

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA**

In the Matter of:

Natural Pork Production II, LLP,

Debtor

Case No. 12-02872-als11

Chapter 11

**ORDER
(date entered on docket: March 12, 2013)**

COURSE OF PROCEEDINGS

The matter before the Court is the First Interim Fee Application filed on behalf of Sugar Felsenthal Grais & Hammer LLP (“SFGH”) related to its employment as counsel to the Official Unsecured Creditors Committee (OUCC). Aaron L. Hammer of SFGH and Jeffrey D. Goetz, Debtor’s general reorganization counsel, appeared at the scheduled hearing. Assistant United States Trustee, James L. Snyder, IC Committee’s counsel, Michael P. Mallaney, and Robert J. Bothe, attorney for First National Bank of Omaha, were present. The court has jurisdiction of these matters pursuant to 28 U.S.C. sections 157(b)(1) and 1334. The following findings of fact and conclusions of law are entered by the Court pursuant to Federal Rules of Bankruptcy Procedure 7052 and 9014.

BACKGROUND

Natural Pork Production II, LLP (“NPP” or “Debtor”) filed a voluntary chapter 11 proceeding on September 11, 2012. Its primary assets include ownership of four subsidiaries¹

¹ These entities filed separate chapter 11 proceedings on December 7, 2012: Crawfordsville, LLC Case No. 12-3748; Brayton, LLC Case No. 12-3749; North Harlan, LLC Case No. 12-3750, and South Harlan, LLC Case No. 12-3751.

that operate hog production facilities in Iowa and Indiana. The Debtor states that its financial issues stem from the disassociation of a substantial number of partners, and payments made to these dissociated partners under the terms of a Settlement and Intercreditor Agreement (“SIA”) which was in place with an unincorporated association called the IC Committee (“ICC”).

The original schedules identified AgStar Financial Services, FLCA; First Farmers Bank & Trust; GE Capital Business Asset Funding Corp.; and Metropolitan Life Insurance Co. as secured creditors. These primary lenders hold liens against land, livestock and the operating assets of the subsidiaries. Schedule F, filed with the petition, contained the names of 185 creditors holding unsecured claims. Of this total number, twenty-four creditors were described as being owed “trade debt” in the total amount of \$566,979.² The remaining 161 creditors identified on Schedule F hold “sub-debt” arising under the partnership agreement. This category constituted the largest creditor category in both number and amounts owed.

NPP filed first day motions for Use of Cash Collateral and for an Order Establishing Procedures for Monthly Compensation and Reimbursement of Expenses of Professionals (“Motion for Monthly Compensation”).³ The valuation of assets and possible liquidation of NPP and its subsidiaries were addressed at a preliminary telephonic hearing which authorized the interim use of cash collateral. At that hearing, and by virtue of the adversary proceeding filed by NPP against the ICC on September 14, 2012, it was clear that a dispute existed as to the validity of pre-petition payments made pursuant to the SIA to NPP’s disassociated partners.

Notice of the appointment of an OUCC was filed by the United States Trustee on September 26, 2012. The following creditors holding sub-debt were named to the committee: Alan Axelrod; Aribe & Manuela Axelrod (c/o Alan Axelrod); Frederick WW Bolander; R II B

² The largest claimant in this category is Klaus Pohlman with a scheduled debt of \$479,247.

³ Requesting permission for Debtor to pay 80% of its professional fees and expenses on a monthly basis without a formal fee application or court order approving payment.

Family, LLC (c/o Rick Bolander) and Revocable Trust of Frederick and Rinkse Bolander (c/o Gabriel Ventures Partners). No creditors holding trade debt were appointed to the OUCC. Although five entities are listed, the Axelrod debts all appear to be represented on the Committee by Alan Axelrod, and the remaining creditors appointed appear to be related in some fashion to Frederick Bolander or Gabriel Ventures Partners. Within a few days of the OUCC appointment, attorneys affiliated with SFGH⁴ submitted three applications to appear pro hac vice, and the firm joined NPP's Motion for Monthly Compensation.

Final hearing on the use of cash collateral and Motion for Monthly Compensation was conducted on October 1, 2013. At that time, counsel for NPP stated that a stipulated final order related to the use of cash collateral would be filed within forty-eight hours. The Motion for Monthly Compensation was denied, but fee applications were permitted on shortened intervals of every sixty days pursuant to 11 U.S.C. § 331 (2012).

Thereafter, on October 4, 2012 SFGH filed its formal application to be employed as counsel for the OUCC, which disclosed billing rates for attorneys and paraprofessionals ranging from \$125/hour to \$655/hour (SFGH discounted these rates by 10%). The employment of SFGH was approved. An application by the OUCC to employ Conway Mackenzie as a financial advisor was contested and set for hearing.

Early in the case, the ICC filed a Motion to Appoint Trustee, which various parties later joined. The Debtor resisted this action, and the OUCC joined in that objection on October 9, 2012. A hearing originally scheduled for October 10, 2012 on these matters was continued by agreement of the parties to allow additional time for settlement discussions.

In mid-October, NPP filed a number of amendments to its original schedules. The substantive amendments included adding the ICC as a secured creditor holding a contingent,

⁴ A fourth attorney sought pro hac vice admission on December 12, 2012.

unliquidated and disputed claim in the amount of \$13,973,723 on an amended Schedule D, and revising information contained on Schedules A, B and the Statement of Financial Affairs. An amended Schedule F was filed on December 8, 2012, which added the names of all disassociated partners as holding contingent, unliquidated and disputed obligations. Many of these disassociated partners also hold sub-debt and were previously listed on the originally filed Schedule F.

Hearing on the Motion to Appoint Trustee and the OUCC Application to Employ Financial Advisor was conducted on December 10, 2012. The Motion to Appoint Trustee was denied. Upon the statement that the OUCC would not continue to seek retention of Conway Mackenzie, the pending application was granted for the limited purpose of allowing a final fee application to be submitted for services rendered before the hearing.

A number of professionals have been employed by NPP in this proceeding, including general reorganization counsel, special counsel for both litigation and general corporate matters; a reorganization consultant and tax professional(s). To date, there have been fee applications filed for each of these professionals. General reorganization counsel for NPP filed its first interim fee application in the amount of \$85,614.50 for the time period of September 11, 2012 through November 18, 2012 with hourly rates ranging from \$75 to \$320. No party objected to the fee application. The Court reduced the amount requested by \$1,311.50⁵ and entered an order approving payment of interim fees \$84,303.⁶ Debtor's special litigation counsel received approval for payment of fees in the amount of \$50,689.50 for the time period of September 11, 2012 through November 29, 2012 with hourly rates ranging from \$112.50 to \$310. Special corporate counsel has an application pending in the amount of \$18,418.00 for the time period of

⁵ The majority of this amount related to time expended on the Motion for Monthly Compensation.

⁶ As disclosed in the Application for Compensation, the amount of \$49,516.04 was earned and received pre-petition by general reorganization counsel.

September 12, 2012 through November 28, 2012 with hourly rates ranging from \$250 to \$295. A first and final application for fees of \$4,824.08 is also pending on behalf of reorganization consultant Falck & Associates. The tax accountants employed by the Debtor have submitted a first interim application for compensation totaling \$1,868.25.

In its first interim fee application covering the time period of September 26, 2012 through November 26, 2012, SFGH seeks payment of professional fees in the amount of \$202,405.50. No objections were filed to this fee request.

DISCUSSION

In this District, In re Pothoven details the format for the information to be included with an application seeking payment of fees and how services may be evaluated by the Court. 84 B.R. 579 (Bankr. S.D. Iowa 1988). Notwithstanding compliance with the technical requirements set forth in In re Pothoven, the court “has the independent authority and responsibility to determine the reasonableness of all fee requests, regardless of whether objections are filed.” Id. at 583 (Bankr. S.D. Iowa 1988). In reviewing and approving compensation for the work performed on behalf of the OUCC, the Court must determine whether the compensation meets the standards identified at 11 U.S.C. sections 330(a)(3) and 330(a)(4). The requested amounts must be shown to be reasonable and “likely to benefit the debtor’s estate or necessary to the administration of the case.” “The applicant bears the burden of proof on its claim for compensation.” In re Keene Corp., 205 B.R. 690, 695 (Bankr. S.D.N.Y. 1997). “This burden is not to be taken lightly, especially given that every dollar expended on legal fees results in a dollar less that is available for distribution to the creditors or use by debtor.” In re Pettibone Corp., 74 B.R. 293, 299 (Bankr. N.D. Ill. 1987); see also In re Northwest Airlines Corp., 400 B.R. 393 (Bankr. S.D.N.Y. 2009).

At the Court's direction a hearing was scheduled on SFGH's first interim fee application to address concerns related to the scope of services and amount of the fees. In examining these issues the Court relies upon 11 U.S.C. sections 330(a), 1103(c), the principles enunciated in In re Pothoven, and the lodestar method that has been adopted in the Eighth Circuit.

The lodestar method, calculated by multiplying the reasonable hourly rate by the reasonable number of hours required to represent the debtor in the case, is the appropriate approach for determining reasonable compensation under § 330. To determine the reasonable rates and hours, § 330(a)(3)(A) directs courts to consider factors including: the time spent; the rates charged; the necessity of the services for administration of the case; the reasonableness of the amount of time spent in light of the complexity, importance and nature of the problem, issue or task addressed; and the reasonableness of the requested compensation compared to the customary compensation charged by comparably skilled practitioners in non-bankruptcy cases.

In re Agriprocessors, Inc., No. 08-02751, 2009 WL 2578950, *1-2 (Bankr. N.D. Iowa Aug. 19, 2009) (quoting In re Nilqes, 301 B.R. 321, 324–25 (Bankr. N.D. Iowa 2003), citing In re Apex Oil Co., 960 F.2d 728, 732 (8th Cir.1992)); see also In re Kula, 213 B.R. 729 (B.A.P. 8th Cir. 1997).

1. Likely Benefits and Necessity to Administration of the Estate

Counsel's professional statement in response to questions at the hearing seemed particularly focused on what services SFGH routinely provides in every chapter 11 case in which it is employed as committee counsel. Lacking in this explanation was information which justified the extent of services provided under the circumstances of *this case* as being necessary or reasonable.

In a number of instances there appears to be a duplication of services between the Debtor's professionals and SFGH. Specifically, it is unclear why the OUCC became so involved in the following issues that were identified in the fee application: 1) negotiation of a consensual

cash collateral order (which the Court notes was substantially agreed to prior to the appearance of OUCC counsel); 2) conducting a “full-scale investigation” into the debtor’s operations; 3) delivering opinions to the Debtor on additional causes of action that were being handled by Debtor’s special counsel; 4) addressing matters related to the Motion to Appoint Trustee⁷; and 5) insuring that case professionals were properly retained and defended from collateral attack. SFGH admittedly was informed during its first conversation with general reorganization counsel of NPP’s plans to liquidate its assets and subsidiaries. Within that context, the information provided at the hearing did not clarify whether the “full scale” investigations and assistance provided were necessary or requested. Rather than conferring an actual or intended benefit to the estate or the general unsecured creditors, many of SFGH’s services could be viewed as simply verifying information and validating actions taken by other professionals in the proceeding.

In considering applications for compensation of unsecured creditors’ committee counsel, it has been stated that:

Legal services rendered on behalf of a committee are necessary if they are rendered in furtherance of the committee's duties under § 1103(c). . . . [T]he three basic functions of a committee are 1) to monitor the debtor's operations, 2) to investigate potential insider causes of action, and 3) to negotiate on the plan of reorganization. These functions are intimately tied to promoting the economic interests of the committee members. . . .

Although committee functions are fairly broad and important, committees do not act in the capacity of "Grand Overseer" over every Chapter 11 case. Counsel must limit the issues deemed necessary to investigate and not become overly involved in the case. A committee's attorney must use reasonable billing judgment and consider if the costs of services would be disproportionately large in relation to the size of the estate or likelihood of success. The value of the services must be viewed with the benefit of hindsight and must be reasonable in light of the outcome.

⁷ At hearing counsel indicated that the OUCC was only supportive of Debtor’s position to resist the appointment of a trustee, but the itemized billing indicates substantial time expended on this issue.

In re Agriprocessors, Inc., No. 08-02751, 2009 Bankr. LEXIS 3916 (Bankr. N.D. Iowa Dec. 8, 2009) (quoting In re Nat'l Cattle Congress Inc., No. 93-61986 (Bankr. N.D. Iowa Mar. 26, 1996) (citations omitted)); see also In re Hearthstone Homes, Inc., Case No. BK12-80348-TLS, 2012 WL 4027296 (Bankr. D. Neb. Sep. 12, 2012) (Judge Saladino).

Substantial time was spent by SFGH on the OUCC's attempt to employ a financial advisor. Related to this work, three exhibits were received: "Court Documents Search" (Exhibit A), an Application for Order Authorizing Retention of Investment Bank to the Official Committee of Unsecured Creditors in the *Arc Venture Holdings, Inc.* Case No. 08-46367 (Bankr. D. Minn.) (Exhibit B), and an Order Granting the Committee's Application in the *Arc Venture Holdings* case (Exhibit C). No elaboration was provided as to the relevance or use of these exhibits in a review of SFGH's pending fee application. Presumably, these documents were offered to show that an OUCC may seek to employ a financial advisor. Exhibit A is a chart that appears to summarize a document search that located Orders approving employment of a financial advisor by creditors' committees in thirty-two Chapter 11 proceedings during the time period of 2006 through 2012. Comparing the results contained in Exhibit A to total business Chapter 11 cases filed during the same time period reveals that employment of financial advisors by committees was authorized in only .05% of all cases.⁸ Far from being routine, these figures indicate that approval of such employment is very rare, and it can be inferred that it is not reasonably necessary in the majority of Chapter 11 proceedings.

2. Reasonableness of Rates

Various factors contribute to a determination of reasonable hourly rates within the context of a fee application in a specific Chapter 11 proceeding, and courts should consider:

⁸ 63,780 business chapter 11 cases filed 2006-2012. <http://www.uscourts.gov/Statistics/BankruptcyStatistics/12-month-period-ending-december.aspx>.

- 1) the attorney's customary hourly rate charged to similar clients with similar legal difficulties and the requested rate to determine whether the attorney's customary charge is reasonable under the circumstances.
- 2) the rates charged by comparable attorneys in the local area, realizing, however, that large or complex cases may require the participation of counsel from other parts of the country. In those instances the comparison of hourly rates can be made on a national basis.
- 3) the quality of legal services provided and the skill of the attorney.
- 4) the novelty and difficulty of issues in the case involving a wide range of problems which would support compensation at a higher rate.
- 5) whether the specific task is performed by the appropriate professional/nonprofessional.
- 6) the billing judgment of the attorney.

See In re Atwell, 148 B.R. 483, 488-89 (Bankr. W.D. Ken. 1993).

The issue of local versus out of state professionals has a bearing on this calculation. The Supreme Court has held that the lodestar calculation must be done according to the prevailing local rates in the relevant community.” Blum v. Stenson, 465 U.S. 886, 895 (1984); In re ACT Mfg., Inc., 281 B.R. 468, 486 (Bankr. D. Mass. 2002). “[C]ourts . . . should depart from the local rate only when the case required expertise is not locally available.” In re ACT Mfg., Inc., 281 B.R. at 486 (citing In re LearningSmith, Inc., 247 B.R. 581, 582 (Bankr. D. Mass. 2000)). There is no need to look farther than the applications submitted to date by the other professionals in this case to conclude that the rates and total amounts charged by SFGH exceed the local standards.

“Many bankruptcy cases are often more regional or even national than they are local in scope, so that looking solely to the local community's range of rates would impose an unnecessarily parochial cap on the case.” In re Temple Ret. Cmty., Inc., 97 B.R. 333, 342-43 (Bankr. W.D. Tex. 1989). If the circumstances of the case justify bringing in outside counsel, a

firm may be paid its normal prevailing rate, instead of being limited to the local rate in the community. Id.

Not every case warrants going outside the local community for representation. When the nature of a given case in fact justifies the retention of out-of-town counsel, however, local rates should not operate as a limiting factor in determining the reasonableness of the base fee sought. Moreover, even if the billing rates themselves are justified, the total bill must itself be reasonable:

The regular hourly rates simply do not become ipso facto final fee awards in this court. Retention of attorneys at high hourly rates is based not only upon the assumption that the attorneys billing at such rates have the necessary experience and competence to handle complex matters, but also upon the further assumption that attorneys billing at such high rates can normally perform their duties in fewer hours than less experienced attorneys who may bill at a lower rate....True economy of administration in a reorganization case must be determined not by hourly rates per se but rather by the overall "bottom line," i.e., the total hours expended to hopefully accomplish a successful reorganization. ... the total cost to the estate in terms of total dollars will normally be lower in the first instance notwithstanding the higher hourly rates.

In re Temple Ret. Cmty., Inc., 97 B.R. at 343.

Mr. Hammer stated that his firm reached out to the Committee members to offer his firm's services in NPP's Chapter 11 proceeding. Based upon the record, it is uncertain whether employment of committee counsel from outside the local area was necessary, but the Court defers to the OUCC's judgment and right to select representation of its choice. This deference, however, should not be interpreted as a tacit conclusion that fee requests will automatically be construed as reasonable.

CONCLUSIONS

Bankruptcy attorneys are not entitled to compensation merely because time recorded was actually expended. "Billable hours do not necessarily translate into compensable hours." In re New Boston Coke Corp., 299 B.R. 432, 447 (Bankr. E.D. Mich. 2003). Professionals paid by the

estate should evaluate how their work will advance the interests of the estate or unsecured creditors, and whether other professionals in the proceeding have already adequately addressed identical issues. SFGH has not adequately demonstrated that its services were reasonable and necessary to the extent and amount provided.

The hourly rates charged by SFGH are significantly higher than the rates charged by local practitioners, however, the blended hourly rate after the courtesy reduction is within reasonable limits. No downward adjustment of the individual hourly rates charged by SFGH is necessary in this first interim fee application.

The amount of professional fees that are determined to be reasonable in each project category are addressed and allowed as set forth below.

	Fees Requested	Fees Allowed
1. General Case Administration	\$31,145.40	\$31,450.40
2. Schedules & Reports	\$1,506.60	\$1,506.60
3. Investigation of Operations and Assets	\$29,835.90	\$29,835.90
4. SFGH Retention and Fee Applications	\$12,361.95	\$12,361.95
5. Other Professional Retention and Fee Applications No basis has been provided for the reasonableness or benefit to the estate for such extensive review of other professional retention fee applications. Substantial time in this category identifies services related to the attempt to employ Conway MacKenzie and for payment of a percentage of professional fees without benefit of court approval. These issues were pursued in spite of objections raised by the Office of the United States Trustee to both of these issues. At the hearing on the Motion for Monthly Compensation,	\$41,308.65	\$0.00

the only benefit identified in the request was related to the cash flow of the applicant's law firm and the potential risk involved in undertaking the representation. Billing for these services does not comport with 11 U.S.C. sections 1103; 330(a)(3) and 330(a)(4)(A).		
6. Claims Objection and Analysis	\$220.50	\$220.50
7. Secured Creditors The application misstates the number of credit facilities that were required to be explored. Examination of the secured position claimed by the ICC is duplicative of the services performed related to litigation, and work performed related to the investigation of operations and assets. There is no information that suggests that the secured positions of the primary lenders were in question, or that the Debtor's investigation and evaluation of the validity, priority and extent of these liens was inaccurate or required verification.	\$37,430.55	\$20,000
8. Creditor Inquiries, Negotiations and Settlement	\$176.85	\$176.85
9. Committee Meetings and Governance	\$20,454.75	\$20,454.75
10. Asset Sales	\$4,455.90	\$4,455.90
11. Litigation Debtor has retained special counsel to be involved in the adversary proceedings and representation of the Debtor in a proceeding removed from state court by the ICC. In reviewing the amendments made to the pending adversary proceeding by special counsel there appears to be no substantive causes of action added as a result of legal analysis performed on behalf of the OUCC. The amendments undertaken by Debtor's special counsel relate to factual matters in response to the pending Motions to Dismiss. Parenthetically, the Court observes that the December 12, 2012 amendment to Schedule F now lists individuals and entities that are identified as both disassociated partners and holders of subordinated debt. In the future, it is unclear whether services performed under this category can be provided without generating potential conflicts between the	\$20,767.95	\$10,000

divergent interests of unsecured creditors.		
12. Travel	\$2,740.50	\$2,740.50
Total	\$202,405.50	\$133,203.35

Due to the level of work performed in project categories 3, 7 and 11, and the fees allowed here, it stands to reason that only minimal, if any, similar services will be required in the subsidiaries' cases.⁹

IT HEREBY ORDERED that

1. Professional fees of SFGH are allowed in the amount of \$133,203.35.
2. Actual expenses claimed by SFGH in the amount of \$1,545.20 are allowed.

/s/ Anita L. Shodeen
Anita L. Shodeen
U.S. Bankruptcy Judge

Parties receiving this Memorandum of Decision from the Clerk of Court:
Electronic Filers in this Chapter Case

⁹ Billings for services to the subsidiaries related to historical background, general case administration, analysis of operations or assets, retention of other professionals, or litigation will be carefully reviewed in light of this Order.