UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 97-07229-W
Air South Airlines, Inc.,	**JUDGMENT**
Debtor.	Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Debtor's application for authorization to employ David Y. Monteith as general counsel *nunc pro tunc* filed October 29, 1997 is granted to the extent as to authorize the employment of Monteith as special counsel for the purpose of the Debtor's Regulatory Compliance. Monteith shall provide a detailed application for compensation which lists all post-petition services and expenses to the Court in a format which meets the requirements of this Court's Local Rules and the U.S. Trustee's office within seven (7) days of the entry of this Order. The Court shall thereupon set a hearing for consideration of said application. The Court shall address the Trustee's motion for turnover by separate order.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
January 16, 1998.

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UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 97-07229-W
Air South Airlines, Inc.,	**ORDER**
Debtor.	Chapter 7

THIS MATTER comes before the Court upon Air South Airlines, Inc.'s ("Debtor" or "Air South") application for authorization to employ David Y. Monteith ("Monteith") as general counsel *nunc pro tunc* filed October 29, 1997 ("Application") and upon objections thereto filed by the W. Ryan Hovis, the Chapter 7 Trustee ("Trustee"), the United States Trustee ("U.S. Trustee") and three creditors, shareholders, and former members of the Board of Directors of the Debtor, Patrick O'Shea, Donald Baker and Red Martin (jointly "O'Shea"). Also before the Court is the Trustee's motion for turnover of a pre-petition retainer to Monteith from Air South and the objection thereto filed by Monteith.

The Debtor's Application seeks retroactive approval from the date of the Chapter 11 petition, August 28, 1997, of the Debtor's employment of Monteith as "general counsel to assist its [the Debtor's] bankruptcy counsel with a number of issues including, but not limited to, corporate structure, shareholder matters, corporate transactions, Federal Aviation Administration, Department of Transportation, and Securities and Exchange Commission compliance issues and reporting requirements."[1]

The objections to the Application primarily challenge the appropriateness of the

[1] Paragraph 3 of the Debtor's Application.

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employment being retroactive and raise the issue of whether Monteith meets the employment requirements of either 11 U.S.C. §327(a) or §327(e).[2] In the Debtor's response to the objections, the Debtor clarifies that Monteith's employment is sought under §327(e) as special counsel and based upon bankruptcy counsel's[3] "need to draw on the resources of persons who were familiar with the details of Air South's operations and history, and a general need to draw on information sources." Based upon the testimony and evidence submitted, the Court makes the following Findings of Fact and Conclusions of Law

FINDINGS OF FACT

It appears that Monteith had served as outside general counsel and an officer, Corporate Secretary, of the Debtor from October 1995 until the filing of the Chapter 11 bankruptcy petition. In such a relationship, Monteith was paid a retainer to cover certain general legal services at a reduced hourly rate, but allowed to separately charge his usual hourly rate of $175 for any additional services provided beyond seventy-seven (77) hours per month.

On August 27, 1997, the day before the filing of the bankruptcy petition, Monteith and the Debtor entered into a Retainer Agreement which provided that the Debtor employed Monteith "to so act on what matters it [Monteith] and the Corporation [Debtor] agree are appropriate". Upon execution of the Retainer Agreement, Monteith was paid a $10,000 retainer

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[2] Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.* shall be by section number only.

[3] The Debtor employed Nexsen Pruet Jacobs & Pollard, LLP as its bankruptcy counsel in the case by application of August 28, 1997 and Order of October 10, 1997 to "advise Air South on the many legal issues arising in this case, to draft documents and pleadings, to litigate various issues, to assist in the administration of the bankruptcy estate, and to otherwise represent and counsel Air South in the performance of its duties."

to be charged upon at the rate of $175 and in increments of 1/10 of an hour with monthly invoices being supplied. It is the payment of this retainer which is the subject of the Trustee's turnover motion.

Upon the bankruptcy filing, Monteith continued to perform the same sort of services he previously provided Air South but additionally assisted the Debtor's bankruptcy counsel and dealt with a number of pressing issues associated with or exasperated by the Debtor's filing, including but not limited to issues involving key employees, suppliers, airport facilities, insurers and others who were not being paid. Monteith also participated in discussions with potential investors in or purchasers of the airline in order to gain new capital funds which all parties agreed were critical to any reorganization attempts by the Debtor.

According to Affidavit of Monteith filed on January 2, 1998 in connection with the Trustee's request for turnover of the retainer payment,

> During the 30 days following the Chapter 11 filing of Air South, he [Monteith] devoted a substantial amount of time (approximately 52 hours) to keeping Air South in a position to continue operation in a reorganization under Chapter 11. In particular, he was involved in: keeping the company's insurance in force; attempting to obtain post-petition financing; pursuing proposed transactions to sell the airline; retaining the airline's licenses from the Federal Aviation Administration and its Certificate of Public Convenience and Necessity from the Department of Transportation; preserving the continuance of the company's leases of five aircraft; the company's "401(k)" employee benefit plan; filings with the Securities and Exchange Commission required by the bankruptcy; physical security of the records of the company; meetings with the board of directors; and numerous other matters effecting the airline's potential for reorganizing under Chapter 11.

The Debtor was unable to obtain investors or a sale and soon after the filing lost possession of its airplanes. The case was then converted to Chapter 7 on October 16, 1997.

At the hearing on the Application, the U. S. Trustee announced that he had settled his objection to the Debtor's application and agreed for Monteith's employment as special counsel pursuant to §327(e) upon certain conditions which were not offered into the record at that time.

CONCLUSIONS OF LAW

The standards for appointment of a professional on a *nunc pro tunc* basis in this District are provided in this Court's opinion in In re TJN, Inc., 194 B.R. 396 (Bkrtcy. D.S.C. 1996).

1. The debtor, trustee or committee expressly contracted with the professional person to perform the services which were thereafter rendered;
2. The party for whom the work was performed approves the entry of the nunc pro tunc order;
3. The applicant has provided notice of the application to creditors and parties in interest and has provided an opportunity for filing objections;
4. No creditor or party in interest offers reasonable objection to the entry of the *nunc pro tunc* order;
5. The professional satisfied all the criteria for employment pursuant to 11 U.S.C.A. §327 and Rule 2014 of the Federal Rules of Bankruptcy Procedure at or before the time services were actually commenced and remained qualified during the period for which services were provided;
6. The work was performed properly, efficiently, and to a high standard of quality;
7. No actual or potential prejudice will inure to the estate or other parties in interest;
8. The applicant's failure to seek pre-employment approval is satisfactorily explained;
9. The applicant exhibits no patter of inattention or negligence in soliciting judicial approval for the employment of professionals.

In re TJN, Inc., 194 B.R. 396 (Bkrtcy. D.S.C. 1996).

At the hearing on the Application, the Trustee and O'Shea conceded that Monteith met the first, second, third and ninth factors. The Chapter 7 Trustee argued primarily that Monteith's employment failed to meet the seventh and eighth factors. O'Shea argued primarily that Monteith failed to meet the requirements of the fifth factor. The fourth factor, no creditor or party in interest offers reasonable objection to the entry of the *nunc pro tunc* order, of course turns upon the ruling on these objections. As the objections relate to the sixth factor, that the

work was performed properly, efficiently, and to a high standard of quality, in as much as no detailed description of the services actually performed was presented to the Court, and upon the parties willingness to defer the issue of the reasonableness of compensation until a later application and hearing, the Court finds the standard required by the sixth factor is met subject to a subsequent review of the services.

As to the seventh In re TJN, Inc. factor, the Trustee and O'Shea assert that the estate and other parties will be prejudiced upon approval of the Application since Monteith received a retainer which if effective has the effect of elevating his fees and expenses to a secured status to be paid ahead of any Chapter 7 administrative expenses. This Court disagrees.

As noted in In re Printing Dimensions, Inc., 153 B.R. 715, 719 (Bkrtcy. D.Md. 1993), all pre-petition retainers for bankruptcy services, regardless by whom paid, are subject to review and disgorgement under § 329(b) and Bankruptcy Rule 2017, if they are excessive or unreasonable. In re Printing Dimensions, Inc., 153 B.R. 715, 719-720 (Bkrtcy. D.Md. 1993). Also see In re Stoecker, 114 B.R. at 971, 978 and In re McDonald Bros. Constr., Inc., 114 B.R. at 995-96).

While the effect of the retainer agreement in this case is primarily the subject of the turnover motion to be addressed by separate order if necessary, the prejudice envisioned by the seventh In re TJN, Inc. factor requires a harm or disadvantage caused by the delay in seeking approval of the employment, not by the terms of the employment. Considering that the funds for Monteith's fees were set aside by the Retainer Agreement, such fees and expenses if allowed will not draw against funds collected or generated by the Chapter 7 Trustee. Furthermore, the application was filed 13 days after the case was converted and therefore the Chapter 7 trustee could hardly have relied upon the failure to earlier file it. Based upon the presentation at the

hearing, the Court finds no actual or potential prejudice to the estate or other parties.

The In re TJN, Inc. eighth factor requires that the failure to seek employment approval be satisfactorily explained. This explanation has been held to be more than an oversight.

> The Court concludes that Crews' reasons for not obtaining prior approval of its employment do not justify a retroactive employment order. The reasons for delay, if viewed in the most favorable light, might be considered an oversight. Even so, the Court finds this an unsatisfactory basis for retroactive approval under the circumstances here.

In re Tidewater Memorial Hosp., Inc., 110 B.R. 221, 227 (Bkrtcy.E.D.Va. 1989). Monteith testified that he was advised by the Debtor's bankruptcy counsel that he must make application and that it must be approved by the Court. Furthermore, there were apparently discussions regarding the disinterestedness and adverse interest requirements of §327 because Monteith made efforts to ensure that he had collected all pre-petition amounts owed to him before the petition was filed and made certain averments regarding disinterestedness and adverse interest in his affidavit filed with the application pursuant to Bankruptcy Rules 2014 and 2016. Monteith testified that he relied upon the Debtor's bankruptcy counsel to prepare the necessary employment papers but that due to the immediacy and complicated nature of the demands upon him associated with the Debtor's filing that he neglected to follow up with bankruptcy counsel. The Debtor's response to the objections prepared by bankruptcy counsel indicates that he was unaware Monteith had failed to prepare and file his own application and that due to the severely distressed circumstances under which the case was filed, the matter was overlooked immediately after the filing.

The Court accepts the argument that the circumstances surrounding Air South, both

before and immediately after the filing of the petition, were severely distressed and to a great degree extraordinary, even for a newly filed Chapter 11 case. The Debtor was a highly publicized business whose start up involved public funds. It was a major employer in the State of South Carolina. It's operations were highly regulated by various government agencies due to the concern for public safety. For these reasons, the bankruptcy case received the highest of public scrutiny and attention from the media, both local and regional, which intensified the already desperate financial distress of the business, disintegration of corporate governance and certain shareholder disputes. The filing also required several emergency hearings before this Court. In general, the circumstances surrounding the case and its administration were extraordinary, to which the failure to more timely act regarding the employment application may reasonably be attributed. Finally, it is also clear that Monteith had no prior experience in serving as counsel for a bankruptcy estate and that the application, while late, was not egregiously late, being approximately sixty (60) days overdue. For all of these reasons, the Court finds the eighth factor has also been met.

The fifth factor pursuant to the In re TJN, Inc. test requires that the applicant meet all criteria for employment under § 327 and Rule 2014 of the Federal Rules of Bankruptcy Procedure during the time of rendering services. The failure to meet all of these requirements and especially the full disclosure requirements can be fatal to the application. In re American Thrift & Loan Assoc., 137 B.R. 381, 390 (Bkrtcy. S.D. Cal. 1992). Also see In re Envirodyne Indus., Inc., *150 B.R. 1008, 1018 (Bkrtcy. N.D.Ill.1993)* and In re DeVlieg, Inc., *174 B.R. 497,* 502 (N.D.Ill. 1994)(the requirements of section 327 are to be strictly construed, especially in the conflict of interest setting).

According to the Debtor's response and pursuant to the testimony by the Debtor's bankruptcy counsel, the Debtor had always intended to employ Monteith as special counsel under §327(e) and not as an attorney under §327(a). There are three conditions that must be met to be employed as special counsel.

> First, the appointment of special counsel must be in the best interests of the estate. In re DeVlieg, Inc., 174 B.R. 497, 502 (N.D.Ill.1994). Second, special counsel must not hold an interest adverse to the estate with respect to the matter for which he or she is employed. Id. at 503 (citing In re Hempstead, 34 B.R. 624, 626 (Bkrtcy. S.D.N.Y.1983)). Third, the special purpose for which counsel is appointed must not rise to the level of conducting the bankruptcy case for the debtor. Id. at 504 (citing In re Tidewater Memorial Hosp., 110 B.R. 221, 227-28 (Bkrtcy.E.D.Va.1989)).

In re Brennan, 187 B.R. 135, 155 (Bkrtcy. D.N.J. 1995).

Section 327(e) offers a less restrictive means of employment for an attorney who has been previously employed by a debtor and does not require such an applicant to be disinterested as defined in §101(14).[4]

> Sections 327(e) is not as strict in disqualifying attorneys. Under Section 327(e), special counsel need not be disinterested but merely not represent or hold any interest adverse to the debtor or to the estate with respect to matters on which counsel is to be employed.

In re Imperial Corp. of America, 181 B.R. 501, 506 (Bkrtcy. S.D.Cal. 1995). Section 327(e) provides:

> The Trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold

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[4] At the hearing, it was stipulated by the applicant and Monteith that at the time of service, Monteith was not disinterested by virtue of his position as Corporate Secretary.

> any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

11 U.S.C. §327(e). Furthermore, the legislative history also provides guidance on this issue. The legislative history to this section indicates as follows:

> This subsection does not authorize the employment of the debtor's attorney to represent the estate generally or to represent the trustee in the conduct of the bankruptcy case. The subsection will most likely be used when the debtor is involved in complex litigation, and changing attorneys in the middle of the case after the bankruptcy case has commenced would be detrimental to the progress of that other litigation.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 328. Also see Matter of F&C International, Inc., 159 B.R. 220, 222 (Bkrtcy. S.D.Ohio 1993)(We are dealing with a request to approve an expanded role for special counsel, not general bankruptcy reorganization counsel, and thus § 327(e) applies). It is clear that §327(e) intends to limit the circumstances of continued employment to specified and not general matters, in fact, matters separate from the general conduct of the case.

> The "special purpose" must be unrelated to the reorganization of the debtor and must be explicitly provided in the application seeking approval of the attorney's employment.

3 Collier on Bankruptcy, ¶327.04 (9)(b) (15th ed.rev.1996). The requirement that the appointment as special counsel not include representing the debtor generally in the bankruptcy proceeding is critical.

> A threshold requirement under § 327(e) is that the appointment be for a "special purpose," and not to represent the trustee in "conducting the case." We have found little authority on how this requirement ought to be interpreted.
> ....
> The applicability of § 327(e) turns on whether it is sufficient for § 327(e) that there be a narrow characterization of the purpose of the appointment, or whether it is necessary, in addition, that the

> appointment meet the negative characterization that the purpose not be part of the trustee's general duty of conducting the case. We think it is clear both from the language of § 327(e) and from the framework of § 327 more generally that, even if there is a special purpose, *it is crucial that the appointment not be part of the* trustee's general duty of conducting the case. First, the text of § 327(e) says "a specified special purpose, other than representing the trustee in conducting the case." The qualification in the latter clause is in addition to the description "specified special purpose." We interpret this to mean that among specified special purposes, those that involve representing the trustee in conducting the case are ruled out for § 327(e).

In re Neuman, 138 B.R. 683, 685-686 (S.D.N.Y. 1992). Also see In re NRG Resources, Inc., 64 B.R. 643, 647 (W.D.La.1986)(Moreover, the 'specified special purpose' requirement serves the important policy of avoiding an unnecessary duplication of services at the expense of the estate).

> The suggestion that the contemplated services [of the applicant in this case do] "not necessarily fall under the purview of services normally rendered by general bankruptcy counsel" is sophistry, as the case law clearly demonstrates. Negotiating, renegotiating and/or reworking the 1984 Loan as well as assisting in the *construction of a Chapter 11 Plan and Disclosure* Statement are duties clearly beyond the scope and intent of Section 327(e). See, e.g., In re Tidewater Memorial Hospital, Inc., 110 B.R. 221, 227-228 (Bkrtcy.E.D.Va.1989) (solicitation and negotiation of proposals for the sale or reorganization of the primary asset, including assisting the debtor with its plan of reorganization, which is the principal purpose of the Chapter 11 case, is "tantamount to representing the debtor in the conduct of the case."); Hempstead Realty, supra at 625 ("to assist debtor in preparing a plan of arrangement" is "more appropriately the sort of legal work that general counsel for a Chapter *11* debtor must pursue."); In re Impact Publications, Inc., 24 B.R. 980, 982 (Bkrtcy. N.D.Tex.1982) ("Matters involving liquidation of the estate, including sale of assets, is a duty of the trustee.... Professionals employed by the trustee, whether under § 327(a), § 327(d), or § 327(e) may not be employed and will not be compensated for services that the Code requires of the trustee."). Compare, In re Stoecker, 114 B.R. 965, 973 (Bkrtcy. N.D.Ill.1990) (investigating and developing lender liability claims are among the statutory

> duties of a trustee); Statewide Pools, supra (collecting certain of the debtor's accounts receivable and the continued pursuit of a patent suit are acceptable tasks for special counsel).

In re Interstate Distr. Center Assoc., Ltd., 137 B.R. 826, 832-833 (Bkrtcy. D.Colo. 1992). By confining the subject area of employment, the Court and all parties may more closely scrutinize and restrict the possibility of a conflict of interest or weakened loyalty to the interest of the estate and its creditors. See Matter of F&C International, Inc., 159 B.R. 220, 223-224 (Bkrtcy. S.D.Ohio 1993). Section 327(e) intends to limit the scope of such counsels involvement as a *quid pro quo* for lessening the grounds for disqualification while also maintaining the minimal requirement that counsel not represent or hold any interest adverse to the debtor or the estate, with respect to the matter in which the attorney is to be employed and that the employment must still be in the best interests of the estate.

In this case, rather than seeking Monteith's employment in a limited area or a specified specific matter, the Debtor seeks to employ Monteith in essentially the same capacity that he represented Air South pre-petition, that being the broad capacity of outside general counsel pursuant to a retainer.

While no details of the services rendered have yet been provided to the Court, Monteith's testimony indicated that his services were wide ranging, from dealing with insurance, to pacifying key employees, to dealing with airport authorities and certain regulatory agencies, to providing information and working on financing. The broadness of his employment is indicated by the Retainer Agreement entered into with the Debtor on the eve of the filing which states that he is being employed "to act on what matters it [Monteith] and the Corporation agree are appropriate". Considering the disintegration of corporate governance resulting in somewhat of

an absence of management after the case was filed, the Court surmises from the testimony that Monteith to a great extent filled the role usually occupied by salaried management in not only dealing with operational problems but also in assisting bankruptcy counsel in achieving the means or methods of reorganization, including providing historic information, contacts and retrieval of records. As stated previously, efforts inherent in conducting the case are expressly prohibited under §327(e).

This Court cannot find any reported case which allows §327(e) as a means to provide the retention of outside general counsel for the broad purpose of assisting bankruptcy counsel despite the applicant's belief that such retention was necessary under the circumstances of this case. To the contrary, there is reasonable case authority which requires an application which seeks to broadly employ an attorney "to perform legal services for the debtor as may be necessary", rather than being limited or confined to a specific project or proceeding, to be viewed in the same light as general Chapter 11 counsel under §327(a). In re Hempstead Realty Associates, 34 B.R. 624 (Bkrtcy. S.D.N.Y., 1983).

It may well be that Monteith's employment could have been authorized for the specified special purpose of the closing of a corporate refinancing, merger or sale which was within reasonable prospect. However, the Court cannot conclude such was the intention from the application and from the presentation made to date. Likewise, this Court frequently recognizes the need for special counsel to deal with specialized areas of the law and regulatory agencies such as the Federal Aviation Administration, the Department of Transportation, or the Securities and Exchange Commission. Such an intention to use Monteith for those areas was specifically listed in the Application, and therefore this Court is inclined to recognize the request for

Monteith's employment for that limited purpose, *nunc pro tunc*. However, as to Monteith's employment in any broader or more general capacity, such as outside general counsel, based upon the record to date, the Court declines to approve such employment *nunc pro tunc* because such employment appears to contradict the purposes and allowance of §327(e).

The applicant, the Debtor, and now for all intensive purposes, Monteith, bears the burden of proof upon the request for *nunc pro tunc* approval of employment. In re TJN, 194 B.R. 396 (Bkrtcy. D.S.C. 1996). The burden has not been met as to the request for employment as general counsel.

In addition to the above arguments that Monteith has not complied with §327(a) or (e), O'Shea argues that Monteith represents and holds an interest adverse to the Debtor and should therefore be disqualified from representing the Debtor. O'Shea alleges that there is an actual conflict of interest in so far as Monteith was an officer of the Debtor at the time of the filing, had an unexercised option to purchase shares of stock, and because the Trustee has a potential preference action for the recovery of pre-petition fees paid to Monteith.

> Code sections 327(a) and 1107(a) authorize a debtor in possession to employ professional persons who do not hold or represent an interest adverse to the estate. The term "adverse interest" is not defined by the Code. However, one often-cited definition which suffices for present purposes is as follows:
>
> > [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 claimant; or (2) to possess a predisposition under circumstances that render such a bias against the estate.
>
> To 'represent an adverse interest' means to serve as agent or attorney for any individual or entity holding such an adverse

> interest. In re Roberts, 46 B.R. 815, 827 (Bkrtcy. D.Utah 1985), aff'd in part and rev'd in part on other grounds, 75 B.R. 402 (D.Utah 1987).

In re Brennan, 187 B.R. 135, 149 (Bkrtcy. D.N.J. 1995). Also see In re Thrifty Oil Co., 205 B.R. 1009 (Bkrtcy. S.D.Cal. 1997). Nothing presented at the hearing convinces the Court that Monteith's administrative position as Corporate Secretary or the potential option to purchase shares for a value far greater than the book value of those shares at or near the date of the petition constitutes such an adverse interest. In fact, Monteith may have had an interest that was not adverse to the Chapter 11 estate but which paralleled the estate's interests; that being a successful reorganization.

> There is no conflict where the interests represented by special counsel are parallel, rather than adverse. In re Sally Shops, Inc., 50 B.R. 264, 267 (Bkrtcy. E.D.Pa.1985).

In re Adam Furniture Industries, Inc., 191 B.R. 249, 258 (Bkrtcy. S.D.Ga. 1996). Also see In re Statewide Pools, Inc., 79 B.R. 312, 315 (Bkrtcy. S.D. Ohio 1987) (pursuant to the current versions of both subsections (c) and (e) of § 327, unless that representation presents an actual conflict or is actually or potentially adverse to the debtor or to the estate, such representation is not a bar to employment).

As to the potential preference, this Court shall follow the approach of the bankruptcy court in In re Brennan, supra.

> The U.S. Trustee and the SEC therefore failed to establish that the payment in question is probably an avoidable preference. The mere accusation that it could be avoidable is not sufficient to disqualify [the applicant].

In re Brennan, 187 B.R. 135, 154 (Bkrtcy. D.N.J. 1995). In so far as no preference action has yet

been asserted by the Trustee nor has any potential defenses, including the ordinary course of business defense, been considered, and considering the fact in this case that Monteith's post-petition services have already been provided and were for a very limited time, the Court shall not conclude that the mere possibility of a preference presently meets the definition of an adverse interest. Clearly upon a later determination that an actual preference exists such would be grounds to retroactively disapprove employment and require disgorgement.

> If an adversary proceeding is filed against [applicant] and the transfer is avoided as to the payment of the prepetition debt, [applicant] is subject not only to disgorgement of the preference, but also to the possible denial or reduction of compensation under Code section 328(c) as well.

In re Brennan, 187 B.R. 135, 154 (Bkrtcy. D.N.J. 1995).

The Court also recognizes that these last grounds for objection were raised solely by O'Shea, Baker and Martin, who were shareholders and members of the Board of Directors and associated with Monteith in the prepetition operation of Air South and with whom Monteith is presently involved in litigation in the United States District Court. These parties motivations for objection before this Court are also a proper subject for consideration. In re Brennan, 187 B.R. 135, 150 (Bkrtcy. D.N.J. 1995). Having found that Monteith has shown that he meets this criteria for employment, the burden then shifts back to the objecting parties to show grounds for disqualification.

> The best solution in such circumstances is for the court to determine if the debtor has made a prima facie showing that the professional meets the criteria for employment under Code section 327. If so, then the burden shifts to an objecting party to make a prima facie showing of facts which probably constitute cause for disqualification.

In re Brennan, 187 B.R. 135, 145 (Bkrtcy. D.N.J. 1995). In this case, it is the finding of the Court that the objecting parties have not met their burden in regards to the presence of an actual conflict or adverse interest.

Finally, as to the best interests test, the only evidence presently before the Court are the Debtor's bankruptcy counsel's averments that Monteith's assistance was necessary to any prospect for reorganization and Monteith's general testimony describing the nature of services which he provided. Considering the above described circumstances surrounding Air South's filing and the short lived attempts to reorganize, the Court accepts that Monteith's employment, at least to the extent of the specified specific purpose of service as the Debtor's Counsel for Regulatory Authorities was in the best interests of the estate.

Therefore, the Court grants the Application to such extent as to authorize the employment of Monteith as special counsel for the purpose of the Debtor's Regulatory Compliance and orders that he provide a detailed application for compensation which lists all his post-petition services and expenses to the Court in a format which meets the requirements of this Court's Local Rules and the U.S. Trustee's office within seven (7) days of the entry of this Order. The Court shall thereupon set a hearing for consideration of said application. The Court shall address the Trustee's motion for turnover by separate order.

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
January 16, 1998.

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