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 REGARDING SUPPLEMENTAL APPLICATION OF VAN COTT, BAGLEY, CORNWALL & McCARTHY FOR COMPENSATION FOR DEFENSE OF THIRD AND FINAL APPLICATIONS OF TRUSTEE, ACCOUNTANT FOR TRUSTEE AND COUNSEL FOR TRUSTEE, AND SUPPLEMENTAL APPLICATION OF W. LAMONTE ROBISON AND ROBISON, HILL & COMPANY FOR COMPENSATION FOR DEFENSE OF THIRD AND FINAL APPLICATIONS OF TRUSTEE, ACCOUNTANT FOR TRUSTEE AND COUNSEL FOR TRUSTEE

Two fee applications are pending before the Court. The first is the Supplemental Application of Van Cott, Bagley, Cornwall & McCarthy for Compensation for Defense of Third and Final

Applications of Trustee, Accountant for Trustee and Counsel for Trustee (Van Cott's Supplemental Application). The second is the Supplemental Application of W. LaMonte Robison and Robison, Hill & Company for Compensation for Defense of Third and Final Applications of Trustee, Accountant for Trustee and Counsel for Trustee (Trustee's Supplemental Applications) (collectively the Supplemental Applications).

The Supplemental Applications represent one more phase in the evolution of a contentious fee dispute arising from fees and costs incurred by W. LaMonte Robison, the court-appointed trustee in this chapter 11 case (Trustee), the Trustee's court-appointed accounting firm of Robison, Hill & Co., and Van Cott, Bagley, Cornwall & McCarthy (Van Cott), the attorneys authorized to represent the Trustee. The parties objecting to the Supplemental Applications are Western States Investments, L.C., B.R.& F., L.C., and the Reorganized Debtors (Objectors), some of whom proposed the now confirmed *Plan of Reorganization Proposed by Western States Investments, L.C. and B.R.&F., L.C.* dated March 21, 1996 (Confirmed Plan). The Objectors are economically related to the original management of Ricci Investment Company and its related entities, the Consolidated Debtor. The Objectors were displaced as management by the appointment of the Trustee in this case.

PRIOR PROCEEDINGS

On October 24, and December 12 and 13, 1996, the Court heard evidence regarding Van Cott's third fee application filed April 25, 1996, (Van Cott's Third Application) wherein Van Cott sought reimbursement for $106,476 in fees and $5,119.85 in costs. The Objectors challenged the allowance of $40,797.05 of the fees requested in Van Cott's Third Application as follows:

$20,653.50 for fees incurred to prepare the Trustee's competing plan and disclosure statement;

$16,543.55 for fees related to issues of environmental regulation and compliance requirements;

$1,424.00 for fees related to turnover of documents; and

$2,176.00 for fees incurred to prepare prior fee applications.

The evidence presented to support Van Cott's Third Application included testimony by the following: 1) the Trustee's lead attorney describing Van Cott's Third Application, and the history of the case and factual circumstances of the charges for the disputed fees, 2) an associate attorney describing legal research and advice related to environmental regulations and compliance issues, 3) creditor's counsel regarding environmental matters, 4) the Trustee regarding the history of the case and his perspective of the factual circumstances surrounding the fees challenged by the Objectors, and 5) an expert witness opining regarding the appropriateness of the Trustee's preparation of a competing disclosure statement and plan. Van Cott also presented evidence regarding its billing procedures and methodology for producing what the Court found to be a confusing and inaccurate project billing format that comprised Van Cott's Third Application.

On January 10, 1997, the Court issued a Memorandum Decision and Order (Attorneys' Fee Decision) allowing as an administrative expense $81,553 in fees and $5,119.85 in costs as the final allowance for Van Cott's Third Application, plus allowance of $183,950.52 from two prior fee applications. *Ricci Investment Co.*, 93B-23895 slip op. at 31-32 (January 10, 1996, Bankr. D. Utah). In the Attorneys' Fees Decision, the Court disallowed $20,653.50 in fees related to the preparation of the

Trustee's competing plan and disclosure statement and $4,467.00 in legal fees related to a transaction involving real property in Grand Junction, Colorado. The amount disallowed represented 62 percent of the fees challenged by the Objectors. The Court did not reduce Van Cott's fees as a result of the incomplete itemization of services performed by that firm even though the Court noted that some of the time entries were inaccurate and the format required parties to cross-check every entry for accuracy. *Ricci Investment Co.*, 93B-23895 slip op. at 16 and 29 (January 10, 1996, Bankr. D. Utah).

On January 21, 1997, Van Cott appealed the Attorneys' Fee Decision disallowing a portion of Van Cott's fees. The Objectors cross-appealed on January 31, 1997, but later withdrew their cross-appeal. As required by the Confirmed Plan, the Objectors paid Van Cott $70,129.30 on February 19, 1997, and the balance of $16,543.55 on April 4, 1997. Van Cott's appeal of the Attorneys' Fee Decision is pending before the District Court.

In spite of the Court's Attorneys' Fees Decision on similar and related issues, another evidentiary hearing went forward on January 16, February 21 and 28, 1997,[1] regarding the Trustee and Robison, Hill & Co.'s Third Application filed April 26, 1996, (collectively the Trustee's Third Applications). The Trustee requested $41,942 in fees and Robison, Hill & Co. sought $14,198.10 in fees and $53.70 in costs. The Objectors challenged the Trustee's Third Applications on a number of theories including an objection to the time spent for preparation of the competing plan and disclosure statement, but ultimately focused upon the assertion that the Trustee and Robison, Hill & Co.'s hourly fees should have been

[1] The Court limited the trial time available to the litigants to three days for the Trustee's Third Applications because it was apparent that if time constraints were not imposed, the litigation would expand to consume an amount of time on the Court's calendar disproportionate to the sums at issue.

reduced by at least 15 percent as a result of what the Objectors considered negligent administration of the estate. The Trustee and his professionals proceeded with the second hearing upon the premise that any compromise with the Objectors that resulted in a substantial reduction in the amount of fees requested by the Trustee would constitute an admission of either negligence or wrongdoing by the Trustee and would, among other things, damage the Trustee's reputation built on forty years of service to the Court.

The evidence presented to support the Trustee's Third Applications included testimony by the following: 1) the Trustee describing the Trustee's Third Applications, history of the case and his perspective of the factual circumstances surrounding the challenged fees, 2) the prior Court appointed examiner regarding his examination as set forth in the examiner's report filed with this Court and upon which the Court had based its appointment of the Trustee, 3) former employees of the estate regarding certain events during the Trustee's administration of the estate, and 4) an expert witness opining as to the appropriateness of the accounting and management activities of the Trustee during the Trustee's term of administration. The Trustee also presented evidence to provide the Court with instruction regarding how to read and decipher the Trustee's Third Applications. In addition, the parties stipulated that the Court consider all the evidence produced at the prior hearing related to Van Cott's Third Application.

The Objectors raised a colorable claim upon which they presented factual and expert evidence. Despite this, the Court ultimately found the Trustee carried his burden of proof in support of the majority of the sums sought in the Trustee's Third Applications. On March 18, 1997, the Court issued a Memorandum Decision and Order (the Trustee's Fees Decision) allowing as an administrative expense $36,595.60 in fees for the Trustee, and $13,773.60 in fees and $53.70 in costs for Robison, Hill & Co.

as the final allowance for the Trustee's Third Applications, plus final allowance of $103,539.50 for the Trustee and $34,868.88 for Robison, Hill & Co. from prior fee applications. *Ricci Investment Co.,* 93B-23895 slip op. at 24 (March 18, 1997, Bankr. D. Utah). The Court disallowed $5,392.00 and $424.50 respectively from the Trustee and Robison, Hill & Co's Third Applications. The disallowed time entries related to the preparation of the Trustee's plan and disclosure statement. The disallowance was consistent with the Attorneys' Fees Decision entered less than two months earlier in this case. The Trustee and Robison, Hill & Co. appealed the Trustee's Fees Decision. As required by the Confirmed Plan, on April 4, 1997, the Objectors paid $36,595.60 in fees to the Trustee, and $13,773.60 in fees and $53.70 in costs to Robison, Hill & Co. The appeal of the Trustee's Fees Decision is pending before the District Court.

PENDING SUPPLEMENTAL APPLICATIONS

Van Cott's Supplemental Application now pending before this Court represents the fees and costs expended in defending Van Cott's Third Application and the Trustee's Third Applications that were heard in December of 1996, and January and February of 1997. The total fees and costs in Van Cott's Supplemental Application is $165,032.00 in fees, reflecting 1,006.3 professional hours expended, and $28,558.56 in costs. Van Cott voluntarily reduced its Supplemental Application to $78,257.12 in fees and $13,605.97 in costs (a 53 percent reduction to account for duplication of attorney time, reduction for travel time, and a proportional disallowance of Van Cott's Third Application related to the disallowed fees).[2] Van Cott seeks reimbursement of $2,590.50 in fees for preparation of the Van Cott Supplemental Application and the Trustee's Third Applications and collection fees incurred to compel the Reorganized

[2] Van Cott reserves the right to seek a portion of these fees if the appeal of the January 10, 1997 Attorneys' Fees Decision is successful.

Debtors to pay the prior fee awards. Van Cott further seeks $648.64 in accrued interest at the rate of 5.64 percent, the federal legal rate, on the fees and costs awarded in the Van Cott Third Application but not paid in full until April 4, 1997. Van Cott bases its request for interest on the unpaid fees on what it describes as the Reorganized Debtors' unreasonable delay in payment.

The total fees and costs reported in the Trustee's Supplemental Application are $38,064.00 in fees and $7,917.60 in costs. The Trustee voluntarily reduced the amount of his fee request in his Supplemental Application to $36,473.12.[3] The Trustee seeks interest of $102.34 on the same grounds asserted by Van Cott and discussed above. Robison, Hill & Co.'s Supplemental Application seeks fees of $4,700.00, reimbursement of costs in the sum of $102.34, and interest of $38.59.

The Van Cott Supplemental Application contains fees sought for prosecution of both Van Cott's Third Application and the Trustee's Third Applications. Therefore it is impossible to characterize the Van Cott Supplemental Application seeking fees of $78,257 as relating only to the Van Cott Third Application that requested $106,476 in fees, because it also contains time entries related to the defense of the $56,140.10 sought in the Trustee's Third Applications. The Trustee's Supplemental Applications are similar. In order to obtain an accurate assessment of the fees and costs actually expended by each Applicant for defense of each of the Third Applications, it is necessary to break apart both Supplemental Applications as they relate to the Third Applications to arrive at the total time each Applicant spent and the actual administrative expense sought from the estate of the Reorganized Debtors. When the expense categories are recombined, the calculation reveals that the total fees and costs incurred by both Van Cott

[3] The Trustee reserves the right to seek a portion of these fees if the appeal of the March 18, 1997 Trustee's Fee Decision is successful.

and the Trustee related to Van Cott's Third Application is $17,575.61 in fees and $6,034.90 in costs. The total fees and costs incurred by both Van Cott and the Trustee related to the Trustee's Third Applications is $98,208.13 in fees and $15,649.44 in costs. This analysis is more fully set forth at pages 17 and 21-22 *infra*.

At the time of the hearings on the Supplemental Applications, pre-petition unsecured creditors had already received their 100 percent distribution under the Confirmed Plan but secured creditors had not received complete payments and the administrative claims represented by these Supplemental Applications also remained unpaid. The Confirmed Plan provides that administrative claims will receive cash equal to the amount of the administrative expense as soon as practicable after the claim or expense becomes an administrative expense. The Confirmed Plan does not provide for interest on allowed but unpaid administrative claims. *Confirmed Plan*, Article II A. 2.1 (c). Payment of all administrative fees and costs requested will not effect the distribution to unsecured prepetition creditors.

JURISDICTION

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. § 157(2)(B). The Confirmed Plan provides at Article IX, 9.6, that this Court shall retain jurisdiction after the effective date to hear and determine all administrative claims. The applicant bears the burden of proving entitlement to fees under 11 U.S.C. § 330.[4] *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*

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

Business Equip., Inc.), 23 F.3d 311, 314 n.5 (10th Cir. 1994)); *Murphy, Thompson & Gunter v. Griffin (In re Griffin)*, 93-C-1048 slip op. at 24 (July 18, 1994 D. Utah) ("[F]ee applicant has the burden of establishing reasonableness").

DISCUSSION

The parties raise a variety of arguments why the fees should or should not be allowed. The Applicants and the Objectors both revealed the terms of the various settlement offers and argued about the effect of the offers and counter-offers on the course of the litigation leading up to both hearings.[5] Van Cott argues that the majority of the objections filed to the Trustee's Third Applications were without foundation and were filed for improper purposes, such as to harass or cause unnecessary delay or to needlessly increase the cost of litigation in violation of Fed. R. Bankr. P. 9011 (although Van Cott and the Trustee have elected not to file a motion for sanctions under Rule 9011 at this time). Van Cott also complains that the objections disregarded existing case law respecting surcharges upon a trustee and the standard for assessing the appropriateness of a trustee's business judgment. The Applicants point out that the Objectors could prove no losses to the estate resulting from the Trustee's administration of the estate. Most importantly, the Applicants' protest that the objection called into question the Trustee's competency, ability and experience, and failure to adequately defend against these allegations might have tarnished the Trustee's reputation and his ability to serve the Court in future cases.

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[5] On June 6, 1996, the Objectors suggested Van Cott reduce its fees by $66,476.00 but allow costs of $5,119.85, and the Trustee and Robison, Hill & Co. reduce their fees by $36,140.10. On July 17, 1996, the Objectors suggested that Van Cott reduce its fees by $31,000, and the Trustee and Robison, Hill & Co. by $21,000. On September 13, 1996, Van Cott offered to reduce its fees by $3,500. During the course of the evidentiary hearing on the Trustee's Third Application, the Objectors proposed that the Trustee and Robison, Hill & Co. reduce their fees by $5,000, which was countered by an offer to reduce the fees by $5,000, provided, that there be no impediment to filing these Supplemental Applications.

The Objectors focus the Court's attention on the magnitude of the fees sought in these Supplemental Applications and assert that the Supplemental Applications seek 126 percent of the amounts originally sought in the Third Applications, and 155 percent of the amounts eventually allowed. The Objectors argue the Applications are self-serving and assert that the Applicants' arguments are based upon the perception of who "won" and who "lost" in the prior fee application litigation. They also argue that Van Cott's allocation of time entries between different task categories in Van Cott's Supplemental Application is flawed and misleading. The Objectors claim that during the course of litigation regarding the Third Applications, they had identified an expert willing to serve as a special master and had prepared the pleadings to obtain court approval. The Objectors argue that the Applicants' inexplicable withdrawal of their consent to the appointment of a special master resulted in an increase in overall fees. They also argue that the interest sought is not allowable, that expert witness fees should not be allowed, and that the costs requested, to the extent they are taxable costs, should be denied.

The Bankruptcy Code and cases interpreting Code provisions provide the sole source of guidance in assessing the allowance of the requested fees. There is no fee shifting statute applicable to this case that would allow the Court to base a fee award on which party was or was not the prevailing party in the fee litigation. There is no contract between the parties that provides for fees and costs, although the Confirmed Plan governs the timing of the payment of administrative expenses once they are allowed by the Court. There is no basis for this court to award fees as a sanction for the objections filed to Van Cott's Third Application or the Trustee's Third Applications, or for failure to negotiate a settlement of the issues

prior to trial. There is no provision in the Code that mandates that full fees be approved if the allowed fees have no effect on the return to unsecured creditors under the Confirmed Plan.

The determination whether the fees requested in the Supplemental Applications are allowable is governed by Section 330, as it existed prior to the Bankruptcy Reform Act of 1994.[6] Former Section 330 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 —
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> (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 services, the time spent on such services, and the cost of comparable services other than in a case under this title; and
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> (2) reimbursement for actual, necessary expenses.

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[6] 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 entered in this case 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 .

The controlling case law in this district interpreting former Section 330 is *Rubner & Kutner, P.C. v. U.S. Trustee (In re Lederman Enters., Inc*.), 997 F.2d 1321 (10th Cir. 1993).[7] In *Lederman*, the Tenth Circuit stated 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. Accordingly, this Court must assess whether the fees and costs requested in the Supplemental Applications produced a benefit to this bankruptcy estate.

Benefit to the Estate

Pursuant to the rule announced in *Lederman*, the Court must first determine whether the fees itemized in the Supplemental Applications provided a benefit to the Consolidated Debtors' estate. The Applicants must demonstrate that at the time the services were rendered, the services were reasonably likely to provide a benefit to the bankruptcy estate. *Lederman*, 997 F.2d at 1322. Benefit is not a term defined by the Bankruptcy Code or by *Lederman*. Various courts have found that the preparation and defense of fee applications can provide a benefit to an estate. However, in requesting fees incurred not just in preparing a fee application, but in defending one, the applicant must exercise reasonable discretion because defense of a fee application can be an extremely self serving exercise. A survey of reported cases regarding fee requests for preparation and defense of fee applications indicates that courts have allowed up to 7.5 percent of the total fee application for the preparation and prosecution of a subsequent fee

[7] The criteria under section 330(a) used to determine the fees to which a chapter 11 trustee is entitled "have closely resembled the factors used for awarding attorneys fees." *Gill v. Wittenburg (In re Financial Corp. of America)*, 114 B.R. 221, 223 (9th Cir. BAP 1990).

application, with various reductions based, among other things, on whether the original application was ultimately allowed.[8] In some cases, fees were denied entirely even though the objections were not frivolous and the fees sought initially were substantially reduced. *In re Four Star Terminals, Inc.*, 42 B.R. 419 (Bankr. D. Alaska 1984) ($5,122.50 for preparing and defending fee application of $478,663 disallowed with a finding that the preparation of the fee application was of value only to the applicant, not the debtor or its creditors).

Van Cott Supplemental Application

At oral argument, Van Cott was unable to articulate the benefit to this estate of the fees set forth in Van Cott's Supplemental Application representing time spent defending and preparing its Third Application. Van Cott did offer an explanation that most of the fees in its Third Application were found by the Court to have benefitted the estate, therefore the fees incurred prosecuting its Third Application must also be a benefit to the estate. However, this explanation does not detract from the fact that Van Cott's defense of its Third Application was primarily a self serving activity. Ordinarily, the benefit to an estate from the time spent preparing and defending a fee application is derived from providing the Court with

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[8] *In re Manoa Fin. Co., Inc.*, 853 F.2d 687 (9th Cir. 1988) (time spent for successfully litigating fee awards if the application ultimately prevailed would be awarded); *In re Nucorp Energy, Inc.*, 764 F.2d 655 (9th Cir. 1985) (decision disallowing fees of 7.5 per cent of original application reversed); *In re CF&I Fabricators of Utah, Inc.*, 131 B.R. 474, 488 (Bankr. D. Utah 1991) (fees of 6.5 percent of original application for debtor's counsel were reduced to 2.1 percent); *In re Heck's, Inc.*, 112 B.R. 775, 793 (Bankr. S.D.W. Va. 1990) (three percent of the total fees allowed); *In re Churchfield Management & Inv. Corp.*, 98 B.R. 838, 887 (Bankr. N.D. Ill. 1989) (three percent of total hours in the absence of unusual circumstances); *In re Chicago Lutheran Hosp. Ass'n*. 89 B.R. 719 (Bankr. N.D. Ill. 1988) (fees of $13,000 representing 13 per cent of total compensation were obviously unreasonable and would be reduced to 7.5 percent); *In re By-Rite Oil Co*., 87 B.R. 905, 917 (Bankr. E.D. Mich. 1988) (five percent reduction following *Coulter v. State of Tennessee*, 805 F.2d 146 (6th Cir.1986) which established a five percent limitation in civil rights actions); *In re Pettibone Corp*., 74 B.R. 293 (Bankr. N.D. Ill. 1987) (in absence of unusual circumstances, hours allowed for preparing and litigating fee application should not exceed three percent of total hours)(citing *Coulter*, 805 F.2d at 151). *But see*, *Numley v. Jessee*, 92 B.R. 152 (D.W.D. Va. 1988) (order disallowing fees generated by appeal of fee ruling reversed).

information about the progress of the case and the activities of the professionals so the court can make an informed judgment regarding the reasonableness of the fees incurred. *In re CF&I Fabricators of Utah, Inc.*, 131 B.R. 474, 488 (Bankr. D. Utah 1991) (educating the court so that it can make an informed judgment is a valuable service to the estate). Therefore, the reasonableness and necessity of the fees incurred to prepare a fee application relate only to the benefit derived by the estate.

The amount of time necessary to inform the Court regarding any particular fee application will vary with the nature of the allegations, the complexity of the legal issue in dispute and the vigor with which the opposing parties choose to prosecute their claims and allegations. There is no doubt that Van Cott faced vigorous opposition to its fees requested in its Third Application. However, while not presuming to be fully informed regarding all the parties actions in the case that had not been brought to the Court's attention through various pleadings during the years this case has been under its supervision, this Court had been involved in the case from the petition date and prior to the time when either the Trustee or Van Cott were appointed as professionals. The Court had reviewed and assessed the evidence that resulted in the appointment of the Trustee, as well as multiple subsequent hearings ending in approval of the Confirmed Plan. Three full days of trial on Van Cott's Third Application was excessively self serving in light of the Court's existing knowledge regarding the case and did not provide the Court with any measure of education that was proportional to the time Van Cott spent re-plowing the same ground. Evidence regarding information the Court already possesses merely to review the history of the case, to ascribe motivation to the parties actions that may not have been readily apparent, or just to make a record for

appeal purposes is not compensable because it is not a benefit to the estate and is not reasonable or necessary.

Under these circumstances, Van Cott did not exercise reasonable discretion during the course of the litigation as it observed the collective fees and costs to defend the Van Cott Third Application increasing. The amount of preparation and time spent in court in comparison to the amount in dispute should have been more balanced. It is obvious that the time spent defending the Van Cott Third Application was significantly disproportionate to the amount ultimately in dispute. Furthermore, the time spent before the Court explaining the confusing methodology that produced the project billing format that comprised Van Cott's Third Application, that ultimately proved to be inaccurate, is not compensable. Van Cott's Third Application should have been drafted in such a manner that it was not only accurate, but self explanatory, and should not have required such considerable effort and further instruction to decipher its content.

The Court has found no authority, and Van Cott presented none, why fees for the preparation of Van Cott's Supplemental Application should be allowed. *Churchfield Management*, 98 B.R. at 887 (future applications should not seek additional compensation for preparing applications pending before the court). Even if such authority exists, the itemization indicates a substantial portion of the time incurred was spent conferring with business office personnel regarding time summaries and editing the time and expense entries contained in the billing statements. *CF & I Fabricators of Utah*, 131 B.R at 485 (time spent to rectify computer billing package that does not retrieve information in a format compatible

with bankruptcy requirements is not compensable). Only the time spent drafting the narrative would have been compensable in any event. *Id.* at 487.

The Court examined the fee categories contained in the Supplemental Applications and determined that a total of $17,575.61 in fees were incurred by Van Cott and the Trustee to defend Van Cott's Third Application. Other courts have weighed the reasonableness and the necessity of incurring fees to defend a prior fee application in comparison to the benefit to the estate have ordered reductions in requests ranging from complete denial to awards of 7.5 percent of the fee request. To the extent a portion of the total $17,575.61 in fees itemized in each of the Supplemental Applications relating to Van Cott's Third Application were beneficial to the estate, and in consideration of the reductions ordered by the Court and the redundancy of the evidence produced at the hearing, the Court concludes that 4 percent of the amount of fees sought, or $4,259.04 is reasonable and necessary, and will be allowed. Since both Van Cott and the Trustee submitted Supplemental Applications related to the defense of Van Cott's Third Application, the 4 percent fees allowed should be prorated at a factor of .242327 among the total of $17,575.61 representing fees incurred by both Van Cott and the Trustee in defense of Van Cott's Third Application.[9] Van Cott's request for reimbursement of costs and expenses related to defense of Van Cott's Third Application itemized in Exhibits A of $1,082.85 and B of $4,952.05 will be allowed in the same proportion as the fees as necessary costs, resulting in allowance of $262.40 and $1,200.01 respectively.[10]

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[9] $4,259.04 ÷ $17,575.61 = .242327.

[10] Van Cott's Supplemental Application lists, prior to reduction, the following charges: copies $4,842.30; telephone tolls $206.85; telecopies $290.50; postage $29.13; express and certified mail charges of $122.58; document reproduction (out of house) of $102.84; and transcripts of $105.00. Most of the entries list only the date incurred and the charge. Travel costs were written off, but were lumped and insufficiently described and were not allowable in any (continued...)

Between each of the Supplemental Applications, the following are the amounts that are sought and allowed compared to the amounts sought and allowed in Van Cott's Third Application and the Trustee's Third Applications:

Fees Related to Van Cott's Third Application

Applicant	*Description*	*Fees Req.*	*Costs Req.*	*Fees All'd.*	*Costs All'd.*
Van Cott	Fees and costs incurred to defend Van Cott and Trustee's Third Applications (1/2)	*$4,021.77	*$1,082.85	$974.58	$262.40
	Fees and costs exclusively related to defense of Van Cott's Third Application	*$11,720.72	*$4,952.05	$2,840.24	$1,200.01
Trustee	Fees exclusively related to defense of Van Cott's Third Application	?$1,735.84	$0	$420.64	$0
Trustee	Travel Time	?$97.28	$0	$23.57	$0

[10](...continued)

event. *In re Rocky Mountain Helicopters, Inc.*, 186 B.R. 270, 275 (Bankr. D. Utah 1995)(insufficiently described expenses disallowed). Van Cott's Supplemental Application does not describe the actual per page copy charge or the actual per page fax charge as required, although Counsel indicated upon questioning that the copy charge was 10 cents per page. *CF&I*, 131 B.R. at 494 (telecopier costs are reimbursed only at actual cost). Some of the larger entries for copies are $442, $420, $260 and $390 per entry. What was copied is not disclosed, so it is impossible to determine if the charges are actual and necessary. If 4,000 copies were made in one day, there is no disclosure whether a commercial copy center would have a more reasonable rate than 10 cents per page. Likewise there is no indication in Van Cott's Supplemental Application why certified or express mail was used rather than regular mail. Van Cott's Supplemental Application also lists $12,714.60 in expert witness fees without any more breakdown of the costs incurred. Without more information the Court would only be speculating whether these costs were necessary. *In re Jensen-Farley Pictures, Inc.*, 47 B.R. 557, 588 (Bankr. D. Utah 1985)(Court should not be required to speculate about the nature of cost entries). These factors alone would lead to disallowance of a large portion of the costs.

Total Reimbursement Sought in Both Supplemental Applications Related to Van Cott's Third Application	***$17,575.61***	***$6,034.90***
Interest Claim	$648.64	
Total Fees and Costs Requested in Van Cott's Third Application	***$106,476.00***	***$5,119.85***
Total Amount Allowed in Van Cott's Third Application	***$81,553.00***	***$5,119.85***

The court disallows Van Cott's request for payment of interest on the fees and costs approved by the Court in the Attorneys' Fees Decision. The Confirmed Plan does not provide for payment of interest on administrative fees and Van Cott has not provided the court with adequate legal authority to allow an interest award outside the provisions of the Confirmed Plan. The fees and costs incurred by Van Cott to compel the Reorganized Debtor to pay the amounts allowed by the Attorneys' Fees Decision, will likewise be disallowed in their entirety. There is no evidence to indicate that a delay of 19 days and 17 days from the perfection of the appeals and withdrawal of the cross appeal, respectively, were not within the "as soon as practicable" parameters of the Confirmed Plan.

Trustee's Supplemental Application

There is a benefit to the estate of allowing estate funds to be used to pay for a trustee's defense of allegations that the trustee acted negligently, if those allegations are subsequently found to be untrue. Such allegations are rare, very serious and should be fairly aired in court. If not, the failure to

explore and resolve allegations of impropriety may serve to impeach the integrity of the administration of the estate and the bankruptcy system as whole. The estate must bear a reasonable portion of the costs if such allegations are to be fairly and completely litigated and presented to the Court. The failure to allow such fees may make it difficult in the future to find qualified individuals to serve as trustees in light of the additional exposure to personal liability these individuals may face as estate fiduciaries.

Once a benefit to the estate is found, the issues of reasonableness and necessity required by Section 330 must be assessed. When assertions of negligence are viewed as an attack on a trustee's professional reputation, there may be an inclination to mount a defense that goes beyond merely informing the Court of the facts in a manner that provides the Court with sufficient evidence to make an informed decision. Instead, there may be a tendency for the defense to take on more personal connotations that is beyond any specific and quantifiable benefit to the estate. In that event, the burden of such defense cannot be borne solely by the estate. Although the estate's professionals should generally be allowed to litigate according to their best professional judgment,[11] a distinction must be made between a defense that is a benefit to the estate because the allegations raise assertions of harm to the estate, and the case where a defense becomes totally self serving and the allegations constitute a harm only to the trustee's reputation in general. If a trustee wishes to spend funds far beyond the total amount sought in a fee application to defend his or her reputation, the choice is the trustee's, but the expenditure is not a benefit to the estate and should not be borne by the estate. Unfettered use of estate funds to finance the defense against such allegations may also produce a chilling effect on legitimate claims and criticism raised by parties in interest.

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[11] *See, e.g., In re Rocky Mountain Helicopters, Inc.*, 186 B.R. 270 (Bankr. D. Utah 1995) (court would not reduce fees for what was perceived as unreasonably litigious activity inclined to litigation instead of negotiation).

It is apparent in this case that Van Cott and the Trustee were unwilling to settle the dispute without full vindication of the allegations against the Trustee's. That was the Applicants' prerogative, but the estate cannot bear the burden of protecting the Trustee's reputation.[12]

The reasonable amount necessary to defend these kinds of allegations will be different in each case based upon the prosecuting vigor and financial resources of the objecting party, the seriousness of the allegations, and the complexity of the facts. In this case, the Objectors' inability to produce persuasive evidence to support almost every aspect of their allegations is an important factor to consider in assessing the reasonableness of the Trustee's response to the allegations. It is difficult to see, however, based on a general cost benefit analysis, how incurring fees in an amount almost double the amount sought to be awarded in the previous application reflects a dispassionate professional assessment of the situation. In no event should the estate bear the difference between the $56,140.10 sought in the Trustee's Third Applications and the $98,208.13 expended for its defense, for such excesses are neither reasonable nor necessary as an expense of the estate.

Under all the facts and circumstances of this case, the Court will allow as compensation requested in the Trustee's Supplemental Application, 4 per cent of the total amount of the Trustee's Third Application and Robison, Hill & Co.'s Third Application for the services of generally informing the court regarding the basis for the fees sought.[13] In addition to the 4 percent award and due to the unique

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[12] Throughout these disputes related to the Trustee's fees, the Court has detected an undercurrent of personal animus between the litigants. To the extent that rival accounting firms vie for a perceived advantage in appointments by the United States Trustee in future chapter 11 cases through this type of protracted litigation, it has no place in either the objection to or defense of pending fee applications.

[13] The extensive testimony regarding how to read the Trustee's Third Applications should not have been (continued...)

circumstances of the assertions made against the Trustee, as well as the Objectors general failure to present persuasive evidence to support those allegations, the Court will allow an additional 30 percent of the fees sought in the Trustee's Third Application and Robison, Hill & Co.'s Third Application. The collective 34 per cent of the fees requested is $19,087.63. The allowed fees shall be prorated at factor of .194359 of the total request of $98,208.13 of itemizations related to both Van Cott's and the Trustee's defense of the Trustee's Third Applications.[14]

Costs will be allowed in the same proportion as necessary expenses. The costs allowed in Van Cott's Supplemental Application related to the defense of the Trustee and Robison, Hill & Co. are $1,471.50. The costs allowed in the Trustee and Robison, Hill & Co.'s Supplemental Applications related to the defense of their applications will be allowed in the amounts of $1,538.85 and $31.24 respectively. Therefore, the following are the amounts that are sought and allowed:

Fees Related to the Trustee and Robison, Hill & Co's Third Applications

Applicant	*Description*	*Fees Req.*	*Costs Req.*	*Fees All'd.*	*Costs All'd.*
Van Cott	Fees and costs incurred to defend Van Cott's and Trustee's Third Applications	*$10,583.63	*$2,849.60	$2,057.02	$553.84
	Fees and costs exclusively related to defense of Trustee's Third Applications	*$48,284.50	*$4,721.47	$9,384.53	$917.66

[13](...continued)
necessary because the document should have been self-explanatory.

[14] $19,087.63 ÷ $98,208.13 = .194359.

Fees Related to the Trustee and Robison, Hill & Co's Third Applications

Applicant	*Description*	*Fees Req.*	*Costs Req.*	*Fees All'd.*	*Costs All'd.*
Trustee	Fees and costs exclusively related to defense of Trustee's Third Applications	?$32,952.00	?$7,917.60	$6,404.52	$1,538.85
	Travel Time	?$1,688.00	$0	$328.08	$0
Robison, Hill [15] & Co.	Fees and costs exclusively related to defense of Trustee's Third Applications	?$4,650.00	?$160.77	$903.77	$31.24
	Travel Time	?$50.00	$0	$9.71	$0
Total Reimbursement Sought in Both Supplemental Applications related to Trustee's Third Applications		***$98,208.13***			
Interest claim		$102.34			
Total Fees and Costs Requested in Trustee's Third Applications		***$56,140.10***			
Total Amount Allowed in Trustee's Third Applications		***$50,369.20***			
Plus Van Cott's fees to prepare the Supplemental Application			*$2,590.50		
Plus Van Cott's cost of collecting allowed fees from the Third Application			*$1,056.00		

[15] Van Cott's Supplemental Application combines its defense for both the Trustee's Application and Robison, Hill & Co.'s Third Application. It is impossible to segregate the amount of time the law firm spent for the Trustee's Third Application and Robison, Hill & Co.'s Third Application, therefore, the amounts must be combined and considered together.

*Entries included in the total reimbursement request contained in Van Cott's Supplemental Application of $78,257.12 in fees and $13,605.97 in costs.

?Entries included in the total reimbursement request contained in the Trustee and Robison, Hill & Co.'s Supplemental Applications of $41,173.12 fees and $8,078.37 in costs.

Based upon the foregoing, it is hereby

ORDERED:

1. Van Cott's Supplemental Application will be allowed in the amount of $15,256.37 in fees and $ 2,933.91 in costs.

2. The Trustee's Supplemental Application will be allowed in the amount of $7,176.81 in fees and $1,538.85 in costs.

3. Robison, Hill & Co.'s Supplemental Application will be allowed in the amount of $913.48 in fees and $31.24 in costs.

4. Interest is disallowed.

5. Collection costs are disallowed.

DATED this ____ day of January, 2000.

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JUDITH A. BOULDEN
United States Bankruptcy Judge

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I served a true and correct copy of the foregoing Memorandum Decision and Order Regarding Supplemental Application of Van Cott, Bagley, Cornwall & McCarthy for Compensation for Defense of Third and Final Applications of Trustee, Accountant for Trustee and Counsel for Trustee, and Supplemental Application of W. LaMonte Robison and Robison, Hill & Company for Compensation for Defense of Third and Final Applications of Trustee, Accountant for Trustee and Counsel for Trustee, by mailing the same, postage prepaid, to the following, on the ____ day of July, 1997.

John A. Snow, Esq.
Van Cott, Bagley, Cornwall & McCarthy
50 South Main Street, #1600
P. O. Box 45340
Salt Lake City, Utah 84145

Bryce D. Panzer, Esq.
Blackburn & Stoll, LC
77 West 200 South, Suite 400
Salt Lake City, Utah 84101

R. Mont McDowell, Esq.
McDowell & Gillman, P.C.
50 West Broadway, Suite 1200
Salt Lake City, Utah 84101

United States Trustee
Attn: Laurie Crandall, Esq.
Boston Building, Suite 100
#9 Exchange Place
Salt Lake City, Utah 84111

W. LaMonte Robison
Robison, Hill & Co.
1366 E. Murray-Holladay Road
Salt Lake City, Utah 84117

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Marji Hanson
Bankruptcy Court Clerk