

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,)	
)	
Plaintiff,)	
)	
v.)	Case No. 4:12-CV-00080-CEJ
)	
BURTON DOUGLAS MORRISS, <i>et al.</i> ,)	
)	
Defendants, and)	
)	
MORRISS HOLDINGS, LLC,)	
)	
Relief Defendant.)	

**RECEIVER'S THIRD INTERIM APPLICATION FOR ALLOWANCE
AND PAYMENT OF FEES AND EXPENSES INCURRED BY THE
RECEIVER, RETAINED COUNSEL AND OTHER PROFESSIONALS**

Receiver Claire M. Schenk, in her capacity as receiver (“Receiver”) for Acartha Group, LLC (“Acartha”), MIC VII, LLC (“MIC”), Acartha Technology Partners, LP (“ATP”) and Gryphon Investments III, LLC (“Gryphon”) (collectively, the “Receivership Entities”), files her *Third Interim Application for Allowance and Payment of Expenses Incurred by the Receiver, Counsel and Other Professionals* (the “Application”), and requests that this Court (1) find the total professional fees and costs incurred during the period of July 1, 2012 through September 30, 2012 (the “Application Period”) are reasonable and appropriate, and (2) enter an Order¹ authorizing the Receiver to make payments for certain professional services and expenses incurred during the Application Period. The Receiver submitted the Application to the United States Securities and Exchange Commission (the “SEC” or “Commission”) for review and approval prior to submission to the Court. The Commission has approved the Third Quarter Fee

¹ A proposed order is attached hereto as Exhibit E.

Application. A Standardized Fund Accounting Report (“SFAR”), which summarizes receipts and disbursements for this quarter, is attached hereto as Exhibit A.²

The Receiver respectfully requests that the Court authorize the Receiver to pay reasonable fees and costs incurred by the following retained professionals: (a) Thompson Coburn LLP, the Receiver's primary counsel; (b) Segue Equity Group, LLC, the Receiver's investment fund manager; (c) FTL Capital LLC, the Receiver's business advisor; and (d) CliftonLarsonAllen LLP (“CLA”), the Receiver’s tax preparer. While the Receiver requests a finding that the total professional fees and costs incurred by these professionals during the Application Period are reasonable and appropriate, for purposes of this Application, the Receiver has agreed, at the request of the SEC and pursuant to discussions with the SEC, to request payment of only eighty percent (80%) of the legal and professional fees accrued during the Application Period at this time, as opposed to the full amount of the invoiced fees.³

I. RETENTION OF RECEIVER, DISCLOSURE OF COMPENSATION AND ACTIVITIES OF RECEIVER DURING APPLICATION PERIOD

On January 17, 2012, the SEC filed its Complaint and Ex Parte Emergency Motion for Appointment of Receiver. On that same day, the Court granted the SEC’s motion and entered the Order Appointing Receiver (“Receivership Order”). (Dkt. No. 16). The Receiver’s authority, duties, and obligations are set forth in the Receivership Order. The SEC’s motion and the Court’s appointment were based upon the Receiver’s proposal to the SEC (the “Proposal”). The Proposal set out the qualifications of the Receiver and the support to be received from Thompson Coburn LLP as primary counsel to the Receiver. Additionally, the Proposal fully

² A SFAR will be submitted in Final at the conclusion of the Receivership, following a reconciliation of receipts and disbursements occurring over the course of the Receivership.

³ The remaining twenty percent (20%) of the legal and professional fees accrued during the Application Period which are not authorized for payment at this time, would be payable upon further application to this Court.

disclosed the proposed compensation schedule and course of action contemplated by the Receiver. (Dkt. No. 4, Exhibit 1).

The overall function of the Receiver as set out in the Receivership Order is to administer and manage the business affairs and assets of the Receivership Entities, act as the managing member or partner of the Receivership Entities, marshal and safeguard all of the assets of the Receivership Entities and take such actions as are necessary to protect investors. In furtherance of these objectives, paragraph 4 of the Receivership Order empowers the Receiver to “employ legal counsel, actuaries, accountants, clerks, consultants and assistants as the Receiver deems necessary and to fix and pay their reasonable compensation and reasonable expenses.” Moreover, in addition to the authority granted in paragraph 4 of the Receivership Order, paragraph 5 provides that the Receiver may “[e]ngage persons in the Receiver’s discretion to assist the Receiver in carrying out the Receiver’s duties and responsibilities.” *See* Receivership Order, Dkt. No. 16, at p. 3.

Pursuant to these authorities, and in keeping with paragraph 26 of the Receivership Order, the Receiver now files her Fee Application for the third quarter of this year, along with the requisite supporting documentation. Submission of this Fee Application is also supported by the information stated in the Receiver’s Second and Third Interim Status Reports (filed April 20, 2012 and August 14, 2012, respectively), which includes proposals, fee arrangements and retainer agreements for the service professionals providing support to the Receiver for the benefit of the Receivership estate. (*See* Dkt. Nos. 134 and 189).

The activities of the Receiver are guided by the Receivership Order which requires the Receiver to, among other things: take immediate possession of and administer the assets of the Receivership Entities; investigate the manner in which the affairs of the Receivership Entities

were conducted; institute such actions and legal proceedings, for the benefit and on behalf of the Receivership Entities and their investors and other creditors as the Receiver deems necessary; defend, compromise or settle legal actions in which the Receivership Entities or the Receiver is a party; assume control of all of the Receivership Entities' financial accounts, as necessary; and make payments and disbursements from the funds and assets taken into control as necessary in discharging the Receiver's duties.

Thus, with the assistance of the personnel described in those Reports, the Receiver has:

(i) Worked closely with CLA to prepare and file the requisite tax filings for the Receivership and related entities. Following meetings with the Receivership entities' former accountants and management, review of organizational documents and satisfaction of due diligence concerns, CLA filed returns for a total of eighteen (18) entities.

(ii) Pursued claims involving two separate insurance policies. While discussions remain ongoing, a partial payment was recently made under the comprehensive and general life policy upon the Receiver's claim.

(iii) Finalized comprehensive claims bar date procedures for the review and approval of the Court.

(iv) Continued to oversee the business affairs of the Receivership entities. Among other activities, the Receiver participated in the discussions and negotiations of terms of the various capital calls, exercised the rights allowed under the relevant agreements, and facilitated communications between the Receivership Entities' investment concerns and the investors in order to allow the opportunity for follow-on investments.

(v) Continued efforts to acquire custody of Receivership property held by former employees, service professionals and others.

(vi) Continued to arrange for the orderly transfer of electronic data and documents to the offices of the Receiver while pursuing the production of additional information from various sources.

(vii) Continued to review and organize the electronic and hard copy documents acquired by the Receivership.

(viii) Filed a claim in the bankruptcy proceeding involving Burton Douglas Morriss for each Receivership entity in the amount of \$9.1 million and monitored the continuing proceedings.

(ix) Continued to represent the interests of the Receivership entities in the ongoing SEC proceeding as well as the litigation of the separate proceeding filed against Morriss Holdings.

(x) Continued to review and analyze other potential receivership claims, and investigated the claims made in the matter captioned, *Ron Nixon, et al., v. B. Douglass Morriss, et al.*, 11SL-CC04718, filed in St. Louis County Circuit Court, November 29, 2011.

Additionally, the Receiver and Receivership personnel are handling the day-to-day matters of the four Receivership Entities. This entails a wide variety of tasks ranging from simple to complex, *e.g.*, a review of daily mail, oversight of bank accounts, and participation in investor calls, board meetings, and capital calls. The Receiver continues to gather information so that she may respond to the Court with a summary of the value of the Receivership Entities' assets and liabilities and to tally and analyze claims received as required by the Receivership Order. (Receivership Order, Dkt. No. 16, at p. 3).

II. REQUEST FOR FEES AND EXPENSES

The Receiver and her counsel, fund manager and advisors have worked diligently to marshal and preserve all assets of the Receivership Entities, investigate their business operations,

and compile information that the Receivership Entities may use to prosecute the Receiver's claims in litigation and defend claims asserted against the Receivership Entities.

The Receiver respectfully requests an award for legal and professional fees and the reimbursement of certain expenses incurred on behalf of the Receiver for services rendered during the Application Period and a finding that these legal and professional fees and costs are reasonable and appropriate. These amounts total \$205,690.95 in the aggregate (the "Total Award"). The Total Award is comprised of: (a) \$152,149.38 in legal fees and costs for Thompson Coburn LLP, the Receiver's primary counsel; (b) \$10,166.63 in professional fees for Segue Equity Group, LLC, the Receiver's investment fund manager; (c) \$700 in professional fees for FTL Capital, LLC, the Receiver's business advisors; and (d) \$42,674.94 in professional fees and costs for CLA the Receiver's tax preparer.

Significantly, the Receiver and many of the professionals working with her performed services at deeply discounted rates. Moreover, the Receiver further reduced the costs to the Receivership estate by writing off various fees incurred for work performed. For example, counsel to the Receiver did not include charges for designing and managing internal document management systems and related time or for a significant portion of the Receiver's start-up costs associated with the Receivership and related legal and factual research.

As noted above, while the Receiver seeks a finding that the Total Award is reasonable and appropriate, the Receiver seeks Court permission to pay less than the Total Award at this time. Specifically, the Receiver seeks permission to pay eighty percent (80%) of the legal and professional fees and one hundred percent (100%) of the costs incurred during the Application Period as follows: (a) \$120,819.00 in legal fees and \$1,125.63 in costs for Thompson Coburn LLP; (b) \$8,133.30 in professional fees for Segue Equity Group, LLC; (c) \$560.00 in

professional fees for FTL Capital, LLC; and (d) \$34,055.59 in professional fees and \$105.45 in expenses to CLA. Therefore, although the Total Award sought is \$205,690.95, the total requested payment at this time is \$164,798.97. The Receiver is asking for payment of the reduced amount at this time, at the request of and pursuant to discussions with the SEC.

This request is the Receiver's third application to the Court for compensation and reimbursement of expenses for services rendered on behalf of the Receiver.⁴ No understanding exists between the Receiver and any other person for the sharing of compensation sought by this Receiver, except among the partners and associates of the employees of the firms retained by the Receiver.

In support of the efforts performed on behalf of the Receiver, the Receiver has attached Exhibits to its Application consisting of:

Exhibit A: Third Quarter SFAR

Exhibit B: Certification

Exhibit C: Summaries of professional and paraprofessional time and fees

Exhibit D: Individualized and detailed invoices of all services rendered, expenses, and disbursements for Thompson Coburn LLP, Segue Equity Group, LLC, FTL Capital, LLC, and CliftonLarsonAllen LLP

Exhibit C contains an aggregate summary of all hours and fees of all professionals and

⁴ The Receiver's *First Interim Application for Allowance and Payment of Expenses Incurred by the Receiver, Counsel and Other Professionals* ("First Application"), covering the period January 17, 2012 through April 30, 2012, was approved by the Court on September 20, 2012 (Dkt. No. 199) and payments were made as follows: \$301,266.96 in legal fees and \$21,158.67 in costs to Thompson Coburn LLP; \$12,724.61 in professional fees to Segue Equity Group, LLC; \$4,531.46 in legal fees and costs for Pepper Hamilton, LLP; and \$12,676.00 in professional fees for FTL Capital, LLC.

The Receiver's *Second Interim Application for Allowance and Payment of Expenses Incurred by the Receiver, Counsel and Other Professionals* ("Second Application"), covering the period May 1, 2012 through June 30, 2012, was approved by the Court on November 28, 2012 (Dkt. No. 213) and payments were made as follows: \$196,305.12 in legal fees and \$1,526.68 in costs to Thompson Coburn LLP; \$25,433.08 in professional fees to Segue Equity Group, LLC; and \$10,076.00 in professional fees for FTL Capital, LLC.

A summary of funds available in Receivership accounts and obligated funds is attached as Exhibit 1 to the SFAR.

paraprofessionals that provided services to the Receiver during the Application Period. The total amount represents the amount of time expended by each attorney, paralegal, and professional multiplied by the applicable hourly rate. Exhibit D contains individualized and detailed descriptions of the daily services rendered and the hours expended by the various attorneys, paralegals, and professionals employed on behalf of the Receiver in this case during the Application Period. Exhibit D also contains a detailed schedule listing the expenses and disbursements for which the Receiver seeks reimbursement. Exhibit D is based on, among other information, the contemporaneous daily time records maintained by the Receiver's attorneys, paralegals, and professionals who rendered services in this case. The Receiver has reviewed and approved these time records, and based on the complexity of the case, the Receiver respectfully submits that the requested compensation is reasonable.⁵

III. MEMORANDUM OF LAW IN SUPPORT OF REQUEST

Under governing law, following a determination that services were rendered and costs expended in furtherance of the Receivership, the Court may award compensation for the presented fees and costs. When determining an award of attorneys' fees, the Court should use the lodestar method of multiplying the number of hours reasonably expended by the reasonable hourly rate. *S.E.C. v. Petters*, No. 09-1750 ADM/JSM, 2009 WL 3379954, at *3 (D. Minn. Oct. 20, 2009) (citing *Fish v. St. Cloud State University*, 295 F.3d 849, 851 (8th Cir. 2002)). A reasonable hourly rate is the ordinary fee for similar work in the community. *Petters*, 2009 WL 3379954, at *3 (quoting *Avalon Cinema Corp. v. Thompson*, 689 F.2d 137, 140 (8th Cir. 1982)); *see also Fish*, 295 F.3d at 851 ("A reasonable hourly rate is usually the ordinary rate for similar work in the community where the case has been litigated."). The Receiver respectfully suggests

⁵ Certain redactions to these records have been made because of work product and privilege concerns and to protect the confidentiality of investors and investment concerns.

that for the reasons stated herein and based upon the background information regarding rates and qualifications set forth in the Proposals and the Third Interim Status Report, this request for fees for payment of the Receiver's attorneys and other professionals meets the criteria for this interim compensation.

In this case, the Court's Receivership Order requires the Receiver to "administer such assets as is required in order to comply with the directions contained in this Order, and to hold all other assets pending further order of this Court." (Receivership Order, Dkt. No. 16, at p. 2). The Receivership Order allows the Receiver to: (i) appoint "one or more special agents, employ legal counsel, actuaries, accountants, clerks, consultants and assistants as the Receiver deems necessary and to fix and pay their reasonable compensation and reasonable expenses, as well as all reasonable expenses of taking possession of the assets and business..." (Receivership Order, Dkt. No. 16, at p. 3); and (ii) "engage persons in the Receiver's discretion to assist the Receiver in carrying out the Receiver's duties and responsibilities" (*id.*). The Court further authorized payment of the Receiver's counsel from the funds held by the Receivership, (*see* Receivership Order, Dkt. No. 16, at p. 6), and empowered the Receiver to "make or authorize such payments and disbursements from the funds taken into control, or thereafter received by the Receiver ... as may be reasonable, necessary, and advisable in discharging the Receiver's duties" (*id.* at p. 4).

The Receiver's attorneys, paralegals, accountants and experts have incurred reasonable fees and costs consistent with the Court's orders, and payment is appropriate and warranted in consideration under applicable Eighth Circuit case law.

WHEREFORE, the Receiver respectfully requests that this Court enter an Order (i) finding that the Total Award is reasonable and appropriate; (ii) authorizing an award of fees and costs in the amount of \$164,798.97; (iii) directing the Receiver to make payments as follows

based upon the authority submitted by the Receiver in support of this Application and allowing payment to be made from any one or more of any of the accounts listed in Exhibit 1 to Exhibit A: (a) \$120,819.00 in legal fees (representing eighty percent (80%) of invoiced fees) and \$1,125.63 in costs for Thompson Coburn LLP; (b) \$8,133.30 in professional fees (representing eighty percent (80%) of invoiced fees) for Segue Equity Group, LLC; (c) \$560.00 in professional fees (representing eighty percent (80%) of invoiced fees) for FTL Capital, LLC; and (d) \$34,055.59 in professional fees (representing eighty percent (80%) of invoiced fees) and \$105.45 in costs for CliftonLarsonAllen LLP; and (iv) providing for such other relief as is appropriate under the circumstances.

Respectfully Submitted,

THOMPSON COBURN LLP

December 21, 2012

By /s/ Stephen B. Higgins

Stephen B. Higgins, #25728MO

Brian A. Lamping #61054MO

One US Bank Plaza

St. Louis, Missouri 63101

Phone: (314) 552-6000

Fax: (314) 552-7000

shiggins@thompsoncoburn.com

blamping@thompsoncoburn.com

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2012, I electronically filed the foregoing with the Clerk of the Court through the Court's CM/ECF system which will send a notice of electronic filing to the following:

Catherine L. Hanaway, Esq.
Ashcroft Hanaway LLC
222 South Central Ave., Suite 110
St. Louis, Missouri 63105
Counsel for Defendant Burton Douglas Morriss

Adam L. Schwartz
Robert K. Levenson
Brian T. James
Securities and Exchange Commission
801 Bricknell Avenue, Suite 1800
Miami, Florida 33131
Attorneys for Plaintiff

I further certify that on December 21, 2012, I served the foregoing document by First Class U.S. Mail on:

Morriss Holdings, LLC
7820 Maryland Ave.
St. Louis, Missouri 63105

Morriss Holdings, LLC
c/o Corporation Service Company
221 Bolivar Street
Jefferson City, Missouri 65101

/s/ Stephen B. Higgins