SO ORDERED,

Judge Katharine M. Samson
United States Bankruptcy Judge
Date Signed: March 8, 2019

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: NATIONAL TRUCK FUNDING, LLC *et al.*

CASE NO. 17-51243-KMS

CHAPTER 11

DEBTORS

ORDER GRANTING IN PART AND DENYING IN PART FIRSTAND FINAL APPLICATION OF CHAFFE SECURITIES, INC. FOR ALLOWANCE OF FEES AND EXPENSES (Dkt. # 1222)

THIS MATTER is before the Court on the First and Final Application of Chaffe Securities, Inc., for Allowance of Fees and Expenses ("Application") filed by Chaffe Securities, Inc., assignee of Chaffe & Associates, Inc.[1] (collectively, "Chaffe") (ECF No. 1222); the Opposition to the Application filed by Hannah Baby, L.L.C., First United Management, Inc., Yolo Capital, Inc. and Moonpie, FLP (collectively, "Yolo Group") (ECF NO. 1258); the Reply Brief in Further Support of the Application filed by Chaffe (ECF No. 1268); and the Amended and Supplemental Opposition to the Application filed by the reorganized National Truck Funding, LLC ("NTF") and American Truck Group, LLC ("ATG") (together, "Reorganized Debtors")[2] (ECF No. 1333).

[1] On May 30, 2018, Chaffe and Associates, Inc. assigned to Chaffe Securities, Inc. "all obligations, responsibilities and rights, including the rights to payment, relating to and arising under the Engagement Agreement." Appl. ¶ 5, ECF No. 1222 at 4. Chaffe Securities holds "the necessary licensure required for advisors participating in equity transfers." *Id.*

[2] CAC Properties, Inc., an affiliate of the Yolo Group, purchased the membership interests of NTF and ATG (together "Debtors"). The Reorganized Debtors' objection was filed as an amendment to the Yolo Group objection.

Chaffe seeks approval of fees and expenses for services rendered in its capacity as restructuring advisor for Debtors. Appl., ECF No. 1222. The Reorganized Debtors object, claiming the amount of Chaffe's fee request is improper and inaccurate. Having considered the evidence and testimony at the hearing on the Application ("Hearing"), as well as applicable law, the Court finds that the Application should be granted in part and denied in part, as follows.

Jurisdiction

The Court has jurisdiction over the subject matter of and the parties to this proceeding under 28 U.S.C. § 1334. This matter is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (B), (O).

Factual Chronology

1. NTF and ATG filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on June 25, 2017. The Court ordered joint administration of the related cases with NTF designated as the lead case. ECF No. 79.

2. On July 21, 2017, three weeks after the petitions were filed, the Debtors requested authorization to employ Chaffe as restructuring advisor and investment banker under 11 U.S.C. §§ 327 and 328. ECF No. 109. The engagement agreement attached to the employment application detailed the negotiated terms and conditions of employment. ECF No. 109-1.

3. Chaffe was to be compensated for services under the following fee structure: (a) a $15,000.00 monthly fee; (b) a $125,000.00 fee [3] for structure and implementation of DIP financing ("DIP Financing Fee"), incremental to monthly fee, exit financing or sale fee; (c) a fee equal to 3.5% of gross proceeds from financing other than DIP financing ("Exit Financing Fee"), incremental to monthly fee, DIP financing fee or sale fee; (d) a sale fee ("Sale Fee") equal to 3.5%

[3] This fee was later reduced to $75,000.00 by agreement of the parties. Chaffe Reply, ECF No. 1268 at 2 n.4.

of aggregate consideration for a sale ("Aggregate Consideration"),[4] incremental to any DIP financing fee or Exit Financing Fee. ECF No. 109-1 at 3-4. The $15,000.00 monthly fee would be credited against any Sale Fee. *Id.* at 4. Subject to Court approval, the agreement also allowed reimbursement of reasonable expenses not to exceed $15,000.00 without prior consent. *Id.*

4. An agreed interim order authorizing Chaffe's employment *nunc pro tunc* to July 18, 2017, was entered with certain issues taken under advisement by the Court. ECF No. 311.

5. Excepting requests for indemnification or for restructuring fees in connection with a competing plan, the final order authorized the terms and conditions of Chaffe's employment and compensation under 11 U.SC. § 328. ECF No. 681.

6. The Debtors determined that a sale of their membership interests was the best way to maximize value for creditors of the bankruptcy estates. They requested approval of bid protections in connection with the sale of their equity interests through a proposed plan. ECF No. 606. Orders were entered granting bid protections and setting deadlines for selection of a stalking horse bidder and for submission of bids. ECF Nos. 694, 826.

7. Chaffe worked with the parties to analyze acquisition offers. "In consultation with Debtors' counsel and other stakeholders, Chaffe determined that the equity purchase and exit

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[4] "Aggregate Consideration" was defined under the agreement to mean:

> the total fair market value (determined at the time of the closing of a Sale by the Company and Chaffe in good faith) of all consideration paid or payable to, or received by, directly or indirectly, the Company, its Bankruptcy estate, its creditors and/or the security holders of the Company in connection with a Sale including all (i) cash, securities (equity or otherwise) and other property, (ii) Company indebtedness assumed, satisfied, or paid by a purchaser (including, without limitation, the amount of any indebtedness, securities or other property "credit bid" in any Sale) and any other indebtedness and obligations, including tax claims that will actually be paid, satisfied, or assumed by a purchaser from the Company or the security holders of the Company and (iii) amounts placed in escrow and deferred, contingent and installment payments.

ECF No. 109-1 at 4. At the Hearing, Chaffe's witness summarized Aggregate Consideration as "the net present value of all the cash, debt assumed and other liabilities assumed at, on behalf, or in payment for the two companies, American Truck and National Truck." Trial Tr., ECF No. 1361 at 15.

funding offer from CAC Properties, Inc. . . . presented the greatest realizable recovery for the creditors and was in the best interest of the estate." Appl. ¶ 11, ECF No. 1222 at 6.

8. A Joint Chapter 11 Amended Plan of Reorganization[5] ("Plan") was filed by the Debtors, the Official Committee of Unsecured Creditors ("Committee") and CAC Properties, Inc. ("CAC Properties"). ECF No. 876. After a hearing on confirmation and a subsequent ruling on objections to the Plan, the order confirming the Plan was entered on July 2, 2018. ECF Nos. 926, 1081, 1088, 1165. "The CAC Properties acquisition of the Debtors' equity closed on or about July 12, 2018." Appl. ¶13, ECF No. 1222 at 7.

9. On July 30, 2018, Chaffe filed its Application for final allowance of fees and expenses for services[6] rendered from July 18, 2017, through July 30, 2018. ECF No. 1222 at 7, ¶ 14. Chaffe asserted that fee arrangements approved under § 328 of the Bankruptcy Code are "modified only for developments unforeseen when originally approved." *Id.* at 8, ¶ 17 (citing *Donaldson Lufkin & Jenrette Sec. Corp. v. Nat'l Gypsum Co. (In re Nat'l Gypsum Co.),* 123 F.3d 861, 862 (5th Cir. 1997). Chaffe requested, in the alternative, that its fees and expenses be approved under § 330 and factors generally reviewed to determine reasonableness of fees and expenses. *Id.* at 8-11 (citing *Johnson v. Ga. Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir. 1974), *overruled on other grounds by Blanchard v. Bergeron,* 489 U.S. 87 (1989)).

10. Chaffe sought approval of compensation in the amount of $1,024,516.12 and expenses in the amount of $20,375.80, and requested payment, after deduction of fees paid, in the amount of $859,516.12 in compensation and $14,018.68 in expenses, as follows:

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[5] This was the second plan filed by the Debtors. *See* Joint Chapter 11 Plan of Reorganization of the Debtors, ECF No. 584.

[6] Chaffe's Application details services provided including preparation of financial projections, negotiation of DIP financing, solicitation of bids to acquire the Debtors or their assets, integration of information provided to prospective lenders and purchasers, and development of an online data room. ECF No. 1222 at 4-6.

Compensation:

DIP Financing Fee		$75,000.00
Exit Financing Fee	+	$0.00
Sale Fee	+	$949,516.12 (3.5% x Aggregate Consideration)
Less Monthly Fees paid	-	$165,000.00
Payment requested		$859,516.12

Expenses:

Expenses amount		$20,375.80
Less payment	-	$6,357.12
Expense payment requested		$14,018.68

ECF No. 1222 at 7.

11. Total Aggregate Consideration was itemized in an exhibit attached to the Application:

Exhibit 3
CAC Properties Aggregate Consideration
7.30.2018

	Face Value of Consideration	NPV of Consideration[5]
Exit Funding Cash	3,500,000	3,500,000
Assumed Liabilities		
Eva Bank Secured Real Estate Claim[1]	7,008,817	7,008,817
Customer Deposits[2]	1,517,981	1,517,981
DIP Loan[3]	1,002,881	1,002,881
Total Assumed Liabilities	9,529,679	9,529,679
Consideration to Secured Creditors[4]	12,576,125	12,440,672
Allocation of Un/Underscured	2,000,000	1,658,681
Total Aggregate Consideration	**27,605,804**	**27,129,032**

Footnotes

(1) Taken from the May 31, 2018 Balance Sheet. Includes LOC, Mortgage and Other. Other is believed to be post-bankruptcy mortgage payments based on conversations with former CFO Alan Walls.

(2) Includes $180,842.68 from ATG and $1,337,138.57 from NTF. Both figures sourced from respective company's May 31, 2018 Balance Sheet.

(3) Outstanding DIP principal amount of $988,060 from the May 31, 2018 NTF Balance Sheet, plus $14,821, three months interest at 6% on the $988,060.

(4) Total consideration to Secured Creditors is based on the replacement value for all trucks in the March 2018 Taylor & Martin appraisal. This figure also includes an additional $70,000 in value for People's Bank and $40,000 for Clarence Buckner, as reflected in the confirmed plan. All consideration is to be repaid through a 48-month note at 100% of replacement value and assumes no truck collateral is sold during the 48 months, with the exception of the Class 4 Inoperable Trucks, which payment is at face value. CAC Properties plans to either return to creditors or make payments to creditors using the proceeds from selling those trucks.

(5) Those payments made over time are discounted at a rate of 6.5%, the all-in interest rate for asset-based loans using equipment as collateral in the $10-$25 million range. The source for this rate is the 2018 Private Capital Markets Report by Dr. Craig R. Everett of Pepperdine's Grasiadio School of Business and Management.

ECF No. 1222-3 at 2. Chaffe computed its Sale Fee on the Net Present Value ("NPV") of consideration.

12. The EvaBank secured real estate claim, included as an assumed liability on which Chaffe computed its Sale Fee, did not become a secured claim of the Debtors until the post-petition transfer of real property on Canal Road in Gulfport, Mississippi ("Canal Road Property") from American Success Irrevocable Trust ("ASIT"), a company related to Debtors, to NTF. Notice of Transfer, ECF No. 726. ASIT and NTF were co-makers on notes to EvaBank that were secured by the Canal Road Property, owned solely by ASIT at the time of the bankruptcy. The debt owed to EvaBank by NTF was, therefore, an unsecured debt on the date the bankruptcy was filed.

13. The Reorganized Debtors objected to Chaffe's fee calculation, asserting that amounts comprising total Aggregate Consideration, on which the Sale Fee was computed, were improper and inaccurate. ECF No. 1333.

14. Chaffe agreed to reduce the Sale Fee and submitted a revised itemization of Aggregate Consideration at the Hearing on its Application. Trial Tr., ECF No. 1361 at 34.

Aggregate Consideration

CAC Properties Aggregate Consideration
7.30.2018

	Face Value of Consideration	NPV of Consideration
Exit Funding Cash	$3,500,000	$3,500,000
Assumed Liabilities		
Eva Bank Secured Real Estate Claim	$7,008,817	$7,008,817
Customer Deposits	$500,655	$500,655
DIP Loan	$1,056,874	$1,056,874
Total Assumed Liabilities	$8,566,346	$8,566,346
Consideration to Secured Creditors	$12,576,125	$12,440,672
Allocation of Un/Underscured	$2,000,000	$1,658,681
Total Aggregate Consideration	**$26,642,471**	**$26,165,699**

Sale Fee

- $26,165,699 x 3.5% = $915,799.47
- Less Monthly Fees paid = $165,000.00
- Sale Fee = $750,799.47

Trial Ex. Chaffe 6, ECF No. 1341 at 38-39. Adding the revised Sale Fee to the $75,000.00 DIP Financing Fee results in a fee request of $825,799.47.

15. At the Court's direction, the parties presented an order allowing payment of the uncontested portion of Chaffe's fee. Order, ECF No. 1342. The order, entered on September 11, 2018, allowed payment of $341,152.00 based on the following computation:

Partial sale fee	$ 66,531.00	(3.5% x $ 1,900,902.00) NPV of amounts to Unsec/Undersecured
Partial sale fee	$364,621.00	(3.5% x $10,417,733.00) NPV of assumed debt for operable trucks
	$ 75,000.00	(DIP Financing Fee)
	-$165,000.00	(Credit for Monthly Payments)
	$341,152.00	

ECF No. 1342. At the Hearing, Chaffe submitted a worksheet supporting these calculations.

Schedule of Unsecured/Undersecured Claims

	Paid at Closing	One Year Anniversary	Total Face Value	Net Present Value
Class 3	111,987	111,987	223,974	$ 216,379
Class 4	84,599	84,599	169,198	$ 163,461
Class 7	45,636	45,636	91,271	$ 88,176
Class 5 Returned Trucks	-	757,778	757,778	$ 706,388
Class 5 Returned Trucks Loan	-	-	757,778	$ 726,498
	242,222	1,000,000	2,000,000	$ 1,900,902

Schedule of Class 3 and Class 5 Operable Truck Consideration

	Face Value	Net Present Value
Class 3	$ 6,215,125	$ 6,154,867
Class 5	$ 4,304,600	$ 4,262,866
	$ 10,519,725	$ 10,417,733

NPV of Consideration	**$ 12,318,635**
Sale Fee of 3.5%	$ 431,152
Minus: Monthly Credits	$ (165,000)
Currently Agreed Upon Fee	$ 266,152
Plus: DIP Fee	$ 75,000
Currently Due to Chaffe	**$ 341,152**

Trial Ex. Chaffe 5, ECF No. 1341 at 37.

16. After subtracting the uncontested portion of the Sale Fee ($431,152.00) from the reduced fee of $915,799.47, the amount of the Sale Fee at issue is $484,647.47.

17. At the Hearing, the Court heard testimony from: Gladys Fenner Gay LeBreton, Managing Director of Chaffe & Associates, Inc., and President of Chaffe Securities, Inc. (Trial Tr., ECF No. 1361 at 13); Stewart Peck, the former lead counsel for the Debtors (*Id.* at 89); Bruce Lindsay, President of the Reorganized Debtors (*Id.* at 105); and Michael Brandner, a member of

the Yolo Group (*Id.* at 127). After hearing the testimony of witnesses and arguments of counsel, the matter was taken under advisement.

Analysis

The Reorganized Debtors' objections fall within several categories:[7] (1) terms and conditions of Chaffe's employment and compensation have proved improvident in light of developments not capable of being anticipated (ECF No. 1333 at 5-10); (2) calculation of Aggregate Consideration is inaccurate (ECF No. 1333 at 1-5); (3) the sale to CAC Properties under the confirmed Plan should be deemed a competing plan, subjecting Chaffe's fee to review under § 330 as opposed to § 328 (ECF No. 1333 at 10-11); and (4) legal expenses should not be allowed (ECF No. 1258; ECF No. 1361 at 11-12).

I. The Terms and Conditions of Chaffe's Employment and Compensation Were Not Improvident Under § 328.

A. Terms and Conditions of Chaffe's Employment

The terms and conditions of Chaffe's employment and compensation were authorized by the Court under 11 U.S.C. §§ 327 and 328. Order Cond. Grant'g Appl., ECF No. 681. But after the conclusion of employment, allowed compensation may be different from what was approved "if the terms and conditions prove to have been improvident in light of developments not capable of being anticipated." 11 U.S.C. § 328(a); *see Daniels v. Barron (In re Barron),* 225 F.3d 583, 586 (5th Cir. 2000) ("[A] bankruptcy court may only depart from a compensation scheme approved under § 328(a) 'if such terms and conditions prove to have been improvident in light of developments *not capable of being anticipated* at the time of the fixing of such terms and conditions.'").

[7] The Court considers other objections that may have been raised in the pleadings to be resolved, abandoned or moot.

The terms and conditions of Chaffe's compensation included a Sale Fee of 3.5% of Aggregate Consideration. ECF No. 109-1 at 3-4. Aggregate Consideration includes liabilities assumed by a purchaser. *Id.* at 4. As part of the Plan, CAC Properties assumed the secured indebtedness of EvaBank in the amount of $7,008,817.00. Trial Ex. Chaffe 6, ECF No. 1341 at 38; ECF No. 1361 at 32. The 3.5% Sale Fee on the EvaBank liability alone amounts to $245,308.59. The Reorganized Debtors assert that the liability for EvaBank's secured claim could not have been anticipated at the time of Chaffe's fee agreement and that it should be excluded from the fee calculation as improvident under § 328. ECF No. 1333 at 5-10; ECF No. 1258.

B. The EvaBank Secured Real Estate Claim and Transfer of Property

The Debtors operated their trucking business from facilities on the Canal Road Property. ASIT was the sole owner of the Canal Road Property and in September 2016, Debtors leased the property from ASIT paying combined rent of $15,050.00 per week. ECF No. 905 at 2; ECF No. 1333 at 5. The leases were to terminate in August 2020. ECF No. 1333 at 5. The Debtors listed the leases in their bankruptcy schedules. NTF Case No. 12-51243, Sch. G, ECF Nos. 172, 213, 721; ATG Case No. 17-51244, Sch. G, ECF Nos. 92, 103, 136.

In June 2016, three months prior to execution of the leases by the Debtors, ASIT and NTF executed a note payable to EvaBank in the amount of $6,900,000.00, secured by a deed of trust on the Canal Road Property. EvaBank Mot. Lift Stay, ECF No. 763 at 1-2. Eleven months later, ASIT and NTF executed a second note to EvaBank in the amount of $600,000.00 also secured by the Canal Road Property. *Id.* ASIT also granted an assignment of leases and rents from the Canal Road Property to EvaBank. *Id.*

Although the original schedules filed by the Debtors reflected the leases with ASIT, Debtors' counsel did not learn until early January 2018 that NTF was a co-maker on the EvaBank

note and that NTF's *unsecured* liabilities were understated by over $7 million, because of a failure to list the unsecured obligation to EvaBank. ECF No. 1333 at 7, ¶ 8; ECF No. 1361 at 89-90. This indebtedness came to light when Power Land LLC ("Power Land"), a potential bidder for Debtors and sponsor of Debtors' first plan, requested the EvaBank loan documents as part of its due diligence. [8] In mid-January, Chaffe learned that Debtor NTF was a co-maker on the EvaBank loan when Chaffe was given the EvaBank loan documents to put in the data room. ECF No. 1361 at 83-84.

On February 5, 2018, NTF's schedules were amended to include the *unsecured* debts to EvaBank,[9] since the Canal Road Property that secured the debt was owned by ASIT. Sch. E/F, ECF No. 721 at 4. On the same day, ASIT quitclaimed the Canal Road Property to NTF. ECF No. 726.

C. Effect of Transfer

The Canal Road Property transfer had a significant impact on the Debtors. The Reorganized Debtors assert that the transfer of the property to NTF "had the effect of cancelling the leases on the property since the ownership and the tenants were the same." ECF No. 1333 at 10, ¶ 15; ECF No. 1361 at 100. According to the Reorganized Debtors, a 2018 appraisal obtained by the Committee valued the property at $3,960,000.00, an amount substantially less than the amount of debt on the property. ECF No. 1333 at 9, ¶ 14; ECF No. 1361 at 68. The Reorganized Debtors assert that, as a result of the post-petition transfer, the estate was required to pay EvaBank $7 million because the loan could not be crammed down to value over the objection of EvaBank.

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[8] Peck testified that he learned of the EvaBank loan while at Power Land's office and that the Debtors had not told him about it. ECF No. 1361 at 90. He originally thought that ASIT owned the property and was also the only obligor on the note. ECF No. 1361 at 93. He stated that he immediately contacted the Debtors' CFO, and that the CFO did not know about the loans either. *Id*. at 90.

[9] EvaBank was initially listed on the Debtors' schedules because of a separate loan secured by trucks.

ECF No. 1333 at 9-10, ¶¶ 15-16; ECF No. 1361 at 57-58. If the EvaBank debt had remained an unsecured claim, payment on the $7 million debt would have been shared pro rata with other unsecured creditors.[10] ECF No. 1361 at 56; 93-94. The Reorganized Debtors argue that "[w]ithout the transfer, the cost to the estate would have been solely the lease payments through the remaining terms of the leases and the time necessary to allow the buyer to find alternative space in a planned move." ECF No. 1333 at 10; ECF No. 1361 at 117-18. The Reorganized Debtors object to payment of Chaffe's fee based on the assumption of the EvaBank debt, arguing that "[p]aying a sales fee to Chaffe, for an improvident business decision, merely compounds the problem and amounts to a windfall to Chaffe. At most, the sales fee should be based upon present value of the remaining lease payments." ECF No. 1333 at 10.

At the Hearing, counsel for Chaffe argued that Congress enacted § 328 to eliminate uncertainty associated with fees "even at the risk of potentially underpaying or conversely providing a windfall to professionals retained by the estate." ECF No. 1361 at 5 (citing *ASARCO, L.L.C. v. Barclays Capital, Inc. (In re ASARCO, L.L.C.),* 702 F.3d 250, 258 (5th Cir. 2012) (retention of professionals under § 328 allows pre-approval "even at the risk of potentially underpaying, or, conversely, providing a windfall to, professionals retained by the estate under §328(a)."). LeBreton testified that she did not think it was "at all unusual . . . during a bankruptcy for liabilities to become apparent that the debtors did not declare initially." ECF No. 1361 at 33.

[10] Under section 4.7 of the confirmed Plan, general unsecured Class 7 claims were entitled to receive a pro rata share of $1 million on the effective date and $1 million on the first anniversary of the effective date. ECF No. 1209-1 at 27.

D. Improvident Standard Under § 328

If the Court determines that the terms and conditions of Chaffe's pre-approved fee agreement are improvident[11] in light of developments not capable of being anticipated, then the fee is subject to review and the Court may allow compensation different from terms approved. *See Gibbs & Bruns LLP v. Coho Energy Inc. (In re Coho Energy Inc.),* 395 F.3d 198, 204 (5th Cir. 2004) ("even if the bankruptcy court acts to 'guarantee' attorney's fees, it reserves the power to alter them."). The Fifth Circuit has held to a stringent standard for an adjustment of fees under § 328(a):

> We have repeatedly interpreted § 328(a) as meaning precisely what it says: A professional may be retained on any reasonable terms; but, once those terms have been approved pursuant to § 328(a), the court may not stray from them at the end of the engagement unless developments subsequent to the original approval that were incapable of being anticipated render the terms improvident. *See Coho Energy,* 395 F.3d at 204–05; *In re Barron,* 325 F.3d 690, 693 (5th Cir. 2003) (*Barron II*); *Barron I,* 225 F.3d at 586 (admonishing the bankruptcy court for failing to rely "upon the plain language of" § 328(a)); *see also In re Nucentrix Broadband Networks, Inc.,* 314 B.R. 574, 580 (Bankr.N.D.Tex. 2004) ("As taught by the Fifth Circuit, the bankruptcy court must honor the plain meaning of Section 328."). Section 328(a) therefore creates a "high hurdle" for a movant seeking to revise the terms governing a professional's compensation *ex post facto. In re Smart World Techs., LLC,* 552 F.3d 228, 234–35 (2d Cir. 2009) ("Surprisingly few cases have construed [§ 328(a)'s] language, but those that have make it evident that it is a high hurdle to clear."); *see also Coho Energy,* 395 F.3d at 205 (commenting that § 328(a) sets a "high standard").

ASARCO, L.L.C. v. Barclays Capital (In re ASARCO, L.L.C.), 702 F.3d 250, 257-58 (5th Cir. 2012).

The party requesting the revision "must show not merely that a compensation adjustment is appropriate in light of subsequent developments that were previously unforeseen or unanticipated by the parties, . . . [but is also] tasked with the weightier burden of proving that the

[11] The meaning of "improvident" may include "[o]f or relating to a judgment arrived at by using misleading information or a mistaken assumption." *Improvident,* Black's Law Dictionary (9th ed. 2009).

subsequent developments were incapable of being anticipated at the time the engagement was approved." *Id.* at 258 (citing *Daniels v. Barron (In re Barron),* 325 F.3d 690, 693 (5th Cir. 2003)). The record must show, with specificity, developments that could not have been anticipated. *Id.* ("[B]efore a court may revise a compensation agreement, it must explain with specificity why the subsequent developments were 'incapable of being foreseen.'"); *Peele v. Cunningham (In re Tex. Sec., Inc.),* 218 F.3d 443, 446 (5th Cir. 2000) (court could not alter compensation approved under § 328 without making finding of improvidence due to unanticipated circumstances).

After careful consideration of the circumstances of this case, the Court finds that the Reorganized Debtors have not met the "high hurdle" of establishing a subsequent development incapable of being anticipated at the time Chaffe was employed. Since it appeared in this case, Yolo Group has been investigating the transfers between and among Debtors and various individual and corporate insiders of Debtors as well as the transaction between EvaBank and ASIT. *See, e.g.,* Mot. Exam. of NTF, ECF No. 205; Mot. Exam. of ASIT, ECF No. 224. At a hearing on September 8, 2017,[12] regarding discovery in an adversary proceeding between Debtors and the Yolo Group, counsel for the Yolo Group argued, "We have a ton of interrelated entities. We have a ton of money that's gone out of this business. We have trucks that have been sold out of the trust. We have just something that warrants looking at it very carefully." ECF No. 509 at 21. Additionally, in a term sheet dated December 28, 2017, Yolo conditioned an offer for a DIP loan on a second lien on the Canal Road Property and on a requirement that NTF "file suit against ASIT seeking a declaration that the [Canal Road Property] is in truth and fact owned by [NTF]." ECF No. 725 at 7. Although the post-petition transfer of property outside the ordinary course of Debtors' business and without court approval is extraordinary, the Court cannot find that it was

[12] The motion to employ Chaffe was also heard on this date.

"not capable of being anticipated" given what was suspected or known by the parties from the beginning of the case about the Debtors' dealings with insiders.

II. Fee Calculation: Not All Components of Aggregate Consideration Were Accurate.

The Reorganized Debtors object to the accuracy of values used by Chaffe as components of Aggregate Consideration, including the customer deposit liability, consideration to secured truck creditors, NPV calculations and the discount rate. The Reorganized Debtors also assert that Chaffe double-counted certain funds in their computation of Aggregate Consideration. The Court does not consider these objections as further requests to alter the fee pre-approved under § 328, but as requests to ensure accuracy in the calculation of Aggregate Consideration.

A. Customer Deposits

As an assumed liability of the Reorganized Debtors, Chaffe included a "Customer Deposits" component of Aggregate Consideration. ECF No. 1222-3 at 2. The Reorganized Debtors objected to the original $1,517,981.00 amount for customer deposits, arguing that only 132 of 400 truck leases were being assumed by the Reorganized Debtors, that claims for return deposits on rejected leases would be unsecured claims rather than assumed liabilities to be included in Aggregate Consideration, and that deposits owed on assumed leases are reduced by repair costs, cleaning and other items. ECF No. 1333 at 3.

LeBreton agreed at the Hearing that the Customer Deposits liability should only relate to truck leases that are assumed. ECF No. 1361 at 25. She revised the calculation of Aggregate Consideration by decreasing the amount for Customer Deposits to $500,654.57 based on a schedule of assumed truck leases and customer deposits. *Id.* at 26.

Counsel for the Reorganized Debtors asserts that there should be a further reduction in the customer deposits component of assumed liabilities because lease provisions require an automatic

offset in the amount of $1300.00 per truck on lease termination, regardless of damage. Trial Tr., ECF No. 1361 at 10, 39-41. This amount includes a detail charge of $895.00 and a service charge of $495.00. *Id.* at 39; Trial Ex. CSC-1, ECF No. 1340.

The Court agrees that the Customer Deposits component of Aggregate Consideration should be reduced because of the contractual offset against the customers' deposits. The schedule of assumed truck leases and deposits identifies 132 leases, and of those leases, four do not have any deposit remaining and three have a deposit of $995.00 each. Trial Ex. Chaffe 2, ECF No. 1341 at 17-20. The rest have deposit balances exceeding $1300.00. The Court finds that Customer Deposits of $500,655.00 should be reduced by $165,485.00, computed by adding $162,500.00 ($1300.00 x 125) + $2,985.00 ($995.00 x 3), resulting in a Customer Deposit component of $335,170.00.

B. Consideration to Secured Creditors and Inoperable Truck Valuation

The Reorganized Debtors object to Chaffe's use of replacement value for the "Consideration to Secured Creditors" component of Aggregate Consideration in the amount of $12,576,125.00 including both operable and inoperable trucks. ECF No. 1333 at 2; ECF No. 1222-3 at 2. The Debtors point out that the Amended Plan and Supplement used "replacement value for the value of the trucks being retained, and used 'actual cash received' as the value of the inoperable trucks." ECF No. 1333 at 2; ECF No. 1055 at 6-7; ECF No. 1361 at 45-48; ECF No. 1209 at 23-25.

LeBreton testified that replacement value was chosen "in part because the original plan specified replacement value as the level of value associated with the inoperable trucks." ECF No. 1361 at 30. She claimed that under the amended Plan there was "no clear statement about what level of value to attach to the trucks on the date . . . the [P]lan becomes effective." ECF No. 1361

at 30, 78-79. She admitted that "possibly" an adjustment may be required in the calculation of Aggregate Consideration. *Id.* at 31.

The Plan provisions on valuation and treatment of operable and inoperable truck claims are instructive. Section 4.3 provides for repayment of Operable Trucks (Classes 3a-3x) based on a forty-eight month amortization, with creditors to "receive payment in an amount equal to the Replacement Value of such Collateral, together with interest at the Applicable Rate." ECF No. 1209-1 at 23-24, ¶ 4.3(A). The Reorganized Debtors maintain the right to a post-effective date sale option. *Id.* at 24, ¶ 4.3(B).

Section 4.4 provides treatment for Inoperable Trucks (Classes 4a-4q). ECF No. 1209-1 at 24-25, ¶ 4.4(A). Secured creditors may elect between two options: (1) return of collateral or (2) sale of collateral by the Reorganized Debtors with 85% of net sales proceeds remitted to the creditor. *Id.* at 24.

Adjustment to the unsecured portion of Class 4 claims is based on an agreed credit or the "amount actually received," as follows:

> The Class 7 claim possessed by a Class 4 creditor shall be reduced by the following:
>
> a) If the parties agree as to the credit the amount agreed to by the parties; or
>
> b) If the parties do not agree as to the credit the amount actually received by the Class 4 creditor in connection with the sale of trucks identified on Amended Exhibit B to the Amended Plan Sponsor Term Sheet.
>
> The Class 7 claim of a Class 4 creditor shall initially be the orderly liquidation value as set forth in the T&M Appraisal for such property (the "Initial Class 7 Claim"). Upon sale or receipt of proceeds, the Class 7 claim of a Class 4 creditor the Initial Class 7 Claim of such creditor shall be adjusted up or down based upon the difference between the Orderly Liquidation Value assigned to such Collateral and the proceeds actually received by such creditor.

ECF No. 1209-1 at 24-25, ¶ 4.4.

The Court finds that Chaffe's use of replacement value for inoperable trucks is not consistent with Plan provisions. The Plan contemplates a credit of an agreed amount, or of the amount received through liquidation of the collateral, with an initial value assumption of orderly liquidation value, to be adjusted up or down based on the difference between orderly liquidation value and the proceeds actually received. *Id.* The valuation of inoperable trucks was not designed to be finalized as of the effective date of the Plan; instead, it would be adjusted. ECF No. 1209-1 at 25. Consequently, the Court finds that the value for the inoperable trucks should be either an amount agreed to by the Reorganized Debtors and the creditor or the amount received by the creditor after sale of the collateral.

C. Double Counting for DIP Loan and Unsecured Creditor Payment

The Reorganized Debtors assert that the DIP Loan liability and $1 million of the payment to Class 7 unsecured creditors, included in separate components of Aggregate Consideration, are also included in the $3.5 million Exit Funding Cash component of Aggregate Consideration, resulting in "double counting" of those components in the fee calculation. ECF No. 1333 at 4; ECF No. 1361 at 9-11.

LeBreton testified that the $3.5 million figure for the Exit Funding Cash comes from Section 5.1 of the confirmed Plan that requires an affirmative commitment to provide cash, and she argues there is no double counting of the DIP Loan and the $1 million to unsecured creditors. ECF No. 1361 at 20-21. She stated that CAC Properties promised in Section 5.2 of the confirmed Plan that they would assume the DIP Loan and that it was not actually paid off from the $3.5 million of Exit Funding Cash. *Id.*, ECF No. 1361 at 50-51.

The Reorganized Debtors argue that the DIP Loan from Power Land was repaid. ECF No. 1361 at 51. Lindsay testified that the new loan was taken out "so that the company didn't have to

use cash to pay off the DIP loan," and that there was no assumption of the DIP Loan.[13] ECF No. 1361 at 125. He stated Yolo Group Holdings LLC was the source of the $1 million payment to Power Land (to repay the original DIP loan)[14] and that the payment was part of the $3.5 million commitment. ECF No. 1361 at 126.

Section 5.1 of the Plan clearly sets forth the sources of capital to fund the Plan. These sources include $3.5 million in exit funding, funds from liquidation of the Yolo Group trucks and reinvestment of distributions received by the Yolo Group in connection with its status as an unsecured creditor and other funds as are necessary to pay administrative claims. ECF No. 925-2 at 1; ECF No. 1209-1 at 28-29. Section 5.2 of the Plan reiterates certain obligations of the Amended Plan Sponsor, including the obligation to satisfy the original DIP loan, but does not restrict the Amended Plan Sponsor from using contributed capital to meet this obligation. The Reorganized Debtors presented undisputed testimony that the payoff of the DIP loan was part of the $3.5 million exit funding. ECF No. 1361 at 126. Consequently, Chaffe has not established that it is entitled to a separate Sale Fee for assumption of the Power Land DIP loan.

Regarding the argument that $1 million of the payment to unsecured creditors was double counted, LeBreton testified that $242,222.00 was deducted as the amount paid at closing, as reflected in the different amounts shown for "Allocation of Un/Undersecured" creditors in the first and second columns of the Aggregate Consideration exhibit to the Application.[15] ECF No. 1361

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[13] LeBreton contended that it was a fiction that the loan was paid and that "[i]t just went from one party to the next." ECF No. 1361 at 51.

[14] This loan was necessitated by the fact that the Power Land DIP loan came due on June 1, 2018, the same date that the Court entered its Opinion and Order on Confirmation of Chapter 11 Plan and required the parties to submit a confirmation order. Am. Mot. Post-Pet. Fin'g, ECF No. 719-1 at 1; ECF No. 1088.

[15] The first column provides "Face Value of Consideration" in the amount of $2,000,000.00, and the second provides "NPV of Consideration" in the amount of $1,658,681.00. ECF No. 1222-3 at 2; ECF No. 1361 at 17. The deduction reflects not only the $242,222.00 paid at closing but also a deduction for the net present value calculation for payments over a 48-month schedule using a discount rate of 6.5%. ECF No. 1361 at 18-19.

at 17-18, 22. She testified that the remaining portion of the $1 million allocation to undersecured and unsecured creditors is not actually paid but goes to the Yolo Group and is contributed by them as capital to the Reorganized Debtors, citing Section 5.1 of the Plan. ECF No. 1361 at 22. Under the Plan, payment to the Yolo Group is deferred. *Id.* Lindsay testified that the Yolo Group had agreed that the funds (in excess of $700,000.00) would be available to the Reorganized Debtors and that Yolo Group had deferred its right to receive payment at closing. ECF No. 1361 at 122. He stated that under Section 5.1 of the Plan, the amount allocated to the Yolo Group under the Class 7 distribution to unsecured creditors was part of CAC Properties' affirmative funding commitment to the company. ECF No. 1361 at 124. Counsel for Chaffe argued that, under Section 5.1 of the Plan, the Yolo Group's share of the $1 million was not paid from the $3.5 million. ECF No. 1361 at 124-25.

The Court finds that the funds listed in the un/undersecured component of Aggregate Consideration are not double-counted in the Exit Funding Cash. As stated by Chaffe, $242,222.00 of the amount was to be paid at closing and was deducted from the $1 million before the 3.5% Sale Fee calculation was applied. The remaining portion represents part of the Yolo Group's funding commitment which is separate from the $3.5 million commitment.

D. Calculations of Discount Rate and Net Present Value

At the Hearing, counsel for the Reorganized Debtors raised an objection to Chaffe's discount rate and calculation of NPV for some components of Aggregate Consideration. LeBreton explained that she used a 6.5% discount rate from the annual Pepperdine Private Capital Markets Report. ECF No. 1361 at 18, 53-54. She also explained that some of the components (like the EvaBank secured debt) may not have been discounted to present value where there was a separate interest rate or an assumption of face value. ECF No. 1361 at 42-43, 77-78

LeBreton stated that an NPV calculation was included for both the secured and unsecured truck allocations, including the Yolo Group trucks. ECF No. 1361 at 44-45, 52-53, 75-77. With regard to the Class 3 operable trucks, she stated that "[you are] discounting both the payments and the interest paid over time back to the present value and the reason why it doesn't look substantially different is because the interest rate [6%] and the discount rate [6.5%] are very close." ECF No. 1361 at 77.

Having heard the testimony and explanations by Chaffe about the discount rate used and calculation of NPV, the Court accepts Chaffe's calculation of NPV.

III. The Sale to CAC Properties Was Not a Competing Plan.

The Reorganized Debtors argue that the Plan should be deemed a competing plan, therefore qualifying for an exception to the § 328 pre-approval of Chaffe's fee under the Court's prior order approving employment. ECF No. 681. However, the Plan was, in fact, filed as a joint Plan by the Debtors, the Committee, and CAC Properties and does not qualify as a competing plan under the prior order. Therefore, the fees will not be reviewed under an exception to the order approving employment.

IV. Not All Chaffe's Legal Expenses Are Allowable.

Chaffe seeks allowance of total expenses incurred in the amount of $20,375.80, less reimbursements of $6,357.12, resulting in a request for payment of $14,018.68. ECF No. 1222 at 7; ECF No. 1222-1. Yolo Group objected to Chaffe's reimbursement of legal fees, arguing that in *Baker Botts L.L.P. v. ASARCO LLC,* 135 S.Ct. 2158 (2015) the Court "rejected the ability of an estate professional to seek reimbursement of the costs and expenses incurred in a fee application." ECF No. 1258 at 7. Yolo Group also objected to fees related to discovery requests and for advising Chaffe about matters in the bankruptcy case. ECF No. 1258 at 8.

Chaffe responded to the objection arguing that *Baker Botts* disallowed an award of attorney's fees for "fees incurred in defense (not preparation) of its own fee application." ECF No. 1268 at 9. Chaffe asserted that "none of the fees requested are those fees currently being incurred in defense of Chaffe's Fee Application so there is no possible implication of the 'American Rule' which was the foundation of the majority's opinion in *Baker Botts*." *Id.* The Court agrees that the *Baker Botts* argument does not apply to the fees at issue in this case.

Chaffe also responded to Yolo Group's objection to payment of fees incurred in discovery, or assistance in bankruptcy matters, stating that the engagement agreement allowed for "reimbursement of all out-of-pocket expenses incurred by Chaffe in connection with its engagement." ECF No. 1268 at 9 (bolding omitted). Chaffe's engagement letter contains the following provision for allowances of expenses:

> 3. Expenses. In addition to the fees described above and subject to Bankruptcy Court approval, the Company agrees to reimburse Chaffe for all reasonable out-of-pocket expenses incurred by Chaffe (or reimbursable by it to its personnel) in connection with its engagement under this Agreement. These expenses include (without limitation) travel, meals, outside printing, and delivery expenses, and fees and expenses of Chaffe's legal counsel. These reimbursable expenses (not including expenses otherwise reimbursable, including under the Indemnification Letter referred to in Section 6, Indemnification) will not exceed $15,000 without the Company's prior consent, which will not be unreasonably withheld. Expense invoices will be provided by Chaffe from time to time and are to be paid within 15 days after the Company receives a statement from Chaffe.

ECF No. 109-1 at 4 (highlighting in original).

The Court finds that the fees for discovery or for bankruptcy matters fall within the expenses allowed in the engagement letter.[16] However, the Court recognizes that a portion of the fees billed as expenses were incurred after termination of Chaffe's engagement. The engagement letter provides that Chaffe's engagement shall end on the 12-month anniversary (from the date the

[16] Section 328 "involves only limitations on fees or compensation, not expenses. Reimbursement of expenses are governed by the standards set forth in § 330(a)(1)(B) which provide 'reimbursement for actual, necessary expenses.'" Robert J. Landry & James R. Higdon, *A Primer on 11 U.S.C. § 328 and its Use in Alternative Billing Methods in Bankruptcy,* 50 Mercer L. Rev. 537, 555 (1999) (footnotes omitted). In addition, the expense reimbursement was agreed to in Chaffe's engagement letter subject to bankruptcy court approval. ECF No. 109-1 at 4.

engagement agreement is signed). ECF No. 109-1 at 4, ¶ 4. And the engagement would terminate sooner if there is a written termination notice or in the event of "dismissal of the Bankruptcy, conversion of the cases from Chapter 11 to Chapter 7, entry of a Final Order confirming the Company's Plan of Reorganization and the Plan going effective or a sale of substantially all of the assets of the Company under 11 U.S.C. § 363." *Id.* at 4-5, ¶ 4. The effective date of the confirmed chapter 11 Plan was July 12, 2018. Notice of Occurrence of Effective Date, ECF No. 1209 at 1.

Exhibits 1-D and 1-E, attached to Chaffe's Application, included entries for services performed by counsel for Chaffe after July 12, 2018, in the amount of $5,675.00. ECF No. 1222-1. The Court finds that Chaffe's expenses should be reduced by this amount, resulting in total expenses of $14,700.80 ($20,375.80 - $5,675.00). After subtracting the $6,357.12 previously reimbursed, payment is allowed in the amount of $8,343.68.

Conclusion

For the reasons stated above,

IT IS ORDERED that Chaffe's Application for Fees and Expenses is granted in part and denied in part as stated herein.

IT IS FURTHER ORDERED that Chaffe shall submit a final form of order, consistent with this ruling and signed as to form by counsel for Reorganized Debtors, setting out the adjusted dollar amounts for its fees and expenses within fourteen days of the date of this order.

END OF ORDER