UNITED STATES BANKRUPTCY COURT

IN AND FOR THE DISTRICT OF ARIZONA

In re BCE WEST, L.P., *et al.*, **EID # 38-3196719** ` **Debtors.**	**In Chapter 11 proceedings** **Case Nos. 98-12547 through 98-12570-PHX-CGC** **Jointly administered** **UNDER ADVISEMENT MEMORANDUM DECISION RE: FINAL APPLICATION OF H0ULIHAN LOKEY HOWARD & ZUKIN, INC. FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES**

I. INTRODUCTION

Houlihan Lokey Howard & Zukin, Inc., ("HLHZ") served as a financial advisor to the Official Committee of Unsecured Creditors. It has filed a final application for professional compensation and reimbursement of expenses to which the Trustee for the Boston Chicken, Inc. Plan Trust ("the Trustee") has objected. The application seeks a total of $1,740,000.00 in fees and reimbursement of expenses in the amount of $46,028.94. HLHZ has already been paid $1,243,891.62 pursuant to the Court's Order Authorizing Interim Payments ("Knudsen Order"), leaving $542,137.32 unpaid of the amount requested. The Trustee has objected to all of the claimed expenses and between $1,118,000.00 and $1,190,000.00 of HLHZ fees.[1] Therefore, HLHZ seeks an order allowing its remaining fees and directing payment of the unpaid portion of $542,137.32; the Trustee seeks an order disallowing all expenses and requiring HLHZ to return to the estate between $621,891.60 and $693,891.60. Thus, the amount in dispute between the parties is approximately $1,200,000.00.

The matter was tried to the Court on May 24, 2002, at which point the matter was taken under advisement.

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[1]The Trustee's expert witness, Daniel Armel, testified that a reasonable fee for HLHZ in this case is between $550,000.00 and $622,000.00.

II. BACKGROUND

A. The Dispute

This dispute highlights a clash between cultures that became apparent in the early stages of the case. Prior to the filing of this case in October, 1998, an unofficial committee of bondholders (the "Ad Hoc Committee") was formed to represent the interests of approximately $650,000,000.00 in public debt. That committee hired both counsel, Hebb & Gitlin (later Bingham Dana) and a financial advisor, HLHZ. After the case was filed, an Official Unsecured Creditors Committee ("Committee") sought to engage both Hebb and HLHZ as estate professionals. On November 18, 1998, the Committee and HLHZ entered into a retention agreement. On December 7, 1998, an application seeking approval of the agreement was filed with this Court. Debtors filed an objection to the application on January 22, 1999, and the matter came on for hearing on January 26, 1999. Pre-petition, HLHZ was engaged by the Ad Hoc Committee commencing July 28, 1998, at company expense, for a minimum of 4 months at a monthly flat fee of $150,.000.00. Pursuant to that agreement, the company paid HLHZ a retainer of $600,000.00, denominated as "earned on receipt."

In the bankruptcy case, HLHZ agreed that it would receive $265,000.00 in full satisfaction of its services from the October 5 petition date through November 30, 1998 (with the remaining $235,000.00 being applied to pre-petition fees). Thereafter, the Committee and HLHZ agreed that it would receive a flat monthly fee of $150,000.00 to be approved by the Court under 11 U.S.C. section 328 (a) which the parties agreed would "fairly compensate Houlihan Lokey and provide certainty to the committee." The Debtor objected to the section 328(a) aspect of the engagement; that section provides that the Court may only approve compensation different from the agreed upon amount "if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." The Debtor argued that HLHZ's fees should be subject to the approval standard of 11 U.S.C. section 330(a); in other words, the parties and the Court should have the opportunity, at the end of the day, to review the entire amount sought by HLHZ as being "reasonable" under applicable professional

compensation standards.[2]

Before the hearing on January 26, 1999, negotiations reduced the areas of disagreement substantially. In particular, HLHZ agreed that it would reduce its monthly fee amount to $100,000.00 from and after February 1, 1999, that it would agree to be paid in accordance with the *Knudsen* order already in place, that it would keep time records, and that its fees could be reviewed for reasonableness on a quarterly basis. However, HLHZ insisted that it retain section 328 protection after such quarterly review; in other words, it insisted that once a quarterly application had been approved, the award was final.

These concessions were not sufficient for the Debtor to drop its objection. As a result, the Court proceeded with a contested hearing on January 26, and heard testimony from Andrew Miller, a principal of HLHZ. During his testimony, Mr. Miller strongly suggested that, if the Court did not grant the "finality" relief requested, HLHZ would choose to "transition" the assignment to another qualified professional.

The Court thereafter issued its "Under Advisement Order Re: Application to Employ Houlihan Lokey" on February 4, 1999. In that order, which is part of the record in this proceeding, the Court stated the following:

> Under these facts, the Court concludes that to be "reasonable," as required by section 328(a), this retainer arrangement must be reviewed under section 330 at the end of the day in light of the actual events of the case. Finally, the fact that this review will be imposed should not be taken as evidence that the "reasonableness" of the fee will be tested solely or even primarily on an imputed hourly rate. While that factor may be relevant, it will not be determinative.
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> The Court also recognizes that section 328(a) is meant to encourage the use of alternative fee arrangements in bankruptcy cases so it will not strike the agreement entirely or require strictly hourly billing as suggested by [the 1995 lenders]. Parties should be free, and indeed encouraged, to devise alternative fee arrangements without slavish devotion to an hourly rate so long as the terms of the arrangement are, in fact, reasonable under the facts of the case. Therefore, this Court will approve the retention of Houlihan Lokey on a flat monthly rate so long as certain conditions are met. First, Houlihan Lokey must apply for fees under section 330 and, as it has already agreed, provide detailed billing statements, in no greater than half hour increments, itemizing the time it spent providing services to the Committee. Second, Houlihan Lokey must abide by the payment order (Docket 200) and the section 331 interim

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[2]The 1995 Lenders, chiming in at the hearing, sought to require HLHZ to keep detailed time records and be compensated strictly on that basis.

fee application provisions set forth therein. Third, Houlihan Lokey must, in its final application under section 330, justify the reasonableness of its fees and expenses to this Court. Houlihan Lokey's application under section 330 shall include an itemization for all fees it has been paid since the petition date. The Court will review the $265,000.00 in post-petition fees for October and November of 1998. Those fees charged for December, 1998, and January, 1999, ($300,000.00), and those incurred thereafter under the reasonableness standard of section 330.

Notwithstanding Mr. Miller's comments to the contrary at the hearing, HLHZ did not walk, agreed to the Court's terms, and was engaged as financial advisor to the Committee pursuant to order dated February 24, 1999. Thereafter, HLHZ filed five fee applications as follows:

1 First application dated February 12, 1999, for the period October 5, 1998 (the petition date) through January 31, 1999, for $565,000.00 plus expenses of $21,406.00. This application covered the $265,000.00 for the time period from the petition date until November 30, 1998, and two months (December, 1998 and January, 1999) at a flat fee of $150,000.00 per month. Time records were attached showing that 1,032.5 hours of professional time were expended.

2 Second application dated July 14, 1999, for the period February 1, 1999, through May 31, 1999, in the total amount of $350,000.00. This application includes the monthly fee of $100,000.00 for February and March, 1999, and a reduced monthly fee of $75,000.00 for the two months of April and May, 1999, together with expenses of $5,698.92.[3] Time records were attached showing that 324 hours of professional time had been expended.

3. The third application dated November 12, 1999, for the period June 1, 1999, through September 30, 1999, in the amount of $300,000.00, representing $75,000.00 per month, plus expenses of $1,787.60. Time records were attached showing that 465.5 hours of professional time was expended during that period.

[3]The Court did not order the reduced fee of $75,000.00; this apparently arose pursuant to an agreement between HLHZ and the Committee.

4. The fourth application was filed on March 2, 2000, covering the time period from October 1, 1999, through January 31, 2000, for $300,000.00 (four months at $75,000.00) and out of pocket expenses of $2,096.85. Time records were attached showing that 408 hours of professional time were expended.

5. The final application was dated July 5, 2000, for the time period February 1, 2000, through April 30, 2000, for $300,000.00 (four months at $75,000.00) plus expenses of $15,039.57. Time records were attached indicating that 352.5 hours of professional time were expended.

HLHZ has sought no compensation or any expenses for any period beyond April 30, 2000.

Each of these interim applications was approved by the Court after notice, with objections to final allowance being reserved. This was the same procedure used for all professionals. Payment was made HLHZ as indicated above pursuant to the *Knudsen* order.

B. The Objections

The Trustee raises two fundamental objections. First, the Trustee argues that HLHZ has flatly failed to abide by the terms of the Under Advisement Decision later incorporated in the Order of Retention in that both its time records and its expense requests are wholly inadequate. Specifically, the Trustee argues that the evidence establishes that the time records were not contemporaneous, were often copied from one professional to the other, contained inadequate descriptions, and may, in some cases, have been simply made up. The Trustee urges the Court to determine that HLHZ's "cavalier" attitude toward the Court-ordered requirement of adequate time records should bar it from receiving a significant portion of its monthly fee.[4]

Second, the Trustee argues that the fees are not reasonable given the economic realities of the case. In the Trustee's view, the Committee's constituency, the unsecured creditors, was clearly under water and stood no reasonable chance of receiving a distribution (other than, perhaps, a

[4]The sufficiency of the expense records was not specifically addressed at trial, except in exhibits, including the Trustee's objection (containing an analysis of the expense records by Mr. Daigle of Boston Chicken) and Mr. Armel's opinion report. The Court has independently reviewed the expense request.

nominal distribution such as was eventually negotiated with the consent of the secured creditors). In the Trustee's view, fees incurred pursuing strategies, such as a "stand alone plan", were neither reasonable nor of benefit to the estate where those strategies themselves were "dead on arrival." Specifically, the Trustee urges that no such plan would be possible without securing exit financing and that Committee professionals, specifically including HLHZ, understood that such financing was not feasible. In the absence of exit financing or the consent of the DIP lenders (which all parties agree was not forthcoming), no stand alone plan was possible. Further, the Trustee testified that given the purely "financial advisory" nature of the services involved, an hourly based fee was the only basis upon which to make a determination of reasonableness. This opinion was shared by the Trustee's expert, Mr. Armel.

HLHZ argues that it complied in good faith with the Court's Under Advisement Order and that its services were both reasonable and necessary. It reiterates the Committee's position throughout the case that there was substantially more value in the Company than was realized through the sales process and that it was fully justified in pursuing that for the benefit of the Committee's constituencies.

III. DISCUSSION

A. A Brief Economic History of the Case

HLHZ first became involved in the Debtor's business in the summer of 1998. At that time, the prognosis for this debtor was good; all parties agreed that there was sufficient value in the company to cover the secured debt of in excess of $260 million and provide a substantial return, probably in the form of equity, to the unsecured bondholders holding around $627 million in debt. New management, under the direction of Mr. Jenkins had been installed, a new business plan proposed, and an internal reorganization, either in or out of court, appeared reasonably likely, both to the secured creditors and to the unsecured creditors. It was against this background that HLHZ was initially engaged by the Committee.

During the summer of 1998, a group of the secured lenders had provided an approximately $35,000,000.00 liquidity facility to the Debtor in addition to the outstanding secured debt. When

the case was filed, a $70,000,000.00 DIP facility was put in place, providing the Debtor with a fresh $35,000,000.00 in additional paying off the existing liquidity facility. Unfortunately, by late December, 1998 or early January, 1999, the secured lender's optimism had faded. Based upon financial information provided by the Debtor, the agent bank had concluded that the 1996 Lenders' collateral was in serious jeopardy and that other options, particularly the sale of the company as a going concern, needed to be pursued. The analysis by the secured lenders at that time was that, based upon the Debtor's numbers, the company would run out of money by the end of June, 1999.

The DIP facility was on a relatively short leash, and was renewed by the DIP lenders during the first quarter of 1999 only on the condition that the company would agree to pursue strategic alternatives, specifically that it would engage an investment banker to shop the company. Thus, the "sale" strategy was undertaken; it ultimately led to the approval of the sale of the company in the first half of 2000 and the closing of the sale in June of that year. During this time, the Committee, through its counsel and based upon financial advice from HLHZ, argued strenuously that a sale was premature, that the result would be a "rock bottom" price, that marketing the company during a period of financial downturn would "poison" the market, and that the best strategy for all constituencies, including the secured lenders, was to allow operations to stabilize, cash flow to improve, and value to be increased.

Given rulings by the Court, and the approval of the new conditions of the DIP facility, it was clear that the secured lenders in effect controlled whether sale would take place or not. The differential between the amounts projected to be received and the amount necessary to be received for the unsecured creditors to receive any distribution appeared to be at least $100 million.

At around this time, the middle of 1999, HLHZ acknowledged that the obtaining of a substitute DIP facility (a necessary step in forestalling the sale without the consent of the lenders) was not likely. Although such lenders did exist (Foothill Capital for one), there were no funds available to pay the necessary fees to put such a facility, necessarily expensive, in place. Nevertheless, the Committee continued to express, both externally and internally, its view that a

stand alone plan would be a better alternative, that a sale on the proposed schedule was a "rush to judgment," although Committee counsel did acknowledge that pursuing an anti-sale strategy was unlikely to succeed in light of the status of the case.

Beginning in July, 1999, however, the fortunes of the company began to improve. Reported EBITDAL showed improvement, WPSA showed marked improvement and the Committee and its professionals again asserted that a sale was leaving substantial value on the table to the detriment if all constituencies. Nonetheless, after the initial proposed sale to BMAC fell through, a new deal was negotiated with a subsidiary of McDonald's, the execution of which was announced just after the new year in 2000. In the spring of 2000, consensual resolution was reached with the Committee, returning nominal value ($2,000,000.00 in cash from sale proceeds plus up to $1,000,000.00 in recoveries from avoidance claims) and a plan of reorganization was confirmed.

B. The Time Keeping Controversy

Clearly, HLHZ was not pleased that it had to keep time records in this case. HLHZ's representative testified that the timekeeping requirement caused a "great moan among the troops." Further testimony indicated that not only was there an aversion to keeping time records, but that the financial advisors considered it almost an insult. As one witness put it, their work is not "manual labor" where the value of the services is counted by "stacking so many bricks." At the January hearing, Mr. Miller testified that, in dozens of cases, he had never been required to keep time. Mr. Fragen testified that they were simply not set up to do so and didn't know how to do so. The task for the timekeeping requirement was delegated to Mr. Fragen's personal assistant who created an Excel type template, distributed it to timekeepers, and then collected the results. It is clear there was no serious effort made to create a viable system, to explore what kind of software might exist, or to educate the professionals involved about the importance of the time records or the manner in which they should be kept. Mr. Fragen testified that "after a 16 hour day" he didn't want to keep time; he wanted to go home and play with his children.

Of course, the problem is that the financial advisors are no less than busy in a major Chapter 11 case than the lawyers; but the lawyers do find time to keep contemporaneous records, to follow

the United States Trustee's guidelines and to comport with the standards established over the years for approval under section 330. Mr. Toder on behalf of the 1995 Lenders at the application hearing in January summed up the "clash of cultures", stating:

> "This is really our own fault. And I include the professionals and the Bench. We have set up the investment bankers as some extraordinary mystique and that we can't touch them. All rules are off when it comes to them."

While HLHZ's position is this case certainly comports with that sentiment, interestingly enough, its expert's does not. Mr. Derrough testified that there has been a steady increase in the requirement of time records for financial advisors in bankruptcy cases. While he expressed the opinion (as to which there is no serious disagreement) that the normal fee arrangement for a financial advisor is a monthly flat fee, he did indicate that in from one-third to one-half of the cases he was now seeing imposed the requirement of some type of time records. Indeed, he indicated that in a number of professional associations have efforts under way to come up with nationwide standards on the subject and that there was a clear trend in that direction. Indeed, Mr. Derrough said "in the jurisdictions in which we have been involved in so far since I have been at Jefferies and Co., we have been required to provide some element of time records."

Notwithstanding its attitude, HLHZ takes the position that it did in fact comply with the time records requirement; however, beyond doubt, its effort was at best substandard and unenthusiastic. Indeed, the attitude within HLHZ appeared to be that the time records were a mere technical requirement and that its original fee arrangement had been approved in all material respects by the Court. Of course, that wasn't true, given the fact the section 328 was removed and that the time records were specifically included to provide some sense of what had been done when the time came to review the fees for reasonableness. Mr. Derrough even suggested that the time records of financial advisors tend to be under inclusive because of their inexperience and distaste for preparing them. While this may well be true, it appears to be a somewhat self destructive philosophy since the financial advisors should know that the records will be reviewed by the Court in deciding whether to approve the fees as requested.

In short, the Court has little sympathy for HLHZ's argument that it did the best it could and could not be reasonably expected to do more. The fact is that there is off-the-shelf software available for timekeeping, that the clear trend nationwide is to require some level of timekeeping and that the mere fact of timekeeping does not render one less of a professional. Indeed, if there is one firm that should be sensitive to these issues, it is HLHZ. See *In re Circle K Corporation,* 272 F.3rd 1150 (9th Cir. 2001). The record is also clear that no one at HLHZ made a serious effort to impress upon the professionals working on the case the importance of keeping accurate and contemporaneous time records; rather, the institutional approach was that this was unfortunately a necessary, unimportant, technical requirement to getting paid. It is also particularly surprising given the fact that, once the Court issued the Under Advisement Decision, HLHZ had every opportunity not to take the engagement but opted to do so.

Notwithstanding all of this, the fact remains that the Court did approve, and *intended* to approve, a flat fee arrangement as opposed to an hourly based arrangement. To the extent the Trustee's position is premised upon an imputed hourly rate approach, it is misdirected. The Court made it very clear in the Under Advisement Decision that "slavish" adherence to the hourly rate approach is not a necessary nor desirable. Such an approach may unreasonably assume that time spent equals value conferred and, the approach, just like any cost plus contract, creates perverse incentives by rewarding excessive time expenditures subject only to a retrospective examination into the labyrinth of hundreds of pages of time records. For these reasons, the Court made it clear that it was approving a flat fee arrangement but that the reasonableness of the flat fee arrangement needed to be tested after the case was over. And that one, but not the only, manner of doing so would be to review time expended. HLHZ's casual approach to timekeeping has made this aspect of this Court's review materially more difficult. The Court did not approve an open ended flat fee, subject only to going through the motions of fulfilling the technical requirement timekeeping, but rather a monthly retainer that the applicant was on notice would be reviewed in retrospect at the end of the case for reasonableness.

Having said all this, what then is the appropriate standard to apply in this case? As noted,

while determining the imputed hourly rates may be helpful, it is not the sole answer. In addition, determining comparable rates from other kinds of professionals, as suggested by Mr. Armel, and then applying those to the hours spent in this case is likewise not the correct approach. That would be testing HLHZ's work against a standard that is different from the one under which its retention was approved by the Court. Therefore, the Court has reviewed this application applying the following standards:

1. Is the fee commensurate with the level of effort expended by the professionals, taken as a whole?
2. Is the fee reasonable in terms of the status of the case and the continuing need for the services provided; and
3. Did the professional provide benefit to the estate?

In determining level of effort, the only substantive evidence submitted by HLHZ are the time records; therefore, they will be the basis of the Court's decision. However, the Court agrees with the Trustee that they are patently insufficient in that: 1) they were not contemporaneous; 2) no serious effort was made to educate timekeepers as to their responsibilities; 3) many entries do not correlate with otherwise known facts; 4) no effort was made to determine whether assistance, through software or otherwise, was available to make the process better and more accurate; 5) many entries are simply copied among timekeepers; 6) they were generally considered as an afterthought rather than a professional responsibility; 7) compliance was delegated to a non-professional and 8) that they represent an apparent conscious decision by HLHZ to resist compliance in a contemporarily professional manner. Therefore, because the inadequacy of the time records (particularly after the issue was litigated in a contested hearing) in fact could justify disallowance of the fees on a much broader scale notwithstanding the work done by HLHZ, the Court will deduct 10% from the amount otherwise awardable.to HLHZ.

In terms of the reasonableness of the fee, tested against the status of the case, the record contains substantial testimony from the players in the case, in addition to the Court's own familiarity with the case based upon the record as a whole. With regard to benefit to the estate, however, a few

additional words should be said.

This Committee represented a constituency consisting of $627 million in unsecured bond debt, plus other unsecured creditors, particularly lease rejection claimants, that as a whole totaled in the vicinity of $1 billion. It is overly facile to suggest that a committee, or its professionals, representing a constituency of that magnitude should simply close up shop because things may look bleak. A committee's fiduciary responsibility, like the fiduciary responsibility of its professionals creates serious obligations that need to be taken seriously. The Court believes this Committee and these professionals acted consistently with those obligations. Likewise, it is facile to suggest that a committee or its professionals should be oblivious to the realities of the case. Oftentimes, however, reality is in the eye of the beholder; here, the secured lenders believed that a quick sale was the only way out, and, based on the evidence, the Court does not doubt their good faith in doing so. However, that does not mean the Committee was acting irresponsibly in believing that an internal reorganization based upon improving results could eventually lead to more value to its constituents. Therefore, "benefit to the estate," taking into account the interests of this very substantial constituency must involve a reconciliation of the reasonableness of these two different world views. Two final points to consider: 1) Throughout the case HLHZ filed its fee applications, disclosed its time records and did not draw an objection. Granted, objections could reserved until the end of the case, and were. But it is notable that the record contains no suggestion by any party that what HLHZ was providing was insufficient. In addition, there was no motion by any party seeking to reconsider the appointment of professionals for the Committee or seeking the dissolution of the Committee itself, based upon the lack of value available for it. 2) Although a selling point of HLHZ was that it would do what was necessary without charging more than its agreed upon monthly fee, the reality is that after the first application period, the level of effort declined precipitously and never returned to its previous level.

Having reviewed the entire record, including the testimony given at the hearing, the deposition excerpts that were designated by the parties and the numerous exhibits, the Court finds and concludes that the appropriate approach is to review the monthly fee retainer for each month

against the level of effort actually expended (taking the time records as the best evidence of that effort) , against the status of the case at that time and against the benefit to the estate.

1. The First Application.

The first application seeks $565,000.00 for the time from the filing of the petition through January 31, 1999. This was clearly the most intense period of effort by HLHZ. The time records indicate 1,032.5 hours, or an average of 250 hours per month. Notably, the senior members of the HLHZ team, Mr. Gold and Mr. Miller, were most actively involved during this time; as noted by Mr. Armel, their level of activity fell off dramatically thereafter. The work during these time periods was premised upon the pre-petition retainer agreement of $150,000.00 per month. At this point, the Debtor appeared viable, there was sufficient value to cover the secured creditors' claims and there was a high likelihood of a recovery for the unsecured creditors. The level of effort was relatively high and the status of the case certainly justified substantial compensation for the financial advisor. The Court will approve the requested $565,000.00 for this period of time.

2. The Second Application.

This period covers February 1, 1999, through May 31, 1999. This period is a trough; the operations of the Debtor deteriorated substantially, and the move toward selling the assets gained momentum. The level of effort dropped substantially, including a materially decreased role for the senior professionals. To some extent, this was recognized by HLHZ when it reduced its monthly fee to $75,000.00 for the final two months of this period. However, the Court finds that this decrease does not adequately take into account the change of circumstances in the Debtor's status and the materially lower level of effort put out by HLHZ. Therefore, the Court will allow compensation during this period at four months at $75,000.00 or $300,000.00.

3. The Third Application.

The third application covers the period from June, 1999, through September 30, 1999.

Although the operations of the company begin to improve during the latter part of this period, the status of the case still did not favor any kind of a return for the unsecured creditors. Indeed, by the

early part of this period, HLHZ acknowledged that efforts to obtain exit financing had not been successful and likely would not be. The focus of the Committee was to continue to work toward convincing the Debtor and the banks of the wisdom of more time even though there was a clear sense that a sale was inevitable. While other strategies might have been undertaken, the likelihood of success was acknowledged to be low. The Committee and its professionals understood that they still had some leverage based upon a "kamikaze" approach but financially viable options were absent. The level of effort remained low, well below half of that of the time expended during the period covered by the first application although slightly up from the time expended in the second application. Given all of these factors, the Court concludes that a flat fee of $50,000.00 per month is reasonable for this period.

4. The Fourth Application.

The fourth application covers the period October 1, 1999, through January 31, 2000. By now, the general range of the market value of the assets had been clarified through the bidding process. No money was available to pay the fees for exit financing and the unsecured creditors themselves had not brought any other buyers to the table and had not come up with any other means of forestalling the sale of the assets. Any plan for the unsecured creditors depended upon the continuity of management and the Committee acknowledges that "battle fatigue" had set in among the key people. Given the level of effort and the economic status of the case, a flat fee of $35,000.00 for each of these four months is reasonable.

5. The Fifth Application.

This covers the period of February 1, 2000, through April 30, 2000. This is the denouement from the standpoint of the Committee; the case creeps to its conclusion with a negotiated resolution. The need for financial advisory services from HLHZ to the Committee is minimal and the level of effort is low. A monthly fee of $15,000.00 is reasonable.

Thus, the total fee otherwise awardable is $1,235,000.00. A 10% reduction yields an approved amount of $1,111,500.

That takes us to the question of expenses.

HLHZ requests in excess of $46,000.00 in expenses. Although there is substantial documentation, it is not presented in a way that justifies full allowance. This is particularly true in connection with expenses such as telephone charges where monthly bills from various individuals are allocated on a pure percentage basis without any indication of the basis for that allocation. Likewise, there are some charges that are non-compensable in a bankruptcy context unless they have been specifically approved, such as overtime meals. There was no such approval in this case. Finally, as pointed out by Mr. Armel, there are travel costs charged where the time records do not correlate, thereby making it impossible to verify that the travel actually benefitted the estate. Given these facts, it is difficult if not impossible to make an expense by expense determination. Taking into account all of these considerations, the Court finds and concludes that an approximate 50% reduction of the amount requested is justified; therefore $23,000.00 for expenses will be allowed. This leads to a total award of $1,134,500 to HLHZ. Given the amounts already paid, HLHZ is to reimburse the Estate $109,391.62.

IV. Conclusion

This dispute presents issues that must be addressed on a comprehensive basis. The tension between lawyers accustomed, indeed addicted to, time keeping on the one hand and financial advisors spurning it as unprofessional on the other serves the interests of neither. Obviously, qualified financial advisors are essential to successful reorganizations. While it does not serve the public interest to create a fiscal environment that drives such firms away from bankruptcy practice, it just as surely does not serve the interests of such firms to be unduly resistant to the requirements of the bankruptcy environment. This Court, for one, does not believe that purely time based fees are appropriate for all professionals in every case; indeed, such an approach can lead to anomalous results. Nevertheless, once the "rules of engagement" are defined, it is up to all professionals to abide by them. It is likewise up to the bankruptcy community to form a consensus on what those rules ought to be, either for all professionals or for different classes of professionals. This Court, for one, hopes that it does.

The Trustee is to submit a form of order consistent with this Memorandum Decision.

So ordered.

DATED: September 30, 2002

s/s Charles G. Case II
CHARLES G. CASE II
UNITED STATES BANKRUPTCY JUDGE

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