

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MEGAN-RACINE ASSOCIATES, INC.

CASE NO. 92-00860

Debtor

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

The Court has heretofore orally ruled on the Interim Fee Applications filed in this Chapter 11 case by the Examiner Robert E. Barton, PE ("Examiner") and the Examiner's attorneys, Hinman, Howard & Kattell, LLP ("HH&K"). The Interim Applications appeared on the Court's motion calendar at Syracuse, New York on October 3, 1995. At the time of the hearing there were no written or oral objections to the Interim Applications. The Court, however, orally

reduced both Interim Applications sua sponte allowing the Examiner a fee of \$21,660 and reimbursement of expenses in the sum of \$1,544.11 while approving a fee to HH&K of \$8,499.00 and reimbursement of expenses in the sum of \$1,881.01.¹

At the hearing, HH&K, Amy Shapiro, Esq. of counsel, requested the opportunity to file written responses to the Court's proposed reduction of the Interim Applications. The Court granted the request and Supplemental Affidavits were filed with the Court on October 13, 1995.²

JURISDICTIONAL STATEMENT

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

DISCUSSION

At the outset, the Court notes that the instant Interim Fee Applications were the eleventh filed by the Examiner and the seventh filed by HH&K covering the period April 1992 through July 1995. To date, the Examiner has been authorized interim fees of \$460,954.00 and disbursements of \$74,002.09, while HH&K has been

¹ Barton's Interim Fee Application sought a fee of \$28,752.00 and disbursements of \$1,544.11 while HH&K's Interim Fee Application sought a fee of \$17,310.00 and disbursements of \$1,881.01.

² A supplemental Affidavit was filed by Amy Shapiro, Esq. on behalf of HH&K while Robert E. Barton, P.E. filed a supplemental Affidavit on behalf of the Examiner.

authorized fees of \$155,454.00 and disbursements of \$25,999.21.

The Court proposed to reduce the Examiner's Interim Application primarily due to daily entries in his time records labelled "Review plant performance and project thru _____". Charges for this daily activity totalled approximately \$7,000.00, which the Court indicated it would disallow. The Court has subsequently reviewed the Examiner's Supplemental Affidavit. The Examiner asserts that he has been engaged in the daily review of plant operations of the Debtor for the preceding 24 hours since January of 1993, apparently at the request of the Debtor's primary secured creditor, the Federal Deposit Insurance Corporation ("FDIC"). The Examiner contends that such daily monitoring allows him to evaluate how the plant is operating and the mode of operation for the following 24 hour period in order to maintain a balance between electricity and steam production.

Upon further consideration of the Supplemental Affidavit of the Examiner and the fact that the Examiner has rendered similar compensable services without objection for more than a year prior to the instant Fee Application, the Court will vacate its oral direction and approve the Fee Application of the Examiner in the full amount of \$28,752.00. The Court has previously approved reimbursement of expenses in the full amount of \$1,544.11.

Turning to the HH&K Fee Application, the Court on October 3, 1995, orally approved a fee of \$8,499.00 disallowing fees for services rendered in connection with interoffice conferences between two or more HH&K partners, reviewing pleadings in the pending Niagara Mohawk Power Corp. v. Debtor adversary proceeding

("NIMO litigation"), reviewing cash collateral stipulations and orders and preparing fee application beyond a reasonable number of hours.

The Supplemental Affidavit of Shapiro on behalf of HH&K suggests that if the Examiner did not oversee the so-called "NIMO litigation", it would have failed in its representation of Barton. Additionally, Shapiro alleges the office conferences between HH&K partners were due primarily to a change in the mode of operation of Debtor's plant between April and October 1995. Notwithstanding that assertion, HH&K has agreed to reduce its Fee Application in the amount of \$870.00, attributable to office conferences between partners.

In addition to intraoffice conferences, the Court is critical of HH&K's involvement in four other areas which appear to be either outside of the scope of its representation of the Examiner or were of no benefit to the creditors of this estate.

Three of those areas involve reviewing of the Debtor's cash collateral motions and orders, involvement in the NIMO litigation other than those services specifically related to the deposition of the Examiner and services which appear to have been intended to shield the Examiner from potential liability. The final area of which the Court is critical involves the time devoted to the preparation and advancement of fee applications.

Accordingly, with regard to the review of cash collateral motions filed by the Debtor as well as any order disposing of same, the Court will disallow 3 hours attributable to Richard Pille, Esq. ("RP") and 1.5 hours attributable to Amy Shapiro, Esq. ("AS"); with

regard to the NIMO litigation, the Court will disallow 5.3 hours attributable to RP and 2.3 hours attributable to James F. Lee, Esq. ("JL"); with regard to services rendered in connection with the potential liability of the Examiner personally, the Court will disallow 4.9 hours attributable to JL. Finally, with regard to the preparation and advancement of the fee applications, the Court will disallow 8.1 hours attributable to AS and 2.7 hours attributable to Florence Whittaker, paralegal.

Thus, the Court will reduce the Fee Application by \$4,509.00 and allow HH&K a fee of \$12,801.00 together with disbursements in the sum of \$1,881.01.

IT IS SO ORDERED.

Dated at Utica, New York

this day of 1995

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge