THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION AT AKRON

IN RE:	)	CASE NO. 96-50540
	)	
AIRSPECT AIR, INC.	)	CHAPTER 11
	)	
DEBTOR	)	**JUDGE MARILYN SHEA-STONUM**

ORDER RE: "APPLICATION OF SPECIAL COUNSEL FOR DEBTOR AND DEBTOR-IN-POSSESSION FOR PAYMENT OF ATTORNEYS' FEES"

This matter comes before the Court on the "Application of Special Counsel for Debtor and Debtor-in-Possession for Payment of Attorneys' Fees" (the "Application for Fees") filed by Jeffrey L. Nichwitz ("Nichwitz"), Timothy L. McGarry, and the law firm of Nichwitz, Pembridge & Chriszt Co., L.P.A. (hereinafter collectively referred to as "Applicant" or "NPC") and an objection to the Application for Fees filed by Spasoje Miskovic ("Miskovic"), president and sole interest holder of debtor. The Court held a hearing on the matter at which Nichwitz appeared on behalf of Applicant and Daniel McGowan ("McGowan") appeared on behalf of Miskovic. During the hearing, Nichwitz testified and various documents were admitted into evidence. The Court also heard legal argument from both counsel. At the conclusion of the hearing, each party was granted additional time in which to respond to an issue raised by the Court during the hearing. Those pleadings were timely filed and the matter was then taken under advisement. (The

Application for Fees and the Applicant's supplemental pleading shall hereinafter be referred to as the "Application" and Miskovic's objection to the Application and his supplemental pleading shall hereinafter be referred to as the "Objection").

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon Nichwitz's testimony, the evidence presented and the arguments of counsel during the hearing on this matter, as well as the entire record in this chapter 11 case and the Adversary Proceeding (as defined below), the Court makes the following findings of fact and conclusions of law.

BACKGROUND FACTS

Pursuant to a long-term lease with the City of Akron (the "City"), Airspect Air, Inc. ("Airspect") operated a "fixed base operation" at the Akron-Fulton International Airport located in Akron, Ohio. Various disputes arose between Airspect and the City regarding the terms of the parties' lease including, among other things, Airspect's contention that it was not responsible for paying a "fuel flowage fee" and certain rent payments. Accordingly, Airspect withheld payment of such fees and rents from the City. At that time, the lease had a remaining term of 28 years and Airspect allegedly had spent approximately $1.7 million on improvements to the leasehold property through the construction of a 28,500 square foot building, hangar, ramp and fuel farm (collectively, the "Improvements").

The Initial Litigation and the Bankruptcy Filing: In January 1993 Airspect initiated litigation against the City in the form of an action for declaratory judgment filed in the Summit County Court of Common Pleas. This proceeding was later dismissed without prejudice. In June 1994, the 1993 state court proceeding was re-filed. The City filed an

answer and cross-claim in that case claiming that Airspect had substantially breached various terms and provisions of its lease with the City. Thereafter, Airspect filed an answer to the City's cross-claim and asserted its own cross-claims against the City for breach of contract, misrepresentation and constructive eviction. Airspect prayed for relief in the amount of $10 million in compensatory damages plus recission of its lease agreement with the City.

In December 1994, the City filed a motion for partial summary judgment which was granted in March 1995 as to Airspect's misrepresentation and constructive eviction causes of action and a trial was scheduled to determine the remaining matters. Before commencement of the trial, the attorney who was then representing Airspect filed a motion to withdraw. That motion was granted in August 1995 and after retention of interim replacement counsel the trial was rescheduled for March 1996.

In December 1995 Nichwitz was retained as Airspect's counsel[1] and a request that the March 1996 trial be rescheduled was denied by the trial court. When that motion was denied, it is now uncontested that Nichwitz counseled Airspect through Miskovic to consider filing bankruptcy to delay the trial so that he could become familiar with the case and conduct the discovery he considered necessary to properly prepare the matter for trial. Nichwitz then referred Airspect to bankruptcy counsel, and on March 13, 1996 this chapter 11 case was filed. Thereafter, the pending state court action was transferred to this Court and assigned Adversary Number 96-5047 (the "Adversary Proceeding"). Pursuant to an

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[1] In December 1995, Nichwitz was practicing as a sole practitioner but shortly thereafter participated in the formation of the law firm of DiLeone, Nichwitz, Pembridge & Chriszt Co., L.P.A., which later changed its name to Nichwitz, Pemridge & Chriszt Co., L.P.A. Throughout the pre-petition state court litigation and as post-petition *special* counsel, Airspect has been represented by the same attorneys all of whom are now affiliated with Applicant.

Order dated May 20, 1996, Applicant was retained as special counsel, on a contingency basis, to represent D.I.P.[2] in the Adversary Proceeding.

Non-Assumption of the Lease: D.I.P. did not assume its lease with the City within the time specified in 11 U.S.C. §365(d)(4). On June 27, 1996, the City filed a motion requesting, *inter alia*, an order declaring the lease rejected and a termination of the automatic stay. Through oral decisions rendered at hearings on the City's motion, the Court determined that D.I.P.'s lease with the City had been rejected by operation of law but that the City, although entitled to adequate protection, was not entitled to relief from the automatic stay.[3] Nichwitz was present at and participated in those hearings.

The City appealed this Court's ruling that it was not entitled to relief from the automatic stay to the District Court which referred the matter to consideration by a Magistrate Judge. On April 9, 1998, the Magistrate Judge entered his Report and

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[2] Reference to Airspect as D.I.P. denotes the change in status of Airspect after its chapter 11 filing, including the need for recognition of statutory requirements with which chapter 11 debtors must comply and the consequences that ensue when insufficient attention is given to those requirements as apparently happened in this case.

[3] In so holding, this Court determined that "highly unusual circumstances" existed in this case:

> Movant's counsel suggested that the cause for granting relief from the automatic stay was the termination of the contract, by virtue of the failure of the debtor to take steps necessary under 11 U.S.C. §365(d)(4). Again, because this Court does not view rejection as being the equivalent of termination, simply the rejection . . . is not in and of itself cause under the highly unusual circumstances of this case, for relief being granted from the stay. . . . Among those highly unusual circumstances is the fact that the contractual relationship between the City and the debtor in possession is a ground lease on which significant improvements have been made by the Debtor. . . . Here, the motion for relief from stay braided into it, in essence, a request for very significant, substantive relief: a finding that the contract was terminated. I'm not sure whether this was the intention of the moving party, but one could read the motion as seeking, in essence, a forfeiture of significant assets.

See "Filing of Amended Oral Decision" at pgs. 5-7 [Appeals File docket #67].

Recommendation holding that D.I.P. had no right to continued possession of the leased premises and that the City was entitled to their immediate surrender. In so holding, the Magistrate Judge expressly found that the deemed rejection under §365(d)(4), "while not necessarily extinguishing the rights of nondebtor third parties nevertheless automatically extinguished the rights therein of the debtor and/or the bankruptcy trustee." *See* Report and Recommendation of Magistrate Judge, entered April 9, 1998, at page 19 [Appeals File docket #89]. Both parties filed objections to the Magistrate Judge's decision. On July 8, 1998, the District Court entered an order adopting the Magistrate Judge's Report and Recommendation in all respects and finding that the City was entitled to immediate possession of the leased premises. *See* Order of District Court, entered July 8, 1998 [Appeals File docket #90]. The parties further appealed the matter to the Sixth Circuit Court of Appeals where it remained pending until the appeals were voluntarily dismissed pursuant to the parties' global settlement. *See* pgs. 8-9, *infra*.

The Adversary Proceeding: On March 13, 1996 the pending state court litigation was transferred to this Court by the filing of the Adversary Proceeding. D.I.P. and the City proceeded in this Court with what was, at times, very contentious discovery. On September 30, 1996, D.I.P. filed a counterclaim against the City for promissory estoppel and, at the

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[4] On April 25, 1997, the City filed a motion for summary judgment regarding D.I.P.'s demand for a jury trial in the Adversary Proceeding and on May 7, 1997, D.I.P. filed its memorandum in opposition to the City's motion for summary judgment. On May 28, 1997, this Court entered an order denying D.I.P.'s request for a jury demand. The description in the Application of the parties' dispute regarding the jury demand issue demonstrates the vigor with which the parties approached so many of the issues presented in this case:

> Airspect's Memorandum in Opposition to the City's Motion for Summary Judgment is notable in that it involved research and briefing of all of the factual

same time, lodged a jury demand to which the City did not consent.[4] On motion filed by D.I.P., the reference to the Bankruptcy Court was withdrawn, and in September 1997 the Adversary Proceeding was transferred to the United States District Court for the Northern District of Ohio. Thereafter, the parties requested mediation and the District Court referred the case to mediation in January 1998. More than one month later, when the parties had still not successfully selected a mediator, the District Court extended the deadline for completion of mediation to May 15, 1998. The parties were unable to agree on a mediator until May 8, 1998, necessitating another extension of the deadline to May 25, 1998. The parties then jointly moved for, and were granted, an additional continuance to June 30, 1998.

The mediation was not successful and on July 30, 1998, the District Court conducted a status conference and was informed that the parties were involved in settlement discussions. The District Court then ordered all action stayed and directed the parties to file a status report by December 1, 1998. Another status conference was conducted on November 30, 1998 with no additional progress reported. Another status report was then required by January 19, 1999.

Because the parties' January status reports did not show promise of a timely settlement, the District Court set the Adversary Proceeding for a trial in August 1999.

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issues involved in the City's breach of its lease with Airspect. These issues included the City's breach of lease; breach of its obligation of "good faith"; and promissory estoppel claims; Airspect's brief also attacked deficiencies in the City's claim of breach and its reliance on the doctrine of primary jurisdiction. NPC's response to the City's 40-page brief in support of its Motion for Summary Judgment (plus a four volume appendix) consisted of a 38-page opposition brief with a two volume appendix. This project alone consumed nearly 100 hours of time and involved three attorneys. The City then filed a 20 page reply with a two volume appendix which NPC reviewed and then opposed.

See Application for Fees at pgs. 11-12.

Dispositive motions, which had not been previously filed, were scheduled to be at issue by May 7, 1999, following a discovery deadline of March 31, 1999. Thereafter, the parties' sought another extension of the August 1999 trial date set by the District Court.

On March 8, 1999, the District Court received a report from the mediator who, with the District Court's approval and at the request of this Court, had been brought back into the case in mid-February 1999 to help promote a global settlement of all related matters pending in the bankruptcy court, the District Court and the Sixth Circuit Court of Appeals. Pursuant to the mediator's report, the parties were coming close to a settlement but a final resolution of all pending matters might take as much as four additional months. Accordingly, the mediator supported the parties' request for another extension of the August 1999 trial of the Adversary Proceeding.

The District Court denied the parties' request for an extension of the trial in the Adversary Proceeding. In expressing its frustration with the parties' protracted and combative litigation, the District Court stated:

> This Court does not believe that extending the trial date and existing deadlines will serve any useful purpose. This case has been in essentially the same posture at least one other time. This is not the first time the parties have indicated the likelihood of settlement. In the past, after obtaining their requested extensions of time, the phantom settlements then disappeared and the case continued in limbo, with the parties at apparent impasse. The Court respects [the mediator's] assessment of the likelihood of settlement; however, based on past experience, the Court declines to grant the instant motion.
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> All deadlines remain in force and this case shall remain on the trial calendar for August 30, 1999. The parties are free to continue their efforts to resolve this matter and the Court encourages them to do so. However, no schedule changes will be made. If no settlement is forthcoming, the case will proceed to trial.

See March 12, 1999 Order (Resolving Doc. No. 45), in U.S. District Court, Northern District of Ohio, Eastern Division Case No. 5:97 CV 1903.

The Global Settlement: Sometime in December 1998, Miskovic retained McGowan as his personal counsel and requested that McGowan intercede in negotiations with the City. Such intercession apparently was useful. In July 1999, D.I.P. filed a motion seeking authority to settle its dispute with the City and to sell the assets of its bankruptcy estate, namely the Improvements. That motion was granted and, pursuant to the parties' agreement,[5] the City paid D.I.P. $575,000.00 in exchange for D.I.P.'s immediate surrender of the leased premises and Improvements. The global settlement also included a voluntary, joint dismissal of the Adversary Proceeding and the appeals pending in the Sixth Circuit.

THE APPLICATION AND THE OBJECTION

Applicant claims that, pursuant to its contingency fee agreement with D.I.P., it is entitled to received 33% (or $189,750.00) of the $575,000.00 paid to D.I.P. by the City.[6] In support of the Application, NPC offers a detailed compilation of 1,392.29 hours of time, from January 5, 1996 through August 23, 1999, that it asserts were spent in pursuing

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[5] The parties' negotiations resulted in the City's agreement to consider the sale of D.I.P.'s business to a new fixed base operator with a reservation of the right to reject the chosen operator and instead pay a $575,000.00 lump sum payment to D.I.P. for the immediate surrender of the leased premises and the Improvements. If the City permitted the proposed sale, D.I.P. would receive an immediate $200,000.00 from the buyer, the City would receive $490,000.00 from the buyer payable over a period of 20 years and D.I.P. would receive $600,000.00 from the buyer, also payable over a period of 20 years.

[6] Through the Application, Applicant does not seek reimbursement for any expenses because all such expenses have previously been paid or reimbursed from a $6,000.00 retainer provided to it by D.I.P. and approved by this Court.

[7] In the Application, Applicant sets forth that the amount of fees being requested is actually less than the fees incurred ($229,838.65) based upon time expended (1,392.29 hours) and the applicable hourly rates (which ranged from $150.00 per hour at the beginning of Applicant's retention to $175.00 per hour by the end of Applicant's retention). *See* Application for Fees at pgs. 2 and 10.

D.I.P.'s rights relative to the City via the Adversary Proceeding.[7] In the Objection, Miskovic contends that the services rendered by Applicant were of no benefit to estate, did not promote the orderly or prompt disposition of the bankruptcy case and its related proceedings and that the amount of compensation sought by Applicant far exceeds any reasonable compensation in light of the results achieved by those services.[8] Miskovic also contends that the settlement with the City, which resulted in $575,000.00 being paid to the bankruptcy estate, did not result directly from Applicant's representation of D.I.P. in the Adversary Proceeding. Therefore, Miskovic contends that the triggering requirement for the claimed contingency fee was never met.

DISCUSSION

Section 330(a) of the Bankruptcy Code provides that a court may award reasonable compensation and reimbursement for "actual, necessary services" but that a court shall not allow compensation for services not reasonably likely to benefit debtor's estate or not necessary to the administration of the bankruptcy case. *See* 11 U.S.C. §330(a)(1)(A)-(B) and (a)(4)(A). The fee applicant bears the burden of proving that it has earned the requested fees and that those fees are reasonable. *See Zolfo, Cooper & co. v. Sunbeam-Oster Company, Inc.*, 50 F.3d 253, 261 (3rd Cir. 1995); *In re Kenneth Leventhan*

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[8] During the hearing on this matter, Miskovic, through counsel, represented to the Court that he has no objection to Applicant's receiving $36,000.00 which he claims represents that approximate amount of fees incurred by Applicant for services in representing D.I.P. from the onset of this bankruptcy case to September 9, 1996, the date on which this Court entered its finding that the lease had been rejected pursuant to 11 U.S.C. §365(d).

& Co., 19 F.3d 1174, 1177 (7th Cir. 1994). Because Applicant was retained in this case pursuant to a contingency fee agreement, the appropriate first step in assessing the award of professional fees is by reference to that agreement.

The Contingency Fee Agreement: Pursuant to a contingency fee agreement, Applicant agreed to represent D.I.P. as special counsel in its bankruptcy case:

> in connection with the claims asserted by and against the City of Akron . . . which contingent fee representation shall be strictly limited to pursuing claims against, and defending claims by, the City of Akron that have already been asserted in the [pending] litigation. . . . By way of example only, . . . *representation of Airspect on a contingency fee basis shall not include services with respect to any sale or potential sale of Airspect or any property of Airspect*, shall not include the defense of any eviction action initiated by the City of Akron and shall not include proceeding against the City of Akron other than for monetary damages (e.g. injunctive relief or contempt).

See Application for Fees - Exhibit 1 at pg. 1 (emphasis added). The parties' contingency fee agreement further provides that "if we settle the matter at least two (2) weeks prior to trial, [Applicant's] fee will be thirty-three percent (33%) of the amount or value recovered." *See Id.* at pg. 2.

Despite the fact that the global settlement in this case centered on the sale of the Improvements (*see* footnote 5, *supra*), Applicant contends that it is entitled to receive a full 33% of the $575,000.00 paid to the estate by the City. As justification for this position, Applicant contends that the contingency fee should attach to all proceeds received by the estate because the bulk of the Adversary Proceeding's damage claim went to the Improvements for which the City eventually paid the estate. Applicant further contends that the ever present risk of loss posed by the pending Adversary Proceeding furthered the City's

eventual agreement to a global settlement in this case.

While the Court appreciates the risk factor inherent in agreeing to represent clients on a contingency fee basis, it also recognizes that to justify what can, sometimes, result in unusually high fees, counsel must fulfill the contingency that triggers the agreed upon fee. In this case, that contingency was either a trial or settlement of the Adversary Proceeding and not, as specifically noted in the parties' retention agreement, "services with respect to any sale or potential sale of Airspect or any property of Airspect." Although the global settlement in this case resulted in settlement of the Adversary Proceeding, it was not settlement of that litigation alone that brought proceeds into debtor's estate. Accordingly, the Court cannot find that NPC fulfilled the contingency necessary to entitle it to receive a full 33% of the $575,000.00 paid to the estate by the City.[9]

Compensation Under §330(a) of the Bankruptcy Code: Despite a non-award of

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[9] *See In re Roger J. Au & Son, Inc.*, 152 B.R. 475 (Bankr. N.D. Ohio 1992) in which the bankruptcy court held that special counsel retained to represent debtor in an adversary proceeding pursuant to a contingency fee agreement did not demonstrate that a creditor's contribution to debtor's estate "directly resulted" from special counsel's efforts in the case. In so holding, the Court stated:

> While the court is aware of criticism of the concept, it has long held to the view that results obtained or, in other words, benefits to the estate, are a crucial factor in fixing compensation of professionals. . . . Much more difficult than stating the concept is applying it practically, however. It is one thing to look at a fee bill and sort out specific actions which can be tied to particular results, e.g., recovery of a sum of money for the estate from the prosecution of a preference action, and quite another to look, as here, at a fund of money contributed for, probably, several reasons and conclude that any one professional or group of professionals "caused" or "created" that fund, in whole or in some percentage. . . . The court is satisfied that the efforts of [applicant] are reflected at least to some extent in the ultimate contributions [creditor] made to this plan. It is not prepared, however, to accept applicant's view that his efforts, alone, compelled creditor to so act.

In re Roger J. Au & Sons, Inc., 152 B.R. at 476-77 (citations omitted).

compensation pursuant to the parties' contingency fee agreement, Applicant's services to the bankruptcy estate must be analyzed, generally, in the context of §330(a) of the Bankruptcy Code. That is, the Court must consider whether NPC met its burden in demonstrating that its services to the estate were actual and necessary and, if so, whether the compensation being sought for those services is reasonable.

In considering whether its services were "actual and necessary," NPC must demonstrate that those services conferred benefit on the bankruptcy estate. *See Ferrara & Hantman v. Alvarez (In re Engel),* 124 F.3d 567 (3rd Cir. 1997) (holding that the question of whether attorneys' services conferred benefit on the bankruptcy estate is not merely one factor to be considered in deciding what would constitute fee for those services but is, instead, the threshold question bearing on the attorneys' eligibility for compensation from the estate). *See also Rubner & Kutner, P.C. v. U.S. Trustee (In re Lederman Enterprises, Inc.),* 997 F.2d 1321, 1323 (10th Cir. 1993). In total, Applicant spent 1,392.29 hours of time, from January 5, 1996 through August 23, 1999, pursuing the Adversary Proceeding on D.I.P.'s behalf. In the Application and through the testimony of Nichwitz, NPC contends that the amount of time it spent on the Adversary Proceeding was necessary given its position as replacement counsel in that litigation and the fact that the issues involved were complex and involved a 17 year history of dealings between the City and Airspect. NPC further contends that its services in prosecuting the Adversary Proceeding conferred benefit on the estate because they helped to preserve claims of the D.I.P. which could have been lost but for Applicant's efforts and because the ever present threat to the City of losing in the Adversary Proceeding helped facilitate the ultimate, global settlement in this case.

In contrast, Miskovic contends that, despite its suggestion that Airspect file for bankruptcy, Applicant never changed from its pre-petition "litigation mode" to a mode of

dealing with the realities of D.I.P.'s position once it did file for bankruptcy, particularly after the deemed rejection of the lease with the City. Specifically, Miskovic notes that, although NPC amended the Adversary Proceeding pleadings on September 30, 1996 (which was well after debtor was deemed to have rejected and, thus, breached the lease) to include a counterclaim for promissory estoppel, NPC never included a claim for the value of the Improvements in the event that D.I.P.'s breach of the lease resulted in its termination.

The testimony and evidence offered during the hearing on this matter supports Miskovic's contention that, despite Airspect's bankruptcy filing and subsequent rejection of its lease with the City, Applicant never significantly changed from its pre-petition "litigation mode." Among the evidence offered during the hearing on this matter was a letter, dated September 20, 1996, from Nichwitz to D.I.P.'s primary bankruptcy counsel which refers to D.I.P.'s continued desire to assign or sublease its rights under the lease with the City.[10] Although reference is made to this Court's September 9, 1996 ruling that rejection of the

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[10] The text of that letter is, in pertinent part, as follows:

> Enclosed for your review and attention are copies of two letters. The first [dated September 18, 1996] is the letter [Miskovic] sent to the City of Akron to obtain approval for a proposed sublease of a portion of the property to Financial Facilitators Plus. The second is Archie Skidmore's letter refusing such approval. Per our discussions with [Miskovic], we need to file a motion with the Bankruptcy Court to obtain such consent. The City's refusal is obviously part of a continuing plan to discriminate against and financially damage Airspect Air. As we discussed, any sublease can only improve the value of the property (not damage it) and any additional income to the Debtor is in the best interest of all creditors, including the City.

See Nichwitz Exhibit 3 at unnumbered pg. 1.

[11] Applicant's September 20, 1996 letter to debtor's primary bankruptcy counsel goes on to say:

> With respect to Mr. Skidmore's reference to the court-ordered rejection of the lease, the Court has already acknowledged that this is an unusual situation where

lease did not entitle the City to immediate relief from the automatic stay,[11] no mention is made to the fact that rejection of the lease extinguished any right that D.I.P. may have had to assign or sublease to a third party. *See* 11 U.S.C. §365(f)(2) and §365(g)(1). Moreover, during his testimony, Nichwitz acknowledged that at no time during this bankruptcy case did Applicant ever counsel debtor that it no longer had a lease which it could assign and that, as late as June of 1999, Applicant was still counseling D.I.P. that the merits of its position in the Adversary Proceeding had not significantly changed. Nichwitz also testified that up until the time the parties entered into the global settlement, Applicant was vigorously preparing for and ready to go to trial with the same strategy and, essentially, on the same causes of action advanced in the pre-petition, state court litigation.

In its defense, Applicant contends that D.I.P. (through its principal, Miskovic) refused to authorize any reasonable settlement demand to the City, thus prolonging the pendency of the Adversary Proceeding.[12] This Court is not unsympathetic to the dilemma presented to counsel when a client demands full vindication of its case. However, that dilemma can, in most instances, be abated or avoided altogether when counsel makes certain

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> the lessee wants to continue to perform under the lease and is current on all lease obligations that are not in dispute. In fact, the Court has ordered Airspect Air to pay post-petition fuel flowage fees, which is akin to an ongoing lessor-lessee relationship.

See Nichwitz Exhibit 3 at unnumbered pg. 1.

[12] In its supplement to the Application, NPC makes specific note of the fact that, during the hearing on this matter, Miskovic did not testify. Although Miskovic's testimony might have provided the Court with further insight into Applicant's relations with D.I.P. during the pendency of this case, the Court notes that it is Applicant's burden, in the first instance, to prove that its fees were reasonable and necessary and not D.I.P.'s burden to refute the evidence presented by Applicant. The Court further notes that, although Miskovic was present during the entire hearing in this matter, NPC did not call upon Miskovic to testify.

that the client is fully informed of how, by the passage of time and changes in circumstances, the potential outcome of the pending case is no longer in the client's favor. Moreover, a professional retained to represent a debtor in a bankruptcy proceeding must always be aware that its client is the debtor-in possession estate, not the debtor's shareholder[s].[13]

> It must be remembered that the [debtor-in-possession] is not like a private client. If an attorney's client wishes to pursue litigation which may not be cost-effective (but is ethically and legally permissible) he is only wasting his own money. The [debtor-in-possession] is a fiduciary. If [it] pursues such litigation, [it] is spending the estate's money, money which should inure to the benefit of creditors.

Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.), 143 B.R. 560, 562-63 (B.A.P. 9th Cir. 1992), *citing In re Scoggins,* 142 B.R. 940, 946-47 (Bankr. D. Or. 1992). *See also In re Taxman Clothing Co.*, 49 F.3d 310, 315 (7th Cir. 1995) (noting that "the care, diligence, and skill that a lawyer for the debtor's estate . . . like the trustee himself . . . is required to bestow as part of his fiduciary duty is not merely care, diligence, and skill in the prosecution of the estate's claims . . . . [i]t is also care, diligence, and skill in deciding which claims to prosecute, and how far.") (citations omitted).

Ignoring the contingent nature of its retention, Applicant also contends that "Section 330 does not authorize compensation only to professionals who take successful actions. . . . To the contrary, if there was a reasonable chance of success which outweighs the costs in pursuing the action, then fees relating thereto are compensable." *See* Supplement to Application for Fees at pg. 4 (citations omitted). This Court does not expect counsel for a

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[13] The clarity of these concepts can certainly be blurred in any given case. In this case, Miskovic was not only the sole shareholder and the sole management figure, but also the holder of the largest debt claim.

debtor to succeed in every endeavor undertaken on the estate's behalf. However, when counsel who represented a debtor on a pre-petition basis is subsequently retained by the estate, that counsel should only proceed with the same pre-petition strategy if, after taking into consideration the chances of success ***in the context of a bankruptcy proceeding***, the potential benefit of that pre-petition strategy outweighs the potential costs to the estate and, ultimately, to the creditors of that estate. *See In re Taxman Clothing Co.*, 49 F.3d 310, 315 (7th Cir. 1995); *In re Angelika Films 57th Inc.*, 227 B.R. 29, 42 (Bankr. S.D.N.Y. 1998); *In re Hunt*, 124 B.R. 263, 267 (Bankr. S.D. Ohio 1990). It is not Applicant's failure to succeed in the Adversary Proceeding that raises questions regarding whether its services conferred benefit on the bankruptcy estate; instead, it is Applicant's failure to re-evaluate Airspect's position and alter its litigation strategy after Airspect filed for bankruptcy and ultimately was deemed to have rejected the lease that gives this Court pause.

Based upon a review of the Application, the evidence adduced during the hearing on this matter and Miskovic's lack of objection as to services rendered from the onset of this bankruptcy case to September 9, 1996, the Court finds that Applicant met its burden of proving that those services conferred benefit on the estate. The Application reveals that NPC spent 247 hours of time up through September 9, 1996 and, at an hourly rate of $150.00, Applicant should be compensated $37,050.00 for those services.

As for services rendered after September 9, 1996, the Court finds that Applicant's failure to fully understand and evaluate D.I.P.'s position relative to the Adversary Proceeding in many ways hindered D.I.P. from facilitating a prompt disposition of the main bankruptcy case and its related proceedings. Because NPC failed to carry its burden of proof that those services conferred benefit on the estate, Applicant will not be compensated for those services from estate funds. A separate judgment consistent with these findings of

fact and conclusions of law will be entered.

IT IS SO ORDERED.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 3/17/00