

# In the United States Bankruptcy Court

## for the Northern District of Iowa

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NATIONAL CATTLE CONGRESS, INC.  
Debtor.

Bankruptcy No. 93-61986KW  
Chapter 11

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### **ORDER RE SECOND INTERIM APPLICATION OF CHILDERS & FIEGEN, P.C., COUNSEL FOR OFFICIAL COMMITTEE OF UNSECURED CREDITORS, FOR APPROVAL OF COMPENSATION OF ATTORNEYS' FEES AND EXPENSES**

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On September 7, 1995, the above-captioned matter came on for hearing pursuant to assignment. Tom Fiegen represented Childers & Fiegen as counsel for the Official Unsecured Creditors Committee. John Titler represented Debtor National Cattle Congress, Inc. Janet Reasoner appeared on behalf of the U.S. Trustee.

The matter before the Court is the Second Interim Application of Childers & Fiegen, P.C., Counsel for Official Committee of Unsecured Creditors, for Approval of Compensation of Attorneys' Fees and Expenses. After presentation of evidence and arguments of counsel, the Court took the matter under advisement. The time for filing briefs has now passed and the matter is ready for resolution. This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(A).

#### **STATEMENT OF THE CASE**

The law firm of Childers & Fiegen ("Counsel") seeks fees for legal services as counsel for the Official Committee of Unsecured Creditors for the period between August 16, 1995 and July 15, 1995. Fees for this period total \$31,338 and expenses total \$6,121.14 for a total request of \$37,459.14. The Court previously approved interim payment of fees and expenses based on 75% of balances shown on monthly statements subject to Court review and final allowance. The Court approved Counsel's first application for interim compensation for the period ending on August 15, 1994, subject to Debtor's reservation of its right to object to the fees, in the amount of \$38,108.60, of which \$4,640.82 remains unpaid.

Debtor objects to the application. It states that the fees and expenses are, in general, excessive and not warranted under the circumstances. Specifically, Debtor asserts that the following charges are excessive: 1) Attorney Fiegen's hourly rate increase from \$100 to \$120 without explanation, 2) the rate of \$1.00 per page for fax transmissions regardless if transmission is long distance or local, and 3) \$.30 per page for receipt of faxes. Debtor argues that a charge of \$.50 per page for transmitting faxes

is more appropriate and that no charge should be made for receiving faxes.

Debtor also believes some actions taken by counsel were without authorization by the Committee and were taken to harass Debtor and its directors and staff. On this issue, Debtor specifies that the following actions by the Committee and Counsel were unwarranted and constituted harassment: 1) negotiations in 1994 with gaming companies, i.e. Lady Luck and Concorde Gaming, for the purpose of formulating a plan of reorganization; 2) pursuing allegations of Debtor wrongdoing in issuing bonds and granting mortgage liens; 3) attempting to obtain appointment of a Chapter 11 Trustee. It also asserts that Counsel proceeded to pursue the appointment of a Trustee without the Committee's authorization.

The U.S. Trustee comments that Counsel must show that the services provided were reasonably related to the functions of the Committee described in 1103(c).

Augie Masciotra testified at the hearing on behalf of Debtor. He stated that the Committee and Counsel made statements to the media meant to harass and embarrass Debtor and its directors. He stated that Attorney Fiegen called Masciotra a lightning rod for critics and imparted the idea that passage of the referendum would only benefit the "fat cats" of the community.

Committee member Jerry Maifeld testified on behalf of the Committee. He stated that all of Counsel's activity was authorized by the Committee.

Subsequent to the hearing, Debtor provided copies of Counsel's fees statements with yellow highlighting showing the specific entries to which its objections are directed. A review of the highlighted entries indicates that Debtor mainly objects to Counsel's involvement in the following general areas: 1) objecting to incurring secured debt in April 1994; 2) communications with Lady Luck and Concorde Gaming representatives regarding a management agreement; 3) drafting a motion for appointment of Chapter 11 Trustee in June 1994; 4) formulating a plan of reorganization in July 1994, including disclosure statement and report on claims, based on negotiations with Concorde Gaming and objecting to Debtor's Plan; 5) opposing revocation of Debtor's racing license; 6) investigating whether bonds and mortgages given by Debtor were correctly authorized by corporate resolution; and 7) moving for appointment of Chapter 11 Trustee in March 1995.

Counsel sent the undersigned a seven-page letter which states that it is intended to serve as a brief in support of the fee application.

### **CONCLUSIONS OF LAW**

The Official Unsecured Creditors Committee was appointed pursuant to 11 U.S.C. 1102(a). Counsel was appointed attorney for the Committee with court approval pursuant to 1103(a). Under 330(a)(1), the Court may award "reasonable compensation for actual, necessary services" rendered by professional persons employed under 1103.

The fee applicant bears the burden to prove necessity and reasonableness of fees under 330(a)(1). In re Tak Communications, Inc., 154 B.R. 514, 517 (Bankr. W.D. Wis. 1993). Legal services rendered on behalf of a committee are necessary if they are rendered in furtherance of the committee's duties under 1103(c). In re Gulf USA Corp., 171 B.R. 379, 382 (Bankr. D. Idaho 1994); In re Heck's Properties, Inc., 151 B.R. 739, 745 (S.D.W. Va. 1992). Section 1103(c) states

(c) A committee appointed under section 1102 of this title may --

(1) consult with the trustee or debtor in possession concerning the administration of the case;

(2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(3) participate in the formulation of a plan, advise those represented by such committee of such committee's determination as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;

(4) request the appointment of a trustee or examiner under section 1104 of this title; and

(5) perform such other services as are in the interest of those represented.

Thus, the 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. In re Cumberland Farms, Inc., 154 B.R. 9, 12 (Bankr. D. Mass. 1993). These functions are intimately tied to promoting the economic interests of the committee members. Pettibone, 74 B.R. at 309.

In performing these functions, a committee is entitled to seek administration of the bankruptcy estate in a manner different than that favored by the trustee or debtor-in-possession. In re Lifschultz Fast Freight, Inc., 140 B.R. 482, 488 (Bankr. N.D. Ill. 1992). A committee acts within its statutory authority to seek appointment of a Chapter 11 Trustee as specifically provided in 1103(c)(4). Heck's Properties, 151 B.R. at 757. Participation in formulation of a plan of reorganization and advising creditors of its determination regarding any plan formulated are perhaps a committee's most important functions. In re Wire Cloth Prods., Inc., 130 B.R. 798, 812 (Bankr. N.D. Ill. 1991).

Although committee functions are broad and important, committees do not act in the capacity of "Grand Overseer" over every Chapter 11 case. Pettibone, 74 B.R. at 309. Counsel must limit the issues deemed necessary to investigate and not become overly involved in the case. Cumberland Farms, 154 B.R. at 12. 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. Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc., 924 F.2d 955, 959 (9th Cir. 1991). The value of the services must be viewed with the benefit of hindsight and must be reasonable in light of the outcome. In re Wang Labs., Inc., 149 B.R. 1, 4 (Bankr. D. Mass. 1992).

Allowance of fees for a committee's attorney lies within the sound discretion of the bankruptcy court. Puget Sound, 924 F.2d at 957. Such discretion is exercised with an eye toward balancing the two policies underlying 330: economizing in the interest of the estate while encouraging qualified lawyers to take bankruptcy cases. Tak Communications, 154 B.R. at 516.

The Court has reviewed Counsel's fee applications in light of the foregoing with special focus on each of the delineated categories of Counsel's services to which Debtor objects. The Court initially concludes that Counsel did not act without authorization by the Committee based on testimony by a member of the Committee at the hearing. As to whether Counsel's services were "necessary" under 330(a), it appears to the Court that the Committee has acted within its authority to investigate the conduct of Debtor, to work toward formulation of a plan and to promote the economic interests of the unsecured creditors.

Members of the Committee were familiar with members of Debtor's Board of Directors. Their concerns regarding the conduct of Debtor's Board members in formulating a plan were reflected in Counsel's negotiations with competing gaming companies in an attempt to propose a competing plan of reorganization. Counsel's efforts were helpful in retaining Debtor's license which arguably improved Debtor's chances for reorganization. The Committee is expressly authorized to investigate potential insider causes of action and request appointment of a trustee. On this record, the court has no adequate factual basis to conclude that Committee efforts were motivated by improper rather than legitimate purposes. See Heck's Properties, 151 B.R. at 757.

Debtor specifically objects to the increase in the hourly rate charged by Attorney Tom Fiegen from \$100 to \$120 per hour. Generally, in reviewing fee applications, the Court calculates the lodestar amount by considering the hours expended by the attorneys and estimating the reasonable time required to perform the compensable services. In re Snook, No. 92-62249LW, slip op. at 3 (Bankr. N.D. Iowa Jan. 11, 1994). The Court then multiplies the number of hours reasonably expended by a reasonable hourly rate. In re Apex Oil Co., 960 F.2d 728, 731 (8th Cir. 1992).

Debtor's objection appears to be directed at the reasonableness of Attorney Fiegen's new hourly rate of \$120. In In re Hunt's Health Care, Inc., 161 B.R. 971, 982 (Bankr. N.D. Ind. 1993), a creditor objected to trustee's counsel increasing hourly rates during the pendency of a case. The court overruled the objection as there was no evidence that the rates charged, either before or after the increase, were not reasonable or that it was not appropriate for counsel to increase its hourly rates. Id. In another case, a bankruptcy court's denial of increased fees was found to be clearly erroneous. Heck's Properties, 151 B.R. at 754. The district court stated that the case had progressed over two and one-half years and the billing rates for two associates would be expected to increase during that period. Id. Another court, however, has stated that the assumption that the passage of time alone warrants an automatic increase in counsel's hourly rate is unacceptable in a bankruptcy context. In re First Software, Corp., 79 B.R. 108, 119 (Bankr. D. Mass. 1987).

The Court concludes, in the exercise of its discretion and applying its personal knowledge of legal fees in this district, that Counsel's increase of Attorney Fiegen's hourly rate is not unreasonable or inappropriate. This case is fairly complex and longstanding. The rate of \$120 per hour for an attorney

of Mr. Fiegen's experience rendering services such as those required in this case is acceptable.

Debtor objects to Counsel charging \$1.00 per page for fax transmissions and \$.30 per page for fax receipts. Courts have acknowledged in recent years that communication by facsimile transmissions has become "a way of life." In re Nephi Rubber Prods. Corp., 146 B.R. 782, 783 (Bankr. N.D. Ind. 1992). They differ, however, in deciding how to compensate for the expense of faxes.

In Nephi Rubber, the court allowed reimbursement for outgoing facsimile transmissions at the amount of the telephone call charge or, if such amount is not readily determinable, \$1.00 per page for domestic and \$2.00 per page for international transmissions. Id. at 784. The court did not allow reimbursement of incoming facsimile transmissions reasoning that the cost of receiving the transmissions is de minimis. Id. Another court decided to allow reimbursement for outgoing fax expenses at the actual cost of the telephone call, or, if telephone logs are not maintained, at \$.15 per page. In re Almacs, Inc., 178 B.R. 598, 605 (Bankr. D.R.I. 1995). Incoming faxes were reimbursed at a flat rate of \$.20 per page. Id. In In re CF & I Fabricators, Inc., 131 B.R. 474, 494 (Bankr. D. Utah 1991), the court concluded that charges for faxes would be reimbursed only at the actual cost, i.e. the cost of the telephone call for outgoing faxes and the actual cost of paper, toner or ink for incoming faxes.

In the interest of reasonableness, the Court concludes that fax transmissions and receipts should be billed according to their actual cost. This Court has previously stated, in reviewing a fee application submitted by Childers & Fiegen, that there is no reason for charging more to receive a fax than to photocopy a document. In re Reil, No. 92-00860W, slip op. at 3 (Bankr. N.D. Iowa June 27, 1994). Therefore, a flat rate of \$.25 for fax receipts will be allowed as reflecting the actual costs of paper and toner or ink.

The actual cost of an outgoing fax is the cost of the telephone call. If the cost of the telephone call for outgoing faxes is not readily discernable, a flat rate of \$.25 per page would be acceptable as reasonably related to the amount of postage that would be required if the communication was made by mail rather than by fax. Counsel should modify its billing system and recompute the expenses charged for faxes to conform with Reil and this decision.

**WHEREFORE**, the Second Interim Application of Childers & Fiegen, P.C., Counsel for Official Committee of Unsecured Creditors, for Approval of Compensation of Attorneys' Fees and Expenses is APPROVED in part and DENIED in part.

**FURTHER**, fees for legal services as set out in the Application are APPROVED.

**FURTHER**, Counsel shall recompute charges for fax transmissions and receipts in accordance with this decision.

**FURTHER**, the remainder of expenses listed in the Application are APPROVED.

**SO ORDERED** this 28th day of November, 1995.

Paul J. Kilburg

U.S. Bankruptcy Judge