

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
PLANO DIVISION**

IN RE:	§	
	§	Chapter 11
FOREST PARK MEDICAL CENTER AT FRISCO, LLC,	§	
	§	Case No. 15-41684
	§	
Debtor.	§	

**OBJECTION TO UNSECURED CREDITORS COMMITTEE PROFESSIONALS’
FIRST INTERIM APPLICATIONS FOR ALLOWANCE OF COMPENSATION
AND REIMBURSEMENT OF EXPENSES INCURRED
(Related Docket Nos. 388, 391)**

Sabra Texas Holdings, L.P. (“Sabra”) files this *Objection to Unsecured Creditors Committee Professionals’ First Interim Applications for Allowance of Compensation and Reimbursement of Expenses Incurred* (the “Objection”). In support of the Objection, Sabra respectfully states as follows:

1. This Objection relates to (i) that certain *First Interim Application by CohnReznick LLP* (“CohnReznick”), *Financial Advisor to the Committee of Unsecured Creditors for Allowance of Compensation and Reimbursement of Expenses Incurred* [Docket No. 388] (“Advisor Application”); and (ii) that certain *First Interim Application for Allowance of Attorneys’ Fees and Expenses for Arent Fox LLP* (“Arent Fox”) as *Counsel for the Official Committee of Unsecured Creditors* [Docket No. 391] (“Counsel Application”) (together, the “Applications”).¹

2. Sabra objects to the Applications for three reasons:

¹ The law firm of Eric A. Liepins, P.C. is employed as local counsel to the Official Unsecured Creditor’s Committee (“Committee”). See *Order* at Docket No. 280. Mr. Liepins has not filed a fee application at this time. Sabra reserves all rights to file any response to any fee application submitted by Mr. Liepins in this Case in the future.

- The Applications seek approval of fees and reimbursement of expenses in excess of the budgeted amounts for the Committee’s professionals.
- The Applications seek approval of fees incurred for investigation of claims against Sabra in excess of the \$25,000.00 limit thereto.
- The Applications seek approval of excessive fees resulting from duplicative efforts, unreasonable rates, and incommensurate value returned to the Estate.

A. The Committee’s Professionals Are Over Budget.

3. On November 10, 2015, the Court entered that certain *Final Order (I) Authorizing Debtor to Obtain Postpetition Financing on a Senior Secured Superpriority Basis pursuant to 11 U.S.C. §§ 105, 361, 362, 363, and 364; and (II) Granting Related Relief* [Docket No. 247] (“DIP Order”).

4. Attached as Exhibit “B” to the DIP Order is the Budget (“Budget”) detailing the authorized expenditures from the Debtor’s bankruptcy estate of loan proceeds provided by Sabra pursuant to the post-petition financing authorized under the DIP Order (“DIP Loan Proceeds”).

5. Pursuant to the Budget, the maximum amount of the DIP Loan Proceeds permitted to be used to pay the Committee’s professional fees and expenses is an aggregate \$405,000.00 through December 31, 2015.

6. As set forth in the Applications, the Committee’s professionals are requesting total approval of \$447,237.58 in fees and expenses incurred through December 31, 2015. Broken down, the Counsel Application requests approval of \$306,959.00 in fees and \$4,944.47 in expenses. The Advisor Application requests approval of \$132,592.50 in fees and \$2,741.61 in expenses.

7. Even without the fees and expenses incurred by Mr. Liepins, the Committee’s professionals are \$42,237.58 over budget through December 31, 2015.

8. Pursuant to the DIP Order, Sabra's indebtedness arising from the DIP Loan Proceeds are entitled to superpriority administrative-expense status, senior to any and all administrative expenses. Sabra's DIP Loan Proceeds have not been repaid in full. To the extent any portion of the unpaid DIP Loan Proceeds, allowed as superpriority administrative expenses, remains outstanding, the Committee's professionals are not entitled to any compensation outside the parameters of the Carve Out, as set forth in the Budget.

9. Sabra objects to the Applications to the extent the Committee's professionals are seeking payment of fees and expenses to be paid from the DIP Loan Proceeds in an aggregate amount more than \$405,000.00 through December 31, 2015.

B. The Committee's Investigation Exceeds the \$25,000 Limit.

10. The DIP Order limits the amount of fees and expenses incurred by the Committee for investigating potential claims against Sabra to \$25,000.00. *See* DIP Order at ¶ 6, p. 20.

11. In paragraph 18 on pages 8-9 of the Counsel Application, Arent Fox seeks approval of \$107,579.00 incurred for "*investigating the estate's potential claims against insiders as well as the Debtor's landlords and DIP lender Sabra.*" Arent Fox does not delineate how much of the \$107,579.00 arises from the Committee's investigation of Sabra.

12. Without a detailed description of the Committee's investigation, any fees and expenses incurred in connection with such investigation must be limited to the cap contained in the Carve Out – \$25,000.00.

13. Sabra objects to the Applications to the extent the Committee's professionals are seeking payment of fees and expenses to be paid from the DIP Loan Proceeds in an aggregate amount more than \$25,000.00 arising from investigation of any matters related to Sabra.

C. The Fees and Expenses Requested in the Applications are Excessive.

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14. The Committee's professionals, as the fee applicants, bear the burden of proof on their claims for compensation. *See In re WNS, Inc.*, 150 B.R. 663, 664 (Bankr. S.D. Tex. 1993). Generally, fee applications, standing alone, must contain sufficient detail to demonstrate compliance with 11 U.S.C. § 330. *See In re 530 W. 28th St., L.P.*, No. 08-13266, 2009 Bankr. LEXIS 4101, at *25 (Bankr. S.D.N.Y. Dec. 11, 2009) (citing *In re Poseidon Pools of Am.*, 216 B.R. 98, 100-01 (E.D.N.Y. 1997)).

15. Section 330(a) of the Bankruptcy Code articulates the basic standards for compensation of professionals' fees and expenses in a bankruptcy case. Section 330(a)(1) allows the Court to grant reasonable compensation for actual, necessary services rendered and to reimburse the applicant for actual and necessary expenses incurred. *See* 11 U.S.C. § 330(a)(1)(A). The Court, however, retains discretion to award less than the amount of compensation that is requested. *Id.* at § 330(a)(2). Indeed, § 330(a)(4)(A) commands that the Court shall not allow compensation for:

- i. unnecessary duplication of services; or
- ii. services that were not –
 - (I) reasonably likely to benefit the debtor's estate; or
 - (II) necessary to the administration of the estate.

See id. at § 330(a)(4)(A).

16. To the extent that a fee applicant's requested compensation is not *per se* prohibited under subsection (a)(4), § 330(a)(3)(A) provides non-exclusive factors for the Court's consideration in evaluating requests for compensation: In determining the amount of reasonable compensation to be awarded to ... [a] professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including – (A) the

time spent on such services; (B) the rates charged for such services; (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title; (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title. *Id.* at § 330(a)(3)(A).

17. Similar to the factors addressed in § 330(a)(3)(a), the Fifth Circuit has directed courts to consider the following factors (the "*Johnson Factors*") when ruling on attorneys' fee requests:

- iii. the time and labor required;
- iv. the novelty and difficulty of the questions presented;
- v. the skill requisite to perform the legal services properly;
- vi. the preclusion of other employment due to the acceptance of the case;
- vii. the customary fee;
- viii. whether the fee is fixed or contingent;
- ix. time limitations imposed by the client with the circumstances of the case;
- x. the amount involved and the results obtained;
- xi. the experience, reputation and ability of the attorney;
- xii. the undesirability of the case;
- xiii. the nature and length of the professional relationship with the client; and
- xiv. awards in similar cases.

See *In re First Colonial Corp. of Am.*, 544 F.2d 1291, 1298-99 (5th Cir. 1977) (adopting factors set forth in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

18. Moreover, to the extent that the requested fees are otherwise compensable under § 330 after applying the Johnson Factors, the Fifth Circuit has further required the applicant to demonstrate that the underlying services "resulted in an identifiable, tangible, and material benefit to the bankruptcy estate." *Andrews & Kurth, LLP v. Family Snacks, Inc. (In re Pro-Snax Distributors, Inc.)*, 157 F.3d 414, 426 (5th Cir. 1998) ("Pro-Snax"); see also *In re Weaver*, 336 B.R. 115, 118-119 (Bankr. W.D. Tex. 2005) ("The Fifth Circuit Court of Appeals [] set the standard by which bankruptcy courts must judge all attorneys[] fees for persons representing the bankruptcy estate."). The material benefit test does not look to the reasonableness of services or expenses at the time such services or expenses are incurred. See *In re Quisenberry*, 295 B.R. 855, 865 (Bankr. N.D. Tex. 2003). "Rather, the test is an objective after-the-fact test: 'whether [] services resulted in an identifiable, tangible, and material benefit to the bankruptcy estate,' regardless of the reasonableness of such services at the time that they were rendered." *Id.* Thus, the applicant must show that its services materially benefited the estate. *Kaye v. Hughes and Luce, LLP*, No. 3:06-CV- 01863-B 2007, U.S. Dist. LEXIS 50929 at *29 (N.D. Tex. July 13, 2007).

19. In this case, Arent Fox's fees should be reduced on at least three grounds. First, the Counsel Application includes requested compensation for unnecessary, duplicative services. Second, the Counsel Application includes requested compensation for services that did not provide a material benefit to the estate. Third, the Counsel Application seeks compensation for services charged at rates that are not appropriate for the services rendered in this District.

i. Arent Fox Overstaffed the Committee's Representation with Duplicative Tasks.

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20. The Debtor's bankruptcy estate should not bear the administrative expense burden of funding Arent Fox's overstaffing. *See In re Green Valley Beer*, 281 B.R. 253, 258 (Bankr. W.D. Pa. 2002). Arent Fox employed an unnecessary number of lawyers on tasks with no explanation for the necessity of the multitude of attorneys. Further, Arent Fox used higher-rate, senior attorneys to perform tasks that should have been performed by more junior attorneys, or, in some instances, a paralegal or secretary. Arent Fox charged the Estate for multiple partners' attendance at the same hearings. On numerous occasions, Arent Fox charged the Estate for multiple attorneys' participation on extended conference calls with counsel. This practice led to the Estate being charged more than was reasonable and necessary for the subject tasks.

ii. Arent Fox Did Not Provide a Material Benefit to the Debtor's Estate.

21. The Counsel Application should also be reduced because Arent Fox has failed to establish that certain specific services rendered were necessary and/or provided a material benefit to the Debtor's Estate. In particular, the Counsel Application seeks \$107,579.00 for "investigation, due diligence and analysis." As detailed above, the Committee's investigation of Sabra was limited to \$25,000.00. Other than broad statements such as "*Arent Fox created document request lists, conducted interviews and performed informal and formal discovery*" and "*Arent Fox thereafter reviewed documents produced and performed a detailed analysis of the estates potential pre-petition claims against various insiders and Sabra,*" the Counsel Application does not provide any detail regarding the alleged claims identified or any tangible result produced from Arent Fox's investigation and analysis. More than \$100,000 just to confirm that no claims exist is excessive and must be capped at the original \$25,000.00 limit.

22. The Counsel Application seeks \$66,430.50 in connection with post-petition Estate financing issues. Arent Fox spent 111.8 hours on evaluating and negotiating comments to the

DIP Order. Sabra's counsel, who prepared the DIP Order and the DIP Loan Documents, did not spend more than 100 hours from "soup to nuts" on the entire DIP Loan transaction and motion practice. It is incomprehensible how Committee counsel could possibly spend 111.8 hours reviewing and commenting on the DIP Order. The Committee's contribution to the DIP Order is not worth of 111.8 hours' worth of Arent Fox's time. This time is excessive, unnecessary and unhelpful to the estate and is not compensable. *See In re New Boston Coke Corp.*, 299 B.R. 432, 442 (Bankr. E.D. Mich. 2003). The fees awarded for Arent Fox's contribution to the DIP Order must be reduced accordingly.

iii. Arent Fox's Rates are Excessive for Committee Representation in this District.

23. The Counsel Application seeks payment for fees ranging from \$795 to \$495 per hour for attorneys representing the Committee in this Case. Prior to Arent Fox's employment in this Case, on November 4, 2015, Sabra filed its *Response and Limited Comments to (I) Application to Employ Arent Fox LLP and (II) Application to Employ Local Counsel for Unsecured Creditors Committee* [Docket No. 235] ("Comment"). As detailed in its Comment, Sabra warned – even before Arent Fox's employment – that the rates charged by Arent Fox's attorneys in this case were not commensurate with the limited local issues involved with this Case.

24. In particular, the rates disclosed in the Counsel Application are more than double the applicable rates assigned to the comparable local professionals retained in this Case. Mr. Liepins' employment application discloses the rate of \$275.00 for Mr. Liepins' representation of the Committee. Debtor's counsel discloses the applicable rate of \$395.00 for Mr. William L. Medford and Ms. Vickie L. Driver as the primary attorneys at Lewis Brisbois, PLLC responsible

for representing Debtor in this Bankruptcy Case. Mr. Medford and Ms. Driver are both partners located in the Dallas, Texas office of Lewis Brisbois, PLLC.

25. In approving Arent Fox's employment as counsel to the Committee, the Court did not approve the rates set forth in its application. There is simply no justification for the Estate to pay twice the rate for comparable representation. There are no facts alleged in the Counsel Application that indicate a special need to depart from the customary rates charged in this District by comparable professionals in this Case. Arent Fox cannot meet its burden of proof to justify rates in excess of double the Debtor's counsel's rates. The fees approved in the Counsel Application must be reduced accordingly.

iv. CohnReznick's Fees are Excessive for Committee Representation in this Case.

26. CohnReznick's fees requested in the Advisor Application should be reduced because it failed to establish that certain specific services rendered were necessary and/or provided a material benefit to the Debtor's Estate, and its services are duplicative of those rendered by the Chief Restructuring Office employed by the Debtor's Estate ("CRO"). In the Advisor Application, CohnReznick seeks approval of \$39,333.00 for reviewing and analyzing the Budget contained in the DIP Order. The Budget was prepared by the CRO in coordination with Sabra and its counsel. At most, CohnReznick contributed to the DIP Order by providing comments to the Budget. It is excessive to bill 63.9 hours and \$39,333.00 for providing comments.

27. Furthermore, CohnReznick requests \$44,810.00 in fees arising from "*assisting Counsel and evaluating the Debtor's proposed sale structure and timeline regarding the Debtor's planned marketing efforts and auction to ensure that any proposed transaction would realize the highest potential value.*" This amount is far in excess of the reasonable and necessary

fees to be incurred by the Committee's financial advisors in relation to the sale proceedings under 11 U.S.C. § 363 in this Case. CohnReznick fails to provide any causal connection between the 71 hours and \$44,810.00 it allegedly spent and the value it contributed to the Estate's sale of assets. The Advisor Application contains nothing more than conclusory statements of how much time was spent on certain activities. This activity in particular requires explanation of the material benefit provided to the Estate, especially considering the CRO's active involvement in the sale process.

WHEREFORE, Sabra respectfully requests that the Court enter an order granting the following relief:

- (a) Reduce the fees awarded to the Committee's professionals to the reasonable and necessary amount in accordance with 11 U.S.C. § 330(a), and eliminate any unreasonable and unnecessary fees incurred by duplicative efforts, excessive rates, and those which do not provide a material benefit to the Debtor's Estate;
- (b) Reduce the fees awarded to the Committee's professional to the limits of the Carve Out detailed in the Budget, including, without limitation, (i) no more than \$25,000.00 attributable to the Committee's investigation of Sabra, and (ii) no more than an aggregate amount of \$405,000.00 through December 31, 2015; and
- (c) award Sabra such other and further relief as the Court deems just and proper.

[Signature page follows]

Dated: February 19, 2016

Respectfully submitted,

GARDERE WYNNE SEWELL LLP

/s/ Deirdre B. Ruckman

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ATTORNEYS FOR SABRA TEXAS HOLDINGS, L.P.

CERTIFICATE OF SERVICE

I hereby certify that, on February 19, 2016, a true and correct copy of the foregoing was served via CM/ECF on all parties registered to receive electronic notice in this case and via e-mail and regular mail on the following parties.

/s/ Deirdre B. Ruckman

Deirdre B. Ruckman

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