

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MEGAN-RACINE ASSOCIATES, INC.

Debtor

CASE NO. 92-00860

Chapter 11

APPEARANCES:

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

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

Before the Court is the Sixth Application of Nixon, Hargrave, Devans & Doyle ("Nixon") for an award of interim compensation and reimbursement of expenses ("Sixth Application"). Nixon was appointed as Debtor's special litigation counsel pursuant to an Order of the Court dated April 15, 1992. The initial order of appointment provided that Nixon would represent the Debtor in connection with "tax assessment reduction proceedings, litigation

and/or arbitration of disputes with certain of Debtor's construction contractors and/or subcontractors together with regulatory matters, on behalf of the Debtor." (See Order of April 15, 1992)

The Sixth Application covers the period April 1, 1994 through September 30, 1994 and seeks \$63,461.00 in fees and \$4,993.11 in reimbursement of expenses. The Application is divided into six monetary components representing distinct tasks undertaken by Nixon during the six month period.

The Sixth Application appeared on the Court's calendar at Utica, New York on December 6, 1994 and while there were no objections, the Court adjourned the hearing to December 13, 1994 to permit a member of Nixon to appear and respond to inquiries from the Court regarding Nixon's representation of the Debtor relative to negotiations and litigation with Niagara Mohawk Power Corporation ("NIMO").

Following an appearance by Robert L. Daileader, Jr., Esq., on behalf of Nixon, at the December 13, 1994 motion term, the Court approved a partial fee of \$13,747.25 together with reimbursement of expenses in the sum of \$4,993.11, but reserved decision on the balance of the Sixth Application pending further review by the Court.

JURISDICTIONAL STATEMENT

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

DISCUSSION

The Court, in the exercise of its independent duty to evaluate attorneys fees, has inquired into Nixon's involvement in what is described in the Sixth Application as negotiations with NIMO "on issues relating to the Power Sales Agreement and in connection with the adversary proceedings between the Debtor and Niagara Mohawk arising out of the Power Sales Agreement." See ¶14A of the Sixth Application. See also In re S.T.N. Enterprises, Inc., 70 B.R. 823, 831 (Bankr. D.Vt. 1987).

At the December 13, 1994 motion term, Nixon and Debtor's general bankruptcy counsel, Menter, Rudin & Trivelpiece, P.C. ("Menter"), advised the Court that Nixon's role in connection with the Power Sales Agreement dispute was confined generally to exploring a negotiated a settlement with NIMO's attorneys while Menter moves ahead with the adversary proceeding involving the Power Sales Agreement in anticipation of an early trial date. Both attorneys stressed the importance of the ongoing negotiations with NIMO while the adversary proceeding is pending.

What the Court found troubling initially was the disclosure that Nixon rather than or in addition to Menter was in effect representing the Debtor in its dispute with NIMO over the threatened termination of the Power Sales Agreement. As a result of the information provided to the Court on December 13, 1994, it now appears that while Menter is actively representing the Debtor in the pending adversary proceeding versus NIMO, Nixon is

apparently negotiating behind the scenes with NIMO in an effort to resolve the litigation. While such a role is an admirable one, particularly if it brings about an early termination of the litigation, it appears to the Court that Nixon's role as a behind the scenes negotiator is beyond the scope of its authority and leads to perhaps a logical conclusion that either Menter or Nixon should remove themselves from the NIMO dispute since it appears that this Chapter 11 case can neither afford nor justify two law firms acting in effect as co-counsel in dealing with the Power Sales Agreement litigation.

The Court notes that Nixon's expanding role in this case was challenged previously by the Official Creditors Committee in connection with its representation of the Debtor in reviewing a proposed partnership agreement which agreement was touted as enabling Debtor to file a consensual plan of reorganization. (See Order Authorizing Expansion of Scope of Employment of Special Counsel, dated January 7, 1994.) In addition, on June 30, 1993 Nixon had obtained an earlier order authorizing it to undertake administrative proceedings before the Federal Energy Regulatory Commission ("FERC") on the Debtor's behalf.

A review of the initial Application and Order appointing Nixon in this case as "Special Litigation Counsel", as well as the subsequent Orders expending that authority, would not appear to include within its ambit, services of a nature now being provided in connection with Debtor's dispute with NIMO, unless one were to assume that the pending litigation somehow falls into the generic category of "regulatory matters". The Court concludes that it does

not.

It is somewhat puzzling why Nixon, which on two prior occasions had sought an expansion of its appointment by Court order, would commit itself to representation of the Debtor in the Power Sales Agreement litigation without seeking a similar clarification or expansion of its authority.

This Court concludes that Nixon exceeded the scope of its appointment when it entered upon a representation of the Debtor simultaneously with Menter in its Power Sales Agreement litigation with NIMO. As a result, this Court will disallow all of Nixon's time from and after August 1, 1994, the date on which the adversary proceeding was commenced by NIMO seeking a declaration that the Power Sales Agreement has been terminated. Such disallowance will be limited to those hours which the Court identifies as involving services related to the adversary proceeding. However, where Nixon's time entries are "lumped" to include disallowed services as well as other unrelated services, the Court will disallow the entire time block.

Upon review of the contemporaneous time records provided by Nixon during the period August 1, 1994 through September 27, 1994, the Court identifies 38.25 unauthorized hours, all of which were billed by Robert L. Daileader, Jr., Esq., at rate of \$240.00 per hour for which compensation will not be allowed. Thus, the Court reduces the request of \$49,713.75 by \$9,180.00 and allows the balance of \$40,533.75 in addition to the amounts previously approved by the Court on December 13, 1994.

IT IS SO ORDERED.

Dated at Utica, New York

this day of

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge