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K.R.W.

THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
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U.S. DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

IN RE:)
D. M. Kaye and Sons Transport, Inc.,)
Debtor)

Bankruptcy Case No.: 00-04867-W.S.C.
Chapter 11

**ORDER AUTHORIZING DEBTOR'S EMPLOYMENT OF ERIK DOERRING AS
SPECIAL TAX COUNSEL FOR THE DEBTOR PURSUANT TO
11 U.S.C. 327(c), AND (e)**

THIS MATTER came before the Court for hearing on October 19, 2000 on the Debtor's application for authorization to employ special tax counsel for the Debtor pursuant to §327 (c) and (e) (the "Application"). The Application requests authorization to employ Erik Doerring of the McNair Law Firm, P.A. ("Firm") as special tax counsel. Because the Firm represents a creditor in this case, Navistar Financial Corporation ("Navistar"), the Application was served on all creditors and parties in interest and set for a hearing. The United States Trustee ("UST") objected to the Application. At the hearing, the Debtor advised the Court that it had provided a supplemental affidavit of professional to the UST which resolved the UST's objection. After reviewing the pleadings and based upon the UST's assertion that the supplemental affidavit resolves his objection, the Court makes the following Findings of Fact and Conclusions of Law.¹

FINDINGS OF FACT

1. On June 2, 2000, the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Since that time, the Debtor has continued in possession of its property.
2. Debtor seeks to employ Doerring and Firm to assist the Debtor in tax related matters, and Doerring has special expertise in such matters. Specifically, the services to be performed by

¹ The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

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Doerring include, but are not limited to, examining tax and other related records in this Chapter 11 case, advising the Debtor on all tax related issues, and possibly negotiating with and litigating against the tax authorities, including the Internal Revenue service and South Carolina Department of Revenue. The Debtor has indicated that Doerring will be responsible for determining and negotiating with the taxing authorities in connection with the amount of tax debt owed by the Debtor. Debtor's bankruptcy counsel will negotiate the term of repayment.

3. Prior to the Debtor's present Chapter 11, Doerring provided tax advice to the Debtor and was paid \$2,139 for those services. The Firm also has connections with the Debtor in regards to a state court lawsuit filed against the Debtor pre-petition and styled *Palmer v. D.M. Kaye and Sons Transport, Inc.* When the lawsuit was commenced, the Debtor retained counsel to provide representation. Based upon the performance of the Firm in connection with tax matters, as described above, the Debtor hired the Firm to continue the Debtor's representation in that lawsuit. The bankruptcy was filed and the lawsuit stayed before the Firm performed any services. While the lawsuit has been removed to the Bankruptcy Court, special counsel advised in his supplemental affidavit that, upon information and belief, the Debtor would not seek to have the Firm appointed in connection with that matter.

4. Firm also has connections with Navistar Financial Corporation ("Navistar"), a creditor in this case. Debtor leased ten (10) tractors from Navistar pre-petition. Firm represents Navistar in the Debtor's bankruptcy. All Navistar leases have been assumed by the Debtor post-petition and a final order approving the assumption was entered by this Court on September 18, 2000. Debtor will continue making payments to Navistar pursuant to that final order, and Debtor's primary obligation under the assumed leases is to make payments to Navistar. The Debtor's obligations to Navistar under the assumed leases can not be altered by a plan of reorganization without Navistar's consent. Any future role of the Firm in representing Navistar will be very

limited.

In connection with other services performed by the Firm for Navistar, the fees paid to the Firm by Navistar or a related entity in fiscal years 1997, 1998, and 1999 totaled \$10,660.50.

5. The Debtor and Navistar have waived any possible conflict of interest. Navistar is being represented primarily by Michael M. Beal and the Debtor is represented primarily by Erik P. Doerring. The Firm agrees to restrict the use of confidential information by creating an ethics wall between Doerring and Michael M. Beal. Information obtained by Doerring in connection with his representation of the Debtor will be kept confidential and not disclosed to other counsel in the Firm representing Navistar.

6. The Debtor and Doerring have agreed that Doerring will be paid his normal hourly rate of \$215

7. Debtor's Application was served on all creditors and parties in interest.

CONCLUSIONS OF LAW

The Debtor seeks to employ Doerring and Firm as special tax counsel pursuant to § 327(c), to assist the Debtor in connection with all tax matters. Section 327(c) provides as follows:

In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such persons' employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an *actual* conflict of interest.

(emphasis added).²

² Prior to its amendment in 1984, §327(c) provided:

In a case under chapter 7 or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, but may not, while employed by the trustee, represent, in connection with the case, a creditor. Whereas prior to the 1984 amendments, dual representation of the trustee and a creditor was prohibited, §327(c) presently does not include a *per se* rule of disqualification but rather sets forth a heightened requirement to disqualify a person from potential employment.

While some courts have adopted a *per se* rule prohibiting the employment of a professional who currently represents a creditor, this Court favors a case-by-case analysis. In the case presently before the Court, while the Firm is representing a creditor in this bankruptcy case, a different attorney with the Firm, Michael Beal, is responsible for Navistar's representation, and most importantly, a final order has already been entered authorizing Debtor's assumption of the Navistar leases. Pursuant to that final order, Debtor will continue making its monthly lease payments to Navistar, and as such, future negotiations between the Debtor and Navistar in connection with the development and confirmation of a plan of reorganization will not be necessary. Also, Doerring's services are limited, and the Firm has agreed to restrict the use of confidential information by creating an ethics wall between Doerring and Michael M. Beal. Information obtained by Doerring in connection with his limited representation of the Debtor will be kept confidential and not disclosed to other counsel in the Firm.

Based upon the foregoing, the Court finds that at the present time, no "actual" conflict exists which would *per se* prohibit the employment of Doerring and Firm. A "potential" conflict of interest, however, can not be entirely ruled out. The Court recognizes that employment of professionals with a "potential" conflict of interest should be disfavored. As the court in In re BH&P, Inc. stated, "the terms 'actual' and 'potential' conflict merely describe different stages in the same relationship." 103 B.R. 556, 563 (Bankr. D.N.J. 1989) ("As previously noted, an actual conflict can be defined as an active competition between two interests, in which one interest can only be served at the expense of the other. A potential conflict can then be defined as one in which the competition is presently dormant, but may become active if certain contingencies occur."). However, the Court believes that the decision of whether to approve the employment of a person who has a "potential" as opposed to an "actual" conflict is solely within the Court's discretion.

The Court finds that the Application to employ Doerring and Firm pursuant to §327(c) should

be approved. While it does not appear from the work Doerring is to perform that any actual conflict of interest may arise, Doerring and Firm bear the ultimate responsibility to report their actions and any potential divergence of interests between the Firm and Debtor. Likewise, the Debtor bears a continuing responsibility to diligently inquire and review the possibility that an actual conflict may develop. In making its decision of whether to approve the employment in this case, the Court has taken into consideration the lack of a present "actual" conflict of interest, the lack of other readily available local counsel suited for the representation of the estate, and the common interest of all parties as well as the estate in having counsel to provide special expertise in connection with tax matters. Keeping in mind the admonition set forth above, the Court concludes that compelling reasons exist to authorize the employment of Doerring and Firm pursuant to Section 327(c).

The Debtor's application to employ Doerring and Firm also comes within the narrow restrictions of Section 327(e) due to Doerring's and Firm's pre-petition representation of the Debtor. That subsection provides that the Debtor may employ for a specified special purpose, other than conducting the case, an attorney who has previously represented the Debtor, if (1) such employment is in the best interest of the estate and (2) the attorney does not hold an adverse interest with respect to the special purpose for which the attorney is being employed.

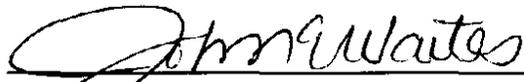
In the present case, the Court finds that Doerring's employment for the specific purpose of providing assistance in connection with tax matters is in the best interest of the estate. The Court believes the standard under the second prong of Section 327(e) listed above *has been met* [REDACTED]

[REDACTED] As such, based upon the reasons as set forth above, the Court finds that Deorning's employment satisfies the second requirement of Section 327(e).

It is therefore,

ORDERED, ADJUDGED, AND DECREED that the Application to Employ Special Tax Counsel is approved. In the case of a development of an actual conflict of interest during the course of the Firm's representation of the Debtor, and upon a report of such conflict to the Court, the Court will take such action as is appropriate to address the situation. Doerring and Firm shall keep the Court and the UST informed of any change of interest in this matter during the course of representation through continuous disclosure as required by fed. R. Bankr. P. 2014(a) and 2016(b).

AND IT IS SO ORDERED on this the 6th day of November 2000 at Columbia, South Carolina.

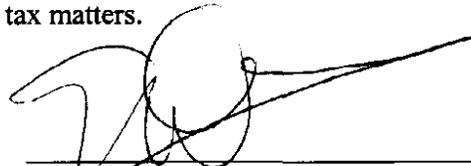


JOHN E. WAITES
UNITED STATES BANKRUPTCY JUDGE

commenced, the debtor had local counsel representing it. Based upon the performance of the Firm in connection with tax matters, the debtor hired the Firm to continue debtor's representation in that lawsuit. The bankruptcy was filed and the lawsuit stayed before the Firm performed any services. While the lawsuit has been removed to the Bankruptcy Court, upon information and belief, the debtor will not seek to have the Firm appointed in connection with that matter.

7. With respect to ground number 6 of the Trustee's objection, the Firm agrees to restrict the use of confidential information by creating an ethics wall between the undersigned and Navistar's counsel, Michael M. Beal. Information obtained by the undersigned in connection with his representation of the debtor will be kept confidential and not disclosed to other counsel in the Firm representing Navistar.

8. With respect to ground number 7 of the Trustee's objection, the undersigned would state that he has developed a special expertise in connection with tax matters.



ERIK P. DOERRING, ESQ.
Post Office Box 11390
Columbia, SC 29211
(803) 799-9800
(803) 376-2277 (fax)

SWORN to before me
this 19th day of October, 2000.

Cindy Hatlin

Notary Public for South Carolina

My Commission Expires: *January 5, 2006*

CERTIFICATE OF MAILING
The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

NOV 8 2001

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE ^{US +}

KAREN R. WEATHERS ^{KW}
Deputy Clerk

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DISTRICT OF SOUTH CAROLINA