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ENTERED ~~OCT 28 2005~~ <sup>OCT 27 2005</sup>  
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OCT 27 2005  
CLERK U.S. BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
BY DEPUTY

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

In re

SENOR SNACKS, INC., SENOR SNACKS  
MANUFACTURING, LTD. and SENOR  
SNACKS HOLDING, INC.,

Debtors.

Bankruptcy Nos. 04-00694-  
JM, 04-00697-JM and 04-  
00734-JM

Jointly Administered

MEMORANDUM DECISION

Fulcrum Capital Group, LLC ("Fulcrum") filed a motion for the allowance of an administrative claim ("Motion"). The Court conducted a hearing on the motion on June 16, 2005. The Court requested additional information from Fulcrum regarding certain expenses included in the claim. Counsel for Fulcrum supplemented the record by filing his declaration on June 24, 2005, at which time this matter was taken under submission.

Fulcrum contends that it made a substantial contribution to the case which benefitted creditors. It asserts it is entitled to an

1 administrative claim for its attorneys' fees and costs pursuant to  
2 Bankruptcy Code Section 503(b)(3)(D).

3 The principal test of substantial contribution is the extent of  
4 benefit to the estate. In re Cellular 101, Inc., 377 F.3d 1092, 1096  
5 (9<sup>th</sup> Cir. 2004); In re Christian Life Ctr., 821 F.2d 1370, 1373 (9<sup>th</sup>  
6 Cir. 1987). See also In re Consolidated Bancshares, Inc., 785 F.2d  
7 1249, 1253 (5th Cir.1986) (substantially contribution where services  
8 foster and enhance, rather than retard or interrupt the  
9 reorganization). There must be a demonstrable benefit to the debtor's  
10 estate or the creditors in order for the services to be compensable.  
11 In re Catalina Spa & R.V. Resort. Ltd., 97 B.R. 13, 17 (S.Cal. 1989).<sup>1</sup>

12 The burden of proof is on the applicant. In re Lister, 846 F.2d  
13 55, 57 (10<sup>th</sup> Cir. 1988). Therefore, any uncertainty as to the benefit  
14 of a service performed must be decided in favor of the estate and  
15 against the applicant. In re Speeds Billiards & Games, Inc., 149 B.R.  
16 434, 439 (E.Tex. 1993). Additionally, a creditor will not compensated  
17 for efforts that duplicate the services provided by others. In re  
18 Alumni Hotel Corp., 203 B.R. 624, 632 (E.Mich. 1996).

19 Fulcrum seeks an administrative claim for fees and costs it  
20 incurred associated with: its motion for the appointment of a Chapter  
21 11 trustee; opposition to Mazon's compensation; its disclosure  
22 statement and plan of reorganization; retaining a financial and  
23 management advisor; and for preparation of its claim.

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26 <sup>1</sup>Mazon contends that Fulcrum's request should be denied because  
27 Fulcrum was simply acting in its own self-interest. Fulcrum points  
28 out that Mazon took a contradictory position when Mazon's own motion  
for an administrative claim under Section 503 was being considered.  
At that time Mazon asserted that "the issue is not whether the  
creditor was motivated by his or her self interest." Mazon's  
objection based on the issue of self-interest is rejected.

1 Mazon objects to the claim on the ground that the services did  
2 not provide a substantial contribution to the case. He also argues  
3 that the time spent on various tasks was excessive and that the time  
4 records are inadequate because they are either lacking in detail or  
5 improperly lump time together.

6 As an initial matter, the Court rejects the request as it applies  
7 to Fulcrum's motion for the appointment of a trustee and its  
8 opposition to Mazon's compensation. The Court never ruled on the  
9 motion for a trustee and it added nothing to the case. Fulcrum  
10 contends that the motion compelled Mazon to move forward with a plan  
11 of reorganization, but that is merely speculation. Likewise, there  
12 was no showing that the opposition to compensation made a contribution  
13 to the case, let alone a substantial contribution, especially in light  
14 of the fact that opposition was also filed by the United States  
15 Trustee, the Creditors' Committee and Bank of the West. Furthermore,  
16 there is no showing that having Mazon receive a reduced salary for  
17 part of the case made a substantial contribution to the case.

18 On the other hand, the Court finds that Fulcrum made a  
19 substantial contribution to the case with its disclosure statement and  
20 plan of reorganization. Fulcrum seeks \$132,866.00 in fees related to  
21 the plan and disclosure statement. Mazon argues that the amount  
22 requested for the disclosure statement is excessive in general, and  
23 in particular because significant portions of Fulcrum's disclosure  
24 statement allegedly were simply copied from Mazon's earlier filed  
25 disclosure statement. Mazon also contends that the time records from  
26 Fulcrum's counsel are inadequate because the entries lack detail and  
27 time spent on various services is not properly broken out. In other  
28 words, Mazon contends there is too much lumping of time records by

1 Fulcrum's counsel.

2 First of all, in reviewing issues such as time spent on the  
3 disclosure statement and plan, the Court recognizes that the  
4 substantial contribution made by Fulcrum is not limited simply to the  
5 drafting of the initial documents, but must include its effort in  
6 getting the plan through the confirmation process, including  
7 responding to the concerns of creditors and an objection filed by  
8 Mazon. This becomes clear upon an analysis of the time spent before  
9 and after the filing of the disclosure statement and plan.

10 Mazon is correct that, when viewed by number of pages, Fulcrum  
11 copied substantial portions of Mazon's own disclosure statement and  
12 plan. Additionally, as compared to the \$33,232.50 billed by Mazon's  
13 counsel for preparation of Mazon's documents (147.7 hours at a rate  
14 of \$225.00 per hour), the amount sought by Fulcrum's counsel  
15 (\$132,866.00) could appear excessive. However, a closer examination  
16 paints a different picture.

17 The billing statements show that in this category of time,  
18 counsel Nathaniel Wood ("Wood") billed approximately 325 hours at a  
19 rate of \$230.00 per hour for a total of nearly \$75,000, while attorney  
20 Roger Meade ("Meade") billed nearly 95 hours at a rate of \$525 per  
21 hour for a total of nearly \$50,000. But, of that time, Wood spent 90  
22 hours preparing the initial disclosure statement and plan, while the  
23 remaining time was spent toward confirmation. That amounts to an  
24 expenditure of \$20,700.00 for the initial plan and disclosure  
25 statement. Likewise, approximately 20 hours of the time charged by  
26 Meade was spent in preparation of the initial documents, which amounts  
27 to \$10,500. This shows that the majority of the time spent by counsel  
28 regarding the plan and disclosure statement concerned stewarding the

1 plan through to confirmation. Additionally, the significant portions  
2 of the plan and disclosure statement, in other words, those portions  
3 that were not boilerplate and most concerned actual implementation of  
4 the plan, were unique to Fulcrum's documents. Therefore, the Court,  
5 except as noted below, is satisfied that the time billed by Fulcrum's  
6 counsel in preparing those documents and obtaining confirmation was  
7 reasonable and provided a substantial contribution to the estate.

8 That said, there are problems with the billing statements  
9 provided in support of the Motion. Fulcrum's disclosure statement and  
10 plan were filed on August 6, 2004. The efforts of Carol Kerr and  
11 Thomas Koegel in January, February and March appear to have had little  
12 to do with Fulcrum's plan.

13 Also, some entries provide no detail at all, e.g., Roger Mead's  
14 entry of July 12, 2004 for 1.5 hours and a charge of \$787.50:  
15 "Telephone conference with Messrs. Argett, Penix and Drake" or Roger  
16 Mead's entry of 8/27/2004 for 1.5 hours and another \$787.50:  
17 "Reviewing and revising draft of email to Mr. Orlik; reviewing  
18 electronic mail message from and sending electronic mail message to  
19 Mr. Argett; sending electronic mail message to Mr. Orlik." Entries  
20 like that do not allow the Court to determine whether the services  
21 provided actually concerned Fulcrum's disclosure statement and plan,  
22 for which the Court is allowing payment, or whether the services  
23 concerned a task for which compensation is being disallowed.<sup>2</sup>

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25 <sup>2</sup> Fulcrum contends that the level of detail is similar to what  
26 was provided by Mazon's counsel in support of Mazon's motion for  
27 payment of his administrative claim. The Court notes that Fulcrum did  
28 not raise an objection as to the adequacy of those time records,  
whereas Mazon specifically contends that there are "many entries with  
insufficient descriptions." Furthermore, a review of the time records  
provided by Mazon and Fulcrum indicates that the lack of detail is  
much more prominent in the billing statements provided by Fulcrum.

1           The issue of lumping of time records is also problematic.  
2 Apparently the system used by Fulcrum's attorneys batches up time  
3 entries for a particular client and totals up the time for each day.  
4 As a result, the billing statements filed with the Court have a number  
5 of entries where counsel lists several tasks, but the amount of time  
6 spent on each task is not provided. The following time entry provides  
7 an example of the difficulty that arises when time is lumped together:  
8

9 7/27/2004 Nathaniel Wood   7.3     \$ 1,679.00

10           Telephone conference with Ms. Kerr, Mr. Mead regarding  
11 strategy for plan of reorganization; telephone conference  
12 with Judge Meyers' law clerk regarding hearing on trustee;  
13 legal research regarding various issues relating to  
14 preparation of plan of reorganization; preparing memo  
15 regarding same; preparing and responding to various e-mail  
16 correspondence regarding stipulation to continue hearing on  
17 trustee.

18           The Court has already denied Fulcrum's motion as it pertains to  
19 time spent on its motion for the appointment of a trustee, and time  
20 spent regarding the stipulation to continue the hearing on the motion  
21 for a trustee likewise would not be allowed. But the entry above does  
22 not indicate how much time was spent on the trustee related matter,  
23 as opposed to time for Fulcrum's plan.

24           As the Court stated above, attorney Wood spent approximately 325  
25 hours on the disclosure statement and plan, and attorney Meade spent  
26 approximately 95 hours. Since this was a substantial amount of time,  
27 it is not surprising that there are multiple time entries that lump  
28 time. Furthermore, some time entries are less problematic, such as  
Wood's entry for August 5, 2004, where all of the tasks listed clearly  
concerned the disclosure statement and plan. In other words, the  
Court's concern is with entries that lump time spent on the disclosure

1 statement with time spent on tasks outside the scope of the disclosure  
2 statement and plan.

3 Fulcrum's attorneys have provided 20 pages of time entries that  
4 it believes are related to the disclosure statement. The Court  
5 recognizes that trying to segregate time entries is an imprecise  
6 business. The Court has reviewed each of the time entries. The  
7 comments above provide an indication of the type of analysis  
8 undertaken by the Court, though it is not practical for the Court to  
9 attempt to detail its analysis of each time entry and the adjustments  
10 it has made as a result. In resolving this matter, the Court has  
11 taken into account both the burden of proof that is on Fulcrum and the  
12 positive results of Fulcrum's efforts in obtaining confirmation of a  
13 plan that pays all creditors in full and was confirmed in a relatively  
14 short period of time.

15 In general, adjustments have been made as follows: 1) time  
16 entries before Wood's entry on 4/20/04 are not adequately connected  
17 to Fulcrum's plan; a reduction of \$4,290 is made as a result; 2) the  
18 issue regarding a lack of detail primarily affects the entries by  
19 attorney Mead; there are more than 30 time entries by Mead that are  
20 questionable based on a lack of detail, with two examples provided  
21 above; a reduction of \$10,500.00 will be made representing 20 hours  
22 at \$525 an hour; 3) lumping primarily concerns the entries of attorney  
23 Wood; while all entries were reviewed, the Court notes there were  
24 approximately 60 entries by Wood of two hours or more, and of those,  
25 approximately 45 entries were for three hours or more; however, the  
26 Court is satisfied that only a half dozen contain objectionable  
27 lumping as explained above; a reduction of \$2,300.00 representing 10  
28 hours at \$230 per hour is made as a result; and 4) an additional

1 reduction of \$2,070.00 is made representing nine hours billed by Wood  
2 on 10/26/04 and 10/27/04 for an ex parte application to shorten time;  
3 that application became necessary when counsel failed to use the  
4 proper local form, and the cost for that error must be borne by  
5 Fulcrum and not the estate. The total of these reductions is  
6 \$19,160.00. The amount allowed to Fulcrum for the disclosure  
7 statement and plan is \$113,706.00.

8 Fulcrum also requests payment of the fees of its consultant, Gene  
9 Huyapa ("Huyapa"). Huyapa submitted a declaration in support of the  
10 request. The only paragraph of the declaration that addresses the  
11 issue of benefit to the estate is as follows:

12 The services I provided included the following, among  
13 others: successfully negotiating with the San Diego  
14 Facility's landlord for an extension of the lease, and  
15 identifying alternative facilities for the Company; meeting  
16 with current employees to keep them from leaving the  
17 Company, as well as recruiting prospective employees for  
18 key positions at the Company; interfacing with key  
19 suppliers to allow for critical product deliveries pre-  
20 effective date as well as consistent supply post-effective  
21 date; meeting with possible co-packers both as a short-term  
22 production alternative for the Company as well as a long-  
23 term strategic alternative.

24 Billing statements are also attached to the declaration.  
25 However, they provide no useful information. They merely show  
26 Huyapa's fixed fee for the week, as well as various costs, such as  
27 travel and phone use. There is nothing to demonstrate when anything  
28 was actually done or how much time was actually spent on any of the  
above tasks. Furthermore, while the general descriptions of  
activities sound beneficial, there really is not an adequate record  
on which this Court could properly evaluate the benefit, if any, to  
the estate. Additionally, the time records are for periods that were  
prior to confirmation of Fulcrum's plan, as would be expected, but

1 Fulcrum suggests that Huyapa's contribution, if any, might have been  
2 made primarily after the effective date and after Fulcrum had taken  
3 control of the company (See, e.g., Fulcrum's Memorandum in support of  
4 its motion, p. 10, ll. 14-16: "Once Fulcrum's Plan of Reorganization  
5 was approved, Mr. Huyapa was focused on ensuring the successful  
6 transition for the Company post-effective date.") Fulcrum has not met  
7 its burden of showing that Huyapa's services and the fees paid for  
8 them resulted in a "substantial contribution" to the estate.

9 Finally, Fulcrum seeks compensation for the fees incurred in  
10 preparing the Motion, as well as its costs. The costs pertain to each  
11 of the categories of services for which it has sought payment, in  
12 other words, costs related to its motion for a trustee, its disclosure  
13 statement and plan, etc. Rather than try to separate the costs by  
14 category, Fulcrum suggests it be compensated for its costs based on  
15 a percentage calculated by comparing the total time its attorneys  
16 spent on all matters related to the entire bankruptcy case to the  
17 time for which it can be compensated through this motion. The Court  
18 agrees that this is an equitable approach. The Court also finds that  
19 such apportionment should be made as to its request for fees in  
20 preparing this claim. In other words, its fees related to preparing  
21 this claim will be reduced to reflect that only a portion of the claim  
22 is being allowed.

23 The supplemental declaration of Mead addresses the issue of  
24 apportioning costs. Fulcrum states that it should receive 76.47% of  
25 all its costs based on comparing the \$205,012.50 in fees sought in the  
26 Motion as compared to the \$268,102.50 in total fees billed by counsel  
27 in this case. Fulcrum's costs were \$20,936.96. Therefore, it  
28 requests \$16,010.07 in costs.

1 Fulcrum also seeks \$6,500.00 for preparation of this claim. It  
2 provided time records supporting \$463.00 of that request, with the  
3 remainder being an estimate of time it expected to expend.

4 As explained above, a significant portion of Fulcrum's overall  
5 request is being denied. The Court is allowing \$113,706.00 for the  
6 disclosure statement and plan. The amount sought by Fulcrum in its  
7 Motion was \$205,012.50, but that includes \$463.00 for preparing the  
8 Motion. Backing that amount out gives a total of \$204,549.50.  
9 Therefore, excluding amounts related to preparing the Motion, Fulcrum  
10 is being allowed 55.59% of the total amount it requested.

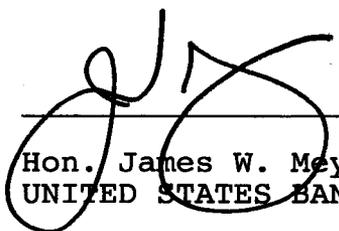
11 The Court applies that percentage to the amount requested in  
12 preparing the Motion as well as to the overall costs requested.  
13 Fulcrum is allowed \$3,613.35 for fees incurred in the preparation of  
14 this Motion. Additionally, it is allowed costs of \$8,900.00.

15 Fulcrum is therefore allowed fees of \$117,319.35 and costs of  
16 \$8,900.00. All other relief sought by Fulcrum is denied.<sup>3</sup>

17 Counsel for Fulcrum is directed to submit a form of order  
18 consistent with this Memorandum Decision within 14 days of the filing  
19 of this Memorandum.

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Date: OCT 27 2005

  
\_\_\_\_\_  
Hon. James W. Meyers  
UNITED STATES BANKRUPTCY JUDGE

27 <sup>3</sup> The Court also rejects Mazon's contention that Fulcrum should  
28 be estopped from seeking more than \$50,000 due to statements in its  
disclosure statement. The statements were merely estimates as to  
expected administrative claims and there is no indication that  
creditors were prejudiced by any alleged misstatements.