UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

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| AMERICAN FREEDOM SECURITIES, INC., Debtor, | CASE NO. 98-23909 |
| BLOCH INDUSTRIES, INC., Debtor, | CASE NO. 98-24376 |
| FIRST AMERICAN RELIANCE, INC., Debtor, | CASE NO. 98-23906 |
| MONEY MANAGERS, INC., Debtor, | CASE NO. 98-23907 |
| QUAKER MAID/BLOCH INDUSTRIES, INC., Debtor, | CASE NO. 98-24000 |
| THE SCHOOLHOUSE GROUP OF COMPANIES, INC., Debtor, | CASE NO. 98-24377 |
| UNIFIED COMMERCIAL CAPITAL, INC., Debtor, | CASE NO. 98-23908 |
| WEALTH & SECURITY PLANNING, INC., Debtor. | CASE NO. 98-24100 |

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DECISION & ORDER

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| SECURITIES AND EXCHANGE COMMISSION, Plaintiff, V. FIRST AMERICAN RELIANCE, INC., et al., Defendants. | 98-CV-6423T |
| THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Plaintiff, V. STEVEN M. DONSKY, as Trustee for the October 14, 1993 Samuel A. Yacono Revocable Living Trust, et al., Defendants. | 98-CV-6454T |

**BACKGROUND**

In August 1998, Samuel A. Yacono ("Yacono"), under investigation by the United States Securities and Exchange Commission (the "Commission"), committed suicide. Prior to his death, Yacono was the sole and/or controlling shareholder of a number of corporations (the "Yacono Controlled Entities"), including American Freedom Securities, Inc. ("American Freedom"), Bloch Industries, Inc. ("Bloch"), First American Reliance, Inc. ("First American"), Money Managers, Inc. ("Money Managers"), Quaker Maid/Bloch Industries, Inc. ("Quaker Maid"), The Schoolhouse Group of Companies, Inc. ("Schoolhouse"), Unified Commercial Capital, Inc. ("Unified Commercial") and Wealth & Security Planning, Inc. ("W&SP").

On October 6, 1998 the Commission commenced an injunctive action (the "Civil Injunctive Action") in the United States District Court for the Western District of New York (the "District Court") against American Freedom, First American, Money Managers, Unified Commercial (the "Yacono Defendant Companies"), The Prudential Insurance Company of America ("Prudential") and William Penn Life Insurance Company of New York ("William Penn"). The Action requested, along with other relief, that the District Court impose a constructive trust on the proceeds (the "Insurance Proceeds") of five (5) insurance policies on the life of Yacono

(the "Yacono Policies") and that the Proceeds be paid over for distribution to the defrauded investors in the Yacono Defendant Companies, rather than to the named beneficiaries of the Policies (the "Beneficiaries"). In the Action, the Commission asserted that Yacono and the Defendant Yacono Controlled Entities had been engaged in a "Ponzi" scheme.[1]

In connection with the Civil Injunctive Action, the District Court appointed a temporary receiver (the "Receiver") for the Yacono Controlled Entities who was directed to file Chapter 7 bankruptcy cases for each of the companies. After Chapter 7 cases were filed by American Freedom on October 16, 1998, Bloch on November 19, 1998, First American on October 16, 1998, Money Managers on October 16, 1998, Quaker Maid on October 23, 1998, Schoolhouse on November 19, 1998, Unified Commercial on October 16, 1998 and W&SP on October 30, 1998, Douglas J. Lustig, Esq. (the "Trustee") was appointed as the Chapter 7 Trustee in each of the bankruptcy cases.

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[1] A "Ponzi" scheme, as that term is generally used, refers to an investment scheme in which returns to investors are not financed through the success of the underlying business venture, but are taken from principal sums of newly attracted investments. Typically, investors are promised large returns for their investments. Initial investors are actually paid the promised returns, which attracts additional investors. *Merrill v. Abbott (In re Indep. Clearing House Co.*, 41 B.R. 985, 994 n. 12 (Bankr. D.Utah. 1984) (citation omitted).

On October 28, 1998, Prudential commenced an interpleader action against Steven M. Donsky, as Trustee for the October 14, 1993 Samuel A. Yacono Revocable Living Trust, and other defendants claiming an interest in the Yacono Policies issued by Prudential, which requested that it be permitted to deposit the proceeds of the Policies into the District Court. William Penn filed a similar interpleader action, and on February 4, 1999, the District Court directed Prudential and William Penn to deposit the Insurance Proceeds into the Registry of the Court.[2]

In each of the Chapter 7 cases of the Yacono Controlled Entities, the Trustee applied to the Bankruptcy Court (the "Bankruptcy Court") for an order approving the employment of: (1) himself and his firm, Saperston & Day, P.C. ("Saperston & Day"), a regional law firm which employs more than seventy (70) attorneys; and (2) Warren B. Rosenbaum, Esq. ("Rosenbaum") and his firm, Shapiro, Rosenbaum, Liebschutz & Nelson, LLP ("Shapiro, Rosenbaum"), to serve as attorneys for the Trustee.

The following representations were included in each application (the "Retention Applications") filed by the Trustee for

[2] The Prudential and William Penn interpleader actions will be referred to collectively as the "Interpleader Action."

the approval of the employment of himself and Saperston & Day, as attorneys for the Trustee:

> SPECIAL FACTS SHOWING NECESSITY FOR SUCH EMPLOYMENT:
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> This case involves potential fraudulent conveyances, preferences, estate, securities and a variety of issues. Although certain matters will be handled by the separate appointment of special counsel, there will be a number of legal matters that may need attention throughout the bankruptcy case of a specific and/or general nature....
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> PROFESSIONAL SERVICE TO BE RENDERED:
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> Specific or general services as may be required throughout the case. It is anticipated that there will be assistance provided to certain special counsel in investigating, litigating and seeking to preserve assets as the case proceeds....
>
> Although it is completely understood that ALL COMPENSATION IS SUBJECT TO COURT APPROVAL, the *maximum compensation* (emphasis added) the firm to be employed typically receives is *$195.00 per hour* (emphasis added) for Douglas J. Lustig, Esq.

Each of the Retention Applications filed by the Trustee for the appointment of Rosenbaum and Shapiro, Rosenbaum included the following representations:

> SPECIFIC FACTS SHOWING NECESSITY FOR SUCH EMPLOYMENT:
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> ...One of the primary sources of funds which may be available to satisfy investors and other creditor claims are approximately $4,000,000 in the proceeds of life insurance policies purchased by Yacono with the proceeds of his allegedly fraudulent scheme. As Yacono purchased the policies with the money illegally obtained from investors, the proceeds of the policies should be subject

> to a constructive trust for the benefit of those defrauded. The other sources of funds which may be available to satisfy investor claims are potential fraudulent transfers, transfers made in the breach of fiduciary duties, preferential transfers to insiders and others and the recovery of pre-petition receivables on behalf of the debtor.
>
> The success of the Trustee's efforts at recovery of funds with which to pay investors and other creditors will be dependent, in part, on the aggressive pursuit of claims in behalf of the debtor with the assistance of knowledgeable and experienced counsel....
>
> PROFESSIONAL SERVICE TO BE RENDERED:
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> Investigation and recovery of insurance proceeds, pre-petition receivables, preferences, fraudulent conveyances and recovery of damages for potential Securities Laws violations....
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> Although it is completely understood that ALL COMPENSATION IS SUBJECT TO COURT APPROVAL, the *maximum compensation* (emphasis added) the person to be employed typically receives for matters such as this is *$185.00 per hour* (emphasis added).

After the Office of the United States Trustee (the "UST") reviewed the Retention Applications and consented to the appointments of the Trustee, Saperston & Day, Rosenbaum and Shapiro, Rosenbaum, the Bankruptcy Court entered orders approving their employment. However, on the October 20, 1998 Order Approving the Employment of the Trustee and Saperston & Day (the "Approval Order"), which was the first of the orders entered by the Bankruptcy Court approving their employment in the cases of the

Yacono Controlled Entities, the Court added the following language: "Not to duplicate the services of special counsel approved by Order of 10/20/98."

In early 1999, the Trustee interposed a cross-claim in the Interpleader Action (the "Trustee's Constructive Trust Claim"), which asserted that the District Court should impose a constructive trust on the Insurance Proceeds for the benefit of all of the creditors of the Yacono Controlled Entities, not just the investors in the Yacono Defendant Companies as requested by the Commission.

On February 1, 2000, the Trustee and the Commission entered into a settlement agreement (the "Settlement Agreement") which provided that any Insurance Proceeds recovered by either the Trustee or the Commission in the Civil Injunctive Action or the Interpleader Action would be placed into an "Insurance Recovery Fund" that would be distributed: (1) first, to pay the costs and expenses of the Trustee incurred in connection with the recovery, including the reasonable attorneys' fees and expenses of the attorneys for the Trustee; (2) next, to pay a capped commission to the Trustee; (3) then, eighty percent (80%) of the remaining balance would be used to pay a *pro rata* distribution on the claims of the investors in the Yacono Defendant Companies; and (4) last, the remaining balance would be used to pay a *pro rata* distribution

on the claims of all of the creditors of the Yacono Controlled Entities, including the claims for any unpaid amounts still due to the investors of the Yacono Defendant Companies.

The Settlement Agreement also provided that the attorneys for the Trustee would "seek compensation for their services in this litigation pursuant to Sections 327, 328, 330 and 331 of the Bankruptcy Code," but it did not specifically provide whether the application for compensation would be brought before the District Court, which had jurisdiction over the Insurance Proceeds from which the compensation would be paid, or the Bankruptcy Court, which had authorized the employment of the attorneys and was clearly the "Court" referred to in the Retention Applications that was to approve any compensation for acting as an attorney for the Trustee.

After the Commission, the Trustee and the Beneficiaries entered into a global settlement agreement regarding the Insurance Proceeds (the "Global Settlement Agreement"), which provided for approximately $4,200,000.00 or ninety-four percent (94%) of the possible Insurance Proceeds to be paid into the Insurance Recovery Fund, the parties, in a joint application to the District Court and the Bankruptcy Court, sought approval of the Global Settlement Agreement. On December 20, 2000, at a joint hearing, the District

Court and the Bankruptcy Court approved the Global Settlement Agreement. On the same date, notwithstanding that Section 330 of the Bankruptcy Code requires notice to the parties-in-interest and a hearing, the Trustee, Saperston & Day, Rosenbaum and Shapiro, Rosenbaum applied *ex parte* to the District Court for awards of compensation for their services rendered and expenses incurred in connection with the Civil Injunctive Action and the Interpleader Action.[3] The requests for compensation were supported by written applications (the "District Court Fee Applications"), which included detailed time records (the "Timesheets") setting forth the services performed by the attorneys for the Trustee.

Notwithstanding that the Trustee in the Retention Applications for himself and Saperston & Day had represented that the maximum compensation typically received for their legal services was $195.00 per hour, the Trustee and Saperston & Day in their District Court Fee Application requested that they be compensated for 301.1 hours of services at the rate of $250.00 per hour, together with a fee enhancement of $184,725.00, for a total compensation for services performed of $260,000.00.

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[3] Although the notice of the joint hearing to approve the Global Settlement Agreement was served upon all creditors, it contained no notice of the amounts being requested as compensation by the attorneys for the Trustee.

Notwithstanding that in the Retention Applications for Rosenbaum and Shapiro, Rosenbaum, the Trustee had represented that the maximum compensation typically received for the matters in question was $185.00 per hour, Rosenbaum and Shapiro, Rosenbaum in their District Court Fee Application requested that they be compensated for their 432.4 hours of services at the rate of $250.00 per hour, together with a fee enhancement of $281,900.00, for a total compensation for services performed of $390,000.00.

The UST and the Commission vigorously objected to the District Court Fee Applications and asserted that: (1) The Trustee and Saperston & Day should be compensated only at an hourly rate of $195.00, the maximum hourly rate set forth in their Retention Applications; (2) Rosenbaum and Shapiro, Rosenbaum should be compensated only at an hourly rate of $185.00, the maximum hourly rate set forth in the Retention Applications, which appeared to be the hourly rate negotiated by the Trustee when he hired them as special counsel; (3) based upon the services rendered and the standards set forth in Section 330 and relevant case law, reasonable and appropriate compensation for the Trustee, Saperston & Day, Rosenbaum and Shapiro, Rosenbaum should be based upon the application of a lodestar (their respective $195.00 and $185.00 hourly rates times the number of actual and necessary hours

expended); (4) there were not the rare and exceptional circumstances presented that would warrant the District Court, in its discretion, making an upward adjustment or enhancement to a lodestar compensation in order ensure that the attorneys for the Trustee were adequately and fairly compensated for the services they performed; (5) although Yacono's financial dealings were complex, the legal and factual issues presented in the Civil Injunctive Action and the Interpleader Action were relatively straightforward and not complex; (6) although the attorneys for the Trustee may have provided quality legal services, they merely assisted the Commission in prosecuting constructive trust claims; and (7) there appeared to be some trustee services included in the District Court Fee Applications of the Trustee and Saperston & Day that should not be compensated for as if they were attorney for the Trustee services.

On January 12, 2001, the District Court entered a Decision and Order (the "District Court Order") that: (1) determined that under the terms of the Settlement Agreement the compensation of attorneys for the Trustee for services in connection with the Civil Injunctive Action and the Interpleader Action were to be governed by the provisions of Sections 327, 328, 330 and 331 of the Bankruptcy Code; (2) noted that the Bankruptcy Court had

familiarity with the procedural and substantive requirements of these professional compensation Sections of the Bankruptcy Code; (3) remanded to the Bankruptcy Court the determination of the reasonable compensation to be awarded to the attorneys for the Trustee; and (4) noted that in its opinion excellent service had been performed by The Trustee and Rosenbaum in bringing these complex matters to a satisfactory conclusion.

On January 26, 2001, in accordance with the District Court Order, Saperston & Day and Shapiro, Rosenbaum filed applications with the Bankruptcy Court (the "Bankruptcy Court Fee Applications") for awards of compensation for their services performed in connection with the Civil Injunctive Action and the Interpleader Action. In the Bankruptcy Court Fee Applications, which included declarations by Rosenbaum (the "Rosenbaum Declaration") and by the Trustee (the "Trustee Declaration") and a Trustees Memorandum of Law (the "Memorandum"): (1) Shapiro, Rosenbaum requested total compensation of $270,250.00 representing a lodestar of $108,100.00 (432.4 x $250.00 per hour), together with a fee enhancement of $162,150.00; a lodestar compensation of $108,100.00 times a 2.5 multiplier; and (2) Saperston & Day requested total compensation of $188,187.50, representing a lodestar of $72,275.00 (301.1 x $250.00

per hour), together with a fee enhancement of $112,912.50; a lodestar compensation of $72,275.00 times a 2.5 multiplier.

In their Declarations and Memorandum, the attorneys for the Trustee, in support of their Applications and requests for compensation, asserted that: (1) by any standard, the Global Settlement, reached as a result of the joint litigation efforts of the Commission, the Trustee and the attorneys for the Trustee, represented an exceedingly favorable result which eliminated: (a) the delays and costs of any further litigation; and (b) the risks of a less favorable result after trial; (2) the risks of trial were significant, since certain of the legal theories asserted by the Commission and the Trustee were based upon issues of law not fully settled in New York State, and there were significant factual issues that might have to be resolved at trial; (3) the fees requested by the attorneys for the Trustee in the District Court had been reduced in the Bankruptcy Court by $191,562.50, approximately thirty percent (30%), in response to the opposition filed in the District Court by the Commission and the UST; (4) even though the potential for recovery was far from certain at the onset of the litigation, the attorneys for the Trustee put aside work on other more immediately compensable matters, and devoted substantial time and energies in prosecuting the Trustee's Constructive Trust

Claim; (5) the legal services required to effectively prosecute the Trustee's Constructive Trust Claim were unique and challenging; (6) the constructive trust claims of the Commission and the Trustee had to be built from the ground up; (7) no one surviving individual had knowledge of the workings of the entire "Ponzi" scheme, which necessitated the interviewing and/or taking of depositions of a large number of material witnesses; (8) most of the Beneficiaries were represented by highly skilled and aggressive counsel; (9) prosecuting the Trustee's Constructive Trust Claim was complicated by the claims of the Commission which were asserted to favor only the investors in the Yacono Defendant Companies, rather than all the creditors of the Yacono Controlled Entities; (10) it was only when the Commission and the Trustee entered into the Settlement Agreement that there was a reasonable likelihood that the Trustee might recover any of the Insurance Proceeds; (11) the attorneys for the Trustee along with the Trustee and the attorneys for the Commission, jointly developed legal theories, planned discovery and developed strategy and tactics; (12) under the Settlement Agreement, the Trustee's attorney's fees were limited to $205.00 per hour only for services rendered in connection with making distributions from the Insurance Recovery Fund, not for services rendered in connection with the Civil Injunctive Action and the

Interpleader Action; (13) the case was appropriate for the application of a multiplier factor or fee enhancement because: (a) there was a substantial recovery for creditors; (b) there was a joint effort by the attorneys for the Trustee and the Commission's staff which resulted in the substantial recovery; (c) the Trustee's Constructive Trust Claim was fully litigated to a settled conclusion; (d) without minimizing the Commission's role, the attorneys for the Trustee aggressively pursued his Constructive Trust Claim to conclusion for the benefit of investor and non-investor creditors; (e) the attorneys for the Trustee had devoted an extraordinary amount of time, energy and concentration to these matters, which required that they put aside other cases; (f) the reputation of the attorneys for the Trustee, which is that they aggressively pursuing litigation to a conclusion, made the prospect of a favorable settlement more likely; (g) the litigation was prosecuted by the attorneys for the Trustee on a contingency basis; (h) the Retention Applications "simply recite that the customary hourly rate charged was ...," which did not confine the attorneys for the Trustee to compensation at that rate for legal services in connection with the Civil Injunctive Action and the Interpleader Action; (i) the attorneys for the Trustee performed services without knowing whether the Trustee would recover any of the

Insurance Proceeds; (j) when the Settlement Agreement was approved by the Bankruptcy Court and the Global Settlement Agreement approved by the District Court and the Bankruptcy Court, all creditors were given notice that there would be compensation awarded to the attorneys for the Trustee, and no creditor objected to the fact that compensation would be awarded; (k) the compensation for the attorneys for the Trustee should be based upon the full recovery of approximately $4.2 million, not just the amount that will be paid to non-investor claimants; (l) the attorneys for the Trustee performed under a real risk of nonpayment, different than the risk of nonpayment that counsel for bankruptcy trustees face in typical cases where there is a predetermination by counsel that there is a high likelihood of success on the merits before they agree to be retained; and (m) in the District Court Order, the Court noted that the constructive trust litigation involved complex matters; (14) a "common fund approach" was the appropriate and preferable method for determining compensation in connection with the services performed by the attorneys for the Trustee in the Civil Injunctive Action and the Interpleader Action; (15) the services performed by Shapiro, Rosenbaum and Saperston & Day were not duplicative of each other; (16) there was no dispute that the services for which compensation

was sought were actually rendered, nor, to the knowledge of the attorneys for the Trustee, was there a dispute that the services were necessary to the proper prosecution of the joint efforts of the Commission and the Trustee in the Civil Injunctive Action and the Interpleader Action; (17) the experience and ability of the attorneys for the Trustee justified an hourly rate of $250.00 in connection with any lodestar analysis; (18) even if a common fund or percentage of recovery method were not found by the Bankruptcy Court to be the appropriate and preferable method for compensating the attorneys for the Trustee, the facts and circumstances presented were such that it would be appropriate to award compensation based upon a lodestar plus a multiplier or fee enhancement basis; (19) a $250.00 hourly rate would be appropriate to reflect the reputation, experience and previous success of the attorneys for the Trustee, and would represent a competitive market hourly rate for cases involving complex litigation; (20) a multiplier or fee enhancement analysis would be appropriate because an excellent and substantial recovery was obtained by the efforts of the attorneys for the Trustee, and there was a substantial risk of litigation and nonpayment; and (21) the failure to compensate the attorneys for the Trustee for assuming a material risk of nonpayment would unjustly enrich the creditors of the bankruptcy

estates, because they would have been provided with valuable legal services at below marketplace rates, and it would discourage experienced attorneys from pursuing such claims on behalf of bankruptcy trustees in the future.

On February 23, 2001, after the UST had renewed her opposition to the request for compensation by the attorneys for the Trustees by relying upon the opposition which she interposed in the District Court, the Commission once again filed opposition to the request for compensation by the attorneys for the Trustee, which: (1) asserted that any award of compensation beyond a lodestar amount, based upon a common fund, percentage or fee enhancement approach, was inappropriate under the facts and circumstances of this case; (2) even after the downward modification of their requests, the compensation sought by the attorneys for the Trustee, equating to approximately $600.00 per hour, was excessive; (3) it was the Commission, not the attorneys for the Trustee, that carried the "laboring oar" with respect to the constructive trust litigation; (4) an award of compensation to the attorneys for the Trustee that exceeded a lodestar amount would be against the public interest, because it would undermine the efforts of the Commission to ensure a maximum recovery for the defrauded investors; (5) the prosecution of the constructive trust claims of the Commission and the Trustee

was not common fund litigation, and any analogy to common fraud cases in setting compensation would be inappropriate; (6) the attorneys for the Trustee simply assisted the Commission, and the best measure of the value of that assistance was an award of compensation based upon a lodestar amount; (7) the accountants for the Trustee, who performed valuable services and did extensive and excellent work, did not request, and were not awarded, compensation by the District Court based upon a common fund, multiplier or fee enhancement approach; (8) nothing in the Retention Applications indicated that the attorneys for the Trustee were being retained on a contingency basis; (9) there was no greater risk in assisting the Commission in prosecuting its constructive trust claim and pursuing the Constructive Trust Claim of the Trustee, than in any other case where attorneys prosecute claims on behalf of a trustee; and (10) awarding compensation to the attorneys for the Trustee beyond a lodestar amount would: (a) discourage the Commission in the future from utilizing bankruptcy proceedings as a means to effect a distribution to defrauded investors; and (b) encourage the Commission to utilize equity receiverships to ensure that a maximum recovery was obtained for defrauded investors.

## DISCUSSION

### I COMMON FUND APPROACH

I find that the use of a common fund approach to determine an award of reasonable compensation for the services the attorneys for the Trustee performed in connection with the Civil Injunctive Action and the Interpleader Action would be inappropriate and not a proper exercise of discretion, because: (1) the District Court Order remanded the determination of a reasonable compensation to the Bankruptcy Court with instructions to make the determination in accordance with Sections 327, 328, 330 and 331 of the Bankruptcy Code, and did not even suggest that the determination should or could be based upon a common fund approach; (2) the "fund" that the attorneys for the Trustee had encouraged the Court to view as a Common Fund, the Insurance Proceeds, was: (a) already in existence and paid into the Registry of the District Court before the attorneys performed any substantial services; and (b) not created by the efforts of the attorneys; (3) the Civil Injunctive Action and Interpleader Action litigation were simply about how much of the previously created "fund" on deposit with the District Court would be awarded to the Beneficiaries, the claims of unpaid investors in the Yacono Defendant Companies or the claims of all of

the creditors of the Yacono Controlled Entities; (4) the constructive trust legal issues, principally developed by the Commission, and the tracing financial issues, principally addressed by the Commission and the forensic accountants, were straight forward and not complex, even though it may have required a substantial amount of time to organize and prosecute them, and the settlement negotiations conducted do not appear to have been any more difficult than in most other commercial or bankruptcy related litigation with multiple claimants; (5) nothing in the record indicates that prior to the filing of their District Court and Bankruptcy Court Fee Applications, the attorneys for the Trustee in any way indicated to the District Court, the Commission, the creditors of the Yacono Controlled Entities, the UST or the Bankruptcy Court that they were performing services on behalf of the Trustee in connection with the Civil Injunctive Action and the Interpleader Action with the expectation that their compensation would be based upon a common fund approach; (6) nothing in the record indicates that the Trustee retained the attorneys for the Trustee with the expectation that their compensation for services performed in connection with the Civil Injunctive Action and Interpleader Action would be based upon a common fund approach; (7) there was nothing in the Retention Applications that indicated to

the Bankruptcy Court or the UST that an award of compensation would be requested by the attorneys for the Trustee for the services performed in connection with the Civil Injunctive Action and the Interpleader Action based upon a common fund approach; and (8) the use of a common fund approach, as suggested by the attorneys for the Trustee, would unfairly give them, rather than the creditors of the Yacono's Controlled Entities, the benefit of all of the efforts of the Commission.

## II PERCENTAGE, FEE ENHANCEMENT OR MULTIPLIER APPROACH

In *In re Interco Systems, Inc.*, 206 B.R. 63 (Bankr. W.D.N.Y. 1997), this Bankruptcy Court held that only in rare and exceptional circumstances would the Court approve a fee enhancement to an award of compensation based upon a lodestar amount, and, if it did, it would only be where an attorney for a trustee achieved exceptional results and the Court, in its discretion, felt that after application of a lodestar billing analysis a professional had still not been adequately and fairly compensated.

I find that the use of a fee enhancement, percentage or multiplier approach to an award of compensation based upon a lodestar amount for the services performed by the attorneys for the Trustee in connection with the Civil Injunctive Action and the

Interpleader Action would be inappropriate and not a proper exercise of discretion, because: (1) although in the District Court Order the Court stated that the matters involved were complex, I agree with the Commission and the UST that the services performed were not any more complex than services routinely performed by attorneys for trustees in cases where: (a) the financial affairs of a debtor are complex; (b) there are multiple parties involved in a litigated matter; and (c) there are difficult settlement negotiations involved; (2) I am unaware of any fee enhancement being approved or awarded by a Bankruptcy Court to the attorneys for a trustee when there have been vigorous and valid objections interposed by fiduciary parties in interest, such as the objections interposed in this matter by the Commission and the UST, especially where, as in this case, the legal staff for one of the fiduciary parties in interest was intimately involved in the litigation and in the best position to evaluate the reasonable value of the services performed by the attorneys for the Trustee; (3) the attorneys for the Trustee are excellent individual attorneys and law firms, and if it were not for their experience, reputation and abilities, they would not, and should not, have been retained by the Trustee to perform the services in question; (4) if the attorneys for the Trustee did not perform exactly as they did,

devoting the necessary time required to handle the matters in question and performing to the level of their reputation, experience and abilities, when determining an award of compensation based upon a lodestar amount, the attorneys might not even be awarded their customary maximum hourly rate; and (5) based upon all of the facts and circumstances of this case, an award of compensation based upon a lodestar amount will fully, reasonably and appropriately compensate the attorneys for the Trustee for the reasonable and necessary legal services that they performed.

**III LODESTAR COMPENSATION**

A. Overview

"Normally...the Lodestar Fee-the number of billable hours times reasonable hourly rates-reflects the novelty and complexity of the case, the experience and special skill of counsel, the quality of the representation and the results obtained." See, *In re UNR Indus, Inc.*, 986 F.2d 207, 210 (7th Cir. 1993).

In determining the amount of reasonable compensation to be awarded in accordance with Section 330 of the Bankruptcy Code, the Bankruptcy Court must take into account all relevant factors, including whether the compensation is reasonable based upon the

customary compensation charged by comparably skilled practitioners in cases other than those under this title.

In determining a reasonable hourly rate as part of a Lodestar analysis for the services performed by the attorneys for the Trustee in connection with the Civil Injunctive Action and the Interpleader Action, although the range of reasonable hourly rates that might be charged by comparably skilled practitioners performing the services might include an hourly rate of as high as the $250.00 hourly rate requested by the Attorneys for the Trustee: (1) in their Retention Applications, it was represented to the Bankruptcy Court, the UST and all parties in interest, including creditors, given the fact that the Applications were on file with the Court, that the "maximum" customary rate charged[4] was $185.00 for Rosenbaum and Shapiro, Rosenbaum and $195.00 for the Trustee and Saperston & Day; and (2) these represented "maximum" customary hourly rates are well within the range of reasonable hourly rates charged for handling these kinds of matters by comparably skilled practitioners in the areas covered by the Western District of New York.

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[4] Although the term maximum customary rate charged may seem ambiguous: (a) the use of the work "maximum" clearly imposes a cap; and (b) the term cannot mean that there could be more than one maximum hourly rate.

In arriving at an award of compensation based upon a Lodestar amount, since, while performing their services in connection with the Civil Injunctive Action or Interpleader Action, the attorneys for the Trustee never: (1) amended their Retention Applications; or (2) otherwise advised the District Court, Bankruptcy Court, Commission, UST or creditors that they did not believe that they were bound by the representations in their Applications that services were being performed at maximum hourly rates of $185.00 and $195.00 respectively, those maximum hourly rates are now binding upon the attorneys for the Trustee.[6]

In determining the reasonable and necessary hours that are compensable based upon a Lodestar amount, the Bankruptcy Court Fee Applications of Rosenbaum and Shapiro, Rosenbaum must be reviewed differently than those of the Trustee and Saperston & Day, because: (1) the Trustee and Saperston & Day were put on notice by the Bankruptcy Court in the Approval Order that their requests for awards of compensation would be scrutinized to ensure that there was no duplication of legal services; (2) the Trustee, since he was

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[6] The attorneys for the Trustee in their Bankruptcy Court Declarations and Memorandum asserted that the Retention Applications only stated that these hourly rates were their customary hourly rates for those services, failing to: (1) note that the word "maximum" was used in the Applications; or (2) make any attempt to explain why the use of the word "maximum" did not result in a cap on their hourly rates.

at all times acting both as the Trustee and as an attorney for the Trustee, was under a duty, unlike special counsel, to ensure that there was no duplication of legal services; and (3) Rosenbaum and Shapiro, Rosenbaum were under no obligation to: (a) review the Bankruptcy Court Fee Applications of the Trustee and Saperston & Day to ensure that they were consistent with their applications; or (b) provide sufficient detail in any entries on their Timesheets to make it clear that there had been no duplication of legal services; (4) the Trustee, since he was at all times acting both as the Trustee and as an attorney for the Trustee on notice of the Bankruptcy Court's concern that there be no duplication of legal services, was under a duty to carefully review all of the fee applications for all of the attorneys for the Trustee to ensure that the Bankruptcy Court Fee Application of the Trustee and Saperston & Day made it clear, if there could be any appearance that there had been a duplication of legal services, why the services performed by the Trustee and Saperston & Day were reasonable, necessary and not duplicative; and (5) the Trustee, since he was at all times acting both as the Trustee, who had retained special litigation counsel, and as an attorney for the Trustee, was under a duty to carefully review the Bankruptcy Court Fee Application of the Trustee and Saperston & Day to ensure that

the Application fully explained why each and every billed legal service was properly categorized as an "attorney service" rather than as a "trustee service."

B. The Fee Application of Rosenbaum and Shapiro, Rosenbaum

With some minor exceptions, neither the Trustee, UST Commission nor any creditors[7] asserted that any of the time expended by Rosenbaum and Shapiro, Rosenbaum, or any of the services performed by Rosenbaum and Shapiro, Rosenbaum were unnecessary, unreasonable, duplicative or otherwise not compensable.[8] After a detailed review of the Timesheets included in the Bankruptcy Court Fee Application of Rosenbaum and Shapiro, Rosenbaum, I find that all of the services performed were reasonable and necessary services, and compensable as an attorney for the Trustee.[9]

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[7]At the hearing on the Bankruptcy Court Fee Applications, an attorney for one of the investor creditors asserted that any award of compensation in excess of a Lodestar amount would be excessive.

[8]Although the UST questioned the time expended by Rosenbaum and Shapiro, Rosenbaum in preparing their Fee Applications, I assume that the time they spent attempting to justify an award of compensation for the attorneys for the Trustee based upon approaches other than a Lodestar amount was pursuant to instructions from the Trustee.

[9]Although there is some time included in the Bankruptcy Court Fee Application of Rosenbaum and Shapiro, Rosenbaum for services performed prior to their appointment as attorneys for the Trustee, I believe that, given all the facts and circumstances presented, compensating them for those services is appropriate.

As I stated at the hearing on the Bankruptcy Court Fee Applications filed by the attorneys for the Trustee, Rosenbaum is recognized as one of the finest commercial litigators in the Western New York area, and he and his partners consistently provide the highest level of legal services as special counsel to various panel Trustees.

An award of compensation for Rosenbaum and Shapiro, Rosenbaum, based upon a Lodestar amount, which I find represents a reasonable and appropriate compensation, based on all the facts and circumstances presented and after taking into account all of the factors required under Section 330, is $80,000.00, which represents $185.00 per hour times 432.4 billed hours worked and found to be reasonable and necessary, slightly rounded up.

C. The Fee Application of the Trustee and Saperston & Day

An award of compensation for the Trustee and Saperston & Day, as attorneys for the Trustee, based upon a Lodestar amount without any deductions, would be $58,714.50, which represents $195.00 per hour times 301.1 billed hours (the "Initial Lodestar Compensation").

After: (1) reviewing in detail the Timesheets submitted with the Bankruptcy Court Fee Application of the Trustee and Saperston & Day, copies of which are attached as "Appendix A"; and (2)

taking into account all of the factors required under Section 330 and the facts and circumstances presented, I have made deductions from the Initial Lodestar Compensation in the total amount of $31,434.00 for:

> (1) billed services that I find are trustee services rather than attorney for the trustee services, because the Trustee has not met his burden to fully explain to the Court why these services, which appear to be administrative services routinely performed by trustees in these kinds of cases where they have hired special litigation counsel, are attorney services;
>
> (2) billed services that indicate that there was a conference or telephonic conference with special counsel, but the conference was not billed by special counsel;
>
> (3) billed services that I find are duplicative of the services performed by special counsel, because the Trustee has not met his burden to fully explain to the Court why these services were reasonable, necessary and not duplicative of services performed and billed by special counsel;
>
> (4) billed services where the time reported exceeds the time billed by special counsel for performing the same services;
>
> (5) billed services where I find that the time reported exceeds the reasonable and necessary time that should have been expended by the attorney billing the service given the attorneys experience and expertise;
>
> (6) billed services that do not appear to be sufficiently related to the Civil Injunctive Action and the Interpleader Action, (this is without prejudice to an application for compensation being

made by the Trustee for these services at a different time);[10] and

(7) billed services that appear to be covered by other time entries of the Trustee and Saperston & Day, because the Trustee has not met his burden to fully explain why these are not inadvertent double billings.

With respect to the deductions made for billed services marked as (2) (not reported by special counsel), the Trustee and Saperston & Day shall have 20 days from the date of the entry of this Decision & Order to provide a certification by special counsel that the conferences reported in fact took place, but special counsel was either directed by the Trustee not to report the services or it otherwise elected not to report the services, along with an explanation from the Trustee as to why those services, presumably duplicative, were different from other apparently duplicative

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[10] Appendix "A" sets forth where complete or partial deductions have been made to a particular time entry for one or more of the reasons set forth above. In reviewing the Timesheets I was shocked at how little effort was made to clarify why many services were attorney services and not trustee services and why other seemingly duplicative services were not duplicative, given that: (1) the Trustee is a long-time and highly experienced bankruptcy practitioner and is acknowledged to be one of the finest members of the panel of standing trustees; (2) there was nothing in the narratives contained in the Bankruptcy Court Fee Applications which attempted to clarify these issues, or to set out what the actual divisions of tasks were between: (a) the attorneys for the Trustee and the Trustee; and (b) the attorneys for the Trustee; (3) it is most unusual for a Trustee to hire more than one firm of attorneys to work on the same litigation matter; (4) Rosenbaum and Shapiro, Rosenbaum, when acting as special counsel to a Trustee, do not require any review or supervision of their work by another attorney; (5) the Court had expressed a concern about the duplication of legal services; and (6) the excessive amount of time billed for preparing the Fee Applications.

services that were billed by the Trustee and Saperston & Day. If a certification is received by the various attorneys for the Trustee, the Court will reconsider awarding compensation for the entries in question.

After the deductions to the Initial Lodestar Compensation set forth on Appendix "A", I find that a reasonable and appropriate compensation for the services the Trustee and Saperston & Day, performed as attorneys for the Trustee in connection with the Civil Injunctive Action and the Interpleader Action is $27,250.00, which represents $195.00 per hour times 139.70 billed hours worked and found to be reasonable and necessary, slightly rounded up.[11]

**CONCLUSION**

Rosenbaum and Shapiro, Rosenbaum are awarded a reasonable compensation of $80,000.00, along with disbursements of $14,251.20, and the Trustee and Saperston & Day are awarded a reasonable compensation of $27,250.00.

**IT IS SO ORDERED.**

**HON. JOHN C. NINFO, II**
**CHIEF U.S. BANKRUPTCY JUDGE**

**Dated: May 3, 2001**

[11] The total of the without prejudice deductions for billed services not related to the Civil Injunctive Action and the Interpleader Action was $5,401.50.