan would likely be confirmed. Second the Proponents object to fees incurred to prepare the Application because it did not comply with the United States Trustee Guidelines and thereby made review very difficult. Third, the Proponents object to fees incurred by the Applicant in parsing documents to be turned over to the Proponents because the Proponents assert the time spent was excessive. Fourth, the Proponents object to fees incurred for environmental work (in addition to the $20,791.34 incurred by TR Tech as environmental specialists during the same period of time) as excessive.[14]

The Application consists of approximately 1½ inches of time entries. When read together, the Applicant and the Supplement are inaccurate in a number of respects and the testimony does not

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[13] No objection is made to the rates charged by the Applicant.

[14] The Proponents have also objected to the Trustee's and Robison, Hill & Company's Third and Final Application for Allowance of Interim and Final Compensation as an Administrative Expense fee application as accountant to the Trustee.

satisfactorily explain the inaccuracies. For example, Cahoon's time entries are inconsistent between the two documents.[15] Some entries that appear on the Application are misentered on the exhibits "A" and "B" to the Supplement.[16] The Supplement is extremely difficult to utilize because it requires entry-by-entry cross reference to the Application. The Supplement also has the anomaly of sometimes, but not always, listing time entries under more than one heading, making reconciliation next to impossible. Many of the entries in the Application are lumped, especially for telephone calls, so that ascertaining the time spent for each subject is impossible. The portion of the Supplement that sets forth time spent preparing the fee application lists only Suniville's time, yet the Application lists at least 13.8 hours of associate time spent in preparing fee applications. In some instances the time entries and their categorization by project billing are unclear.[17]

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[15] The first page of exhibit "A" to the Application asserts that Cahoon spent 54.5 hours at $110 per hour and 107.8 hours at $120 per hour for a total of **162.3** hours or $18,931. The Court's review of the Application indicates that Cahoon, in fact, spent 82 hours at $110 per hour and 72.5 hours at $120 per hour for a total of **154.5** hours or $17,720. Cahoon testified on the stand that he spent a total of **155** hours.

Cahoon's time categorized in exhibits "A" and "B" to the Supplement, shows Cahoon spent 35.9 hours related to the Trustee's Disclosure Statement and Plan (Cahoon testified that he spent 40.9 hours preparing exhibit "D" attached to the Trustee's Disclosure Statement), 114.20 hours on environmental work (this figure does not include approximately 30 to 35 hours Suniville testified that Cahoon spent on environmental work but was inadvertently omitted from the Supplement), 6 hours on the turnover of documents to the Proponents, and Cahoon testified that he spent an additional 17.4 hours on zoning matters, for a grand total of 197.3 hours.

[16] On January 12, 1996, Suniville spent 2 hours in conference regarding the formulation of the Trustee's Plan. The time entry is correctly entered in exhibit "A," but entered as only .2 hours in exhibit "B." On January 26, 1996, Cahoon spent 6.8 hours drafting exhibit "D" to the Trustee's Disclosure Statement and Plan. The time is entered in exhibit "A," but no entry appears for Cahoon on exhibit "B" for that date.

[17] For example, the only time entry in the Application for Cahoon on January 27, 1996 is as follows:

Date	Attorney	Description	Time Spent	Compensation
1/27/96	B. R. Cahoon	Draft exhibit to trustee's disclosure statement re environmental conditions and issues re Vernal, Roosevelt, and 2021 North (3.2); review files re Vernal, Roosevelt and 2021 North (.8); discussions with T. Thatcher re cleanup work on Vernal,	4.8	$576

(continued...)

Although many of the discrepancies appear to be minor, the inaccuracies between the Application, the Supplement and the testimony, cast doubt upon the credibility and accuracy of the data in the Supplement, if not the Application. The Court finds the project billing itemization in the Supplement unreliable and it will be disregarded.

For the purpose of this opinion, the Court has recalculated all time entries related to preparation of the Trustee's Disclosure Statement and Plan, perpetration of the Escrow Agreement related to the Grand Junction Property, and certain time spent related to reviewing claims, directly from the Application. The total time requested, including all time spent in lumped entries, for preparation of the Trustee's Disclosure Statement and Plan totals $20,653.50. The Court further finds that the Applicant incurred $4,467 drafting the Escrow Agreement related to the Grand Junction Properties, not including time spent in closing the transaction that would have occurred regardless of any change in the terms of the Escrow Agreement. In addition, the Applicant's time reflected in unlumped entries spent reviewing claims related only to the Trustee's duties pursuant to section 1106 totals $197.50.

DISCUSSION

The allowance or disallowance of claims against the estate is a core matter and this Court is authorized to hear and determine the issues herein and issue a final order pursuant to 28 U.S.C. §

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[17](...continued)

Roosevelt and 2021 North (.8)

Exhibit "A" to the Supplement indicates that Cahoon spent 3.5 hours ($384) for work on the Trustee's Disclosure Statement and Plan described as "Preparation of environmental report." There is no combination of the time entries from the Application that produces 3.5 hours or $384. In addition, the Application indicates Cahoon's rate was $120/hour on January 27, 1996. Exhibit "A" to the Supplement indicates Cahoon's rate was $110/hour, or something slightly less, on January 27, 1996.

157(2)(B). The Applicant bears the burden of proving entitlement to fees under 11 U.S.C. § 330.[18] *E.g.*, *In re Roberts*, 75 B.R. 402, 404 (D. Utah 1987) (distinguished on other grounds by *Interwest Business Equip., Inc. v. U.S. Trustee (In re Interwest Business Equip., Inc).*, 23 F.3d 311, 314 n.5 (10th Cir. 1994)); *Murphy, Thompson & Gunter v. Griffen (In re Griffen)*, Case No. 93-C-1048 at p.24 (D. Utah July 18, 1994) ("fee applicant has the burden of establishing reasonableness").

Standard Applicable to Allowance of Fees

The statute applicable to this Application is section 330 as it existed prior to the Bankruptcy Reform Act of 1994.[19] That sections states:

> **§ 330. Compensation of officers.**
>
> (a) After notice to the parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, or to the debtors' attorney —
>
> (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by such trustee, professional person, or attorney, as the case may be, based on the nature, the extent, and the value of such

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[18] Future references are to Title 11 of the Unites States Code unless otherwise noted.

[19] *See supra* note 5. Section 330(a) was amended by the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 §§ 224, 702 (1994). The amendment applies only in cases filed on or after October 22, 1994 and "shall not apply with respect to cases commenced under Title 11 of the United States Code before [October 22, 1994]." Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 §§ 224, 702 (1994). The present case was filed on July 16, 1993. The January 23, 1995 Consolidation Order provided that "the Bankruptcy Code, as it existed prior to the Bankruptcy Reform Act of 1994, shall govern the administration of the consolidated estates." Order Respecting Trustee's Motion for Substantive Consolidation (1/25/95). Accordingly, the Court will apply § 330 as it existed prior to the Bankruptcy Reform Act of 1994 .

> services, the time spent on such services, and the cost of comparable services other than in a case under this title; and
>
> (2) reimbursement for actual, necessary expenses.

The controlling case interpreting section 330 is *Rubner & Kutner, P.C. v. U.S. Trustee (In re Lederman Enters., Inc.)*, 997 F.2d 1321 (10th Cir. 1993). In *Lederman*, the Tenth Circuit affirmed the district court's and the bankruptcy court's pronouncement that benefit to the bankruptcy estate is a threshold concern when determining eligibility for fees and not "merely one factor to be considered when using the twelve-factor test adopted in *First Nat'l Bank v. Niccum (In re Permian Anchor Services, Inc.)*, 649 F.2d 763,768 (10th Cir. 1981)." *Id.* at 1323. The Tenth Circuit interpreted the phrase "necessary services" in section 330(a)(1) to include a determination of benefit to the bankruptcy estate. *Id.* ("An element of whether the services were 'necessary' is whether they benefited the bankruptcy estate.").

Trustee's Business Judgment

The Proponents object to the Applicant's request for allowance of fees related to preparation of the Trustee's Disclosure Statement and Plan as providing no benefit to the estate. A great deal of time during the evidentiary hearing was devoted to enumerating the factors that prompted the Trustee on January 16, 1996 to direct the Applicant to prepare a plan and disclosure statement, why those concerns were or were not justified, and whether the Applicant should have complied with his client's instructions. The manner in which the parties presented the evidence compels the Court to distinguish between the evidence related to the Trustee's actions, and that applicable to whether the Applicant's fees

should be allowed. The primary focus of the evidence was whether events supported the Trustee's decision to instruct the Applicant to prepare the Trustee's Disclosure Statement and Plan. It has long been the standard in this jurisdiction that the Court will not interfere with a Trustee's business judgment made in good faith, upon reasonable basis and within the scope of the trustee's authority under the Code. *In re Curlew Valley Assoc.,* 14 B.R. 506 (Bankr. D. Utah. 1981).

Although some of the reasons articulated by the Trustee and the Applicant for deciding to draft the Trustee's Disclosure Statement and Plan, may, in hindsight, appear to have been improvident or premature, there is ample evidence in the record, including an expert opinion, that supports the existence of a reasonable basis for the Trustee's decision, made in good faith, to proceed with his own plan of reorganization.[20] Although the record supports the Trustee's business decision to proceed with the Trustee's Disclosure Statement and Plan, that conclusion is not dispositive of the issue of whether the Applicant exercised proper legal judgment and should have proceeded to draft the documents, or whether the time spent is compensable.

Benefit to the Estate

[20] The appointment of a receiver over the Proponents' assets had the effect of eliminating the funding (referred to as the 'Heart and Soul' of the Proponents' Plan) and thus potentially defeating the Proponents' Plan. The Consolidated Debtors' estate had limited cash resources and the Trustee was concerned about the effect of a forced liquidation on creditors. There was a lack of clarity over the collateralization of the Utco loan and whether the Proponents had the ability to obtain a loan commitment from Utco with sufficient specificity to satisfy the Trustee's apprehensions. Lastly, the Judge in the Henry J. Ricci case was concerned regarding the 'admitted conflict of interest' of Martineau for acting as go between Utco and BRF and charging fees between his two clients and the effect that might have on approving any settlement of the December 23, 1995 order.

The Applicant must demonstrate that when rendered, the services were reasonably likely to provide benefit to the bankruptcy estate. *Lederman*, 997. F.2d at 1322.[21] *See also In re Pacific Research & Development Corp. (In re Lume!)*, Bankr. No. 92B-24501, Memorandum Decision Regarding Fifth and Final Application for Compensation of Debtor's Counsel at p.16 (Bankr. D. Utah 4/3/95) (J. Boulden) (Because "it should have been apparent to the Applicant that the court would not approve the Sale Motion . . . the Applicant has failed to prove that the services were 'necessary' as required by § 330(a)(1).");[22] *In re Rocky Mountain Helicopters, Inc.*, 186 B.R. 270, 272-73 (Bankr. D. Utah 1995) (J. Clark) ("[W]ithout evidence to show that Whitman was aware or should have been aware from the outset that particular litigation would provide no benefit to the debtor, this court will not deny or reduce professional fees for professionals involved in the litigation.") (citing *Lederman*, 997 F.2d 1321 (10th Cir. 1993)). Benefit is not a term defined by the Code or by *Lederman*. In its more expansive judicial interpretation, one nonexclusive factor to consider in determining what is a benefit is "whether the services rendered promoted the bankruptcy process or administration of the estate in accordance with the practice and procedures provided under the Bankruptcy Code and Rules." *In re Spanjer Bros., Inc.*, 191 B.R. 738, 748 (Bankr. N.D. Ill. 1996) (applying the 1994 amendments, the Court found that benefit to the

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[21] In *Lederman*, the bankruptcy court confirmed a chapter 11 plan that required the debtor to make payments to a secured creditor. *Lederman*, 997 F.2d at 1322. The debtor defaulted on its payments, thus entitling the secured creditor to immediate possession of its collateral. Rather than surrender the collateral, the debtor (represented by the same attorneys) filed a second chapter 11 case and sought confirmation of another plan. The bankruptcy court denied the debtor's attorneys compensation for all time related the disclosure and plan confirmation process "[b]ecause these legal services provided no demonstrable benefit to the bankruptcy estate [and the court finds them] unnecessary." *Id*. at 1322.

[22] In *Lume!*, this Court likewise held that where a chapter 11 plan had been denied confirmation as unfeasible, the time spent in regurgitating of the same issues in the form of a sale under § 363 were not compensable because the sale was not approved and counsel should have known the services would be of no benefit to the estate.

estate encompassed both economic and non economic factors).[23] *See also In re Lifshultz Fast Freight, Inc.*, 140 B.R. 482, 487-89 (Bankr. N.D. Ill. 1992) (discussing history of benefit to estate from the Act through pre-1994 amendments to the Code, Court determined that necessary services have always included services that aid in the administration of the case and help the client fulfill duties under the bankruptcy law, whether or not those services result in a monetary benefit to the estate).

Trustee's Disclosure Statement and Plan

In this case the Applicant argues that at the time it drafted and filed the Trustee's Disclosure Statement and Plan, the services were reasonably likely to benefit the estate because it appeared unlikely to the Trustee that the Proponents' Plan would be confirmed. This despite the fact that the Proponents Disclosure Statement had been approved 68 days before the Applicant filed the Trustee's Disclosure Statement and Plan and despite the fact that confirmation of the Proponent's Plan was scheduled 20 days after the Applicant filed the Trustee's Disclosure Statement and Plan.

Implicit in the Applicant's arguments that its services were beneficial is that it had no alternative but to accept the result of the Trustee's business judgment and comply with the Trustee's direction to draft the Trustee's Disclosure Statement and Plan. The Utah Rules of Professional Conduct, Rule 2.1, made applicable to the within proceedings by D. Ut. #103-1(h), provide that, "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice." Compliance with Rule 2.1 required the Applicant to inform the Trustee that if he proceeded with the Trustee's

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[23] The Court notes that the *Spanjer Bros.* court was interpreting "benefit" as it currently exists in section 330. While the Court is applying a prior version of section 330 in this case, the Court concluded that the definition used in *Spanjer Bros.* is equally applicable.

instructions to draft and file a Trustee's plan without first obtaining permission from the Court, a violation of Fed. R. Bankr. P. 3016 would result. *In re Consupak, Inc.*, 87 B.R. 529, 549 (Bankr N.D. Ill., 1988) (Trustee's attorney could not close his eyes to Trustee's actions having legal consequences for the estate, but must comply with the ethical norms governing the practice of law). The Applicant is not shielded by reliance on the Trustee's business judgment, without exercising his own independent legal judgment of whether his subsequent actions were legally supportable. While the Court may rely on the expert's factual testimony opining that the compensation sought for preparation of the Trustee's Disclosure Statement and Plan was necessary and beneficial, the expert's threshold conclusion of law that his opinion was unaffected by a violation of Fed. R. Bankr. P. 3016 is not accepted by this Court.[24] In fact, the Court finds the violation to be the turning point of the analysis.

Rule 3016(a) of the Federal Rules of Bankruptcy Procedure, as it existed during the time relevant to this opinion, states:

> A party in interest, other than the debtor, who is authorized to file a plan under § 1121(c) of the Code may not file a plan after entry of an order approving a disclosure statement unless confirmation of the plan relating to the disclosure statement has been denied or the court otherwise directs.

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[24] To the extent the expert's opinion stated legal conclusions drawn by applying the law to the facts of the case, the Court disregards those statements as violative of Fed. R. Evid. 704(a). *A.E. v. Independent School D. No. 25*, 936 F.2d 472 (476) (10th Cir. 1991) (Fed. R. Evid. 704(a) allows an expert witness to give an opinion as to the ultimate issue of fact, but questions of law are the provence of the Court); *Accord, Sagamore Park Centre Assoc. Ltd. Partnership v. Sagamore Park Properties*, 200 B.R. 332, 341-42 (D. N.D. Ind. 1996) (trial court did not abuse discretion by determining that expert's opinion whether a hypothetical purchaser would take title free of a second mortgage would be of no assistance to the Court because it was a question of law).

Fed. R. Bankr. P. 3016(a) (1996).[25] The Applicant's rates and text in the Application justifying the fees all profess the Applicant's expertise in the bankruptcy field. The Applicant should have known that Fed. R. Bankr. P. 3016(a) is not permissive but is an absolute bar to filing a disclosure statement and plan absent Court authorization.[26] Fed. R. Bankr. P. 3016(a); *In re Express One Internat'l, Inc.*, 194 B.R. 98, 101 (Bankr. E.D. Tex. 1996) ("If [the Debtor] obtains approval of its Disclosure Statement . . . no other party will be permitted to file a plan unless confirmation of [the Debtor's] plan is denied.") (*citing* Fed. R. Bankr. P. 3016(a)); *Te-Two Real Estate Ltd. Partnership v. Creekstone Apartments Assocs. (In re Creekstone Apartments Assocs.)*, 1995 WL 588904 at p.15 (Bankr. M.D. Tenn. 1995) (because bankruptcy court approved debtors' disclosure statement and had not denied confirmation of the debtor's plan, interested party had no right to submit competing plan under 3016(a)); *In re Mother Hubbard, Inc.*,

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[25] The Court notes that Fed. R. Bankr. P. 3016(a) was eliminated, effective December 1, 1996. The Court will apply Fed. R. Bankr. P. 3016(a) as it existed prior to December 1, 1996 because that is the period of time relevant to this opinion. The advisory committee notes to Fed. R. Bankr. P. indicate "[s]ubdivision (a) is abrogated because it could have the effect of extending the debtor's exclusive period for filing a plan without satisfying the requirements of § 1121(d). The abrogation of subdivision (a) does not affect the court's discretion with respect to the scheduling of hearings on the approval of disclosure statements when more than one plan has been filed." Advisory Committee Notes to Fed. R. Bankr. P. 3016 (1996). The reason given for abrogating subdivision (a) to prevent extending the **debtor's** exclusive period has no application in this case where it was the Proponents' Disclosure Statement that was approved. The Court will not accept the subsequent abrogation of subdivision (a) as an excuse for an allegedly knowing violation of this rule.

[26] The Applicant incorrectly cites *Aspen Limousine Serv., Inc*., 187 B.R. 989 (Bankr. D. Colo. 1995) as support for the proposition that "[t]he cases interpreting Rule 3016(a) provide the court with **great flexibility** in managing the reorganization process. "Memorandum in Support of Van Cott, Bagley, Cornwall & McCarthy's Third and Final Verified Application of Trustee's Counsel for Allowance of Interim and Final Compensation as an Administrative Expense at p.27 (10/16/96) (emphasis added). In *Aspen Limousine Service*, the court defined the issues before it as "ones of first impression involving the accelerated and streamlined treatment of small business debtors in Chapter 11." *Aspen*, 187 B.R. at 991. The court indicated that the applicable statutory language was contained in sections 105(d), 1121(e), and 1125(c) of the Bankruptcy Code. *Id*. at 993. In passing, and as an introduction to its analysis of the sections just cited, the *Aspen* court cited Fed. R. Bankr. P. 3016(a) as partial support for the proposition that "Under the provisions of the Bankruptcy Code, this Court is given a **measure of discretion** in managing the confirmation process." *Aspen Limousine Serv., Inc.*, 187 B.R. 989 (Bankr. D. Colo. 1995), *aff'd* 193 B.R. 325 (D. Colo. 1995) (no discussion of Fed. R. Bankr. P. 3016) (emphasis added).

152 B.R. 189, 194-95 (Bankr. W.D. Mich. 1993) ("[A]bsent denial of confirmation of a plan, [Fed. R. Bankr. P. 3016(a)] prohibits filing of a competing plan unless the 'court otherwise directs.'"). *See generally In re Interco Inc*., 137 B.R. 999, 1000-0001 (Bankr. E.D. Miss. 1992) (Congress has established a scheme and a procedure for submission, consideration, and confirmation of a plan of reorganization that is both efficient and fair).

Of course, if this Court applied a judicial interpretation of benefit to mean dollar for dollar economic impact, the time spent drafting the Trustee's Disclosure Statement and Plan would not be compensated because the Trustee's Disclosure Statement and Plan were never heard nor approved by the Court. However, a more appropriate interpretation of benefit encompasses services that promoted the bankruptcy process or administration of the estate, but only if in accord with the practice and procedures provided in the Code and Rules. *See e.g. In the Matter of Taxman Clothing Co.*, 49 F.3d 310, 314-15 (7th Cir. 1995) (*reh'g en banc denied*, March 30, 1995) (Circuit disallowed fees where professional breached fiduciary duty to maximize the value of the estate); *In re James Contracting Group, Inc.*, 120 B.R. 868, 872 (Bankr. N.D. Ohio 1990) (professional not entitled to fees if efforts, in fact, obstructed or impeded the administration of the estate). *See Also Lifshultz Fast Freight*, 140 B.R. at 488-89 (under pre-1994 Code, necessary services include services in addition to those that result in a monetary benefit to the estate). To interpret benefit to include services rendered that were not in compliance with the Code and Rules is unsupported by any case law cited by the Applicant or found by the Court. The Applicant should have known that it was prohibited from filing a competing plan without court permission, which it

neither sought nor obtained.[27] The Court concludes the Applicant's time spent related to the Trustee's Disclosure Statement and Plan in the amount of $20,653.50 could provide no benefit to the Consolidated Debtors' estate and the fees incident thereto are denied. Therefore, since the threshold test of benefit has not been met, the Court will not address the Proponents' other objections related to time spent preparing the Trustee's Disclosure Statement and Plan.[28]

The Applicant argues that even if the Court finds that the Trustee's Disclosure Statement and Plan was of no benefit to the estate, the Court should award compensation of $4,704 for preparation of an environmental report attached as exhibit "D" to the Trustee's Disclosure Statement (Environmental Exhibit) and $2,757.50 for the Trustee's claims review process (Claims Review) because they were relied upon by parties to the reorganization process. The Applicant asserts that it and the Trustee relied on the Environmental Exhibit and the Claims Review to analyze the Proponents' Disclosure Statement and Plan. These assertions are not supported by the evidence.

The Applicant did not begin drafting the Environmental Exhibit until January 25, 1996. This was after the Court had approved the Proponents' Disclosure Statement and the Proponents had filed their Plan. It was also after the Applicant had drafted and filed the Trustee's Objection to Proponents'

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[27] The Court rejects the Applicant's argument that, as in drafting an amended complaint to attach to a motion filed pursuant to Fed. R. Bankr. P. 7015, it was necessary to draft the Trustee's Disclosure Statement and Plan before seeking court approval for their filing pursuant to Fed. R. Bankr. P. 3016(a). Neither the rule nor case law require such action.

[28] The Proponents' remaining objections are that the Trustee's plan could not be confirmed over objection under § 1129(a)(9) and (b)(2)(A)(ii), that settlement negotiations between the Proponents, the Henry J. Ricci trustee, and creditors who filed objections to the Proponents' Plan and Disclosure Statement should have put the Applicant on notice that preparation of the Trustee's Disclosure Statement and Plan would likely be a waste of time, and that the amount incurred in drafting the Trustee's Disclosure Statement and Plan was excessive.

Disclosure Statement, the Trustee's Objection to Proponents' Plan, and the Trustee's Response to Joint Objection which all analyzed issues relating to the environmental condition of the Consolidated Debtors' estate in the context of the Proponents' Disclosure Statement and Plan. Although the Environmental Exhibit is a more comprehensive document, it is obvious the issues and information existed in part prior to January 25, 1996. Moreover, the contemporaneous time entries indicate that the time spent relating to the Environmental Exhibit for which the Applicant seeks to be compensated was for "**drafting** exhibit to [Trustee's] disclosure statement," and was not spent **analyzing** environmental issues or the feasibility of the Proponents' Plan. *See, e.g.*, Application at exhibit "A" (entries for Cahoon dated 1/25/96, 1/26/96, 1/29/96, 1/31/96) (emphasis added).

Richard Rathbun (Rathbun), counsel for the Utah Department of Environmental Quality, testified that he relied on the Environmental Exhibit to reach a settlement with the Proponents during the confirmation process in early March 1996. The Court does not find his testimony persuasive on the issue of whether the Environmental Exhibit provided a benefit to the estate because Rathbun testified that he received the Environmental Exhibit two to four months prior to the March settlement. The Applicant did not begin drafting the Environmental Exhibit until January 25, 1996 --slightly over a month before the settlement.[29] Even if the Court were to disregard Rathbun's testimony regarding when he received the Environmental Exhibit, the Court would still be unable to find that Rathbun's reliance thereon benefitted the estate. To so rule would be to reward the Applicant for allowing a creditor to rely upon an exhibit to an

[29] Rathbun may have been relying on exhibit "A" to the Trustee's Objection to Proponents' Disclosure Statement dated September 25, 1995 and filed with the Court November 13, 1995, slightly less than four months prior to the EPA and DERR reaching a settlement with the Proponents.

unapproved disclosure statement, filed in violation of Fed. R. Bankr. P. 3016(a), and thereby compromise the creditor's substantive rights. The Court finds the Applicant's assertion that the Environmental Exhibit provided a benefit to the Consolidated Debtors' estate independent of the Trustee's Disclosure Statement and Plan without merit.

Likewise, the contemporaneous time entries relating to the Claims Review indicate that the Applicant did not begin preparing the Claims review until January 29, 1996, after the Proponents' Disclosure Statement was filed and approved over the Trustee's Objection to the Proponents' Disclosure Statement that contained a claims analysis, and the Proponents' Plan had been filed and was awaiting confirmation. Application at exhibit "A" (entries for Suniville dated 1/29/96 and 1/30/96 describing times spent as "[o]btain and review claims docket in Ricci Investment case; re trustee's disclosure statement" and "[r]eview B.R.&F. schedule of debts/claims annexed to B.R.&F. disclosure statement; check, proof and revise same and cross reference against schedules and claims register; conference with secretary re preparation of same for trustee's disclosure statement"). Again the entries seek compensation for **drafting** exhibits to the Trustee's Disclosure Statement and not for **analyzing** the Proponents' Plan and Disclosure Statement. *See, e.g., id*. at exhibit "A" (entries for Suniville dated 2/1/96, 2/2/96, 2/9/96). Prior to the end of January 1996, both the Proponents and the Applicant had conducted their own claims analysis. In fact, an analysis by the Applicant was attached to the Trustee's Objection to the Proponents Disclosure Statement filed November 13, 1995.

The Applicant also asserts that it should be awarded compensation for the Claims Review because it was part of the Trustee's duties under section 1106. To the extent that the contemporaneous

time records indicate that the Applicant assisted the Trustee in reviewing claims, rather than drafting an exhibit to the Trustee's Disclosure Statement and Plan, the Court will award compensation. Certain entries in this category, however, are lumped and as a result the Court cannot distinguish between telephone conferences related to claims review and those related to preparation of the Trustee's Disclosure Statement and Plan. Accordingly, the Court will award $197.50 of the $2,757.50 sought as compensation for the Claims Review as benefitting the estate in accordance with section 1106.

Compliance with the United States Trustee Guidelines and Turnover of Documents to the Proponents

The Proponents argue that fees incurred by the Applicant in connection with the preparation of the Application should be minimized or disallowed in part because the Applicant did not comply with the United States Trustee Guidelines for fee applications and in part because the Application was presented in a way that is difficult to analyze. The United States Trustee Guidelines are not applicable to this case for the same reason that the 1994 amendment to section 330 is not applicable. The United States Trustee Guidelines apply only to cases filed on or after October 22, 1994. United States Trustee Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses filed under 11 U.S.C. § 330 at p.1, ¶ I.B. ("The United States Trustees shall use these Guidelines in all cases commenced on or after October 22, 1994.") (issued January 30, 1996).[30]

[30] Although the Consolidation Order states that "the date of the bankruptcy petitions of Inland Oil Products, Inc., Monrovia Oil Products, Inc., and Salina Investment, Inc., shall be deemed to be the date of the entry of this order permitting substantive consolidation and that all deadlines and statute of limitations with regard to these entities will flow from the entry of the order of substantive consolidation," the more applicable language states that the "Bankruptcy Code, as it existed prior to the Bankruptcy Reform Act of 1994, shall govern the administration of the consolidated estates." Consolidation Order at pp. 3-4.

The Court agrees with the Proponents that the Application has not been presented to the Court in a way that makes review readily accessible. The format of the Supplement to the Application that contains only a partial listing of the services performed and requires cross checking of every entry with the Application is extremely burdensome. But, under the circumstances, defects in the format, although annoying, are not by themselves grounds for the disallowance of fees.

The Proponents also object to $1,424 sought by the Applicant as compensation for the turnover of documents to the reorganized debtor and its counsel as unreasonable. The Court rejects the assertion that the fees charged were unreasonable. The service was beneficial and necessary to an orderly transition of the estate from the Trustee to the Reorganized Debtors. In light of the highly adversarial relationship between the Trustee and the Proponents, the time spent and the fees charged are reasonable.

Duplication of Environmental Services

The Proponents object to $21,010.55 sought by the Applicant for environmental work as extraordinary, especially when considering that TR Tech was awarded $20,791.34 during the same six month period of time. The Applicant's expert opined that the attorneys fees charged for environmental work were appropriate and that it was prudent to involve an environmental attorney to deal with environmental issues given their complexity and recognized requirement for specialization. Time spent by Suniville and Cahoon conferencing regarding environmental issues related to the Consolidated Debtors' estate was beneficial and necessary in that it was important for Suniville, as lead attorney, to keep abreast about environmental issues. The Court will not reduce the Applicant's compensation for time spent by both Cahoon and Suniville in meetings relating to the sale and cleanup of properties with potential hazardous waste issues. Both environmental and bankruptcy issues had to be resolved and the Court cannot distinctly categorize the time spent as solely one or the other. The evidence indicates the services rendered by the Applicant are not duplicative of the services rendered by TR Tech and were necessary and beneficial to the Consolidated Debtors' estate.

However, the Court concludes that the fees relating to the Escrow Agreement to the extent that they were expended to obtain and allow a result contrary to the Grand Junction Order are not compensable. *See supra* notes 21-23 and accompanying text (To provide a benefit, services rendered must generally promote bankruptcy process or administration of the estate in accordance with the bankruptcy code.). Because the Application does not break out fees relating to the Escrow Agreement in any meaningful way that would allow the Court to make this determination, the Court finds that the entire

$4,467 incurred by the Applicant that relate to the Escrow Agreement provided no benefit to the Consolidate Debtors' estate and disallows the same.

CONCLUSION

The Court has resolved, as set forth above, all issues regarding the threshold determination of benefit to the estate and whether the services were necessary, as required by *Lederman*. *Lederman*, 994 B.R. at 1323-33. Section 330 also requires a determination of reasonableness, and this Circuit has adopted the lodestar analysis set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974). *See Lederman*, 994 B.R. at 1323; *In re Gillett Holdings, Inc.*, 137 B.R. 475 (Bankr. D. Colo. 1992). That twelve part test[31] when applied to the fees in this case, indicates that the fees charged are reasonable except where noted above.

Based upon the foregoing, it is hereby

ORDERED, as follows:

1. Fees related to preparation of the Trustee's Disclosure Statement and Plan in the amount of $20,653.50, and fees related to the Escrow Agreement in the amount of $4,467 provided no benefit to the Consolidated Debtors' estate and are disallowed,

2. Fees related to Claims Review in the amount of $197.50 are allowed,

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[31] "In awarding fees in bankruptcy matters, the court should consider the following factors: (1) the time and labor required; (2) the novelty and difficulty of the issues presented; (3) the skill required to perform the services properly; (4) the preclusion of other employment due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the professionals; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." *Gillett Holdings*, 137 B.R. at 481, n.10.

3. Total fees in the amount of $81,553 are allowed as reasonable compensation for actual, necessary services performed for the estate pursuant to the Application,

4. Costs of $5,119,85 are allowed pursuant to the Application,

5. All fees and costs awarded by this Order and a total of $183,950.52 allowed by prior Order's of the Court are hereby approved as final compensation in connection with this case.

DATED this ____ day of January, 2000.

_____
JUDITH A. BOULDEN
United States Bankruptcy Judge

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I, the undersigned, hereby certify that I served a true and correct copy of the foregoing Memorandum Decision and Order Granting In Part and Denying In Part Van Cott, Bagley, Cornwall & McCarthy's Third and Final Verified Application of Trustee's Counsel for Allowance of Interim and Final Compensation as an Administrative Expense by mailing the same, postage prepaid, to the following, on the ____ day of January, 1997.

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