

In the United States Bankruptcy Court

for the Northern District of Iowa

STRAYER SEED FARMS INC.

Debtor(s).

Bankruptcy No. 95-62081KW

Chapter 11

ORDER RE MOTION TO EMPLOY ATTORNEY FOR UNSECURED CREDITORS COMMITTEE

This matter came on for hearing before the undersigned on January 3, 1996 on the Creditors' Committee's Application to Employ Counsel. The following attorneys appeared of record: Michael Dunbar for Debtor Strayer Seed Farms, Inc.; Terry Gibson for Unsecured Creditors Committee; Gerald Monk for Lincoln Savings Bank of Reinbeck; Tom McCuskey for Various Creditors; Eric Lam as Examiner; Wes Huisinga for Prairie Land Cooperative; and Steve Moline from the Iowa Attorney General's Office. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

STATEMENT OF THE CASE

The Unsecured Creditors Committee requests approval of appointment of Attorney Terry Gibson from Des Moines as counsel for the Committee. Mr. Gibson previously filed an appearance on behalf of Creditor Donald Anderson who is listed as a priority, unsecured creditor owed between \$25,000 and \$30,000. After being requested to represent the Committee in this case, Gibson withdrew as counsel for Anderson.

Debtor resists appointment of Gibson as attorney for the Unsecured Creditors Committee. It asserts that Gibson's previous appearance on behalf of Anderson constitutes an actual conflict of interest. Gibson responds that no actual conflict exists and asserts that Debtor does not have standing to raise the issues in its resistance.

Also at issue, though not discussed at great length at the hearing, is Gibson's request that the Court approve his employment beginning 11/30/95 at a rate of \$85.00 per hour with a retainer of \$10,000 from Debtor's debtor-in-possession account.

CONCLUSIONS OF LAW

The Official Unsecured Creditors Committee was appointed pursuant to 11 U.S.C. § 1102(a). It requests approval of appointment of Terry Gibson as attorney for the Committee pursuant to § 1103(a). When a conflict of interest is alleged, the Court must construe § 1103(b) which states:

An attorney or accountant employed to represent a committee appointed under section 1102 of this title may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case. Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest.

11 U.S.C. § 1103(b). In alleging a conflict of interest, Debtor has the burden to show that employment of Attorney Gibson would result in his representation of adverse interests, i.e. the Committee and an individual creditor, in a situation with a demonstrated conflict. In re Electrical Materials Co., 160 B.R. 1016, 1018 (Bankr. W.D. Mo. 1993).

Simultaneous representation by an attorney of a committee and an individual creditor of the same class is permissible under § 1103(b) unless the creditor presses litigation on issues potentially adverse to others on the committee. In re

Whitman, 101 B.R. 37, 38 (Bankr. N.D. Ind. 1989). Where actual and irreconcilable conflicts of interests exist in such dual representation, the attorney must cease representation of one client or the other. Id. at 39.

Two considerations underlie the prohibition against simultaneous representation: 1) concern over potential for diminished vigor of a lawyer's representation to avoid antagonizing the other client and 2) the client's expectation of receiving the undivided loyalty of the lawyer. In re Oliver's Stores, Inc., 79 B.R. 588, 594 (Bankr. D.N.J. 1987). The Court must ask if a conflict is likely to arise and, if so, the integrity of the committee process should be protected. Id. Courts have stated that the purpose of § 1103(b) is to not only prevent potential conflicts of interest but also to avoid the appearance of impropriety. Id. at 595-96. "The integrity of the bankruptcy system demands that the professionals serving the committee not place themselves in a situation where their independence, loyalty and integrity can be questioned by the unsecured creditor body whom they represent." Id. at 597.

In this case, Attorney Gibson's withdrawal from representation of Creditor Anderson eliminates the potential for Gibson to be in the position of representing an interest adverse to the Committee's interest. As indicated during the hearing, the Court has concerns about the appearance of impropriety and possible conflicts of loyalty arising from Attorney Gibson's withdrawing from representing a creditor in order to represent the Committee. This, however, appears to be sanctioned by the Bankruptcy Code and not per se objectionable. The Court is confident that Attorney Gibson will not give the Committee reason to question his loyalty.

The Unsecured Creditors Committee requests approval of a \$10,000 retainer from Debtor's funds and a rate of \$85 per hour for Gibson's services. Allowance of fees for a committee's attorney lies within the sound discretion of the bankruptcy court. Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc., 924 F.2d 955, 957 (9th Cir. 1991). 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. In re Tak Communications, Inc., 154 B.R. 514, 516 (Bankr. W.D. Wis. 1993). Generally, when 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 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). This calculation occurs after services are rendered and after an application for approval of fees pursuant to §§ 330 or 331 is submitted to the Court.

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); 11 U.S.C. § 1103(c). These functions are intimately tied to promoting the economic interests of the committee members. In re Pettibone, 74 B.R. 293, 309 (Bankr. N.D. Ill. 1987). Although committee functions are fairly broad and important, committees do not act as some sort of "Grand Overseer" over every Chapter 11 case. Id. 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. This is especially true where, as here, a trustee or examiner is appointed under § 1104 as the duties of that individual greatly overlap the functions of a committee. Compare 11 U.S.C. § 1103(c) with § 1106.

The Court concludes that a retainer of \$5,000 for the services of Attorney Gibson as counsel for the Unsecured Creditors Committee is appropriate in this case. No ruling will be made at this time approving Gibson's hourly rate. Such determination must await the Court's lodestar analysis upon application for payment of fees.

WHEREFORE, the Creditors' Committee's Application to Employ Counsel is APPROVED in part and DENIED in part.

FURTHER, appointment of Attorney Terry Gibson as counsel for the Unsecured Creditors Committee is APPROVED as of November 30, 1995.

FURTHER, the payment of a post-petition retainer of \$5,000 to Attorney Gibson is APPROVED. The Court will reserve approval of Attorney Gibson's hourly rate until consideration of an application for payment of fees.

SO ORDERED this 9th day of January, 1996.

Paul J. Kilburg
U.S. Bankruptcy Judge