

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

FILED
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CLERK

In re:)	Chapter 11	BY _____ DEPUTY
)		
MISSISSIPPI CHEMICAL CORPORATION, <i>et al.</i>)	Case Nos. 03-02984-WEE	
)	(Jointly Administered)	
)		
Debtors.)	Hon. Edward Ellington	
)		

**OBJECTION OF HARRIS TRUST AND SAVINGS BANK, AS ADMINISTRATIVE AGENT,
TO APPLICATION TO EMPLOY GORDIAN GROUP, L.L.C.**

This Objection is filed by Harris Trust and Savings Bank, as Administrative Agent (the "Agent") for both the Debtors' Amended and Restated Credit Agreement dated as of November 15, 2002 (the "*Pre-Petition Credit Agreement*") and the Post-Petition Credit Agreement (the "*DIP Credit Agreement*") approved on an interim basis by this Court on May 16, 2003, on behalf of the lenders under both the Pre-Petition Credit Agreement (the "*Pre-Petition Lenders*") and the DIP Credit Agreement (the "*DIP Lenders*" and, together with the Pre-Petition Lenders, the "*Lenders*"). This Objection is made on a limited basis to the Debtors' Application to Employ Gordian Group, L.L.C. ("*Gordian*") as Restructuring and Financial Advisors for Debtors and Debtors-in-Possession (the "*Application*").

The principal basis of this Objection is that Gordian did not provide the requisite services which might otherwise entitle it to payment of a fee in connection with the Debtors' formulation of and entry into the DIP Credit Agreement or other financial transaction services. More generally, the Agent objects to the Application on the grounds that Gordian may claim an "Additional Fee" (as defined herein) in connection with various financial transactions which

were not contemplated at the time the Debtors entered its engagement with Gordian. In addition, the Agent objects to the Debtors' indemnification of Gordian and its affiliates from claims arising from the engagement.

Since filing their Chapter 11 petitions, the Debtors are currently giving serious consideration to changing their basic business plan as a consequence of volatile gas prices and diminished fertilizer demand. Concurrently, they are discussing with the Lenders a new budget to support revised usage of cash collateral and borrowing needs under the DIP Credit Agreement. Such potential modifications to the manner of conducting their businesses and managing their assets represents a significant departure from the premises upon which the terms of the Gordian engagement were based. The basic services as a financial advisor to the Debtors at a monthly fee of \$150,000 is not objectionable, subject to court approval. However, pre-authorization of additional fees for other financial transaction services, such as debtor-in-possession financing, restructuring, asset sale or other transactions, should be deferred pending development of a revised business plan and budget and final approval of the DIP Financing Order and should be subject to review on a transaction-by-transaction basis.

BACKGROUND

1. The Debtors each filed voluntary Chapter 11 petitions on May 15, 2003 (the "*Petition Date*"). Since then, the Debtors have continued to operate their businesses and manage their assets as debtors-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code, 11 U.S.C §§ 101-1330 (the "*Bankruptcy Code*").

2. Almost eight months prior to the Petition Date, the Debtors engaged Gordian to provide financial advisory services in connection with (a) a potential restructuring of the Debtors' long term debt, including *inter alia* the Pre-Petition Credit Agreement, (b) raising new

or replacement capital, (c) any business combination¹ of the Debtors with another entity or any sale of assets of the Debtors and (d) obtaining debtor-in-possession financing (each, a “*Financial Transaction*”). Engagement Agreement dated September 24, 2002 (the “*Original Engagement Agreement*”) annexed to the Supplemental Affidavit dated June 23, 2003 (the “*Supplemental Affidavit*”) of Peter S. Kaufman in Support of the Application, and Engagement Agreement² dated December 20, 2002 (the “*Engagement Agreement*”) annexed to the Application.

3. Among the services to be provided by Gordian in connection with a proposed Financial Transaction pursuant to the Engagement Agreement are the following:

- (i) evaluating and developing a strategy;
- (ii) representing the Debtors in discussions and negotiations with third parties;
- (iii) negotiating and structuring the financial aspects;
- (iv) assisting in obtaining funding; and
- (v) preparing transaction documents.

(collectively, the “*Services*”). Engagement Agreement, page 2.

4. For these Services, Gordian is to be paid the following non-refundable fees: (a) \$150,000 each month, payable in advance (“*Monthly Fees*”) and (b) an additional fee (“*Additional Fee*”) equal to 1.5% of the principal amount or purchase price of any Financial Transaction effected, subject to an aggregate cap of \$4,000,000. *Id.*

5. In late April, 2003, the Debtors commenced negotiations with the Agent and DIP Lenders respecting the DIP Credit Agreement in preparation for filing their Chapter 11 petitions. These culminated in the execution of the DIP Credit Agreement on or about the Petition Date.

¹ A business combination includes a “merger, consolidation, reorganization, recapitalization, joint venture, or other business combination or sale of assets of the [Debtors] or the acquisition of substantially all or a portion of the assets or outstanding securities of another entity.” Engagement Agreement, page 1.

² The Engagement Agreement superceded the Original Engagement Agreement. Supplemental Affidavit, paragraph 5. The Engagement Agreement added the obtaining of debtor-in-possession financing to the definition of Financial Transactions as initially provided in the Original Engagement Agreement.

6. Gordian did not participate directly in these negotiations with the Agent or become directly involved with the Agent in the preparation of any documentation respecting the DIP Credit Agreement. Although the Agent understands that Gordian may have provided some financial analysis and other support to the Debtors during the period of these negotiations which may have indirectly impacted the provisions of the DIP Credit Agreement, the Agent nonetheless believes that Gordian did not meet the scope of Services which should be provided in connection with this Financial Transaction as set forth in the Engagement Agreement.

7. Strict application of the fee arrangements provided in the Engagement Agreement to the \$37,500,000 DIP Credit Agreement would result in a \$562,500 Additional Fee payable to Gordian. The Agent objects to inclusion of this Additional Fee in the compensation requested for approval by Gordian in the Application.

8. In addition, the Agent objects to including any business adjustment, such as a sale of assets, of the Debtors as a Financial Transaction for which Gordian might claim an Additional Fee. At this time, it is unclear whether the Debtors may decide to sell significant assets, or even one or more of their business components, as part of their reorganization. The Agent and its financial advisor have been considering several options with the Debtors. The Agent believes that the Debtors possess the business acumen to explore future business plans, restructurings, refinancings and asset disposition alternatives without reliance upon the participation of Gordian beyond the Services provided for the \$150,000 Monthly Fee. Also, the Agent recognizes that revisions to the Debtors' business plan may involve the future engagement of specialized advisors to assist in implementing a new structure, so that services of Gordian may become duplicative. Gordian should not be entitled to claim Additional Fees unless a specific transaction is presented to the Court and the fees are determined at that time.

ARGUMENT

I. Compensation Must Be On Reasonable Terms and Conditions.

9. Section 327 of the Bankruptcy Code authorizes the Debtors to employ, with the Court's approval, professionals³ to represent or perform services for the estate. Section 328 sets forth certain limitations on the compensation allowable to professionals employed under Section 327. Specifically, the employment may be on "on any *reasonable* terms and conditions ...including on a retainer, on an hourly basis or on a contingent fee basis." 11 U.S.C. § 328(a) (emphasis supplied). The Bankruptcy Code does not limit the methodology of compensation, but it does require that, whatever the methodology, it must be reasonable.

10. This reasonableness requirement is emphasized again in Section 330 of the Bankruptcy Code, which authorizes the Court to award "reasonable compensation for actual, necessary services rendered" by professional persons to the estate. 11 U.S.C. § 330(a)(1). Section 330 also provides guidelines to a determination of reasonable compensation. Courts are directed to

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 ...; and
- (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners ...

³ The professional must be disinterested and must not hold an interest adverse to the estate 11 U.S.C. § 327(a).

11 U.S.C. § 330(a)(3).

11. None of these factors for reasonableness are favorably presented by Gordian in requesting an Additional Fee in connection with the DIP Credit Agreement. In fact the opposite is true. It appears to the Agent that Gordian spent little time on the DIP Credit Agreement, for which it requests a significant fee of over \$562,000. Overall, the value of the services to the estates from the purportedly minimal participation of Gordian in the post-petition financing process is nominal. (The work Gordian performed was as a financial advisor to the Debtors, not as a placement agent for the DIP Credit Agreement.) The Additional Fee generally requested by Gordian does not satisfy the determination of reasonableness required by both Sections 328 and 330. Any such fee should be determined on a transaction by transaction basis .

12. The Agent expects that the same rationale will also be applicable to any restructuring, refinancing or asset sale. The Agent foresees a restructuring, refinancing or asset disposition process in which the participation of Gordian will need to be defined in the future. At the time of entering the Pre-Petition Credit Agreement in late 2002, which was about the same time Gordian's Engagement Agreement was entered, it did not appear that the Debtors' financial problems would be best resolved by significant asset dispositions, or even a major restructuring in bankruptcy. This may no longer be the working assumption.

13. Section 328(a) recognizes that contractual terms of employment may turn out to impose an unfair and improper burden on the estate:

the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

This is the situation with the Gordian Engagement Agreement with respect to any restructuring, business contraction, refinancing or asset sales. For example, the terms and conditions which promise Gordian an Additional Fee for asset sales were formulated during a period when the Debtors did not foresee any meaningful dispositions of assets. Indeed, the Debtors added to their asset base when they bought Melamine Chemicals, Inc. in April, 2003, just one month prior to the Petition Date. Surely, the Debtors did not anticipate that asset dispositions, or a business contraction, restructuring or refinancing, would potentially comprise a significant element of their business plans. The provisions of the Engagement Agreement which bestow an Additional Fee on Gordian for such services were clearly improvident in light of changed circumstances of the Debtors now. Accordingly, the Court should not at this time allow Gordian to be compensated with Additional Fees for any and all Financial Transactions as part of the Engagement Agreement.

II. The Court Cannot Allow Compensation That Is Unreasonable.

14. Section 330 directs that when compensation is not reasonable, it *shall not* be allowable. Section 330(a)(4) mandates that:

the court shall not allow compensation for

(a) unnecessary duplication of services; or

(b) services that were not

(i) reasonably likely to benefit the debtor's estate or

(ii) necessary to the administration of the case.

The negotiation, structuring and documentation Services, to the extent any were rendered by Gordian in connection with the DIP Credit Agreement or would be rendered in connection with other Financial Transactions, may be both duplicative of the achievements of the Debtors themselves together with the Agent and others and, therefore, not of benefit the estates. Pursuant to § 330, the Additional Fee cannot be allowed by the Court. *In re Jastrem*, 253 F.3d 438 (9th

Cir. 2001)(it is not an abuse of discretion for a bankruptcy court to reduce a professional fee from the amount contractually specified with the debtor when the professional provided minimal work). *See also, In re Mailman Steam Carpet Cleaning Corp.*, 212 F.3d 632 (4th Cir.), *cert denied*, 531 U.S. 960 (2000)(a court properly refuses to enforce an attorney's fee agreement providing for a contingency fee in excess of that allowed by state ethical canons); *In re Engel*, 124 F.3d 567 (3d Cir. 1997)(even after approving retention under Section 327, the court has the authority to alter or deny fees if no benefit resulted to the estate from the retention); *Zolfo, Cooper & Co. v. Sunbeam-Oster Co.*, 50 F.3d 253 (3d Cir. 1995)(a bankruptcy court order authorizing retention of a professional only establishes the nature and range of services and does not bind allowance of particular terms and conditions of compensation).

15. The unreasonableness of the Additional Fee is heightened by the fact that Gordian proposes not to submit any fee applications for allowance by the Court. Gordian argues that it does not maintain hourly billing records because advisors providing investment banking services are not customarily compensated on that basis. It also argues that it need not maintain complete and detailed descriptions of all activities provided as part of its Services because to do so would reduce the timeliness and efficiency of providing its Services.

16. The Agent disagrees. The Agent believes that the normal requirements for allowance of fees should not be waived in connection with either the DIP Credit Agreement or other Financial Transactions. Gordian should be required to substantiate its entitlement to an Additional Fee by demonstrating the benefits provided in a clear and precise statement. Gordian's request to waive such typical requirements only underscores their inability to justify having bestowed any benefit on the estates by the extent of their participation in the post-petition financing process. In equity Gordian should not be freed of accountability for entitlement to fees

for future Financial Transactions in which they do not play a significant role. Gordian's Monthly Fee will adequately compensate continuing baseline financial Services. Any Additional Fee should be considered and decided on a case-by-case and transaction-by-transaction basis when an actual transaction is to be approved by the Court.

17. Gordian and the Debtors request that the retention Application be reviewed by the Bankruptcy Court under Section 328(a) of the Bankruptcy Code. *See, Circle K Corp. v. Hamilton, Lokey, Howard, & Zukin, Inc. (In re Circle K Corp.)*, 279 F.3d 669 (9th Cir. 2001), *cert denied*, 122 S.Ct.. 2663 (2002)(unless the retention application unambiguously specifies that approval is pursuant to Section 328, the professional's fees are reviewable for reasonableness under Section 330). Thereby, Gordian would obviate not only filing fee applications subject to approval of the Court, but also would forego any review of the compensation by third parties, such as the Agent. Although this may be appropriate for the Monthly Fee, any Additional Fee should remain subject to scrutiny by the Court and interested parties for providing at least some reasonable benefit to the estate. If the Court approves the Application as submitted, this will be the only opportunity the Agent has to object to any component of the Additional Fees provided for in the Engagement Agreement.

III. The Debtors' Indemnification of Gordian Should be Struck.

18. Pages 6 and 7 of the Engagement Agreement contain detailed provisions for a comprehensive indemnification and hold harmless of Gordian, its affiliates and their respective members, partners, officers, directors, employees, controlling persons, representatives and agents from all liability "arising out of Gordian's engagement under this Agreement or any transaction or conduct in connection therewith" unless resulting from Gordian's gross negligence or willful misconduct in performing the services. This is a very broad indemnity which is not limited in

dollar amount or any other manner. It also provides a very high standard (gross negligence) of inappropriate conduct by Gordian to cancel out the Debtors' liability. This indemnity is a high-cost element of Gordian's engagement, for which value is questionable. The Agent believes this indemnity requirement should be struck from the Engagement Agreement.

CONCLUSION

18. For the reasons set forth above, the Agent objects to entry of an Order approving the Application of Gordian Group, L.L.C. to the extent it authorizes an Additional Fee to Gordian for any financial restructure, refinancing, debtor-in-possession financing, business combination, reorganization, asset sale or similar or other Financial Transaction. Such should be decided when an actual final deal is presented to the Court. The Agent also objects to the indemnification provision in the Engagement Agreement. The Agent does not object to the Debtors' retaining Gordian as financial advisor at the \$150,000 Monthly Fee.

Respectfully submitted,

HARRIS TRUST AND SAVINGS BANK, not
individually but solely as Administrative
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By: 

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CERTIFICATE OF SERVICE


I do hereby certify that I have this date sent a true and correct copy of the above and foregoing pleading to all parties listed below as well as to all parties on the Fourth amended Shortened Service List, a copy of which is attached hereto:

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SO CERTIFIED, this, the 27th day of June, 2003.



Jetson G. Hollingsworth

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

FILED

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In re:)
)
MISSISSIPPI CHEMICAL)
CORPORATION, *et al.*¹)
)
Debtors.)
)

CASE NO. 03-02984-BWEE DEPUTY
Chapter 11
Jointly Administered

FOURTH AMENDED SHORTENED SERVICE LIST FILED JUNE 18, 2003

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¹ The Debtors are the following entities: Mississippi Chemical Corporation; Mississippi Nitrogen, Inc.; MissChem Nitrogen, L.L.C.; Mississippi Chemical Company, L.P.; Mississippi Chemical Management Company; Mississippi Phosphates Corporation; Mississippi Potash, Inc.; Eddy Potash, Inc.; Triad Nitrogen, L.L.C.; and Melamine Chemicals, Inc.

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