THIS OPINION IS NOT INTENDED FOR PUBLICATION.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

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

On September 28, 2000, this Court entered an "Order Re: 'Application of Special Counsel for Debtor and Debtor-in-Possession for Payment of Attorneys' Fees'" [docket #160] (the "Memorandum Fee Order") and an Entry of Judgment [docket #161] (collectively, the "Final Fee Order") regarding the application [docket #140] (the "Application") of special counsel to debtor and debtor-in-possession, Jeffrey L. Nichwitz, Timothy L. McGarry, and the law firm of Nichwitz, Pembridge & Chriszt Co., L.P.A. (hereinafter collectively referred to as "Applicant" or "NPC") for fees calculated pursuant to a contingency fee agreement, and the objection to the Application [docket #145] (the "Objection") filed by Spasoje Miskovic ("Miskovic"), president and sole interest holder of debtor. Through the Final Fee Order, this Court awarded fees to Applicant in an amount substantially less than that applied for through the Application. Applicant appealed the Final Fee Order and on August 10, 2001, the Bankruptcy Appellate Panel for the Sixth Circuit (the "BAP") entered an Order [docket #191]

reversing the Final Fee Order and remanding the matter with instructions that this Court re-evaluate the Application pursuant to §328(a) of the Bankruptcy Code.

Pursuant to the BAP's decision, this Court held a status conference. During that status conference, counsel for Miskovic indicated that his client wanted to present evidence regarding whether, pursuant to §328(a) of the Bankruptcy Code, the terms and conditions of the contingency fee agreement which formed the basis of the amount applied for through the Application were "improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." An evidentiary hearing was then scheduled and Miskovic and Applicant were directed to file proposed findings of fact and conclusions of law as to their respective positions. Those pleadings were timely filed [docket #194 and docket #195] and the evidentiary hearing held.

During the closing argument phase of the evidentiary hearing, counsel for Miskovic referred to an Ohio Court of Appeals decision dealing with promissory estoppel and relating to an argument regarding whether or not a cause of action based upon promissory estoppel applied in the Adversary Proceeding (as hereinafter defined). Because neither the Court nor counsel for Applicant was provided with a citation to the referenced case, the Court instructed Miskovic's counsel to file a pleading setting forth that citation and a summary of his client's arguments relative thereto. Applicant was also permitted to file a pleading addressing Miskovic's promissory estoppel argument. Notwithstanding this Court's direction to Miskovic's counsel, nothing further was filed on Miskovic's behalf. Applicant did, however,

file a "Supplemental Memorandum Regarding Remand on Improvident Allowance of Contingent Fee Contract" [docket #196].

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 the arguments of counsel, as well as the entire record in this chapter 11 case and the Adversary Proceeding (as hereinafter defined), the Court makes the following findings of fact and conclusions of law.

I. BACKGROUND

On May 3, 1996, Airspect Air, Inc. ("Airspect"), as debtor and debtor-in-possession, filed a motion seeking authority to employ NPC as special counsel "for the purpose of litigating the issues previously raised in the state court action, which action has been removed to this court." *See* "Motion to Employ Special Counsel and to Pay Retainer from Corporate Funds" [docket #19] at unnumbered pg. 1, ¶4. That motion made no reference to either §328 or §330 of the Bankruptcy Code and, as to exactly what debtor was to pay NPC for its services, that motion set forth as follows:

> 7. A fee of $3,000.00 as partial retainer for costs and expenses has been paid to Nichwitz and McGarry by Spasoje Miskovic, the principal of Airspect from his personal funds. Airspect seeks authority to pay an additional $7000.00 for further retainer from funds of Airspect. The principal purpose of such retainer is to retain one or more expert witnesses on behalf of Airspect, which expert witnesses are necessary to prosecute and defend the claims by and between Airspect and the

> City of Akron. Fees, other than expenses, are to be paid on a contingency basis *and are subject to approval by this court*. The fee arrangement states 33% if settled at least two weeks before trial; 40% if within two weeks of trial or, after commencement of trial; 50% if post-trial or re-trial.

See "Motion to Employ Special Counsel and to Pay Retainer from Corporate Funds" [docket #19] at unnumbered pg. 2, ¶7 (emphasis added). A copy of the referenced contingency fee agreement was not attached to debtor's motion to employ NPC.

In support of the motion to employ NPC as special counsel, Jeffrey Nichwitz and Timothy McGarry each filed affidavits. In those affidavits, only §327 of the Bankruptcy Code was specifically referenced:

> Affiant makes this Verified Statement pursuant to the provisions of Sections 327(a) and (c) of the Bankruptcy Code regarding the employment of professional persons by the Trustee, and in light of the restrictions and requirements imposed thereon by Bankruptcy Rules 2014(a), 2016(b) and 5002.

See Affidavits of Nichwitz [docket #20] at ¶1 and McGarry [docket #21] ¶1. Those affidavits also set forth that "the only fees and expenses to be paid to Affiant shall be those allowed pursuant to order of this Court . . . ." *See* Affidavits of Nichwitz [docket #20] at ¶3 and McGarry [docket #21] at ¶3. Those affidavits neither referenced nor attached the contingency fee agreement that was to form the basis of Applicant's compensation in this case.

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On May 20, 1996, this Court entered an order authorizing debtor to employ Applicant as special counsel. The Order was only one page in length and contained no reference to any specific provision of the Bankruptcy Code or to Applicant's contingency fee arrangement with debtor:

> Upon Motion of the Debtor, Debtor-in-Possession, for authority to employ special counsel to represent it in the case relating to the Complaint for Declaratory Judgment pending in the Court of Common Pleas of Summit County, Ohio, being Case No. CV94061978.
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> The Court being satisfied that Jeffrey L. Nichwitz and his law firm . . . and Timothy L. McGarry, a sole practitioner, represent no adverse interest to Airspect Air, Inc. in the matters upon which they are to be engaged, and that their employment is necessary and would be in the best interest of the estate.
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> IT IS ORDERED that Debtor, Debtor-in-Possession, in the above-captioned proceedings be and hereby is authorized to employ Jeffrey L. Nichwitz and his law firm . . . and Timothy L. McGarry, a sole practitioner, to represent it as Special Counsel in the Chapter 11 proceedings to assist in representation of the Debtor, Debtor-in-Possession.
>
> IT IS FURTHER ORDERED that Airspect is authorized to pay the sum of $7000.00 of corporate funds as partial retainer for expenses.

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> IT IS FURTHER ORDERED that Nichwitz and McGarry submit application for fees to this Court for approval.

See "Order Authorizing Employment of Special Counsel" [docket #24].[1]

The Application was filed on February 3, 2000. Through the Application, Applicant contended that, pursuant to its contingency fee agreement with debtor, it was entitled to receive 33% (or $189,750.00) of $575,000.00[2] paid to debtor by the City of Akron (the "City").[3] Applicant set forth that the Application was being submitted to the Court "[p]ursuant to Sections 330 and 331 of the Bankruptcy Code, and in accordance with Rule 2016 of the Federal Rules of Bankruptcy procedure . . . and the guidelines for Compensation and Expense Reimbursement of Professionals promulgated by the Bankruptcy Court for the Northern District of Ohio . . . ." *See* Application [docket #140] at pg. 2. Although Applicant attached a copy of the contingency fee agreement to the Application, no reference was made

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1 This order was prepared by Airspect's bankruptcy counsel in accordance with this Court's standard procedure whereby counsel for debtor and/or the profession seeking to be retained by the estate drafts a proposed order for the Court's consideration. If the proposed order comports with the underlying motion and any related pleadings (as it did in this case), it is entered by the Court.

2 Through the Application, Applicant does not seek reimbursement for any expenses because all such expenses were previously paid or reimbursed from a $6,000.00 retainer provided to it by debtor and approved by this Court.

3 In July 1999, debtor filed a motion seeking authority to settle its dispute with the City and to sell the remaining assets of its estate, namely the Improvements (as hereinafter defined). The parties' negotiations resulted in a global settlement of all matters then pending including the City's agreement to consider the sale of debtor'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 debtor for the immediate surrender of the leased premises and the Improvements. If the City permitted the proposed sale, debtor 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 debtor would receive $600,000.00 from the buyer, also payable over a period of 20 years.

in the Application to §328 of the Bankruptcy Code and the only legal authority cited by Applicant to support its request for fees dealt with "reasonableness" pursuant to §330 of the Bankruptcy Code. *See* Application [docket #140] at pgs. 15-16 and at Exhibit 1.

On February 29, 2000, Miskovic filed the Objection. Through the Objection, Miskovic contended that the services rendered by Applicant were of no benefit to the estate and that the amount of compensation sought by Applicant far exceeded any reasonable compensation in light of the results achieved by those services. Miskovic also contended that the debtor's 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 debtor in the Adversary Proceeding (as hereinafter defined). Therefore, Miskovic asserted that the triggering requirement for the claimed contingency fee was never met. As with Applicant, the only legal authority cited by Miskovic to support the Objection dealt with "reasonableness" pursuant to §330 of the Bankruptcy Code. *See* Objection [docket #145] at pgs. 10-12.

Subsequent to the hearing on the Application and the Objection, both Applicant and Miskovic filed supplemental briefs in support of their respective positions. Again, neither of those pleadings referenced §328 of the Bankruptcy Code and both of the parties' arguments focused on whether or not the services provided by Applicant to debtor as special counsel were "reasonable" pursuant to §330 of the Bankruptcy Code. *See* Supplemental Brief of Applicant [docket #148] and Supplemental Brief of Miskovic [docket #149].

Against this background, this Court did not include a discussion in the Memorandum Fee Order regarding whether §328 of the Bankruptcy Code applied to this case. Instead, the analysis began with a review of the terms of the contingency fee agreement and a determination that, based upon the very specific facts of this case, Applicant had not fulfilled the contingency necessary to entitle it to receive 33% of the $575,000.00 paid to the estate by the City. *See* Memorandum Fee Order [docket #160] at pgs. 10-12. Next this Court analyzed the Application relative to §330 of the Bankruptcy Code and found that not all of Applicant's services were actual and necessary and that only a portion of the fees sought were "reasonable." *See* Memorandum Fee Order [docket #160] at pgs. 12-18.

Notwithstanding the parties' singular focus on §330 of the Bankruptcy Code while the matter was pending before this Court, the issue of whether §328 of the Bankruptcy Code should apply must have been raised on appeal as the BAP characterized the issues before it to be "(1) whether the bankruptcy court erred in determining that a contingency in the contingency-fee agreement entered into between [Applicant] and the Debtor was not satisfied, and (2) whether the bankruptcy court erred in failing to evaluate the attorney fee application pursuant to the provisions of 11 U.S.C. §328(a)." *See* BAP Order [docket #191] at pg. 2. The BAP determined that this Court erred on both accounts. The BAP then reversed the Final Fee Order and remanded the matter with instructions that this Court re-evaluate the Application pursuant to §328(a) of the Bankruptcy Code. *See* BAP Order [docket #191] at pg. 11.

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II. DISCUSSION

In bankruptcy, the applicant for fees bears the burden of proving that it has earned the fees that are requested. *See, e.g., Zolfo, Cooper & Co. v. Sunbeam-Oster Co., Inc.*, 50 F.3d 253, 261 (3rd Cir. 1995); *Cont'l Illinois Nat'l Bank & Trust Co. of Chicago v. Charles N. Wooten, Ltd. (In re Evangeline Refining Co.)*, 890 F.2d 1312, 1326 (5th Cir., 1989).[4] As to the awarding of fees in a bankruptcy case, one of the following provisions of the Bankruptcy Code will apply, depending upon the specific circumstances of each case.

> **11 U.S.C. §328. Limitation on compensation of professional persons.**
>
> (a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a

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[4] Although an applicant for fees bears the burden of proof and bankruptcy courts have an independent duty to review fee applications, *In re Busy Beaver Bldg. Centers, Inc.*, 19 F.3d 833, 840-842 (3rd Cir. 1994), the main issues regarding Applicant's fees were brought forth through the Objection and through Miskovic's contentions after the matter was remanded (as initially raised by his counsel during a status conference) that the terms of the contingency fee agreement were, pursuant to §328 of the Bankruptcy Code, "improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." In an effort (1) to have parties focus earlier rather than later on which facts and legal authority are relevant to their positions in a case and (2) to gain insight from the parties and to assist the Court in its analysis of the matters presented to it, this Court requires the filing of proposed findings of fact and conclusions of law. Although Miskovic, through counsel, filed such a pleading regarding the argument he raised after the case was remanded, that pleading contained an incomplete sentence and incorrect citations to cases. *See* Miskovic's Proposed Findings of Fact and Conclusions of Law [docket #194] at pg. 7, ¶7 and at pgs. 6-7, ¶8 and ¶9. Moreover, none of the cases which were cited and which the Court could actually locate appear to address §328 of the Bankruptcy Code. The fact that the pleading contained an incomplete sentence was addressed at the evidentiary hearing on the matter and Miskovic's counsel indicated that he would amend that document accordingly. No such amendment was ever filed. Although the Court cannot determine if the pleading caused Miskovic's counsel to focus on the legal and factual needs regarding his client's position, it has no trouble determining that the pleading provided very little insight or assistance to the Court.

retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, 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.

11 U.S.C. §330. Compensation of officers.

(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 professional person employed under section 327 or 1103 -

(A) reasonable compensation for actual, necessary services rendered by the . . . professional person, . . .; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion, or on the motion of . . . any other party in interest, award compensation that is less than the amount of compensation that is requested.

(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 -

(A) the amount spent on such services;

(B) the rates charged for such services;

(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;

(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

> (E) whether the compensation is reasonable based upon the customary compensation charged by comparable 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
>
> (ii) services that were not -
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> (I) reasonably likely to benefit the debtor's estate; or
>
> (II) necessary to the administration of the case.

If a court has approved a professional's employment under §328 of the Bankruptcy Code, then the Court may not conduct a §330 inquiry into the reasonableness of the fees and their benefit to the estate. *Pitrat v. Reimers (In re Reimers)*, 972 F.2d 1127, 1128 (9th Cir. 1992). However, unless a professional's retention application unambiguously specifies that it seeks approval under §328 of the Bankruptcy Code and unless the court unconditionally approves that application pursuant to §328, the application remains subject to review under §330 of the Bankruptcy Code. *See The Circle K Corp. v. Houlihan, Lokey, Howard & Zukin, Inc. (In re The Circle K Corp.)*, 279 F.3d 669, 671 (9th Cir. 2002); *Friedman Enters. v. B.U.M. Int'l, Inc. (In re B.U.M. Int'l, Inc.)*, 229 F.3d 824, 829 (9th Cir. 2000); *In re Northeast Express Regional Airlines, Inc.*, 235 B.R. 695, 699 (Bankr. D. Me. 1999); *In re Olympic*

Marine Servs., Inc., 186 B.R. 651, 652-54 (Bankr. E.D. Va. 1995). *See also Zolfo, Cooper & Co. v. Sunbeam-Oster Co., Inc.*, 50 F.3d 253, 262 (3rd Cir. 1995) (burden rests on applicant to ensure that court's order approving retention explicitly notes terms and conditions of retention if applicant expects retention to be approved pursuant to §328 and not §330 of the Bankruptcy Code). *Cf. Peele v. Cunningham (In re Texas Sec., Inc.)*, 218 F.3d 443 (5th Cir. 2000) (holding that retention was approved pursuant to §328 of the Bankruptcy Code where original retention order specifically referenced parties' contingency fee agreement and amended retention order referenced only §§327 and 328 of the Bankruptcy Code).

As noted above, neither the motion seeking authority to employ NPC as special counsel nor the order approving that motion made any reference to either §328 or §330 of the Bankruptcy Code and neither of those pleadings included a copy of the contingency fee agreement through which Applicant claims it is entitled to fees. In fact, the only reference made to the contingency fee agreement included a qualification that all fees be subject to approval by this Court. *See* pgs. 3-4, *supra*, *citing* "Motion to Employ Special Counsel and to Pay Retainer from Corporate Funds" [docket #19] at unnumbered pg. 2, ¶7. In addition to the fact that the motion to employ NPC did not mention, let alone unambiguously specify, that approval was sought under §328 and that this Court's Order approving the retention did not unconditionally approve NPC's retention pursuant to §328, neither NPC nor Miskovic appeared to have believed that §328 controlled this Court's initial evaluation of the Application as both parties relied exclusively upon §330 in their pleadings.

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Although this Court does not consider NPC's retention to have been approved under §328 of the Bankruptcy Code, the BAP concluded that this Court "had previously approved the terms and conditions of this contingent-fee agreement, but it made no finding that those terms or conditions proved to be improvident in light of subsequent events." *See* BAP Order [docket #191] at pg. 10. The BAP went on to state that "[u]nless the bankruptcy court makes such finding, it should not alter the terms and conditions of the parties' fee agreement." *Id.* The BAP then remanded that matter with instructions that this Court conduct an analysis of the Application pursuant to §328 of the Bankruptcy Code. Accordingly, this Court is required to consider whether compensation of NPC pursuant to the terms and conditions of the parties' contingent fee agreement proved to be improvident in light of subsequent events which could not have been anticipated at the time NPC's retention was approved. In order to undertake such an analysis, the Court must once again revisit some of the tortured background of this case.[5]

Pursuant to a long-term lease with the City, 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

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[5] A more detailed background of this case is set forth in the Memorandum Fee Order [docket #160] at pgs. 2-8.

the City. At that time, the lease had a remaining term of 28 years and Airspect had allegedly 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").

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 recision 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 only 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.

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In December 1995 Jeffrey Nichwitz was retained as Airspect's counsel[6] and a request that the March 1996 trial be rescheduled was denied by the trial court. When that motion was denied, Mr. 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. Mr. Nichwitz then referred Airspect to bankruptcy counsel, and on March 13, 1996 Airspect filed a proceeding under chapter 11 of the Bankruptcy Code. Thereafter, the pending state court action was transferred to this Court and assigned Adversary Number 96-5047 (the "Adversary Proceeding").

One asset and arguably the primary asset of Airpsect was its long term lease with the City and all of the causes of action raised against the City were based upon that long term lease.[7] The explicit reason given as to why NPC was being retained as special counsel to debtor was to litigate the issues previously raised in the state court action, which action was then removed to this Court in the Adversary Proceeding. *See* "Motion to Employ Special Counsel and to Pay Retainer from Corporate Funds" [docket #19] at unnumbered pg. 1, ¶4. At the time the Adversary Proceeding was initiated, the only remaining claim that Airspect had pending against the City was for breach of the lease.

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6 In December 1995, Mr. 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 was represented by the same attorneys, all of whom as of the filing of the Application were affiliated with Applicant.

7 Although the Improvements also had some value (as evidenced by their eventual "sale" to the City), their value was inextricably linked to the long term lease.

When the motion to employ NPC was filed and when this Court entered the order approving employment of NPC as special counsel, the status of the long term lease with the City in Airspect's chapter 11 proceeding had not yet been determined. *See* 11 U.S.C. §365(d)(4) (providing 60 days for debtor to decide whether to assume or reject an unexpired lease of non-residential real property). However, because that lease was a primary asset in Airspect's bankruptcy case and because it formed the basis of the causes of action raised by Airspect in the Adversary Proceeding, this Court could and did presume that every necessary action to preserve that lease would be taken. Notwithstanding this presumption, debtor did not timely move to assume its lease with the City and it was ultimately determined that debtor had no right to continued possession of the leased premises and that the City was entitled to immediate possession thereof.[8]

How and why debtor's long term lease with the City was not assumed and exactly whose province it was to follow through on that matter is not entirely clear. In a "typical" chapter 11 case, responsibility for "general bankruptcy matters" such as assumption or rejection of leases would usually fall upon bankruptcy counsel and not special litigation counsel. However, this was not the "typical" chapter 11 case in that NPC had specifically counseled Airspect that filing bankruptcy was a valid litigation strategy relative to its claims against the City. Once that strategy was pursued and NPC sought to be special litigation

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[8] For a more detailed description of debtor's non-assumption of the lease and litigation regarding that matter, *see* Memorandum Fee Order [docket #160] at pgs. 4-5.

counsel, it should have become a primary concern of NPC that all necessary steps be taken to preserve the primary asset of the bankruptcy estate which formed the basis of the litigation which NPC was retained to pursue. And, if such steps were not taken (which obviously happened in this case), NPC should have re-evaluated debtor's options and its strategy relative to the Adversary Proceeding to account for the legal effects of non-assumption of the lease.

Notwithstanding debtor's failure to assume the long term lease with the City, NPC never significantly altered its strategy relative to prosecution of the Adversary Proceeding on debtor's behalf. A detailed discussion of this failure to change from a pre-petition "litigation mode" was set forth in the Memorandum Fee Order and is hereby incorporated by reference as if fully re-written herein. *See* Memorandum Fee Order [docket #160] at pgs. 13-18.

Section 328(a) of the Bankruptcy Code is drafted to permit a bankruptcy court to take into account change in circumstances unanticipated at the time a professional's application for retention was pre-approved. Although not defined in the Bankruptcy Code, this concept of "unanticipated circumstances" is subject to broad interpretation and a bankruptcy court has substantial discretion to alter fee agreements where necessary and award compensation more appropriate under the individual circumstances of each case. *In re Financial News Network, Inc*., 134 B.R. 732, 735 (Bankr. S.D.N.Y. 1991); *In re Confections by Sandra, Inc.*, 83 B.R. 729, 733 (B.A.P. 9th Cir. 1987). *See also In re Omegas Group, Inc.*, 195 B.R. 875 (Bankr. W.D. Ky. 1996) ("unanticipated circumstance" found and fees increased under §328 where parties did not foresee time, pressures or complexity of case and counsel achieved

phenomenal results for the estate); *In re Churchfiled Mgmt. & Inv. Corp.*, 98 B.R. 893 (Bankr. N.D. Ill. 1989) ("unanticipated circumstance" found and fees reduced under §328 where risk of nonpayment under a contingency agreement disappeared).

Based upon the specific and somewhat unusual facts of this case, this Court finds that when it acted on NPC's application for retention as special counsel, no one had focused on the debtor's failure to assume its long-term lease with the City.[9] *In re Begun*, 162 B.R. 168, 179 (Bankr. N.D. Ill. 1993) ("It is lack of knowledge by the Court, as well as lack of knowledge by the Debtor, Debtor's counsel, and the other parties in interest, that is important for purposes of focusing on whether section 328(a) may be applicable."). Had such a fact been comprehended, the need for debtor to retain special litigation counsel on a contingency basis to prosecute the only then remaining claim in the Adversary Proceeding (breach of contract) would not have been as great because, at that point, debtor had, as a matter of law, been deemed to have breached that contract. *See* 11 U.S.C. §365(g)(1).[10] Accordingly, this Court is empowered by §328 of the Bankruptcy Code to disregard the contingency fee agreement between NPC and Airspect.

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9 The NPC retention application was filed prior to the 60 day deadline for addressing the lease assumption, but the order was entered a few days after that period had elapsed without action.

10 Although debtor did attempt to amend its cross-claims against the City to add a cause of action in promissory estoppel and in tortious interference, that attempt did not occur until July 1996. *See* "Motion for Leave to File Amended Cross-Claim Instanter" [Adversary Proceeding docket #5]. Accordingly, neither of those causes of action (which, arguably, could have existed and prevailed regardless of whether the lease with the City was assumed) were pending at the time that debtor filed its motion to employ NPC or at the time this Court considered that motion and approved such employment.

Given this finding, the Court must evaluate Applicant's services to the bankruptcy estate pursuant to §330(a) of the Bankruptcy Code. *Pitrat v. Reimers (In re Reimers),* 972 F.2d 1127 (9th Cir. 1992). Such an evaluation was undertaken by this Court in its Memorandum Fee Order and that analysis is hereby incorporated by this reference as if fully re-written herein. *See* Memorandum Fee Order [docket #160] at pgs. 12-18.

In addition to the foregoing incorporated analysis, this Court has also considered the arguments raised by the parties after the matter was remanded by the BAP. Applicant again contends that it did fully counsel debtor as to the effect of non-assumption of the lease. *See, e.g.*, Applicant's Proposed Findings of Fact and Conclusions of Law [docket #195] at ¶7 and ¶8. The re-iteration of this argument is not, however, persuasive because it fails to counter the uncontradicted testimony and evidence presented during the hearings held in this matter in March 2000 and in October 2001 that even after non-assumption of the lease, NPC continued to address a potential assignment or sublease of debtor's rights under that lease. *See, e.g.,* Memorandum Fee Order [docket #160] at pgs. 14-15.

Applicant also contends that non-assumption of the lease with the City had no effect on the value or efficacy of Airspect's claims against the City. *See, e.g.*, Applicant's Proposed Findings of Fact and Conclusions of Law [docket #195] at ¶14 and ¶15. For instance, NPC states that despite the non-assumption of the lease, debtor still had a valid promissory estoppel claim against the City. *See* "Supplemental Memorandum Regarding Remand on Improvident Allowance of Contingent Fee Contract" [docket #196] at pgs. 2-4. What Applicant does not

set forth, however, is an explanation as to why it never sought to include in debtor's claims against the City a claim for the value of the Improvements in the event that debtor's breach with the City resulted in its termination.[11] Had Applicant, in fact, fully understood the legal effects of non-assumption of the lease and then fully counseled debtor regarding its then remaining options, the need for the addition of such a claim would have become clear.

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[11] Through its Proposed Findings of Fact and Conclusions of Law, Applicant contends that it did seek to recover the value of Airspect's investment in the airport through the Adversary Proceeding. To support that contention, Applicant directs the Court to two paragraphs in an Amended Cross-Claim that Applicant first sought to file on debtor's behalf in July 1996. *See* Applicant's Proposed Findings of Fact and Conclusions of Law [docket #195] at ¶6. The first of the two referenced paragraphs in the Amended Cross-Claim is in Count One, which alleges breach of the lease, and which reads as follows:

> 7. As a direct and proximate result of the City's breaches of its contractual duties to this Defendant, Airspect has been precluded from properly and effectively operating its charter service and fixed base operation. Specifically, Airspect has been effectively deprived of the opportunity to operate its fixed base operation and charter service, which has caused Airspect to suffer substantial damages due to amounts invested at the Airport, lost business and lost profits.

See "Motion for Leave to File Amended Cross-Claim Instanter" [Adversary Proceeding docket #5] at Exhibit A, ¶7. The second of the two referenced paragraphs in the Amended Cross-Claim is in Count Two, which alleges that the City made certain false representations, and which reads as follows:

> 10. In reliance on said representations, Airspect executed the Lease and the Amended Lease, committing itself to invest in excess of One Million Five Hundred Thousand Dollars ($1,500,000.00) in construction to satisfy its lease obligations.

See "Motion for Leave to File Amended Cross-Claim Instanter" [Adversary Proceeding docket #5] at Exhibit A, ¶10. Neither of these referenced paragraphs in the Amended Cross-Claim could be construed (even under the most liberal interpretations of notice pleading) to include a claim for the value of the Improvements should the lease be terminated, nor was there such relief ever specifically identified in the prayer for relief.

Applicant also continues to contend that the City's choice to pay $575,000 to debtor could only have been for the value of Airpect's claims against the City in the Adversary Proceeding. *See, e.g.*, Applicant's Proposed Findings of Fact and Conclusions of Law [docket #195] at ¶13. Even if this were assumed to be true,[12] Applicant had not offered any proof that it helped to facilitate the ultimate settlement of those claims. *See Zolfo, Cooper & Co. v. Sunbeam-Oster Co., Inc.*, 50 F.3d 253, 261 (3rd Cir. 1995) ("The fee applicant has the burden

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[12] The issue of whether or not payment by the City was attributable to settlement of the Adversary Proceeding and the facts related thereto were considered by this Court in its Memorandum Fee Order relative to whether or not NPC fulfilled the contingency in its fee agreement with Airspect. *See* Memorandum Fee Order [docket #161] at pgs. 10-12. In the portion of its opinion determining that this Court abused its discretion in determining that the contingency in the agreement between Airspect and NPC was not met, the BAP appears to rely upon purported facts which were not a part of the record before it:

> The bankruptcy court seemed to think that, since the settlement of the adversary action was formally accomplished by means of a "Motion for Authority to Settle; Compromise Claims; Sell Assets; And Authorizing Actions Necessary to Effectuate Settlement," a sale must have been involved. The settlement documents are not included in the record before this panel, and so it is impossible to make any exact determination about the proportion of this settlement attributable to a "sale," but what seems almost certain is that the settlement of the adversary action included a surrender or relinquishment of Airspect's improvements as quid pro quo for the money paid by Akron. After all, that is how settlements usually work, each side giving something in return for something else. The sale in this case, even if that is the proper characterization, was entirely incidental to, and dependent upon, the settlement of Airspect's litigation claims against Akron. It did not occur by itself, autonomously, outside the adversary proceeding, but within it.

See BAP Order [docket #191] at pg. 9. Although the court records addressing such clearly relevant facts were not a part of the record before the BAP, they were a part of the record before this Court and were considered during the initial evaluation of the Application and have again been considered by this Court in its re-evaluation of the Application after remand. *See, e.g.*, "Motion for Authority to Settle; Compromise Claims; Sell Assets; and Authorizing Actions Necessary to Effectuate Settlement" [docket #124] at Exhibit I (proposed "Purchase Agreement" between Airpect as "Seller" and Exec Air, Ltd. as "Purchaser" for the sale of the Improvements).

of proving it has earned the fees it requests . . . ."). The litigation between Airspect and the City was extremely contentious prior to NPC being retained as special counsel to debtor and such contentiousness did not abate during the pendency of Airspect's chapter 11 case. *See* Memorandum Fee Order [docket #160] at pgs. 5-8. In fact, it was not until Miskovic retained his own personal counsel and requested that such counsel intercede in negotiations with the City that meaningful settlement talks took place.[13] This Court, based upon its direct involvement in this matter,[14] specifically finds (1) that the ultimate settlement of the Adversary Proceeding in the context of sale to the City of debtor's interest in the Improvements made on the rejected lease premises occurred in spite of and not because of Applicant's services on behalf of debtor's estate and (2) that there is no basis for finding that any value attributable to the settlement of the Adversary Proceeding could exceed $112,500.00, which would need to be shown in order to justify a contingency based award

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[13] Miskovic's personal counsel was retained in December 1998 and the debtor's motion seeking authority to settle litigation with the City and to sell assets of its bankruptcy estate was filed in July 1999.

[14] Although the reference of the Adversary Proceeding had been withdrawn, this Court, at the direction of the District Court, oversaw the settlement process directed at a global resolution of matters pending in the Bankruptcy and District Courts and an appeal to the Sixth Circuit concerning the main case. This Court was directly involved in promoting such a settlement in at least two status conferences with the court-appointed mediator. NPC's unwillingness or inability to comprehend the effect of the lease rejection, coupled with a ceaseless combative approach, created a situation where the City and its counsel would deal only with Miskovic's counsel in developing a settlement framework.

higher than that made by this Court on its alternative loadstar approach.[15] NPC has been afforded every benefit of doubt on these matters where it bore the burden of proof.

In short, the arguments raised by Applicant in the pleadings filed after remand are essentially the same as those raised by Applicant during the first hearing on the Application. They are no more persuasive now than when this Court first evaluated the Application.

III. CONCLUSION

Based upon the foregoing, this Court finds that Applicant should be compensated for the services it rendered to the estate up through September 9, 1996. 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

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[15] *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).

rendered after September 9, 1996, the Court finds that NPC should not be compensated. 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: 3/29/02