UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

GREENBRIAR PROPERTIES I, A LIMITED PARTNERSHIP,

Debtor(s).

CASE NO. 94-20351

DECISION & ORDER

BACKGROUND

On February 23, 1994, Greenbriar Properties I (the "Debtor") filed a petition and a list of creditors initiating a Chapter 11 case. The list of creditors included Jon P. Devendorf, Esq. ("Attorney Devendorf") at Hiscock & Barclay ("Hiscock & Barclay") and DePan, Eichenberger & Knowles, Inc. ("DEK"), in care of Robert G. Richardson, Pres. ("Richardson"). On February 24, 1994, the Court entered an Order giving the Debtor fifteen days to file various pleadings which it had failed to file, including a list of its twenty largest unsecured creditors, schedules of its assets and liabilities and a statement of affairs.

On March 2, 1994, DEK filed a Notice of its perfection of an interest in rents. Attached to the Notice was a copy of a mortgage note (the "DEK Note"), which was dated May 15, 1985, was in the original principal amount of $311,925.00 and provided that it was due on or before March 15, 1989 with interest at prime plus one per cent. The Notice also included a copy of a mortgage given to secure the DEK Note (the "DEK Mortgage"), which covered property owned by the Debtor and commonly known as the "Valley View Apartments". The Notice also advised that DEK had obtained the appointment of a State Court receiver (the "DEK Receiver") to collect the rents at the Valley View Apartments as part of a pre-petition state court foreclosure action (the "DEK

Foreclosure Action") which it had commenced on August 21, 1992.

On March 14, 1994, DEK filed a motion (the "DEK Stay Relief Motion"), which was made initially returnable on April 6, 1994, which alleged that: (1) the DEK Mortgage was a third mortgage on the Valley View Apartments; (2) there was $618,174.21 currently due and owing on the DEK Note and Mortgage; (3) the Valley View Apartments were subject to a second mortgage (the "Williams Mortgage") in favor of Douglas R. Williams ("Williams") who had also commenced a state court foreclosure action (the "Williams Foreclosure Action") and obtained a judgment of foreclosure and sale (the "Williams Judgment") in the amount of $1,127,064.65; (4) the Valley View Apartments were subject to a first mortgage (the H.U.D. Mortgage") in favor of H.U.D. which had an outstanding balance of approximately $901,000.00; (5) the DEK Receiver was appointed on August 25, 1992 and continued collecting rents until March 20, 1993 when a receiver (the "Williams Receiver") was appointed in the Williams Foreclosure Action; (6) the DEK Receiver had approximately $174,003.00 in excess funds on hand; (7) the Williams Receiver, who was the same individual as the DEK Receiver, had approximately $150,000.00 in excess funds on hand; (8) the Debtor had no equity in the Valley View Apartments. The DEK Stay Relief Motion requested that the Court enter an order either granting it relief from the automatic stay to allow it to continue with the DEK Foreclosure Action or, in the alternative, that it be provided with adequate protection, including an order providing that the DEK Receiver turn over to DEK the approximately $174,000.00 in excess funds to be applied against the DEK Mortgage.

On March 18, 1994, Williams filed a motion for relief from the automatic stay (the "Williams

Stay Relief Motion") which was made initially returnable on May 6, 1994. The Williams Stay Relief Motion advised that there was a sale scheduled in the DEK Foreclosure Action for February 25, 1994, which is why the Debtor filed its petition on February 23, 1994, and requested that the stay be modified to allow Williams to continue his Foreclosure Action or, in the alternative, that he be granted adequate protection.

A Response on behalf of the Debtor to the DEK and Williams Stay Relief Motions, filed on April 15, 1994, indicated that: (1) a sale in the Williams Foreclosure Action had been scheduled for March 16, 1994; (2) the Valley View Apartments was a 120-unit H.U.D. project; (3) in 1982, the general partners of the Debtor had retained Richardson to sell limited partnership interests in the partnership; (4) instead of selling fourteen of the available limited partnership units to third party investors, Richardson, or DEK, had put up $252,000.00; (5) Richardson later demanded that instead of this amount being treated as equity, it be treated as debt, which resulted in the execution and delivery of the DEK Note and Mortgage; and (6) the Williams Foreclosure Action had been commenced in 1993 because the appointment of the DEK Receiver had put the Williams Mortgage into default.

The DEK and Williams Stay Relief Motions were adjourned several times at the request of the parties, and on a May 4, 1994 return date, the Court was advised that the Motions had been settled and that a proposed stipulated order would be presented.

On May 9, 1994, a stipulated order (the "Settlement Order") was entered which: (1) terminated the State Court receiverships in the DEK and Williams Foreclosure Actions; (2) directed

the Receivers to turn over all excess funds (after payment of state court awarded Receiver's fees and the payment of any outstanding obligations of the Receiver) to the attorney for Williams, to be held in an interest-bearing account (the "Foreclosure Funds Escrow"), subject to further order of the Court; (3) confirmed that the rents and profits from the Debtor's operation of the Valley View Apartments as a debtor-in-possession would continue to be cash collateral in which both DEK and Williams had an interest, and provided that they could be used only in accordance with the provisions of the Settlement Order; and (4) required the Debtor to make specified monthly payments to H.U.D., Williams and DEK, as adequate protection.

On December 5, 1994, DEK, represented by Hiscock & Barclay, after it had successfully opposed the Debtor's request for an extended period within which it would have the exclusive right to a file a plan, filed a Disclosure Statement (the "DEK Disclosure Statement") and a Plan of Reorganization (the "DEK Plan"). The DEK Disclosure Statement and Plan included provisions that: (1) the Williams Mortgage was to be paid by the application of $48,000.00 from the Foreclosure Funds Escrow and monthly cash payments on a 22-year amortization basis with interest at 9% per annum, with the Mortgage being all due and payable in eight years; and (2) the DEK Mortgage was to be paid by the application of the remaining Foreclosure Funds Escrow, to be used to pay DEK's pre- and post-petition attorney's fees and costs "(which DEK estimates to be $70,000.00)", accrued interest on the Mortgage, and monthly cash payments on a 20-year amortization basis with interest at 10% per annum, with the Mortgage being all due and payable in eight years.

On February 24, 1995, a Consent to Change Attorney was filed with the Court by DEK which

substituted for Hiscock & Barclay Laura M. Harris, Esq. ("Attorney Harris"), an attorney who was formerly associated with Hiscock & Barclay and the primary attorney acting on behalf of DEK in the Debtor's Chapter 11 case.

At a May 18, 1995 hearing, the Court confirmed a Second Amended Plan filed by DEK (the "Confirmed Plan"), and an Order of Confirmation was entered on May 19, 1995.

The Confirmed Plan provided that: (1) the H.U.D. Mortgage would be paid with interest at 5.7% per annum by monthly payments amortized over twenty years, all due and payable in eight years, with real property taxes, insurance and escrows, estimated at approximately $32,000.00, to be paid from the Foreclosure Funds Escrow or other cash on hand; (2) the Williams Mortgage would be reduced by $48,000.00 to be paid from the Foreclosure Funds Escrow, and to be paid with interest at 9% by monthly payments amortized over 22 years, all due and payable in eight years; (3) the DEK Mortgage would be reduced by the remaining funds in the Foreclosure Funds Escrow, plus any other excess funds on hand, which would be applied to pay DEK's attorney's fees and unpaid interest on the Mortgage.

On October 5, 1995, Hiscock & Barclay filed an application for an allowance as the attorneys for DEK, requesting attorney's fees of $24,916.50 and disbursements of $1,861.76 (the "Chapter 11 Allowance Request"). DEK opposed the Chapter 11 Allowance Request, and after: (1) a hearing on January 10, 1996; (2) a telephonic pretrial conference conducted on February 20, 1996; (3) Evidentiary Hearing Calendar calls conducted on March 27, 1996, April 24, 1996, May 15, 1996, June 19, 1996; and (4) the parties' agreement that the Court would also determine the reasonable

value of the services rendered to DEK pre-petition by Hiscock & Barclay in connection with the DEK Foreclosure Action, for which DEK has been billed $45,240.91 in fees and disbursements, an Evidentiary Hearing was conducted on August 8, 1996. At the Evidentiary Hearing the Court heard the testimony of Attorney Devendorf, Attorney John P. Sindoni ("Attorney Sindoni") of Hiscock & Barclay, Attorney Harris, and Richardson.

DEK has objected to the pre-petition fees and disbursements requested by Hiscock & Barclay, and has alleged that: (1) overall, the requested fees and disbursements were excessive, unreasonable, not necessarily incurred and 450% more than the highest good faith estimate of fees and disbursements made by Hiscock & Barclay when it was retained; (2) Hiscock & Barclay never entered into a written agreement with DEK at the time it was retained which clearly provided for how its fees and disbursements would be billed and paid; (3) some of the legal positions taken by Hiscock & Barclay in the DEK Foreclosure Action were not well grounded in fact or law, resulting in unnecessary, time-consuming and costly motion practice for which it was now unreasonably requesting to be paid; (4) in the DEK Foreclosure Action, Hiscock & Barclay had incorrectly computed pre-judgment interest in the proposed Judgment of Foreclosure & Sale, resulting in an award of less than what DEK was entitled to, and this amount should be deducted from any allowance of fees and disbursements awarded to Hiscock & Barclay; (5) Hiscock & Barclay was requesting an allowance for some services which were unnecessarily duplicative, specifically some of the services performed by Attorney Sindoni whose time records indicated that on 122 occasions he either "reviewed the file" or "conferenced" with respect to the file; (6) on more occasions than

necessary, personnel at Hiscock & Barclay reviewed the DEK Receiver's accountings, which was not requested by DEK nor necessary, since DEK was perfectly capable of analyzing those accountings itself; (7) the charges for legal research were excessive; (8) the overall value of the services rendered was far less than the amount being requested; (9) Hiscock & Barclay in making its request for an allowance had failed to exercise appropriate billing judgment; and (10) Hiscock & Barclay had not done continuing cost-benefit analysis in the prosecution of the DEK Foreclosure Action.

DEK has also objected to the post-petition services performed by Hiscock & Barclay, and has alleged that: (1) the preparation of the draft of the initial Disclosure Statement was untimely; (2) a charge of $195.00 on October 4, 1994 for the formation of a limited liability corporation was unauthorized, unreasonable and unnecessary; (3) a request for payment for time spent in dealing with pre- and post-petition billing disputes was unreasonable; (4) the amounts requested for copying, fax and travel expenses were excessive; and (5) some of the services performed were unnecessary and duplicative.

Hiscock & Barclay has asserted that: (1) it is entitled to reasonable fees and disbursements in the total amount of $72,019.15, less the amounts paid to date of $33,000.00; (2) it believed that Hiscock & Barclay and DEK had clearly agreed that the strategic objective of the DEK Foreclosure Action was to have a receiver appointed and collect as much rent as possible, a strategy which turned out to have been even more successful than anticipated, resulting in a fund of in excess of $170,000.00 which has benefitted DEK; and (3) the amounts requested for the services performed

by Hiscock & Barclay were at below market rates for high quality services which were performed in a timely and efficient manner and were necessary to achieve the successful results that were achieved.

DISCUSSION

I. GENERAL

Based upon the pleadings and proceedings in this matter, I believe the following factors are important to the Court's decision:

(1) There was in fact a transactional retention by DEK of Hiscock & Barclay to prosecute the DEK Foreclosure Action, but there was neither a written retainer agreement entered into nor a clear oral agreement as to how Hiscock & Barclay's fees and disbursements would be billed and paid, except that it appears that: (a) DEK was not necessarily to be billed strictly on an hourly basis; and (b) the parties believed that there was a reasonable prospect that there would ultimately be sufficient funds in the DEK Receiver's Account (the "Receiver Account")to pay Hiscock & Barclay's reasonable fees and disbursements.

(2) As the DEK Foreclosure Action proceeded and became more complicated, extended, potentially expensive, and, at least as to the amount available in the Receiver Account, more successful than the parties contemplated when the Action was commenced, neither party took the initiative to come to a clear understanding regarding Hiscock & Barclay's fees and disbursements to date and then establish a procedure for an ongoing cost-benefit analysis(the potential additional fees and disbursements being incurred as the action continued vs. the results being achieved).

(3) Richardson, the principal representative of DEK in retaining and working with Hiscock & Barclay, is a sophisticated businessman who, although he may not have had prior dealings with Hiscock & Barclay, undoubtedly has had extensive experience with larger law firms such as Hiscock & Barclay and their billing practices.

(4) It was not completely unreasonable, especially as the Receiver Account and the time

they were "carrying" DEK by not getting paid were both increasing beyond the original contemplation of the parties, for Hiscock & Barclay, even though it had not entered into such a specific agreement, to consider the DEK Foreclosure Action as if it were a contingent fee matter. As a result it may not have been concerned with the specifics of the services being performed and disbursements being incurred, as long as the work was being done and the Account could pay them a reasonable contingent fee and leave a significant net return for DEK.

(5) It was not completely unreasonable for Hiscock & Barclay, even though it had not entered into such a specific agreement, to consider the DEK Foreclosure Action as a "value based billing matter", with value being directly proportional to the net return to DEK.

(6) Hiscock & Barclay's overall hourly rates charged for the nature of the work performed are, in this Court's experience, somewhat below market rates for the time periods in question.

(7) For a non-contingent, one-time transactional representation, Hiscock & Barclay's time recording procedures, especially for its pre-petition services, were not appropriate. The time entries often lack sufficient detail for a determination to be made that the services performed were reasonable, necessary and of benefit to DEK.

(8) For a non-contingent, one-time transactional representation, Hiscock & Barclay, when it rendered its statements, did not exercise appropriate billing judgment, especially in connection with its pre-petition services where it exercised absolutely no billing judgment. When it became clear that DEK did not understand the matter to be the equivalent of a contingent fee matter, and disagreed with Hiscock & Barclay's view of the value of the services performed, the exercise of some billing judgment was warranted.

(9) Richardson, from his high level of involvement in the services being performed by Hiscock & Barclay, both pre-petition and post-petition, had to have known that substantial time and effort was being expended on behalf of DEK, which had an hourly value of well in excess of the initial discussions of the cost of a simple foreclosure action, which this was not. He could not, therefore, reasonably have expected to hold Hiscock & Barclay to a billing range of between $6,000 and $10,000, even though he had not received periodic billing statements.

(10) At trial, Richardson candidly acknowledged that he did not request periodic statements from Hiscock & Barclay during the DEK Foreclosure Action because he

knew that DEK had no funds with which to pay Hiscock & Barclay on an hourly basis, and because the parties understood that Hiscock & Barclay was to be paid from the Receiver Account.

(11) DEK and Hiscock & Barclay must each bear some of the responsibility for their failure to have come to a clear understanding as to the basis on which Hiscock & Barclay would be paid for its services, either initially, or as the DEK Foreclosure Action went forward.

On August 30, 1996, DEK filed an Objectant's Proposed Findings of Fact and Conclusions of Law (the "DEK Findings") which in Paragraphs 22 - 28 set forth specific objections which DEK had to specific time entries or disbursements.

II. POST-PETITION SERVICES

By an Order and Stipulation filed on June 12, 1996, the parties agreed that the Court would apply the standards set forth in Section 330(a)(3)(A) in determining the amount of reasonable compensation to be awarded to Hiscock & Barclay for its post-petition services.[1]

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[1] Section 330(a)(3)(A) and (4)(A) & (B) provide as follows:

(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 time 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

DEK, as set forth in detail on the DEK Findings and on Evidentiary Hearing Exhibits DD, EE and FF, has objected to approximately $7,000.00 of the amounts being requested by Hiscock & Barclay for post-petition services, alleging that such services were not fully compensable because they were either duplicative, unnecessary or excessive. I have reviewed each of the time entries objected to in connection with the post-petition services for which Hiscock & Barclay has requested an allowance, and agree that some downward adjustment is appropriate to arrive at a reasonable compensation.

Much of the requested compensation objected to by DEK for post-petition services rendered

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commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

(E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for

(i) unnecessary duplication of services; or

(ii) services that were not–

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

by Hiscock & Barclay was for services performed by Attorney Sindoni, who, at the Evidentiary Hearing and at a deposition conducted on June 17, 1996 (the "Sindoni Deposition"), indicated that he had no expertise in the area of bankruptcy, and that, except as the responsible attorney or when specifically contacted by or meeting with Richardson, had little substantive input into the representation of DEK as a creditor in the Debtor's Chapter 11 case. My review of the time entries for Mr. Sindoni in the post-petition period indicates that they were primarily in connection with the adequate protection payments being made to DEK, and then were principally to insure that a part of each payment was used to pay Hiscock & Barclay's fees. Those time entries should clearly not be charged to the client. Other time entries for Attorney Sindoni reflect that Attorney Harris and others working on the matter, perhaps because of the firm culture, felt obligated to keep him as the responsible or billing attorney, advised about various matters, even though he had no substantive input into the matters and was not expected to in the future. The other substantial objections to the post-petition services involved the performance of services by paralegals and other attorneys with no particular expertise in bankruptcy matters, or which may have been more administrative than substantive, and travel time to attend hearings at the Bankruptcy Court in Rochester.

This Court has not established a definitive policy with respect to travel time, and in this particular case, I do not feel that the charges for travel time were inappropriate.

Overall, on the facts and circumstances of this case, I believe that DEK, as a creditor, was well represented by Hiscock & Barclay in the Debtor's Chapter 11 case, and that with a downward adjustment of $2,980.00, Hiscock & Barclay will have been awarded reasonable compensation for

its post-petition services.

III. PRE-PETITION SERVICES

Although the factors which Courts consider in order to determine the reasonableness of a request for the payment of attorney fees under New York law are consistent with the factors and standards set forth in Section 330, the parties have agreed that the factors set forth in Section 330 should be used by this Court in determining the reasonableness of the amounts requested by Hiscock & Barclay for its pre-petition services.[2]

In connection with its pre-petition services Hiscock & Barclay did not: (1) enter into a written retainer agreement with DEK; (2) have a clear written or oral agreement with DEK that it would be paid a fee for its services which would be contingent and based upon a percentage of the Receiver Account ultimately paid over or available to DEK; and (3) enter into a definite value based billing and payment agreement with a clear standard to determine value. It does appear, however, that there was a general agreement with DEK, based on the projected scope of the project, that Hiscock & Barclay's fee, if reasonable, would be paid out of the amounts which DEK obtained from the Receiver Account, and that if no amounts were received by DEK it would have no obligation to Hiscock & Barclay beyond the upfront retainer paid to cover the initial disbursements of the DEK

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[2] *See Newman v. Silver*, 553 F.Supp. 485, 496 (S.D.N.Y. 1982); *Rahmey v. Blum*, 95 A.D.2d 294 (2nd Dept. 1983); *Jordan v. Freeman*, 40 A.D.2d 656 (1st Dept. 1972); and *Continental Building Company, Inc. v. Town of North Salem*, 150 Misc. 2d at 151.

Foreclosure Action.

Focusing on the pre-petition services, not within the context of what was ultimately achieved for DEK's benefit in the Debtor's Chapter 11 case, if: (1) the sole goal of the DEK Foreclosure Action had been to obtain for DEK, as a third mortgage holder, some return on the DEK Mortgage when DEK could not otherwise get paid anything, and that return was only to be measured by the net amount of the Receiver Account ultimately available to DEK; and (2) in the DEK Foreclosure Action or in the Debtor's Chapter 11 case, DEK would ultimately have received approximately $140,000 from the Receiver Account (the $174,000 on hand less the State Court ordered payment to HUD for real estate taxes advanced), a contingent fee agreement of approximately one-third of the $140,000 net recovery would not have been unreasonable for DEK to have entered into. However, DEK and Hiscock & Barclay had not entered into such a one-third contingent fee arrangement.

When viewed as other than a contingent fee or value based billing matter, where the agreement was that Hiscock & Barclay was to be paid on an hourly rate basis for reasonable and necessary hours expended on behalf of DEK, it is clear that even having achieved what it considered to be a more than satisfactory result, when it ultimately billed DEK it would have exercised some billing judgment in connection with: (1) the services performed by paralegals which were more secretarial and administrative than professional in nature; (2) research time spent by associates and paralegals in connection with the DEK foreclosure, since even though it was admittedly more complex than a routine foreclosure, Hiscock & Barclay had clearly held itself out to have extensive

expertise in the area of mortgage foreclosures, including matters of subordination of prior lienholders, when a review of the research time recorded was inconsistent with such a claimed level of expertise; (3) inadequate time records resulting in it being impossible for the client to evaluate the reasonableness and necessity of some of the time recorded; and (4) the hours spent by less experienced attorneys and paralegals which were training time or unnecessary conferencing time or reporting time, notwithstanding the possibly discounted billing rates.[3]

I have reviewed each of the time entries objected to in connection with the pre-petition services for which Hiscock & Barclay has requested payment and the detailed objections of DEK, and I agree that some downward adjustment is appropriate to arrive at a reasonable compensation.

Overall, on the facts and circumstances of this case, including that: (1) both DEK and Hiscock & Barclay must bear some responsibility for failing to come to a definitive agreement with respect to fees and disbursements as the DEK foreclosure progressed; (2) the hourly rates being charged by Hiscock & Barclay are somewhat below market; (3) a favorable result was ultimately

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[3] The Court is aware that internally it is important for law firms to require and ensure that all timekeepers record all of their time on a matter, even if after the exercise of billing judgment, some of the recorded time may not be charged to the client. In order to effectively manage the law firm's business, it is critical to know how efficient and effective timekeepers are so that firms can properly staff projects, determine overall levels of staffing, and ensure that individuals are working to capacity. This is especially important to a firm in determining the effectiveness in staffing levels of paralegals and less experienced professionals who sometimes are performing administrative or ministerial acts, are being trained, or are reporting for supervisory and training purposes, rather than for the substantive advancement of the project. That is why judgment must be exercised by the billing professional who must balance these internal record-keeping needs with determining the reasonableness and necessity of time being billed to a client.

achieved for DEK; (4) at the Evidentiary Hearing, Hiscock & Barclay failed to better explain or justify the reasonableness and necessity of many of the services recorded and performed except as a function of result, with a downward adjustment of $9,730.00, Hiscock and Barclay will have been awarded reasonable compensation for its pre-petition services.

IV. DISBURSEMENTS

DEK has objected to $1,639.88 of the disbursements being requested by Hiscock & Barclay, as being either unnecessary or excessive. Again, the parties have stipulated to the Court applying the standards set forth in Section 330. With no clear agreement as to the basis on which disbursements would be charged to DEK, it again appears that a downward adjustment is appropriate. This Court has consistently held that in bankruptcy cases disbursements should not be used as a profit center and that, subject to the need for some rules of administrative convenience, disbursements should be reimbursed at the actual cost to the professionals involved. In this regard the Court has established an administratively convenient rate of fifteen cents per copy for photocopying charges. In this case, Hiscock & Barclay has charged DEK the rate of twenty-five cents per copy, without establishing that its actual cost exceeds fifteen cents per copy. Therefore, the reimbursement for photocopying charges must be reduced by $742.42.

As for objected to facsimile, travel expense and priority mail charges objected to, it appears that in this particular case these charges were within the range of reasonableness. These expenses are often incurred in the discretion of the professionals providing services, and it does not appear that overall Hiscock & Barclay abused good judgment and discretion with respect to these particular

charges. Also, with respect to computer research charges, I have no evidence before me that any of those charges were unnecessary or excessive in this particular case.

CONCLUSION

DEK shall pay Hiscock & Barclay $25,566.75 ($72,019.17 billed less the $2,980.00 post-petition services adjustment, the $9,730.00 pre-petition services adjustment, the $742.42 disbursement adjustment and the $33,000.000 in payments made).

IT IS SO ORDERED.

_____/s/_____
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: January 17, 1997