

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

Case No. 2:09-cv-229-FtM-29DNF

FOUNDING PARTNERS CAPITAL MANAGEMENT  
CO., WILLIAM L. GUNLICKS and PAMELA  
L. GUNLICKS,

Defendants,

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**ORDER**

This matter comes before the Court on the Receiver's First Interim Application for Allowance and Payment of Fees and Expenses Incurred By the Receiver, Retained Counsel and Other Professionals (Doc. #176) filed on November 13, 2009, and Second Interim Application for Allowance and Payment of Fees and Expenses Incurred By the Receiver, Retained Counsel and Other Professionals (Doc. #220) filed on May 18, 2010.

The Court finds that a reasonable attorney fee is calculated by multiplying the number of hours reasonably expended by the reasonable hourly rate. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). A reasonable hourly rate is "the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." Norman v. Housing Auth. of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988). See also Bivins v. Wrap It Up, Inc., 548 F.3d 1348, 1350

(11th Cir. 2008). In making these determinations the Court considers the factors enumerated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). The burden of documenting the appropriate hours and hourly rates is upon the fee applicant, in this case Receiver. Oxford Asset Mgmt., Ltd. v. Jaharis, 297 F.3d 1182, 1195 (11th Cir. 2002). The Court may then adjust the lodestar amount for the results obtained. ACLU v. Barnes, 168 F.3d 423, 427 (11th Cir. 1999).

Although the prevailing market rate is Fort Myers, Florida, the Court finds that the special expertise and resources required for this case and by the Receiver justify the use of non-local attorneys and accountants. Id. at 437. Additionally, the Court previously approved the hourly rates for primary counsel and the accounting firm. (Docs. ## 78, 88.)

**First Interim Application:**

The Receiver, with the approval of the Securities and Exchange Commission, seeks authorization to make payments for the period of May 20, 2009, through August 31, 2009. The Receiver seeks to pay Broad and Cassel, the Receiver's primary counsel, \$374,503.80 of \$529,801.35 in legal fees and costs; Berkowitz Dick Pollack & Brant, the Receiver's accountants, \$217,853.31 of \$310,635.29 in professional fees and costs; and Attride-Stirling & Woloniecki, the Receiver's Bermuda counsel, \$123,019.88 in total legal fees and costs. Primary counsel and the accountants have agreed to request

only 70 percent of their fees at this time, and the total sought is \$715,376.99. This total amount was discounted and certain fees were written off at the request of the Receiver.

The Court finds that the hourly rates of Broad and Cassel and Berkowitz Dick Pollack & Brant are reasonable and comparable to those in the Miami, Florida area. The hourly rates for counsel in Bermuda were previously approved by the Court, Doc. #104, and the Court finds that foreign counsel is an exceptional circumstance warranting a rate higher than the prevailing market rates in Florida. As to the hours, the Court finds that the number of hours are not unreasonable in light of what has been accomplished thus far in this case. See generally Receiver's First Report, Doc. #177. The Court cautions, however, that the use of investor funds must be expended wisely and counsel should use associates at lower billable rates whenever possible. The first interim request will be granted as to the 70 percent sought, and the amount for Bermuda counsel.

**Second Interim Application:**

The Receiver, with the approval of the Securities and Exchange Commission, seeks authorization to make payments for the period of September 1, 2009, through December 31, 2009. The Receiver seeks to make further payments to counsel at Broad and Cassel, accountants at Berkowitz Dick Pollack & Brant, and Bermuda counsel at Attride-Stirling & Woloniecki. The Receiver also seeks to pay

Huron Consulting Group, the Receiver's consultant and testifying expert, as well as Greg Whittmore, counsel in Texas.

Primary counsel, the accountants, and the consultant have all agreed to limit their requests to only 70 percent of their fees at this time, pending further application, and the Receiver states that many of those working with him are working at "deeply discounted rates." As previously stated, the hourly rates are acceptable and the Court finds the number of hours expended are high, but reasonable. The second interim request will be granted as to all counsel and the accountants.

As with counsel and the accountants, the Court authorized the retention of Professor Jay Westbrook to serve as an expert. (Doc. #164.) The Court did not authorize the use of Huron Consulting Group to review discovery provided by the Sun Capital entities. The Receiver states that Huron Consulting Group is a leading national firm of experts in healthcare and related areas that charges higher prices than local firms, and that even the reduced rate it agreed to charge is higher than the Receiver's Florida accounting firm "serving in a consulting capacity." (Doc. #220, p. 10.) The Court is not convinced, as presented by the Receiver, that Huron Consulting Group was necessary in this case. Rather, the Court finds that expert services provided are intertwined with the related matter, Newman v. Sun Capital, Inc., 2:09-cv-445-FTM-

29SPC. The Court declines to grant the application for payment to Huron Consulting Group at this time, without prejudice.

Accordingly, it is now

**ORDERED:**

1. The Receiver's First Interim Application for Allowance and Payment of Fees and Expenses Incurred By the Receiver, Retained Counsel and Other Professionals (Doc. #176) is **GRANTED** and the Receiver is authorized to pay Broad and Cassel \$374,503.80, Berkowitz Dick Pollack & Brant \$217,853.31, and Attride-Stirling & Woloniecki \$123,019.88.

2. The Receiver's Second Interim Application for Allowance and Payment of Fees and Expenses Incurred By the Receiver, Retained Counsel and Other Professionals (Doc. #220) is **GRANTED IN PART AND DENIED IN PART**. The Receiver is authorized to pay Broad and Cassel \$624,297.36, Berkowitz Dick Pollack & Brant \$249,445.75, Attride-Stirling & Woloniecki \$147,877.96, and Gregory A. Whittmore, Esq. \$3,158.00. The motion is otherwise denied.

**DONE AND ORDERED** at Fort Myers, Florida, this 10th day of August, 2010.

  
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**JOHN E. STEELE**  
United States District Judge

Copies:  
Counsel of record  
Receiver