

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

IN RE: FIVE FORTY PARK CORPORATION,)	
Debtor.)	
)	CASE NO. 7-03-04746
)	
)	CHAPTER 11
)	
)	
)	

MEMORANDUM DECISION

The matter before the Court is the Second and Final Application of the firm of Gentry, Locke, Rakes & Moore, (“Gentry Locke”) former counsel to the Debtor in this Chapter 11 case, for compensation and reimbursement of expenses incurred in that capacity for the period May 18, 2004 through October 15, 2004. The Application is supported by the Debtor but is opposed by the United States Trustee and Pepsi-Cola Bottling Co, Inc. of Norton (“Pepsi”), Joseph F. Hunnicutt, and George E. Hunnicutt, Jr. (“the Hunnicutts”), the three major creditors in the case. The amount sought in the Application is a total of \$80,087.63 composed of \$76,442.65 for fees and \$3,645.03 for expenses. Upon the findings of fact and conclusions of law noted below, the Court will approve \$74,735.35 for fees and \$3,645.03 for expenses.

FINDINGS OF FACT

Gentry Locke prepared and filed on the Debtor’s behalf its Chapter 11 bankruptcy petition and was initially approved without objection to serve as its general reorganization counsel in this case. Later, however, information came to light concerning the adequacy of the firm’s disclosures about its prior “connections” with various parties in interest which caused the United States Trustee to file a motion to disqualify it from serving in such capacity, to deny it all

fees, and to require it to disgorge any compensation previously received. This motion was heard and in part granted by this Court in a Memorandum Decision and accompanying Order dated September 30, 2004, which are hereby incorporated by reference as a part of this Decision..

That Decision may be summarized as relieving Gentry Locke from its representation as general reorganization counsel prospectively, effective October 15, 2004, but approving its continued representation as special counsel in the pending adversary proceeding, approving its initial fee application only in the amount of 75% of the amount otherwise claimed by it, reduced by certain travel time incorrectly billed by it at 100% rather than 75% of applicable attorney hourly rates, and providing that its compensation for the balance of the period of its authorized service as Debtor's general reorganization counsel would be approved only to the extent of 90% of the amount otherwise properly due it for its services during such period of time. Gentry Locke has reflected such ruling in the Fee Application now before the Court and the compensation sought has been reduced by the stipulated 10% factor against the total of actual time charges.¹

Nevertheless, the Application has provoked objections from Pepsi, the Hunnicutts and the United States Trustee. At the conclusion of the hearing on April 19 at which Gentry Locke partner J. Scott Sexton testified, the Court provided to counsel for the objecting parties an opportunity to set forth the specific time entries to which they continued to object and for Gentry Locke's counsel to respond. They have done so and the matter is ready for decision.

Counsel for the United States Trustee generally objects that the fees sought "are excessive, did not provide a benefit to the estate and should be disallowed." In addition to this

¹ The Application recites that "all time entries [for the applicable period] have been included at 90 percent of the actual time expended." A review of the billing statement accompanying the Application indicates to the Court, however, that time entries have been made for the actual amount of time spent but the applicable hourly rates have been reduced by 10%, which provides the same ultimate result.

general objection, forty specific objections to various time entries are contained in the United States Trustee's supplement to his original objection. These entries relate to the time spent by Gentry Locke attorneys in dealing with and defending against the objection to their representation of the Debtor and represent the consistency of the United States Trustee's position that such services are part and parcel of counsel's inadequate original disclosures upon which the firm's representation was originally approved and that such disclosures having already been determined by the Court to have been inadequate, albeit not accompanied by a finding that such disclosures had been made with an intent to conceal from the Court and the United States Trustee the full import of the firm's "connections" to parties in interest, the firm does not deserve to receive any further compensation for services which might never have been necessary had sufficient original disclosures been made. This supplement was filed with the Court and can be found at docket entry 235 in this case. Counsel for Pepsi has filed a letter response dated April 26, 2005 and filed in this case at docket entry 236 in which time entries for May 19, 21, 26, 31, June 22, July 21, August 4 and October 15, all in 2004, are specifically criticized. Counsel for the Hunnicutts did not supplement their original objection, which simply adopted by reference the Objection filed by Pepsi, and such counsel further stated at the hearing that his clients would adopt and support the specific objections raised by Pepsi, of which they are the principal officers. On May 5, 2005 counsel for Gentry Locke responded by a letter, which can be found at docket entry 248, to these particularized objections.

The Debtor, by counsel, has represented that the assets of the Debtor will be sufficient to pay its creditors in full as well as the anticipated administrative expenses incurred or to be incurred in this case. This representation has not been challenged either by counsel for the United States Trustee or counsel for the major creditors in the case and the Court sees no reason

to doubt it either. Current counsel for the Debtor in this case, who have taken over both its general reorganization representation and its representation in the adversary proceeding, spoke forcefully at the April 19 hearing in support of Gentry Locke's fee application and did not suggest that any reductions in it be made.

This Court's prior Decision dated September 30, 2004 dealing with Gentry Locke's representation of the Debtor as bankruptcy counsel mandated a 25% reduction in its total fees sought in its First Application and a 10% reduction of fees for services after the concluding date of the First Application and October 15, 2004, on which date its services as Debtor's general reorganization counsel would end. At no time has the United States Trustee, the Debtor, Gentry Locke, or any creditor filed any motion for a rehearing or reconsideration of the Court's rulings made in that Decision and Order.

CONCLUSIONS OF LAW

The Court incorporates by reference its Conclusions of Law made in its September 30, 2004 Memorandum Decision in this matter. While the court admits that the arguments of the United States Trustee, that Gentry Locke should not be compensated for services relating to the defense of its own inadequate disclosures and the effort to continue its representation of the Debtor, carry considerable force, it believes that in the context of the facts of this case, where all creditors will be paid in full and the Debtor, independently represented by competent counsel, supports the fee application in full, it ought to adhere to its original Decision, which requires a 10% reduction from actual charges for this Application and which reduction the firm has already provided for in the pending fee application. What is fair and appropriate justice in matter of this kind is not at all evident and even if the Court if deciding the issue anew might make some distinction in allowing compensation between the services challenged by the United

States Trustee in his supplemented objection and other services rendered by counsel for the Debtor during the time period in question, it is not prepared to say that the end result of its original decision does not render at least approximate justice to parties in interest. In accepting that decision, at least during the continuation of Gentry Locke's services in this case, the parties have in some degree relied upon it subsequently and governed their actions accordingly. Even though the awarding of compensation on interim fee applications is provisional and not final until the determination of approved compensation on the final application², the Court concludes that no sufficient basis has been advanced by the United States Trustee for it to depart from the determination it made when these matters were originally addressed. Therefore, in general the objection by the United States Trustee to all Gentry Locke services related to defending its fee application and retention of position as Debtor's counsel will be denied. It will sustain objections to certain entries, however, as follows:

The 06/21/04 entry for BAH, a firm paralegal, for .10 hour in the amount of \$6.30 for "Pulling First Fee Application for review by Mr. Beck" is disallowed because it represents clerical overhead not properly chargeable to the client.

The 08/81/04 time entry for JSS (Mr. Sexton) for 1.70 hours in the amount of \$344.25 for appearing at the deposition of himself in which the firm was represented by Ms. Thompson, whose time is accounted for and charged in the fee application.

The 09/08/04 time entry for JSS (Mr. Sexton) for 4 hours in the amount of \$810.00 for attendance at the hearing on the firm's very strongly contested fee

²See *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 858 (9th Cir. 2004); *In re Taxman Clothing Co.*, 49 F.3d 310, 312 (7th Cir. 1995); 3 *Collier on Bankruptcy* § 331.03[3] at p. 331-25 (15th ed. rev.).

application and in which he appeared in the capacity of witness on his firm's behalf and in which the firm was represented by Ms. Thompson and Mr. Beck, the senior member of its bankruptcy section.

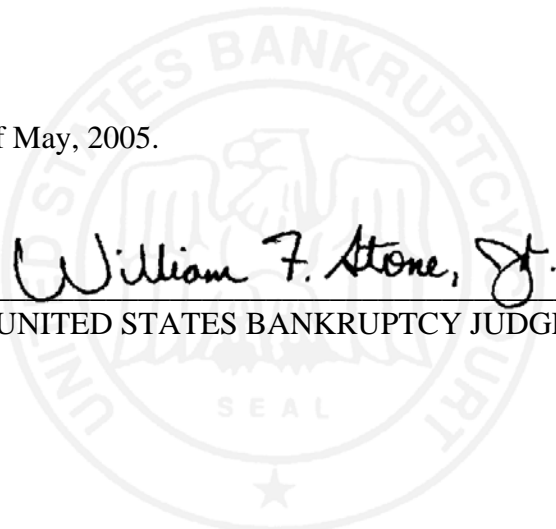
Except as to these indicated entries Gentry Locke's fee application will be approved with respect to the objections filed by the United States Trustee.

Pepsi has filed objections to office conferences in which the time of both attorneys is claimed to have been charged and the charges for two Gentry Locke partners at court hearings and meetings of the Debtor's Board of Directors. The Court is persuaded on the basis of the representations made in Ms. Thompson's May 5 letter to the Court that such charges are appropriate and in the absence of any objection by the Debtor they will be approved. Pepsi also objects to the 10/15/04 time entry for Mr. Sexton for 2.70 hours in the fee amount of \$546.75 for drafting a voting trust agreement. This voting trust agreement was prepared pursuant to authorization given at a Board of Directors meeting on that same date and would have included the members of the Hunnicutt family who were in control of the Debtor after George and Joseph Hunnicutt had been removed from effective control of the company. These services were rendered on the last day of Gentry Locke's general bankruptcy representation of the Debtor. Mr. Sexton testified that this voting trust arrangement was discussed and authorized at the Directors' meeting as a part of reaching a general settlement of all matters in dispute among the members of the Hunnicutt family. After considerations of the arguments made at the hearing by Pepsi's counsel on this point, the Court is persuaded that this objection is well taken. In view of the firm's prior representation of Mrs. Mary Hunnicutt and other members of the Hunnicutt family who were opposed to George and Joseph Hunnicutt's continued dominion over the family's fortune, which resulted with the firm's help in the successful removal of such brothers from

control over the Debtor, the critical significance of such fact in the Court's determination that the firm ought to be removed from continuing to serve as the Debtor's general reorganization counsel, the fact that new counsel was already representing the separate interests of Mrs. Hunnicutt, and the Debtor's retention pursuant to this Court's September 30 decision of new counsel to serve it during the continuation of its attempted reorganization, Mr. Sexton's decision to draft this trust agreement on the last day of his firm's general involvement in the bankruptcy case evidenced, in this Court's view, poor professional judgment on his part and a continuing lack of sensitivity towards the conflict of interest issues raised by his firm's representation of various Hunnicutt family interests. The Court concludes that he should have advised new counsel of the Board's authorization and let them work out with counsel for Mrs. Mary Hunnicutt which firm should prepare the requested document. Accordingly, such service will not be compensated by the Debtor and Pepsi's objection to this time entry will be sustained.

No objection has been raised to any of the expenses claimed by Gentry Locke and they will be approved in the full amount claimed. The Court will enter contemporaneously an order in accordance with its Decision described above.

ENTER this 31st day of May, 2005.


William F. Stone, Jr.
UNITED STATES BANKRUPTCY JUDGE