

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

EAGLE ROCK DAIRYS, INC.
WILLIAM M. BARGABOS
CHRISTINE D. BARGABOS

CASE NO. 92-63813

CASE NO. 92-63812

Debtors

Chapter 11
Jointly Administered Cases

APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

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

The Court has before it the First Interim Application for Allowance for Services Rendered ("First Fee Application") by Dehm & McAbee ("Dehm"), heretofore appointed by this Court as farm business consultants to the Debtors by virtue of an Order dated May 19, 1993. Said appointment was effective on April 28, 1993.

A hearing on the First Fee Application was conducted on September 7, 1993 at a term of this Court held at Syracuse, New York. There was no opposition to the Application.

Dehm seeks a total fee of \$9,385 for services rendered to the Debtor between March 16, 1993 and June 10, 1993. Dehm received a retainer of \$3,000 from a non-debtor third party.

The Court reserved decision on the First Fee Application in light of the significant number of post-petition, pre-appointment hours expended by Dehm for which it now seeks compensation. At the September 7, 1993 hearing, Debtors' attorney provided the Court with a letter from Dehm to the Court dated June 28, 1993 in which Dehm contends that it was requested to finish its first report by April 26th, presumably two days before the effective date of its appointment, by

Debtor Eagle Rock Dairys, Inc., Debtors' attorney and Key Bank.

Subsequently, the Court was provided with a copy of Dehm's letter to Debtors' counsel advising that it would no longer render services to the Debtor Eagle Rock Dairys, Inc. "unless and until the Court has approved said fee, and payment has been made and received in full." (See letter dated September 8, 1993 from Dehm to Kevin M. Newman, Esq.).

This Court has consistently held that services rendered to a debtor by a professional are not compensable unless the professional has first been appointed pursuant to §327(a) of the Bankruptcy Code (11 U.S.C. §101-1330) ("Code"). See In re ICS Cybernetics, 97 B.R. 736, 738 (Bankr. N.D.N.Y. 1989).

The Court is of the further opinion that the recent broadening of the "excusable neglect" standard found in Federal Rule of Bankruptcy Procedure 9006(b)(1) by the United States Supreme Court in Pioneer Inv. Services v. Brunswick Associates, ___ U.S. ___, 113 S.Ct. 1489, 1495 (1993), does not apply to an interpretation of the so-called "per se" rule dealing with fee applications adopted by the United States Second Circuit Court of Appeals. See In re ICS Cybernetics, Inc., supra, 97 B.R. 738.

The Court notes that while Dehm was rendering services to the Debtor, for which compensation is sought, as far back as March 16, 1993, there is nothing to indicate to the Court that Dehm had diligently sought appointment pursuant to Code §327(a) or that it was led to believe that it had been appointed by a third party. It is to be noted that Dehm's Affirmation in support of its appointment was not executed until May 6, 1993, almost two months after the date on which it commenced rendering services to the Debtors for which it seeks compensation.

Dehm's letter of June 28, 1993, while it implies that it was acting in good faith in attempting to meet an April 26th deadline imposed upon it by the Debtor Eagle Rock Dairys, Inc., Debtors' attorney and Key Bank, does not constitute excusable neglect and does not provide any explanation for why Dehm delayed another ten days in making application to the Court for appointment.

Thus, the Court will approve payment to Dehm for all services rendered between April 28, 1993 and June 10, 1993 in the sum of \$2,525.40 (42.09 hours @ \$60.00 per hour). Dehm shall apply the retainer of \$3,000 against said fee and retain the balance of \$474.60 to be applied against subsequent

applications.

IT IS SO ORDERED.

Dated at Utica, New York

this day of November, 1993

STEPHEN D. GERLING
U.S. Bankruptcy Judge