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

In re:	§	
MISSISSIPPI CHEMICAL CORPORATION, *et al.*	§	Case No. 3-03-2984 (WEE)
	§	Chapter 11
DEBTORS.	§	Jointly Administered
	§	

RESPONSE TO OBJECTION OF HARRIS TRUST AND SAVINGS BANK TO DEBTORS' APPLICATION TO EMPLOY GORDIAN GROUP, L.L.C. AS RESTRUCTURING AND FINANCIAL ADVISORS

TO THE HONORABLE EDWARD ELLINGTON,
UNITED STATES BANKRUPTCY JUDGE:

Gordian Group, L.L.C. ("Gordian"), appearing by and through its counsel of record, submits this response to the *Objection of Harris Trust and Savings Bank, as Administrative Agent, to Application to Employ Gordian Group, L.L.C.* (the "Objection"), filed on June 27, 2003 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 and the DIP Credit Agreement (together, the "Lenders"). In the Objection, the Agent asserts a limited objection to the Debtors' *Application to Employ Gordian Group, L.L.C. as Restructuring and Financial Advisors for Debtors and Debtors-in-Possession* (the "Application"). In response to the Agent's Objection, Gordian would respectfully show as follows:

I.

BACKGROUND

1. On May 15, 2003 (the "Petition Date") the Debtors each filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). Since the Petition Date, the Debtors have continued to operate and manage their businesses as debtors-in-possession pursuant to Bankruptcy Code Sections 1107(a) and 1108.

2. Prior to the commencement of these Chapter 11 cases, Gordian was actively assisting the Debtors as financial advisor. The Debtors initially retained Gordian pursuant to a letter agreement dated September 24, 2002 (the "September Agreement").[1] In the September Agreement, the Debtors asked Gordian to (i) assist in the financial restructuring of the Debtors' debt structure, (ii) raise new or replacement capital for the Debtors, or (iii) provide financial advisory services regarding any 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 (in one or a series of transaction, each a "Financial Transaction").

3. For its services under the September Agreement, the Debtors agreed to pay Gordian a monthly advisory fee of $150,000 (the "Monthly Fee"). (September Agreement, p. 3.) The Debtors also agreed to pay Gordian an additional fee of 1.5% of the principal amount or purchase price of any Financial Transaction effected (the "Additional Fee"). (September Agreement, p. 3.) The Debtors also agreed to indemnify Gordian from losses, claims, expenses,

[1] See September 24, 2002 letter agreement, attached as Exhibit "1" to the *Supplemental Affidavit of Peter S. Kaufman in Support of the Debtors' Application to Employ Gordian Group, L.L.C. as Financial Advisor Pursuant to Bankruptcy Code Sections 327 and 328(a).*

damages or liabilities "except to the extent that any such loss, claim, expense, damage or liability is finally judicially determined to have resulted from the gross negligence or willful misconduct of Gordian." (September Agreement, p. 5.)

4. The Debtors subsequently broadened the scope of Gordian's pre-Petition Date services when, pursuant to an October 14, 2002 letter agreement (the "October Agreement"), the Debtors asked Gordian to assist the Debtors "with respect to obtaining debtor-in-possession financing."[2] In the October Agreement, the Debtors agreed that such debtor-in-possession financing ("DIP Financing") would constitute a "Financial Transaction" as that term was defined in the September Agreement and would, thereby, entitle Gordian to the 1.5% Additional Fee on the principal amount of the DIP Financing.

5. As the Debtors' financial condition worsened and a bankruptcy filing appeared imminent, the Debtors and Gordian again addressed the terms and conditions of Gordian's retention as financial advisors. In a letter agreement dated December 20, 2002 (the "December Agreement") the Debtors requested that the Debtors continue to provide the financial advisory services set forth in the September and October Agreements, including Gordian's assistance in obtaining DIP Financing.[3] For those services, the Debtors again agreed to pay Gordian the $150,000 Monthly Fee and 1.5% Additional Fee set forth in the earlier agreements.

6. The Debtors' filed their respective bankruptcy petitions on May 15, 2003. The following day, the Debtors filed the Application and asked that the Court approve the retention

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[2] See October 14, 2002 engagement letter, attached as Exhibit "2" to the *Supplemental Affidavit of Peter S. Kaufman in Support of the Debtors' Application to Employ Gordian Group, L.L.C. as Financial Advisor Pursuant to Bankruptcy Code Sections 327 and 328(a).*

[3] A copy of the December Agreement is attached to the Debtors' Application as Exhibit "A."

of Gordian as the Debtors' restructuring and financial advisor in these bankruptcy cases pursuant to the terms and conditions of the December Agreement.

7. The Agent filed its "limited" Objection on June 27, 2003 -- the deadline to file objections to the Application. In its Objection, the Agent asserts three arguments against the Court's approval of the Application. First, the Agent asserts that Gordian did not provide the requisite services to entitle it to compensation for services relating to the negotiation of the Debtors' DIP Credit Agreement. Second, the Agent asserts that Gordian should not be entitled to the Additional Fee in connection with various financial transactions that the Agent (wrongly) asserts "were not contemplated at the time the Debtors entered its (sic) engagement with Gordian," and do not, therefore, constitute "reasonable" terms and conditions for Gordian's retention as required by Bankruptcy Code Section 328(a). (Objection, p. 1.) Finally, the Agent objects to the Debtors' proposed indemnification of Gordian and its affiliates from claims arising from the engagement.

8. For the reasons set forth below the Agent's Objection should be denied.

II.

ARGUMENT AND AUTHORITY

9. Gordian believes that the terms and conditions of its retention as restructuring and financial advisor to the Debtors are "reasonable" within the context of Bankruptcy Code Sections 328(a) and 330(a), and that the Agent's objections to Gordian's retention should be denied.

A. Gordian is Entitled to Compensation for its Contributions to the DIP Financing.

10. Gordian is undoubtedly entitled to compensation for providing services regarding the DIP Financing. As will be shown at the hearing on this matter, Gordian's professionals were extremely active in (i) identifying and soliciting sources of DIP Financing, (ii) providing financial modeling necessary to support the DIP negotiations, and (iii) negotiating and assisting the Debtor in securing the interim DIP Credit Agreement.

11. It is also unreasonable for the Agent to ask Gordian to justify its fees as to one aspect of Gordian's retention, when the fee negotiated by Gordian and the Debtors contemplated a "basket" of services. It is common in bankruptcy cases for financial advisors to be retained to provide a variety of services, and to be compensated for those services on either a percentage or flat fee basis. The Agent does not point to any case in which a financial advisor's fee is negotiated "a la carte."

12. From the time the Debtors and Gordian entered into the October Agreement, Gordian operated under the assumption that it would be paid for assisting the Debtors in obtaining debtor-in-possession financing. The December Agreement again called for Gordian to be compensated for its assistance to the Debtors in obtaining debtor-in-possession financing.

13. The Debtors' Lenders have been aware of the terms and conditions of Gordian's retention, including its entitlement to an Additional Fee for arranging debtor-in-possession financing, since October 2002. The Agent's last minute attempt to avoid "paying the fiddler" for services already provided is unacceptable. The Agent's objection to this aspect of the Application should be denied.

B. The Services to be provided by Gordian Were Contemplated at the Time the Debtor Entered Into its Agreements with Gordian, and Gordian is Entitled to Compensation According to the Terms of those Agreements.

14. The Agent is simply wrong and unrealistic in its assertion that the scope of services required of Gordian has changed since the time of the December Agreement, and that Gordian is not entitled to the Additional Fee under the current circumstances.

15. To begin, the scope of Gordian's retention pursuant to the December Agreement was very broad, and contemplates "any merger, consolidation, reorganization, recapitalization, joint venture or other business combination or sale of assets of the company or the acquisition of substantially all or a portion of the assets or outstanding securities of another entity." (December Agreement, p. 1.) Both the Debtors and Gordian (an experienced financial advisor in bankruptcy cases) were well aware that a debtor's business and reorganization plans might change considerably in the course of a bankruptcy case. The scope of Gordian's retention under the December Agreement is, by necessity, broad and flexible, and encompasses virtually every activity undertaken by Gordian in these bankruptcy cases.

16. Equally troubling is the Agent's assertion that "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." (Objection, ¶ 8.) The Agent would be hard-pressed to find a financial advisor that would accept an engagement in which its compensation was not determined until such time that the deal was done, save for the bankruptcy court's approval. Such a compensation scheme would be akin to asking someone to paint a house with the understanding that "We'll decide how much we pay after you finish the job." The Agent's suggestion that Gordian's fees

should be decided at such time that a specific transaction is presented to the Court is unrealistic and unworkable. The Agent's Objection to that aspect of Gordian's retention should be denied.

17. The Agent also makes a misdirected argument that the terms and conditions of Gordian's retention are "improvident." (Objection, ¶ 13.) In fact, the improvidence standard relates to a professional's compensation after that professional has already been retained, and is not the appropriate standard to consider at the time of the professional's initial retention.

18. Bankruptcy Code Section 328 provides that a Debtor may employ or authorize the employment of a professional person "on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis" 11 U.S.C. § 328(a). *See, e.g., Donaldson Lufkin & Jenrette Securities Corp. v. National Gypsum Co.*, 123 F.3d 861 (5th Cir. 1997) (noting court may not revisit compensation of professional retained under Section 328 unless terms and conditions prove to be "improvident"). It will be shown at the hearing on this matter that the terms and conditions of Gordian's retention are "reasonable."

19. In general, the selection of a particular professional is within the sound business judgment of the debtor or trustee, and will not normally be upset. *In re Computer Learning Centers, Inc.*, 272 B.R. 897, 905 (Bankr. E.D. Va. 2001) (noting also that selection must be balanced with trustee's duty to properly manage estate assets efficiently, and expeditiously resolve the bankruptcy proceeding). Courts have found that a business judgment rule can be used to test the reasonableness of a proposed professional's employment terms. *See, e.g., In re Baltimore Emergency Services II, L.L.C.*, 291 B.R. 382, 384 (Bankr. D. Md. 2003); *see also United Artists Theatre Co., v. Walton (In re United Artists)*, 315 F.3d 217, 230-33 (3rd Cir. 2003)

(applying principles closely equating to business judgment rule in finding indemnification provision of financial advisor's retention to be "reasonable").

20. The Additional Fee negotiated by the Debtors with Gordian is completely in line with similar fees negotiated in other bankruptcy cases. Moreover, the Additional Fee was negotiated first with the Debtors, and then again with the Committee. Both parties are satisfied with the proposed terms of Gordian's retention, and both used their business judgment to determine that the fees Gordian will be paid are "reasonable" within the context of Bankruptcy Code Section 328. On the other hand, the Agent has offered no evidence to show that Gordian's proposed compensation is "unreasonable."

21. The Debtors used their business judgment in determining that the conditions of Gordian's retention are reasonable. The Agent's objection as to the reasonableness of Gordian's compensation is without support, and should be denied.

C. Indemnification of Financial Advisors in Bankruptcy Cases is Widely Accepted

22. The consensus of recent bankruptcy case authority is to approve indemnification of financial advisors. The most recent and persuasive case on this point is *United Artists Theatre Co. v. Walton (In re United Artists Theatre Co.)*, 315 F.3d 217 (3d Cir. 2003) (approving an indemnification provision protecting a Chapter 11 debtor's financial advisor from liability for ordinary negligence, but not for gross negligence or willful misconduct).

23. In *United Artists*, the Chapter 11 debtor filed an application to retain Houlihan Lokey Howard & Zukin Capital ("Houlihan Lokey") as its financial advisors. The proposed retention agreement contained an indemnification provision purporting to exempt Houlihan

Lokey from liability for its own ordinary negligence, as well as for its gross negligence and for contractual liability. More specifically, Houlihan Lokey's indemnification agreement provided that:

> The indemnification obligations hereunder shall not apply to any Losses that are finally judicially determined to have resulted from the gross negligence, bad faith, willful misfeasance, or reckless disregard of its obligations or duties on the part of Houlihan Lokey or such Indemnified Person.

In re United Artists Theatre Co., 315 F.3d 222 n.4.

24. The United States Trustee objected, claiming, *inter alia*, that the retention agreement exempted Houlihan Lokey from liability for its own negligence, "thus violating the Bankruptcy Code, public policy, and basic tenets of professionalism." *Id.* at 223. However, the district court rejected the U.S. Trustee's objections and approved the debtor's retention of Houlihan Lokey. *Id.* at 224.

25. The Third Circuit affirmed. The appellate court reasoned that the role of a financial advisor in a Chapter 11 case is very similar to the role of a corporate director in the ordinary corporate setting. *Id.* at 230-32. Because corporate directors are usually insulated from liability for their own ordinary negligence (but not gross negligence) under the "business judgment" rule, the Third Circuit Court reasoned the same protection ought to extend to financial advisors in a bankruptcy setting. *Id.* at 233.

26. After discussing the scope of indemnification under Delaware law, as well as the Delaware "business judgment" rule, the court concluded:

> [W]here a debtor's financial affairs ... are shaped by its financial advisors, they lay out the economic choices and assess their risks, and ... can be held accountable for not advising with the level of care or loyalty expected, transposing the business judgment rule from its corporate ambit to bankruptcy appears well-suited. For by this transposition we have a means to distinguish gross from simple negligence, and thus a benchmark for approving as reasonable an arrangement for indemnity that includes common negligence.

Id. at 233.

27. Gordian seeks no more than what state law provides other similarly situated entities. Gordian has never sought indemnification for its own gross negligence or willful misconduct. Like financial advisors in a litany of other cases, Gordian seeks indemnification only for ordinary negligence on terms similar to those approved in *United Artists* and many prior cases.[4]

28. In addition to ignoring the last ten years of cases, the Agent fails to offer any cogent, factually based explanation as to why Gordian's indemnification agreement is alleged to be unfair, unreasonable or not in the best interest of the estate.

29. A policy underlying the retention and compensation structure of the Bankruptcy Code is to encourage bankruptcy professionals to practice in bankruptcy courts by compensating

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[4] In fact, indemnification provisions such as the one before the Court are frequently included in engagement agreements between Chapter 11 debtors and their financial advisors. During the last ten years, bankruptcy courts have routinely approved and enforced these provisions. *See, e.g., In re Baltimore Emergency Services II, L.L.C.*, 291 B.R. 382, 384 (Bankr. D. Md. 2003); *In DEC International, Inc.*, 282 B.R. 423 (W.D. Wis. 2002) (rejecting U.S. Trustee's argument that indemnification provisions in retention agreements are illegal in all circumstances); *In re Joan & David Halpern, Inc.*, 248 B.R. 43, 46-47 (Bankr. S.D.N.Y.), *aff'd* 2000 WL 1800690 (S.D.N.Y. 2000) (approving debtor's application to retain financial advisor and overruling objection to indemnity provision in engagement agreement that indemnified advisor for acts other than bad faith, breach of trust, dishonesty, self-dealing and willful, reckless or grossly negligent misconduct); *In re EWI, Inc.*, 208 B.R. 885, 894 (Bankr. N.D. Ohio 1997) (debtor's financial advisor was contractually entitled to reimbursement of reasonable legal fees and expenses pursuant to indemnification provision in engagement agreement including defending objections to performance of its services and its right to payment on sale of one of debtor's divisions); *In re Baldwin-United Corp.*, 79 B.R. 321, 351 (Bankr. S.D. Ohio 1987) (financial advisor employed by both creditors' committees to negotiate plan of reorganization where court-approved engagement agreement contained indemnification provision for all losses in connection with its services except for liabilities arising out of gross negligence or bad faith).

them in bankruptcy as they would be compensated outside of bankruptcy. *See In re Busy Beaver Building Centers, Inc.*, 19 F.3d 833, 849 (3d Cir. 1994) ("Congress rather clearly intended to provide sufficient economic incentive to lure competent bankruptcy specialists to practice in bankruptcy courts"); *In re McCombs*, 751 F.2d 286, 288 (8th Cir. 1985) ("Bankruptcy courts are no longer bound by pre-Code notions of frugality and economy in fixing fees. Bankruptcy Courts must consider whether the fee awards are commensurate with fees for professional services in non-bankruptcy cases, thus providing sufficient incentive to practice in the bankruptcy courts").

30. The evidence to be presented at trial will show that the terms and conditions of Gordian's proposed retention by the Debtors is comparable to that granted in other bankruptcy cases and in non-bankruptcy settings. There is simply no support for the Agent's contention that the terms and conditions of Gordian's retention are not reasonable.

III.

CONCLUSION

31. The Debtors seek to retain Gordian under the same terms and conditions utilized by the two parties prior to the Debtors' bankruptcy filing. Those terms and conditions, as set forth in the December Agreement, are not out of place in these bankruptcy cases, and are reasonable in the bankruptcy context. This Court should approve Gordian's retention as restructuring and financial advisors to the Debtors.

WHEREFORE, for the reasons set forth above, Gordian prays that the Court approve the Application. Gordian prays for such other and further relief as is just.

Dated: July 1, 2003.

Respectfully submitted,

KANE, RUSSELL, COLEMAN & LOGAN, P.C.

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ATTORNEYS FOR GORDIAN GROUP, L.L.C.

CERTIFICATE OF SERVICE

I do hereby certify that I have this date caused to be served *via* electronic mail and/or U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing pleading to all parties listed below. The Debtors' Noticing Agent, BMC, shall likewise serve a copy of same to all parties on the Shortened Service List.

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SO CERTIFIED, this the 1st day of July 2003.

JOSEPH M. COLEMAN