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

In the Matter of:

Fansteel Foundry Corporation Case No. **16-01825-als11**

Debtor

Application for Compensation (#728)

ORDER

(date entered on docket: November 27, 2018)

Before the Court is the first and final fee application submitted by Gordian Group, LLC (Gordian) related to professional services it provided to Fansteel Foundry Corporation f/k/a Wellman Dynamics Corporation (Debtor). Objections have been filed by the Debtor, Official Unsecured Creditors Committee (OCC) and Wellman Dynamics Corporation Acquisition LLC (WDCA) (collectively Joint Objectors) and 510 Ocean Drive Debt Acquisition LLC (510). To the extent jurisdiction is not conferred under 11 U.S.C. §§158 and 1334 the parties have consented to this Court entering a final order in this contested matter.

For the reasons that follow the objections are overruled and the fee application is approved.

BACKGROUND FACTS

When it became clear that a joint plan of reorganization filed by Fansteel, Inc. and its affiliates was not feasible it was withdrawn and the focus shifted to selling

the Debtor's assets.[1] To that end, on July 14, 2017 a Motion to Sell Free and Clear under 11 U.S.C. §363, along with requests for approval of bidding procedures and the asset purchase agreement from a stalking horse bidder were filed. On the same day the Debtor also filed an Application to Employ Gordian to provide investment banking and financial advisory services. Multiple hearings were scheduled and continued related to these matters.

The OCC initially objected to Gordian's employment stating it disagreed with the Debtor's proposed 363 sale and that it intended to use its professionals to provide services similar to Gordian's which would result in unnecessary duplication. The objection also raised reasonableness of the proposed fee structure arguing that Gordian should not be paid $250,000 as a base fee and should not be compensated for a Financial Transaction related to any party that had been identified as interested in purchasing the Debtor's assets at the time Gordian was employed.

Purportedly as a product of mediation, the parties eventually agreed to submit a consent order to resolve these objections. The following terms were contained in a revised engagement letter dated September 6, 2017: if no bids, other than a bid from a carve out party, the fee was set at $175,000; with a qualifying or overbid the fees would be the higher of $175,000 or 3% of the aggregate consideration[2], and Gordian was required to submit a fee application for a review of the reasonableness of its fees.

In December amended bidding procedures and an amended Asset Purchase Agreement (APA) were approved.

[1] The same decision was reached in Wellman Dynamics Machinery and Assembly, Case No. 16-1827. Similar filings were made in that case along with an Application to employ Gordian which was identical to the one submitted in the Debtor's proceeding.

[2] The original terms included the higher of $250,000 or 6% of the aggregate consideration.

TCTM Financial FS LLC, the stalking horse, was the successful bidder at an auction conducted in late February 2018. At the conclusion of the final sale hearing the Court approved the sale and a detailed consent order followed.

Gordian filed its first and final fee application seeking compensation in the amount of $1,239,762.48. The Joint Objectors allege that Gordian is not entitled to its fee because it failed to perform according to the terms of its engagement and that the fee is unreasonable. 510 objects stating that as a secured creditor the funds owing to Gordian should instead be remitted to it.

DISCUSSION

1. STANDING

It is the Court's observation that all parties were originally operating under the presumption that Gordian's fees would be borne by the bankruptcy estate. That premise changed on December 19, 2017 with the submission of TCTM's Amended APA that included payment of Gordian's fees directly by funding an escrow account at closing. Based upon this fact, even if Gordian's fee application were to not be approved, the bankruptcy estate would not be enhanced or receive any benefit.

The Debtor proposed and vigorously supported Gordian's engagement. The docket, as well as a number of hearing transcripts, are replete with statements detailing the necessity for Gordian's employment, the arm's length negotiation of the fee and its reasonableness. TCTM was in favor of Gordian's retention and raised no objection.

The consent order submitted to resolve the objections to Gordian's employment specifically identifies the issues excluded from that order:

> In agreeing to this Consent Order, the Committee does not withdraw its objection to the WDC sale and marketing process and reserves its rights to further object to same. Specifically, and without limiting the foregoing, the

> Committee does not consent to Gordian selling the WDC assets until such time as the Court rules on whether, and on what terms, to permit a sale or other transaction with respect to WDC to move forward.

The focus of the OCC's objections to reasonableness appear to have been resolved by the revised engagement letter. The entry of an order approving the bid procedures and the sale have rendered moot the continuing objection set forth in the consent order.

The Debtor, OCC and TCTM all supported final approval of the sale with an aggregate purchase price of $41,325,416. A consent order with an attached final APA dated March 1, 2018 clearly discloses that Gordian's fees were included in the purchase price. The Court is unaware that these Joint Objectors raised any looming issue related to Gordian's performance or its entitlement to fees

WDCA, taking the lead on behalf of the Joint Objectors, was not created until after the sale closed.[3] No contract language or court order has been identified that gives WDCA, as TCTM's assignee, the ability to contest whether Gordian adequately performed its services. *Bayside Holdings, Ltd. v. Viracon, Inc.,* 709 F.3d 1225, 1228 (8th Cir. 2013) (assignment places assignee in the shoes of the assignor subject to the same legal rights held by the assignor before the assignment); *Kroeplin Farms Gen. P'ship v. Heartland Crop Ins.,* 430 F.3d 906, 911 (8th Cir. 2005 (no greater rights are conferred under an assignment than those held by the assignor). Importantly, the assignment of the APA to WDCA does not modify the terms of that contract. *Molina v. Barany*, 56 N.Y.S.2d 124, 132 (Sup. Ct. 1945). At a minimum, and at this late date, a reservation of right or at least a demonstration of

[3] A Notice of Closing of Sale was filed with the Court indicating that "TCTM assigned its "Asset Purchase Agreement to WDC Acquisition LLC (WDCA), a Delaware limited liability company and affiliate of TCTM, in accordance with section 10.1 of the Asset Purchase Agreement."

TCTM's dissatisfaction with the marketing and sale process must be identified to warrant WDCA's position. The Court has not been made unaware that TCTM raised any issue related to Gordian's employment, its services or fees during the process of its engagement[4] or related to the sale.

It is well settled that standing cannot be "inferred argumentatively from averments in the pleadings," *Pfizer Inc. v. Elan Pharm. Research Corp.*, 812 F. Supp. 1352, 1356 (D. Del. 1993); citing *Grace v. American Cent. Ins. Co.*, 109 U.S. 278, 284, 27 L. Ed. 932, 3 S. Ct. 207 (1883), but rather "must affirmatively appear in the record." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S. Ct. 596, 608 (1990); citing *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382, (1884). A party seeking relief from a court has the burden of clearly alleging facts demonstrating that it is a proper party to invoke judicial resolution of the dispute. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 80 L. Ed. 1135, 56 S. Ct. 780 (1936); *Pfizer Inc.*, 812 F. Supp. at 1356.

It is questionable whether the Joint Objectors have sufficiently demonstrated their standing to bring the issue of whether Gordian met the obligations of its engagement to earn its fee. Gordian agreed to a review of its fees for reasonableness and the Joint Objectors have standing to raise this issue. 11 U.S.C. 330(a)(2).

Despite the standing concern all of the issues raised in the Joint Objection will be addressed on the merits.

2. 510 OBJECTION

510 did not take an active role in the hearing and did not file a post-trial brief. Its present objection is similar to other arguments previously raised by this creditor

[4] At the time of the hearing on Debtor's Application to Employ Gordian TCTM was fully supportive of the need for an investment banker stating on the record that such services were important even when a stalking horse bid has been submitted and that the proposed fees were reasonable and lower than in many cases.

which state that any funds to be paid to any entity in this bankruptcy case cannot be made prior to payment on 510's secured claim.

Under the APA, the buyer assumed the right to pay Gordian out of its own funds and this amount was included in its bid. The funds to be paid to Gordian are therefore not estate funds and are not part of any collateral to which 510 would be entitled. *In re ICL Holding Co.*, 802 F.3d 547, 557 (3d Cir. 2015). Further, because these funds are property of the purchaser and are unrelated to property of the estate there is no requirement that the bankruptcy priority payment scheme to be imposed on their distribution. *Id*.; See *Matter of Fansteel Foundry Corp.*, No. 16-01825-ALS11, 2018 WL 5472928 (Bankr. S.D. Iowa Oct. 26, 2018)

Because 510 has not demonstrated that it holds a lien against, or is otherwise entitled to payment from, the funds being utilized to pay Gordian's fee this objection is overruled.

3. GORDIAN'S TERMS OF ENGAGEMENT AND PERFORMANCE

The Joint Objection contends that Gordian did not procure a qualified bid for the purpose of earning a commission on TCTM's purchase of the Debtor's assets as required under the engagement letter which states in relevant part:

> i. In the event of (sic) no qualifying bids or overbids are received in connection with the currently-contemplated auction of WD other than from TCTM, 510 Ocean (or Levie or related entities), or Bieber (or related entities) (together, the "Carve Out Entities"), fees earned upon such bids not being received in an amount equal to $175,000 (the "WD Credit Bid Fees"); or
>
> ii. In any other Financial Transactions where a qualifying bid or overbid for WD is received by an entity other than the Carve Out Entities, fees equal to the greater of: (i) $175,000 or (ii) 3% of Aggregate Consideration (defined below) (the "WD Transaction Fee").

Gordian believed its mission was to get to an auction to enhance the value the estate would receive from a purchase price higher than the initial stalking horse bid. In response the Joint Objectors argue that Gordian's directive was restricted to obtaining qualified bids because there is no reference to an auction in the engagement letter. Both views are correct. As a practical matter, the only reason to locate and develop other bids would be to conduct an auction.

The parties indicate that the engagement letter is unambiguous which would preclude consideration of extrinsic evidence to supplement the meaning of the contract and the parties' intent. The record does not support this conclusion. At the hearing the parties spent considerable time examining David Herman, on behalf of Gordian, about exhibits involving the bid procedures, the sale process, bid analysis and calculation of its fee. Consequently, the Court will consider filings related to the sale and the parties' positions before, during and after the sale of the Debtor's assets to resolve this dispute.

A variety of arguments are asserted as to why Gordian is not entitled to its fee starting with its failure to procure a qualified bid. The terms 'qualified bid' or 'Qualified Bidder' are not defined in the engagement letter. To determine and apply their meanings rests in the definitions contained in the bid procedures approved by the Court. At the hearing the Joint Objectors point to twenty-three required conditions set forth in the bid procedures which must be met to be designated as a Qualified Bidder. They identify deficiencies in the bids submitted as follows: Magellan's bid did not exceed the Stalking Horse Bid by the Minimum Overbid amount; the Undisclosed Strategic Bidder had contingent financing, did not submit a signed APA and failed to timely submit its bid deposit. Gordian acknowledges that these bids did not check every box on the listed conditions. Nevertheless, based upon the analysis of the components of the bids it was Herman's opinion that there

were several reasons why those bids would bring value to the sale process. This evidence was not rebutted.

The Joint Objectors do not address an alternative for bid qualification that existed under the bid procedures.

> The Debtor, *in its sole discretion*, together with its advisors shall (i) in consultation with the Consultation Parties and the Stalking Horse Bidder determine whether any person in addition to the Stalking Horse Bidder is a Qualified Bidder as set forth herein;
>
> . . . .
>
> Thereafter, the Debtor shall evaluate and select by February 5, 2018 at 5 p.m. (Central Time) (the "Qualified Bid Announcement Deadline"), those Preliminary Bids which, *in its sole discretion*, after consultation with its professionals, the Consultation Parties, and the Stalking Horse Bidder, are deemed qualified bids entitled to bid at the Auction (the "Qualified Bids").

(emphasis added). This language in the approved bid procedures is unequivocal in granting broad discretion to the Debtor and consultation parties to qualify bids, even those that do not meet each and every condition contained in the definition. The evidence is uncontroverted that this alternative was properly employed prior to the auction to qualify Magellan and Undisclosed as bidders.

At the hearing a series of emails were entered into evidence. Specifically, an email from James Mahoney, Chief Executive Officer of WDC at the time of the sale, which has as its subject line: "I find the Magellan bid Qualified." Gordian corresponded with TCTM to alert them to the Debtor's decision to deem the "Magellan Bid a Qualified Bid, pursuant to the Bid Procedures," and the response received was "TCTM agrees with this decision." The Committee communicated stating it "believe[s] the Magellan bid is a qualified bid."

No evidence calls into question the plain meaning or intent of these communications.

To counter these facts the Joint Objectors now contend that they *let* Magellan participate for the sole purpose of giving them an opportunity to make a truly qualified bid at the auction, but that at the time of the auction there were no truly qualified bids for the purposes of Gordian's fee. This argument is unpersuasive. Aside from all the correspondence stating that Magellan was an accepted qualified bid, the appropriate parties were consulted, and it was ultimately up to the Debtor to make the final determination. Further, the bidding procedures included an ability to formally disqualify bidders. Importantly this procedure was not followed and no testimony was presented that there was any discussion of disqualification for any bid deficiencies at the time of the auction.

A less defined argument by the Joint Objector's infers that TCTM's designation as a "carve out party" in the engagement letter somehow now must insulate it from payment of Gordian's fee. This theory is flawed. The carve out in the engagement letter served to exclude Gordian from collecting a fee on TCTM's stalking horse bid or any initial bids submitted by the named entities. Nothing in the engagement provides that any of the identified entities would continue to be subject to a fee carve out even if an auction was conducted. This calls into question why TCTM would include payment of Gordian's fee as a component of its bid if it would not be obligated to pay the higher fee under the terms of the Engagement Letter. This conspicuous inconsistency was not addressed.

The Joint Objector's brief states that "a major concern from the outset of Gordian's engagement was that Gordian would receive significant compensation in connection with financial transactions that Gordian had no part in procuring." They argue that because Magellan entered an appearance in the case and monitored hearings it was known as a potential purchaser early in this case. The fact that

Magellan was not included as a carve out entity in the engagement letter does not support the suggestion of a high level of interest. There is a lack of supporting detail to substantiate these inferences and no evidence was presented that reflects that Gordian did not provide the same information and services related to Magellan that it did to every other prospective bidder.

Apparently, Gordian was not aware that there was any concern related to its fee until after the sale closed and its fee application was filed. By not raising their objections earlier WDCA and the OCC tacitly agreed with the Debtor's representations at the final sale hearing that: "Pursuant to the amended bid procedures, the debtor conducted a robust auction on February 26, 2018, with three qualified bidders."[5] By signing the consent order all of the Joint Objectors also represented, contrary to their current positions, that: "The Debtor marketed the Acquired Assets and conducted the sale process in compliance with the Bid Procedures Order, the Bid Procedures, the Bankruptcy Code and all other orders entered in this cases (sic)."[6]

The Court finds that Gordian met the expectation for its engagement by producing at least one qualified bidder and is therefore is entitled to apply the 3% fee calculation.

3. REASONABLENESS OF FEES

According to the terms approved in its application Gordian calculated 3% of the aggregate consideration under TCTM's bid which yields a fee of $1,239,762.48. Before turning to the specific task of evaluating reasonableness it is important to note that the Objecting Parties describe the amount requested by Gordian as a

[5] In re Fansteel Foundry Corporation 16-1825, Transcript re: Motion to Sell Free and Clear Pursuant to Section 363(F) (Docket No. 554) Page 11, Lines 10-12.
[6] In re Fansteel Foundry Corporation 16-1825, Order after Hearing Approving (A) Asset Purchase Agreement, and (B) Authorizing the Sale of Acquired Assets of the Debtor Outside the Ordinary Course of Business Free and Clear of Liens, Claims & Encumbrances (Docket No. 536) Page 3, Findings of Fact and Conclusions of Law § F.

"success fee." This characterization is not entirely correct. The fee arrangement approved by the Court is best described as a transaction fee. *In re Relativity Fashion, LLC*, No. 15-11989 (MEW), 2016 Bankr. LEXIS 4339, at *10 (Bankr. S.D.N.Y. Dec. 16, 2016) (addressing in detail fees charged by investment bankers).

> The Bankruptcy Code provides two different approaches to determine retention of and compensation for a professional in a Chapter 11 case to be employed to represent the interests of the bankruptcy estate: (1) retention under Section 327(a), for which reasonable compensation is determined after the services have been provided, based on the factors identified under Bankruptcy Code Section 330(a)(3); or (2) compensation which is pre-approved pursuant to Section 328(a).

In re Iron Horse Bicycle Co., LLC, No. 809-71324-ast, 2010 Bankr. LEXIS 378, *12 (Bankr. E.D.N.Y. Feb. 4, 2010). Either of these statutory provisions could be applied in this case so each will be addressed. An examination of reasonableness under either analysis is determined on a case by case basis under a totality of the circumstances. *Unsecured Creditors' Comm. v. Pelofsky (In re Thermadyne Holdings Corp.)*, 283 B.R. 749, 757 (B.A.P. 8th Cir. 2002); See also *In re Grimes*, 115 B.R. 639, 649 (Bankr. D.S.D. 1990) (analyzing Section 330 under the "totality of the circumstances").

Pursuant to 11 U.S.C. §330 a professional can be compensated for its reasonable, actual and necessary services. As the applicant, Gordian bears the burden of establishing the reasonableness of its requested fees. *In re Tribeca Market, LLC*, 516 B.R. 254, 273 (Bankr. S.D.N.Y. 2014); See also *In the Matter of Nat. Pork Prod. II, LLP*, No. 12-02872-ALS11, 2013 Bankr. LEXIS 5629, *9 (Bankr. S.D. Iowa Mar. 12, 2013) (citing *In re Keene Corp.*, 205 B.R. 690, 695 (Bankr. S.D.N.Y. 1997)). The statute outlines factors that may be considered.

> In determining the amount of reasonable compensation to be awarded to . . . professional person, 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 commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C.A. § 330(a)(3). In one fashion or another, in the Gordian's application, or during Herman's testimony, each of these factors were addressed to justify the reasonableness of the fees requested. Herman stated that Gordian expended at least the recorded 1,421 hours of work to procure a robust auction and that those hours were utilized to determine an "hourly rate." Additionally, he elaborated on the complexity of the case that was unbeknownst to the parties at the outset of the case, not the least of which were the environmental issues. He also testified that had Gordian been aware of the contentiousness in this case it would have likely negotiated a higher fee because of the length of the case and the substantial risk involved. The Objecting Parties did not dispute any of these explanations and did not present any evidence to contradict the substantial effort undertaken by Gordian

in advising the Debtor; its outreach to potential buyers; evaluation of proposed bids and its involvement in the sale process.

The only objection raised to the reasonableness of the fee stems from the Objecting Parties unrest with the hourly rate it calculates under the lodestar method.[7] Application of a lodestar analysis to determine reasonableness of fees is permitted, but it is not required or exclusive to that evaluation. *In re Citation Corp.*, 493 F.3d 1313, 1320 (11th Cir. 2007).

The Joint Objectors contend that Gordian's blended hourly rate is $872.46. They identify a new associate that was part of the team working on this case to argue that such a high hourly for a person with that experience is unreasonable. Absent from this analysis is that Herman is also assigned the same hourly rate which is probably lower than an hourly rate that would be charged by a person with his experience and position. An examination of how this hourly rate was obtained appears to be based upon a simple calculation reflecting an average hourly rate, not a true blended rate. Consequently, what an appropriate hourly rate for either an associate or a higher-level partner cannot be evaluated. In making this argument the Joint Objectors are remiss to overlook that there are many professionals employed in this case that bill at similar or higher hourly rates,[8] who unlike Gordian will be paid from estate funds.

Unlike hourly attorney fees, fees for investment bankers are paid like commission-based professionals. Ultimately, they are designed to reward results,

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[7] See also *In re Nilges*, 301 B.R. 321, 324 (Bankr. N.D. Iowa 2003) (the lodestar method adopted in the Eighth Circuit calculates fees by multiplying the reasonable number of hours required to represent the debtor by the reasonable hourly rate for such work).

[8] In re Fansteel Inc. 16-1823, Motion for Allowance and Payment of Professional Fees of TCTM Financial FS LLC (Docket No. 565):

Associates hourly rates between $510-$930
Counsel hourly rates between $940-$990
Partner hourly rates between $1085-$1400

At the time of the application at Docket No. 565 the Debtor and Fansteel Inc. (16-1823) were jointly administered.

not amount of effort. The amount of Gordian's transaction fee was the result of party negotiations and was the subject of a consent order which all parties signed. Gordian performed the services it promised and its fees are commensurate with, if not lower than, the normal industry standard.[9] Nothing in the record contradicts these conclusions.

Under 11 U.S.C. §328(a) a court approves or rejects employment of a professional based upon the stated compensation terms. *ReGen Capital III, Inc. v. Official Committee of Unsecured Creditors (In re Trism, Inc.),* 282 B.R. 662, 668–669 (B.A.P. 8th Cir. 2002)). The court's role does not extend to changing or dictating other terms. *In re Farmland Industries, Inc.*, 296 B.R. 188, 191 (B.A.P 8th Cir 2003). In this case, the terms of how the fee would be calculated were agreed to by the parties and approved by the Court under the terms outlined in the Engagement Letter attached to the employment application. Ordinarily a court would only revisit the pre-approved terms of a fee arrangement if it is established that that action was "improvident in light of circumstances not capable of being anticipated at the time of the fixing of such terms and conditions." 11 U.S.C. §328(a). Under this provision:

> A determination of reasonableness is made at the time of retention based upon the available information. Pursuant to section 328, a court is asked to approve the reasonableness of a transaction fee arrangement based upon the financial advisor accomplishing a certain goal. Further, after the reasonableness prong is determined, there is no opportunity to revisit that determination unless it proves "improvident in light of developments not

[9] Before Gordian revised its engagement to reduce its fees TCTM was fully supportive of the need for an investment banker. At a hearing related to Gordian's employment its counsel stated that such services were important even when a stalking horse bid has been submitted and that the proposed fees were reasonable and lower than in many cases. In re Fansteel Foundry Corporation 16-1825, Transcript re: Motion to Sell Free and Clear Pursuant to Section 363(F) (Docket No. 299) Page 14-15.

> capable of being anticipated at the time of the fixing of such terms and conditions." 11 U.S.C. § 328(a). That is a very difficult standard to meet and it is not often that these fee arrangements are adjusted.

In re XO Communs., Inc., 398 B.R. 106, 111–12 (Bankr. S.D.N.Y. 2008) (citation omitted).

Gordian took the risk of earning only $175,000 had they not procured a qualified bidder. The parties agreed that if a qualified bidder other than the stalking horse were to engage in the auction Gordian would earn 3% of the aggregate consideration of the sale. None of these circumstances were incapable of being anticipated at the time the employment was approved.

Gordian has met its burden under 11 U.SC. §330 that its fee is reasonable. To the extent 11 U.S.C. §328(a) established the standard for reasonableness there is nothing in the record that would support a conclusion that the fee should not be allowed. For the reasons stated Gordian's fee in the amount of $1,239,762.48 is deemed reasonable.

For the reasons stated, it is ORDERED

1. The Joint Objection is overruled.
2. The Objection filed by 510 is overruled.
3. Gordian's fee application is approved in the amount of $1,239,762.48.
4. Gordian's expenses in the amount of $11,260.60 are allowed.

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

Parties receiving this Memorandum of Decision from the Clerk of Court:
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