Not for Publication

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN RE:	)	CASE NO.	02-30574
	)		
AHEAD COMMUNICATIONS SYSTEMS, INC.,	)	CHAPTER	11
	)	DOC. I.D. NOS.	659, 664, 668, 671, 672
DEBTOR.	)		

APPEARANCES

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MEMORANDUM OF DECISION AND ORDER RE: SUPPLEMENTAL APPLICATION FOR ALLOWANCE OF COMPENSATION AND REIMBURSEMENT OF EXPENSES BY COUNSEL TO DEBTOR-IN-POSSESSION AND GENERAL DATACOMM, INC.'S OBJECTION THERETO

Lorraine Murphy Weil, United States Bankruptcy Judge

The matters before the court are the Supplemental Application for Allowance of Compensation and Reimbursement of Expenses by Counsel to Debtor-in-Possession (Doc. I.D. No.

659, the "Application") (as supplemented by Doc. I.D. Nos. 668 and 672) and General DataComm, Inc.'s ("GDC") objection to the same (Doc. I.D. No. 664, the "Objection") (as supplemented by Doc. I.D. No. 671).

I. BACKGROUND

On April 7, 2005, the court issued that certain Memorandum and Decision Re: Fourth Interim Fee Application for Allowance of Compensation and Reimbursement of Expenses by Counsel to Debtor-in-Possession and United States Trustee's Objection Thereto (Doc. I.D. No. 504, the "Prior Decision"). The Prior Decision set out a detailed history of this bankruptcy case and the court assumes familiarity with that decision. In light of pending matters before the court, some further background is necessary

A. Valuation Motion

On July 27, 2004, GDC filed a motion pursuant to 11 U.S.C. § 506(a) (the "Valuation Motion") seeking a determination of the value of the business of the above-captioned debtor (the "Debtor"). The Valuation Motion was highly contested and evidentiary hearings on the motion were held over five days. At those hearings, numerous witnesses testified and numerous exhibits were admitted into evidence. Subsequently, the parties began discussions towards a proposed consensual plan of reorganization and the Valuation Motion was not pursued.

B. Plan Confirmation

On May 31, 2005, GDC, the Debtor and the Official Committee of Unsecured Creditors (the "Committee") filed a joint disclosure statement (Doc. I.D. No. 544, the "Joint Disclosure

Statement') and a joint liquidating plan of reorganization (Doc. I.D. No. 545, the "Joint Plan").[1] The Joint Plan provided (among other things) that (a) unsecured creditors would receive a *pro rata* share of $500,000.00 (approximately 17 cents per dollar);[2] (b) an escrow (the "Fee Escrow") would be established and funded for payment of administrative claims, priority tax claims, priority claims and allowed unsecured claims; (c) the balance of the Debtor's cash (after payment of or provision for fee claims (among others)) and all of its property would be transferred to NEWCO, a wholly-owned subsidiary of GDC, in partial satisfaction of GDC's secured claim and NEWCO would issue a note in the amount of $5,050,000.00 to GDC, which would be secured by a first-priority security interest upon all the assets of NEWCO; and (d) the Debtor would be dissolved. On May 31, 2005, an order (Doc. I.D. No. 546) issued approving the Joint Disclosure Statement and scheduling the confirmation hearing for June 15, 2005. On June 15, 2005, an order (Doc. I.D. No. 562) issued confirming the Joint Plan. Pursuant to the Joint Plan, GDC is liable (directly, or indirectly through NEWCO) for payment of administrative expenses to the extent that the Fee Escrow is inadequately funded.

C. Other Fee Applications

1. Fifth Interim Fee Application

On May 2, 2005, Z&Z filed its fifth interim fee application (Doc. I.D. No. 518, the "Prior Application") seeking allowance of fees of $243,253.00 and reimbursement of expenses of

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[1] As noted in the Prior Decision, GDC and the Committee previously filed a joint plan (Doc. I.D. No. 360) and the Debtor filed a competing plan (*see* Doc. I.D. No. 369, the "Debtor's Plan").

[2] The class of unsecured creditors included GDC's Deficiency Claim (as defined in the Prior Decision). GDC, however, waived distribution on its Deficiency Claim and any unsecured claim it held against the Debtor.

$16,869.52 for services rendered from August 1, 2004 through March 31, 2005. A hearing on the Prior Application was scheduled for June 15, 2005 and then continued to June 22, 2005.[3] On June 21, 2005, GDC filed an objection (Doc. I.D. No. 566, as supplemented by Doc. I.D. No. 604, the "Prior Objection") to the Prior Application. In the Prior Objection, GDC asserted that Z&Z should not be compensated for services performed with respect to the Debtor's Plan and the Valuation Motion (in the amount of $188,983.00) because neither "benefited [sic] the estate, but on the contrary only resulted in harm to creditors and unjustifiably delayed the administration of this case for more than a year." (Prior Objection at 1.) GDC argued that Z&Z filed a plan that was illegal and unconfirmable on its face because, GDC asserted, (among other things) that proposed plan inaccurately valued the assets of the Debtor at $18,000,000.00 (which allegedly compelled GDC to bring the Valuation Motion) and proposed to issue non-voting stock to GDC.

At the conclusion of the hearing on June 22, 2005, the court instructed Debtor's counsel to file a pretrial order (the "PTO") on or before June 29, 2005 providing counsel for GDC an opportunity to review the PTO and submit any objections thereto, if any. On July 1, 2005, GDC filed an objection (Doc. I.D. No. 574) to the PTO. An on-the-record status conference was held on July 6, 2005 with respect to the PTO and the objection thereto. Subsequently, the PTO (Doc. I.D. No. 578) issued with respect to the Prior Application and the Prior Objection and an evidentiary hearing (the "Prior Hearing") was scheduled for October 11, 2005. In the interim, on-the-record

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[3] The hearing on the Prior Application originally was scheduled to be heard with the hearing on confirmation on June 15, 2005. No objection was made by GDC to the Prior Application prior to or at the June 15th hearing. The background behind how the hearing on confirmation got separated from the hearing on the Prior Application appears in the record. (*See* 6/15/05 Hearing Record at 1:58:32 *et seq.*) In any event, the Joint Plan was confirmed on June 15, 2005 and (consistent with the terms of a court-ordered continuance) the original Prior Objection (as defined below) was filed by GDC on June 21, 2005.

status conferences were held on August 3, 2005 and September 19, 2005 with respect to the Prior Application and the Prior Objection. The parties also filed pre-hearing briefs (*see* Doc. I.D. Nos. 612 and 614).

On October 11, 2005, the Prior Hearing[4] was held at which counsel for the parties argued their respective positions. At the conclusion of that hearing, the court issued its decision on the record approving the Prior Application in its entirety and overruling the Prior Objection. (*See* Prior Hearing Transcript at 55.) With respect to the allegation that Z&Z proposed an unconfirmable plan, the court stated as follows:

> The standard to determine reasonableness in situations like this is set forth in the following quote, "The appropriate prospective for determining the necessity of the activity should be prospective. Hours for an activity or project should be disallowed only where a court is convinced it is readily apparent that no reasonable attorney should have undertaken that activity or project . . . . This is especially true where after the fact matters have ultimately been resolved by consent. The court's benefit of . . . "20/20" hindsight should not penalize professionals." *In re Drexel Burnham Lambert Group, Inc.*, 133 [B.R. 13, 23] (Bankr. S.D.N.Y. 1991). *See also In re Cenargo Int'l, PLC*, 294 B.R. 571, 595 (Bankr. S.D.N.Y. [2003]) ("[T]he focus is on what a reasonable lawyer would have done at the time; the court should not invoke perfect hindsight.") . . . [T]he court is persuaded that an attorney in . . . [Z&Z's] position could have reasonably thought that confirmation of the Ahead plan with its stock voting provisions presented a litigable issue under bankruptcy code sections 1129(a)[(1), 1123(a)(6) and 1123(a)(7)] . . . . The court will not indicate how the court ultimately would have ruled. All that is required is for the court to find that there was a litigable issue, and the court so finds.

(Prior Hearing Transcript at 53:17 – 54:21.)

On October 12, 2005, the court issued an order (Doc. I.D. No. 621) granting the Prior Application in the amount of $243,253.00 in fees and $16,869.52 in expenses. The court also issued orders overruling the Prior Objection (*see* Doc. I.D. Nos. 623, 624). An amended order (Doc. I.D.

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[4] Citations to the transcript of the Prior Hearing will appear in the following form: "Prior Hearing Transcript at ___:___."

No. 626) was issued on October 14, 2005 with respect to the Prior Application. On October 20, 2005, GDC filed a notice of appeal (Doc. I.D. No. 637, the "Appeal") with respect to Doc. I.D. Nos. 621, 623, 624 and 626. GDC did not seek to stay the order approving the Prior Application pending the Appeal.[5] The Appeal currently is pending in the United States District Court and was assigned case number 3:05-cv-01713-CFD.

2. The Final Fee Application

On August 9, 2005, Z&Z filed that certain Final Application for Allowance of Compensation and Reimbursement of Expenses by Counsel to Debtor-in-Possession (Doc. I.D. No. 584) seeking allowance of fees of $41,389.00 and reimbursement of expenses of $1,185.15 for services rendered from April 1, 2005 through June 30, 2005. No objection was filed to that application and an order (Doc. I.D. No. 609) issued on September 22, 2005 approving the application for fees of $38,951.00 and expenses of $1,185.15.

D. <u>The Application</u>

Z&Z filed the Application on April 3, 2006.[6] The Application seeks an award of $81,846.00 in fees and $1,789.22 in expense reimbursement for the period of July 1, 2005 through February 28, 2006. Such fees and expenses were incurred in (1) defending the Prior Application (the "Application Services") and (2) providing services (the "Other Services") related to the

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[5] In fact, counsel for GDC stated at the Hearing (as defined below) that the amounts awarded on the Prior Application were paid to Z&Z in full. (*See* Hearing Record at 2:08:38 – 2:08:42.)

[6] Annexed to the Application are, *inter alia*, relevant time records of Z&Z. A review of those records discloses that Z&Z has divided its billing file for the Debtor into separate billing subfiles including the following: "Case Administration" (file #7818-00001); "Professional Applications/Objections" (file #7818-00006); and "Claims Administration and Objections" (file #7818-00008).

administration of the bankruptcy estate. GDC filed the Objection on April 26, 2006. A hearing (the "Hearing") on the Application and Objection was held on May 3, 2006 at which Z&Z, GDC and the United States Trustee appeared.[7] At the Hearing, GDC argued (among other things) that the Application was premature in light of the Appeal and that Z&Z did not adequately describe the Other Services. At the conclusion of the Hearing, the court took the matters under advisement.

On May 11, 2006, the court issued that certain Brief Memorandum of Partial Decision and Order Requiring Supplementation of Fee Application (Doc. I.D. No. 666, the "Order"). The Order: (1) determined that the Application was not premature and overruled the Objection to that extent; (2) instructed Z&Z to supplement the Application with a "narrative description" of the Other Services; and (3) left the remainder of the Objection under advisement. The Order also noted that the Appeal was not stayed and that the order approving the Prior Application remained in full force and effect. *See* 9E Am. Jur. 2d *Bankruptcy* § 3823 (2006) ("The mere filing of a notice of appeal to review an order of the bankruptcy judge, without more, does not stay the effect or operation of the order.") Moreover, the court stated in the Order that GDC could sufficiently be protected by directing Z&Z to deposit any fees collected from GDC on the Application into the Fee Escrow pending a decision on the Appeal.

On May 17, 2006, Z&Z filed the supplemented Application (Doc. I.D. No. 668, the "Supplemented Application") and GDC filed an objection (Doc. I.D. No. 671, the "Supplemented Objection"). Subsequently, Z&Z filed a response (Doc. I.D. No. 672) to that objection.

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[7] The United States Trustee (the "UST") did not object to the Application. Citations herein to the record of the Hearing appear in the following form: "Hearing Record at ___:___:___."

II. STANDARDS

The award of compensation to estate professionals is governed by Bankruptcy Code § 330 which provides in relevant part:

> (a) (1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103 –
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> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and
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> (B) reimbursement for actual, necessary expenses.
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> (2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.
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> (3) (A) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including –
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> (A) the time spent on such services;
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> (B) the rates charged for such services;
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> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
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> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
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> (E) whether the compensation is reasonable, based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.
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> (4) (A) Except as provided in subparagraph (B), the court shall not allow compensation for –
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> (i) unnecessary duplication of services; or
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> (ii) services that were not –
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> (I) reasonably likely to benefit the debtor's estate; or
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> (II) necessary to the administration of the case.
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> . . .
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> (6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.

11 U.S.C.A. § 330 (West 2005). The burden of proof to show entitlement to the fees requested in the application is on the applicant. *In re Chas A. Stevens & Co.*, 109 B.R. 853, 854 (Bankr. N.D. Ill. 1990). "To meet this burden, the applicant must support its request for fees and expenses with specific, detailed and itemized documentation." *In re The Bennett Funding Group, Inc.*, 213 B.R. 234, 244 (Bankr. N.D.N.Y. 1997). "In cases where the time entry is too vague or insufficient to allow for a fair evaluation of the work done and the reasonableness and necessity for such work, the court should disallow compensation for such services." *Id.* In determining the reasonableness of the services for which compensation is sought, the court should be mindful that

> the appropriate perspective for determining the necessity of the activity should be prospective: hours for an activity or project should be disallowed only where a Court is convinced it is readily apparent that no reasonable attorney should have undertaken that activity or project or where the time devoted was excessive. This is especially true where, after the fact, matters have ultimately been resolved by consent. The Court's benefit of "20/20 hindsight" should not penalize professionals.

In re Drexel Burnham Lambert Group, Inc., 133 B.R. 13, 23 (Bankr. S.D.N.Y. 1991). *See also In re Cenargo Int'l PLC*, 294 B.R. 571, 595 (Bankr. S.D.N.Y. 2003) ("The focus is on what a reasonable lawyer would have done at the time; the Court should not invoke perfect hindsight.").

As noted, Bankruptcy Code § 330(a)(6) specifically contemplates that the preparation of fee applications is compensable thereunder if otherwise appropriate. *See In re Colonial Realty Co.,* 280 B.R. 299 (Bankr. D. Conn. 2002) (Krechevsky, J.) (allowing reasonable fees for preparing fee application).[8] This court concurs with the courts which have allowed the compensation of attorney's

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[8] Section 330(a)(6) resolved a conflict on the point in the courts and the theory behind it was to compensate professionals for performance of certain billing-related tasks unique to bankruptcy. *Cf. In re Computer Learning Centers, Inc.*, 285 B.R. 191, 219-20 (Bankr. E.D. Va. 2002) ("[Those] portions of the billing process common to billing both bankruptcy clients and non-bankruptcy clients are not compensable under § 330 because they are part of the professional's overhead.")

fees incurred in successfully defending fee applications against objections. *See, e.g., Smith v. Edwards & Hale, Ltd (In re Smith)*, 317 F.3d 918, 928 (9th Cir. 2002), *cert. denied*, 538 U.S. 1032 (2003); *Hennigan Bennett & Dorman, LLP v. Goldin Assocs., LLC (In re Worldwide Direct Inc.)*, 334 B.R. 108, 111-12 (D. Del. 2005); *In re Downs & Assocs., Ltd.*, No. 02-32905, 2002 WL 32139302, at *3 (Bankr. W.D.N.C. Dec. 11, 2002); *Computer Learning Centers, Inc.*, 285 B.R. at 223-24. If such fees were not compensable, "creditors could negotiate reductions in these fee awards knowing full well that the attorney is in a no-win situation. Even if the attorney prevails, he or she will in effect have financed the litigation without any hope of surviving it whole." *Worldwide Direct*, 334 B.R. at 111 (internal quotation marks and citation omitted).[9]

III. THE OBJECTION

The Objection is dealt with on an objection-by-objection basis below.

A. Objection Re: Other Services

The Objection objects to the payment of the Other Services because, GDC claims, Z&Z did not bear its burden of establishing that such services were of any benefit to the estate. The total billed for Other Services is $4,152.00. The Objection contends that upon confirmation of the Joint Plan, GDC (or its newly-formed affiliate) acquired all of the assets of the Debtor, including the obligation to pay creditors pursuant to the Joint Plan and an escrow was formed from which payment to creditors would be made. Consequently, GDC alleges that "there was simply no legitimate

[9] Furthermore, "[f]ailure to grant fees for successfully defending challenges to an authorized fee application would dilute fee awards, in violation of section 330(a), and this would reduce the effective compensation of bankruptcy attorneys to levels below the compensation available to attorneys generally." *Smith*, 317 F.3d at 928.

services for [Z&Z] . . . to perform since all further responsibilities were those of GDC." (Supplemented Objection at 1.)

The court notes that entries related to the Other Services include:

- conversations and e-mails with Dean Baker, Esq., the escrow agent appointed under the Joint Plan, regarding the status of the administrative claim escrow (including disbursements and shortfalls);
- conversations and e-mails with an attorney for the UST regarding UST fees, monthly operating reports and claim objections;
- conversations with counsel for GDC regarding the representation of the Debtor (among other things);
- preparation and revision of the sixth interim (or final) fee application and discussions with parties regarding the same;
- attendance at a hearing on fee applications; and
- review of the Committee's fee application(s) and conversations with counsel for the Committee regarding fees and escrow.

The court deems all of the foregoing services proper. As stated above, Bankruptcy Code § 330(a)(6) provides for compensation for the preparation of fee applications. As noted by Z&Z, neither the Joint Plan, the Debtor nor GDC (or its new affiliate) terminated the services of Z&Z. Consequently, Z&Z retained a fiduciary responsibility in its capacity as counsel to the Debtor. The foregoing tasks were consistent with that responsibility. The court notes further that the time expended on those tasks was not excessive. Accordingly, except as noted below, fees and expenses for the Other Services will be allowed.

There are, however, two entries listed with respect to Other Services that are unclear or otherwise inappropriate.

07/05/2005	CIL	Emails re: escrow and D.A. and telephone conference with Attorney Fishman re: same	0.20 hrs	74.00
08/02/2005	CIL	Billing.	0.60 hrs	220.00

With regard to the first entry, the meaning of "D.A." is unknown to the court. Morever, the court is unable to parse through the 0.20 hrs. billed to determine the amount of time properly allotted to "D.A." Consequently, that entire entry will be disallowed as unclear.

With regard to the second entry, there is a hand written notation on the Supplemented Application after Billing: "re six interim fee app." To the extent that the entry pertains to the billing of services provided to the Debtor by an attorney of Z&Z, such work should not be compensated as it would more probably constitute overhead of the firm. *See Computer Learning Centers, supra*. If the entry does not relate to an overhead charge of the firm, the hand written notation does not clarify the service provided and remains vague. For those reasons, that charge will not be approved and will be disallowed.

B. <u>Objection Re: Application Services</u>

1. Application Services did not benefit the estate

GDC argues that the Application Services did not benefit the estate. The court disagrees. Resolution of the Prior Application was necessary for the administration of the case. Because such resolution resulted in the liquidation of an administrative claim, a benefit was conferred upon the bankruptcy estate by the Application Services. *Cf. In re Smith*, 317 F.3d at 928-29; *Worldwide Direct*, 334 B.R. at 111-12.

2. Application is grossly inflated and seeks unwarranted compensation

The Objection seeks to disallow 18.9 hours of work billed for $4,656.00. It targets specifically efforts taken by Z&Z to overcome the attorney/client privilege that exists between GDC and its attorneys in an attempt to seek attorney depositions. Such efforts involved primarily legal research and telephone conferences. At the Hearing, Z&Z argued that such efforts were necessary in light of the fact that (1) GDC created the dispute with respect to the Prior Application; and (2) GDC had been duplicitous in not objecting to a perceived illegality in the Debtor's Plan in connection with GDC's objection to the related disclosure statement. (*See* Hearing Record at 2:19:31 – 2:21:22.) Based upon the foregoing, Z&Z determined that the "at issue" exception to the attorney/client privilege was applicable and issued notices of deposition, which deposition(s) ultimately were not conducted.

It is not necessary for the court to determine whether Z&Z would have been successful in deposing counsel for GDC. The court determines that the work undertaken by Z&Z constituted legitimate litigation strategy which this court has no basis to undermine. As stated by Z&Z, GDC contested the Prior Application and Z&Z sought to defend its application by taking this particular approach.

3. Z&Z's time charges are duplicative and excessive research time

The court does not find the contested time charges to be duplicative. The challenged entries were those of Attorney Grossman who explained the entries to the court's satisfaction at the Hearing.

GDC also objects to the sum of $19,467.50 that was billed for research time dedicated to a single brief submitted to this court and essentially the same brief submitted to the District Court on

the Appeal. From a review of the time records, the court notes that topics researched included the following: defense of fee application; restriction on voting rights; timing of Section 1123 objection; plan modification; plan provision regarding issuance of stock; conduct not in the best interest of the estate; objection of plan in context of objection to disclosure statement; research with respect to Bankruptcy Code §§ 1129(a)(1), 330 and 331; and review of GDC's brief and cases.

As stated by Attorney Grossman at the Hearing, all of the contested research was undertaken in response to GDC's challenge of its Prior Application and the subsequent Appeal. The court does not find such research time to be excessive especially in light of the fact that it spans an eight month period. The fact that such research resulted in only one brief to this court and one brief to the District Court is immaterial to a determination of whether or not Z&Z acted reasonably in the first instance. For those reasons, the court approves the contested research entries.

4. Application is based upon misstatements by Z&Z

GDC disputes: (1) any allegations made by Z&Z at the Hearing that GDC objected to the Prior Application as a negotiating tactic; and (2) Z&Z's allegation that GDC caused the Valuation Motion to be filed. Neither of those allegations has played a part in the court's decision here.

5. Reimbursement of expenses

The Objection objects to expenses for long distance phone call charges and on-line and PACER research charges listed on days when no corresponding time was billed by an attorney for work done. The court is persuaded by Attorney Grossman's explanation that a client billing code is necessary prior to the making of long distance phone calls and the usage of any on-line research

tools and that the lack of correlating work time is due only to Z&Z's choice not to bill for the time expended. Accordingly, expenses will be allowed in their entirety.[10]

IV. CONCLUSION

For the reasons stated above, (a) the Application is approved in part and disapproved in part and the Objection is sustained in part and overruled in part and (b) Z&Z is awarded compensation on the Application in the amount of $81,552.00 in fees and $1,789.22 in expense reimbursement.[11] Payment of the award granted here will be conditioned upon further order of this court entered on motion after resolution of the Appeal. However, in the interim, Z&Z is authorized to take appropriate steps to cause GDC and/or NEWCO (as the case may be) to deposit sufficient funds into the Fee Escrow such that the total of funds in the Fee Escrow (after making provision for any other unpaid fee awards) will be sufficient to pay the foregoing award in full.

It is **SO ORDERED.**

DATED: September 21, 2006

BY THE COURT

Lorraine Murphy Weil

Lorraine Murphy Weil
United States Bankruptcy Judge

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[10] GDC does not challenge Z&Z's hourly rate as unreasonable and the court likewise will not raise that issue.

[11] The court is sensitive to the relationship of this award to the amount of the award on the Prior Application. Absent extraordinary circumstances, the proportion here is at (but does not exceed) the outer limit of what this court is willing to award in application defense situations on an otherwise reasonable application.