

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

-----  
IN RE:

EAGLE ROCK DAIRYS, INC.

CASE NO. 92-63813

Debtor

-----  
IN RE:

WILLIAM MICHAEL BARGABOS  
CHRISTINE BARGABOS

CASE NO. 92-63812  
(Jointly Administered)  
Chapter 11

Debtors

-----  
APPEARANCES:

SHAW, LICITRA, ESERNIO & SCHWARTZ  
Attorneys for Debtors  
1010 Franklin Avenue  
Garden City, New York 11530

STUART GORDON, ESQ.  
Of Counsel

MENTER, RUDIN & TRIVELPIECE, P.C.  
Attorneys for Menter Law Firm  
500 S. Salina Street  
Syracuse, New York 13202

JEFFREY DOVE, ESQ.  
Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

The Court has before it the motion of Shaw, Licitra, Esernio & Schwartz (“SLES”) as substituted counsel to the within Debtors, seeking payment of compensation and reimbursement of expenses pursuant to this Court’s Memorandum-Decision, Finding of Fact, Conclusions of Law and Order dated May 9, 1995 (“May ‘95 Order”).

The motion was argued before this Court on January 21, 1997, adjourned to March 4,

1997 for further argument and then submitted to the Court for written decision as of that date.

### JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1) and (2)(A).

### FACTS

The Court assumes the parties familiarity with the May '95 Order and its contents will not be restated herein.

Subsequent to the May '95 Order, SLES continued its representation of the Debtors and on October 1, 1996 this Court confirmed Debtors' Fifth Amended Plan of Reorganization.

SLES filed this motion on January 6, 1997 seeking compensation for what this Court referred to in the May '95 Order as "counsel's efforts in getting 'up to speed' on relatively short notice in Chapter 11 cases that have been pending more than two years."

### DISCUSSION

SLES makes a somewhat confusing argument in paragraph 21 of its motion dated December 26, 1996. It appears to refer to the "up to speed" period as December 13, 1994 through January 3, 1995, the date on which it was appointed by this Court as Debtors' substitute counsel.

At paragraph 23 of the same motion, it identifies the “up to speed” period by reference to Exhibit C attached to Initial Fee Application which period commenced on November 1, 1995 and extended to November 12, 1996.

For the period December 14, 1994 through January 13, 1995 it appears that SLES incurred some 37 hours generating a fee of \$8,351.25. Conversely, if the Court consider the “up to speed” period as approximately one year commencing November 1, 1995, the generated fee is in excess of \$100,000.<sup>1</sup>

Menter, Rudin & Trivelpiece (“MRT”), Debtors’ former counsel, in opposing the motion asserts that its discharge as Debtors’ initial counsel has never been deemed to have been necessary or appropriate and, therefore, it should not be liable for any fees of SLES. It also raises additional defenses which appear to emanate from a curious reading of the May ‘95 Order. MRT does, however, accurately observe that the “up to speed” period referenced by SLES as extending from November 1, 1995 to November 12, 1996, commencing as it does some eleven months after SLES was appointed as substitute counsel is incomprehensible.

The Court has reviewed the contemporaneous time records submitted by SLES and while it acknowledges that certain entries in those records which post-date January 3, 1995 could arguably be identified as still “getting up to speed”, the Court concludes that the hours expended between December 14, 1994 and January 3, 1995 more appropriately fit within that category. Additionally, the fact that SLES withdrew those hours from its Final Fee Application in response to the objection of the United States Trustee (“UST”) that they were pre-retention hours, makes

---

<sup>1</sup> By Order dated December 16, 1996, the Court *inter alia* awarded SLES final compensation of \$379,007.25 for the period January 3, 1995 through December 10, 1996.

them all the more appropriate for consideration as part of this motion (*See Exhibit A attached to the Response of SLES to the Objection of MRT dated January 16, 1997.*)

The May '95 Order also withheld approval of MRT's then pending Final Application, which sought approximately \$23,000 in fees and expenses, given the circumstances surrounding Menter's withdrawal as Debtors' counsel. The Court expressed its concern at that time as to "whether Menter's alleged action or inaction, allegedly motivated by its conflicting interests, will detrimentally impact on Debtors' ability to reorganize." (May '95 Order at page 14.)

As the Court revisits Menter's Final Application some two years later and approximately six months post confirmation of Debtors' Fifth Amended Plan or Reorganization, it is tempted to conclude that Menter's conduct had no perceptible adverse impact on the outcome of the case and, therefore, its Final Application should be fully approved. At the very least, however, Menter's Final Application must be reduced by the "up to speed" allowance granted to SLES herein, since neither the Debtors nor their non priority unsecured creditors should have to absorb essentially the same fees twice.

Thus, the Court will approve Menter's Final Application totally \$21,922.50 in fees and \$1,524.54 in expenses which amounts less the \$8,351.25 awarded herein to SLES shall both be paid pursuant to the Debtors' confirmed Fifth Amended Plan of Reorganization.

Dated at Utica, New York

this 28th day of April 1997

---

STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge