U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: **20-03333-hb**

ORDER

The relief set forth on the following pages, for a total of 7 pages including this page, is hereby ORDERED.

FILED BY THE COURT
10/08/2020

Entered: 10/08/2020

Chief US Bankruptcy Judge
District of South Carolina

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE: Faith Cathedral Look Up and Live Ministries, Inc., Debtor(s).	C/A No. 20-03333-HB Chapter 11 **ORDER DENYING APPLICATION TO EMPLOY BANKRUPTCY COUNSEL**

THIS MATTER is before the Court on the Application to Employ Bankruptcy Counsel filed by Debtor Faith Cathedral Look Up and Live Ministries, Inc., seeking to employ Pohl, P.A. (the "Attorney") pursuant to 11 U.S.C. § 327.[1] The United States Trustee filed an Objection, asserting conflict of interest issues arising from pre-petition conduct of the Attorney.[2]

On August 23, 2020, the Attorney prepared a promissory note, security agreement and UCC-1 Financing Statement to memorialize an alleged March 12, 2017, loan in the amount of $250,000.00 by the founder and senior pastor of the Debtor, Ethel M. Talbert-Spearman. The transaction had not been in writing before that time, although the new promissory note and security agreement are dated March 12, 2017. The Attorney filed the UCC-1 Financing Statement on August 23, 2020. The next day, on August 24, 2020, the Attorney filed a voluntary petition for Chapter 11 relief for the Debtor. A proposed cash collateral budget, including a payment to Ms. Talbert-Spearman toward this debt balance, was filed on August 27, 2020.[3]

[1] ECF No. 5, Aug. 24, 2020.
[2] ECF 19, filed Sept. 3, 2020.
[3] This payment was later removed to resolve the cash collateral matter.

The information regarding the loan documents drafted and filed for Ms. Talbert-Spearman was not included in the Attorney's Application to Employ or supporting Bankruptcy Rule 2014 Statement. This information was later disclosed after the UST requested details regarding the method in which the Attorney conducted a conflict check. After the UST filed its Objection on September 3, 2020, the Attorney filed an Amended Bankruptcy Rule 2014 Statement disclosing the work performed for Ms. Talbert-Spearman.[4]

Debtor's original Schedules filed on September 17, 2020, listed Ms. Talbert-Spearman as a secured creditor with a claim in the amount of $250,000.00, of which $5,000.00 is secured by collateral. The claim was not marked as contingent, unliquidated, or disputed.[5] Additionally, the transfer and documentation in favor of Ms. Talbert-Spearman was omitted from the Debtor's Statement of Financial Affairs.

An initial hearing on this matter was held on September 22, 2020, and continued to October 6, 2020. At the continued hearing, the Attorney reported that he filed a UCC-3 Financing Statement Amendment to remove the security interest of Ms. Talbert-Spearman. Amended Schedules were also filed to move Ms. Talbert-Spearman's claim from Schedule D to Schedule E/F and to disclose the transfer to her in the Statement of Financial Affairs.[6] Despite these corrective measures, the UST still raises concerns over the Attorney's actions adverse to the estate and potential for other conflicts of interest during the pendency of this case.

[4] ECF No. 20, filed Sept. 4, 2020.
[5] ECF No. 29.
[6] ECF No. 39, filed Sept. 30, 2020.

"In enacting the Bankruptcy Code, Congress entrusted the power to approve the appointment of professionals to work on behalf of a bankruptcy estate to the discretion of the bankruptcy courts." *In re Harold & Williams Dev. Co.*, 977 F.2d 906, 909 (4th Cir. 1992). Section 327 provides the debtor-in-possession, with the court's approval, may employ an attorney that: (1) does not hold or represent an interest adverse to the estate; and (2) is disinterested. 11 U.S.C. § 327(a). This provision is intended to ensure "all professionals . . . tender undivided loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities." *In re Johnson,* 312 B.R. 810, 819 (E.D. Va. 2004) (citing *Rome v. Braunstein,* 19 F.3d 54, 58 (1st Cir. 1994)).

A "disinterested person" is defined by the Code as a person who "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason." 11 U.S.C. § 101(14)(C).

> [T]o hold an interest adverse to the estate means (1) to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival or claimant; or (2) to possess a predisposition under circumstances that render such a bias against the estate.
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> To represent an adverse interest means to serve as an agent or attorney for any individual or entity holding such an adverse interest.

In re Worldwide Wholesale Lumber, Inc., 364 B.R. 197, 201-02 (Bankr. D.S.C. 2006) (quoting *In re Air South Airlines, Inc.*, C/A No 97-17229-W, 1998 WL 34020727, at *7 (Bankr. D.S.C. Jan. 16, 1998)). This "'catch all' provision is broad enough to exclude a [professional] with some interest or relationship that 'would even faintly color the independence and impartial attitude required by the Code.'" *In re AFI Holding Inc.*, 530 F.3d 832, 846 (9th Cir. 2008) (quoting *Kravit, Gass & Weber, S.C. v. Michel (In re*

Crivello), 134 F.3d 831, 835 (7th Cir. 1998)). Thus, "if, for any reason, the attorney has an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders he or she may not serve as attorney for the Chapter 11 debtor." *In re Rabex Amuru*, 198 B.R. 892, 895 (Bankr. M.D.N.C. 1996) (emphasis in original).

Additionally, § 327(c) governs scenarios where the attorney also represents a creditor. "[A] person is not disqualified for employment under this section solely because of such person's 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." 11 U.S.C. § 327(c). An actual conflict of interest is not defined by the Code and courts have not established bright line rules as to when an actual conflict exists. *See Johnson*, 312 B.R. at 822. However, courts have concluded that "an alleged conflict of interest is 'actual' and warrants disqualification under § 327(c) if there is 'active competition between two interests, in which one interest can only be served at the expense of the other.'" *Id.* (quoting *In re BH & P, Inc.*, 103 B.R. 556, 563 (Bankr. D.N.J. 1989), *aff'd* 949 F.2d 1300 (3d Cir. 1991)). Regardless, § 327(c) does not "'preempt the more basic requirements of subsection (a),' and thus the court must still 'determine whether the person is disqualified on any other ground, *e.g.*, an interest adverse to the estate.'" *In re Gregory & Parker, Inc.*, C/A No. 12-01382-8-SWH, 2013 WL 1279405, at *2 (Bankr. E.D.N.C. Mar. 28, 2013) (quoting *In re AroChem Corp.*, 176 F.3d 610, 621 (2d Cir. 1999)).

The Debtor bears "the burden of demonstrating that an applicant for professional employment is qualified under § 327 . . ." *Harold & Williams Dev. Co.*, 977 F.2d at 910,

which is typically accomplished through the required disclosures under Fed. R. Bankr. P. 2014(a). An application to employ counsel must provide, *inter alia*:

> any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

Fed. R. Bankr. P. 2014(a). "Requiring such specific disclosures before the approval of the Court indicates the importance of having a 'disinterested person' represent the debtor and the estate." *In re Kobe Real Estate, LLC*, C/A No. 11-03591-HB, 2011 WL 3880390, at *5 (Bankr. D.S.C. Aug. 31, 2011).

Once the Debtor meets its burden of demonstrating the applicant is qualified under § 327, "the discretion of the bankruptcy court must be exercised in a way that it believes best serves the objectives of the bankruptcy system. Among the ultimate considerations for the bankruptcy courts in making these decisions must be the protection of the interests of the bankruptcy estate and its creditors, and the efficient, expeditious, and economical resolution of the bankruptcy proceeding." *Harold & Williams Dev. Co.*, 977 F.2d at 910.

In this case, the Debtor has failed to meet its burden of proving the Attorney is qualified to serve as counsel under § 327 because the record contains clear evidence of pre- and post-petition actions and conflicts of interest by the Attorney that are adverse to the estate and on behalf of a creditor. By assisting Ms. Talbert-Spearman with a preferential transfer, the Attorney represents an interest materially adverse to the estate and is not a disinterested person under § 101(14)(C). Even after the UST's Objection, the Attorney

filed Schedules and Statements that favored Ms. Talbert-Spearman's interests and were adverse to the estate's interests. Although the Attorney has since recognized the error and attempted to reverse these actions, rectifying at a later date does not erase the fact that a significant conflict of interest is documented in this case and the Attorney served an interest adverse to the estate immediately before filing, which continued for a time post-petition. Moreover, Ms. Talbert-Spearman is the founder and senior pastor of the Debtor and may likely be heavily involved in this case. The Attorney's actions indicate a failure to separate her interests from those of the Debtor, which "color[s] the independence and impartial attitude required by the Code." *AFI Holding*, 530 F.3d at 846 (quoting *Kravit, Gass & Weber*, 134 F.3d at 835).

The Attorney also failed to meet the requirements of Fed. R. Bankr. P. 2014(a) by not disclosing his relationship and work performed for Ms. Talbert-Spearman. The information regarding the Attorney's work for Ms. Talbert-Spearman was only brought to light only after inquiry from the UST. The scheme for the employment of professionals of the estate under the Bankruptcy Code and Rules relies on the forthrightness and transparency of the applicants to ensure that the best interests of the estate are served.

IT IS, THEREFORE, ORDERED that the Application to Employ must be denied because the Debtor and Attorney have not demonstrated that the Attorney is qualified to serve as counsel under § 327(a) and does not hold or represent an interest adverse to the estate and is disinterested person. The Debtor shall comply with SC LBR 9011-2(c) by selecting new counsel. Failure to do so may result in dismissal of the case.