

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re

SHARITY MINISTRIES, INC.,¹

Debtor.

Chapter 11 (Subchapter V)

Case No. 21-11001 (JTD)

Re: D.I. 56

Hearing Date: August 5, 2021, at 1:00 p.m. (ET)

Objection Deadline: July 29, 2021, at 4:00 p.m. (ET)

UNITED STATES TRUSTEE'S OBJECTION TO APPLICATION OF THE DEBTOR FOR ENTRY OF AN ORDER APPROVING THE EMPLOYMENT AND RETENTION OF BAKER & HOSTETLER LLP AS COUNSEL FOR THE DEBTOR, NUNC PRO TUNC TO THE PETITION DATE

Andrew R. Vara, the United States Trustee for Region 3 (the "U.S. Trustee"), through his undersigned counsel, objects ("Objection") to the *Application Of The Debtor For Entry Of An Order Approving The Employment And Retention Of Baker & Hostetler LLP As Counsel For The Debtor, Nunc Pro Tunc To The Petition Date* ("BH Retention Application") filed at D.I. 56, and in support, states as follows:

PRELIMINARY STATEMENT

1. The U.S. Trustee objects to the BH Retention Application because (1) BH has provided insufficient disclosures under Federal Rule of Bankruptcy Procedure 2014 ("Rule 2014") concerning its connection to the Debtor's former² officer and director, William H. Thead III, and

¹ The last four digits of the Debtor's federal tax identification number is 0344. The Debtor's mailing address is 821 Atlanta Street, Suite 124, Roswell, GA 30075.

² It has come to the U.S. Trustee's attention that Mr. Thead resigned sometime within the last week.

concerning its payments from the Debtor within ninety (90) day prepetition period; and (2) the insufficient disclosures makes it impossible to determine whether the BH Retention Application meets the standard for retention of a professional under section 327(a) of the Code.

2. BH's disclosures to date suggest that it may not have an undivided loyalty to the bankruptcy estate and its creditors because its prior representation of Mr. Thead in matters related to the issues that led the Debtor to file this case may preclude it from investigating any and all possible causes of action the estate may have against Mr. Thead. Concerning payments BH received prepetition, it is possible those payments may constitute preferential payments under the Bankruptcy Code if the Debtor's creditors, including the individuals who depend on the Debtor's payment of their medical bills, have not been paid in the ordinary course.

3. Based on these circumstances and the insufficient disclosures about BH's connection to Mr. Thead and its potential status as an entity holding preferential payments, the U.S. Trustee submits that the BH Retention Application should be denied.

JURISDICTION

4. The U.S. Trustee is charged with overseeing the administration of chapter 11 cases filed in this judicial district, pursuant to 28 U.S.C. § 586. This duty is part of the U.S. Trustee's overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts to guard against abuse and over-reaching to assure fairness in the process and adherence to the provisions of the Bankruptcy Code. *See In re United Artists Theatre Co.*, 315 F.3d 217, 225 (3d Cir. 2003) ("U.S. Trustees are officers of the Department of Justice who protect the public interest by aiding bankruptcy judges in monitoring certain aspects of bankruptcy proceedings."); *United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 298 (3d Cir. 1994) ("It is precisely because the statute gives the U.S. Trustee duties

to protect the public interest . . . that the Trustee has standing to attempt to prevent circumvention of that responsibility.”); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 499 (6th Cir. 1990) (“As Congress has stated, the U.S. trustees are responsible for protecting the public interest and ensuring that the bankruptcy cases are conducted according to [the] law”).

5. Under 28 U.S.C. § 586(a)(3)(1), the U.S. Trustee is charged with monitoring applications filed under 11 U.S.C. § 327 “and, whenever the United States trustee deems it to be appropriate, filing with the court comments with respect to the approval of such applications.”

6. Under § 307 of title 11 of the United States Code (the “Bankruptcy Code” or “Code”), the U.S. Trustee has standing to be heard on the issues raised in this Objection.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

7. On July 8, 2021 (the “Petition Date”), Sharity Ministries, Inc. (“Sharity,” or “Debtor”) filed a voluntary chapter 11 petition in this Court. D.I. 1.

8. On the petition, Sharity elected to proceed under Subchapter V of chapter 11, and it asserts that its aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than \$7.5 million. *Id.*

9. On July 9, 2021, the U.S. Trustee appointed Holly Smith Miller (“Subchapter V Trustee”) as the trustee in this case pursuant to section 1183(a) of the Bankruptcy Code. D.I. 21.

10. After the Debtor’s announcement to this Court that it would cease operations and discontinue its mission, the U.S. Trustee filed its *Motion for Removal of Debtor in Possession, or Alternatively, Motion to Expand the Duties of the Subchapter V Trustee* at D.I. 68 (“U.S. Trustee Motion”). The U.S. Trustee Motion is set to be heard on August 5, 2021.

11. Shortly after the Petition Date, the Debtor filed the BH Retention Application seeking to retain Baker & Hostetler LLP (“BH”) as its general bankruptcy counsel under section

327(a) of the Code. *See* D.I. 56. In support of the BH Retention Application, the Debtor filed the *Declaration Of Jorian L. Rose In Support Of The Application Of The Debtor For Entry Of An Order Approving The Employment And Retention Of Baker & Hostetler LLP As Counsel For The Debtor, Nunc Pro Tunc To The Petition Date* (“Rose Declaration”) at Ex. B, D.I. 56. The Debtor also filed the *Statement Pursuant To Bankruptcy Code Sections 329 And 504, Bankruptcy Rule 2016 And Local Rule 2016-1* (“2016 Statement”) at Ex. C, D.I. 56.

12. The Rose Declaration asserts that

Baker is a “disinterested person,” as the term is defined in Bankruptcy Code section 101(14) because Baker, its partners, associates, and employees: (a) are not creditors, equity security holders or insiders of the Debtor; (b) are not and were not, within the two (2) years before the Petition Date, directors, officers or employees of the Debtor; (c) have not been an investment banker for a security of the Debtor, or an attorney for such investment banker in connection with the offer, sale or issuance of a security of the Debtor; (d) are not and never have been a member, officer or employee of the Debtor or of an investment banker; and (e) do not have any interest materially adverse to the interests 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 an investment banker.

Rose Declaration at ¶ 29³.

13. The Rule 2014 Rose Declaration also purports to disclose BH’s connection to the potential parties in interest in this case. To that end, it states

The Debtor and the Debtor’s CEO and Board member, William H. Thead III, have been named as defendants in an action unrelated to this chapter 11 case brought by the State of Texas in the District Court of Travis County, Texas, against Aliera Healthcare, Inc. and

³ Compare 11 U.S.C. §101(14): The term “disinterested person” means a person that—

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and

(C) 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*. (emphases added).

others styled as, *State of Texas v. The Alier Companies, Inc., Trinity Ministries, Inc., Shelly Steele, Timothy Moses, Chase Moses and William Thead*, D-1-GN-19-003388. Baker and its professionals represent the Debtor and previously represented Mr. Thead in his official capacity in that action. Baker withdrew from its representation of Mr. Thead prepetition and no longer represents Mr. Thead in this or any other action.

See D.I. 56-3 at ¶ 3.

14. Concerning its former representation of Mr. Thead in the Texas state court action, the Rose Declaration does not state (i) when that representation ended; (ii) whether BH has formerly withdrawn as counsel in that action; (iii) whether that action was related to the issues that led the Debtor to file this case; (iv) the extent of its representation of Mr. Thead in that action; (v) whether Mr. Thead has authorized BH to represent the Debtor in this case, and if so, the extent of such authorization; (vi) whether BH will be responsible or have any role in assisting the Debtor investigate potential causes of action the estate may have against Mr. Thead; (vii) whether such causes of action will be investigated at all; (viii) the date of Mr. Thead's resignation from the Debtor; (viii) whether the same attorneys from BH that represent the Debtor in this case represented Mr. Thead in the Texas action; and (x) who signed BH's engagement letter on behalf of the Debtor⁴.

15. The 2016 Statement discloses many payments the Debtor made to BH in the ninety-day (90) prepetition period. See D.I. 56-4. It also reveals that BH was paid a total of \$666,044.52 prepetition. The 2016 Statement does not itemize all prepetition payments, and it does not provide corresponding invoice dates, balances remaining after payment, and applicable dates of service.

⁴ The U.S. Trustee has submitted inquiries to the Debtor for most of these issues, and as of the date hereof, although the U.S. Trustee has received some more information, it has not received it all. The U.S. Trustee looks forward to working through the necessary outstanding disclosures with the Debtor prior to the hearing.

ARGUMENT

I. The BH Retention Application Provides Insufficient Disclosures Under Federal Rule of Bankruptcy Procedure 2014, And This Insufficiency Makes It Impossible to Determine Whether the Debtor Has Met the Standard For Retention Under Section 327(a).

16. Federal Rule of Bankruptcy Procedure 2014(a) provides that an application for employment of professional persons “shall state the specific facts showing the necessity for the employment . . . any proposed arrangement for compensation, and, to the best of the applicant’s knowledge, all of the person’s connections with the debtor, the creditors, [and] any other party in interest[.]” Fed. R. Bankr. Proc. 2014(a). The court and parties-in-interest police conflicts through mandatory disclosure of relationships under Fed. R. Bankr. P. 2014(a). The scope of disclosure is broader than the question of disqualification; the applicant and the professional must disclose, without exception, all connections and not merely those that rise to the level of conflicts. *In re Granite Partners, L.P.*, 219 B.R. 22, 35 (Bankr. S.D.N.Y. 1998).

17. Disclosure “goes to the heart of the integrity of the bankruptcy system.” *In re eToys, Inc.*, 331 B.R. 176, 189 (Bankr. D. Del. 2005) (quoting *In re B.E.S. Concrete Prods., Inc.*, 93 B.R. 228, 236 (Bankr. E.D. Cal. 1988)). “[C]omplete and candid disclosure . . . is indispensable to the court’s discharge of its duty to assure the [professional’s] eligibility for employment under section 327(a)[.]” *See eToys*, 331 B.R. at 189. In *In re Enron Corp.*, 2003 WL 223455 (S.D.N.Y. 2003), the court observed: “The purpose of Rule 2014(a) is to provide the court and the United States Trustee with information to determine whether the professional’s employment is in the best interests of the estate.”

18. Once full disclosure is made, Section 327(a) of the Code permits the retention of professional persons “that do not hold or represent an interest adverse to the estate . . . and that are disinterested persons.” Section 101(14)(C) provides, in pertinent part, that a disinterested person

“does not have an interest materially adverse to the interest of the estate . . . by reason of any direct or indirect relationship to, connection with, or interest in, the debtor . . . or for any other reason.”

19. “The term ‘adverse interest’ is not defined by the Code. However, by judicial definition, . . . [it means] (i) 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 (ii) to possess a predisposition under circumstances that render such bias against the estate.” *In re Envirodyne Indus., Inc.*, 150 B.R. 1008, 1016-17, 1019 (Bankr. N. D. Ill. 1993) (internal citations omitted) (noting that a debtor in possession has affirmative duty to investigate potential claims).

20. In evaluating whether a professional “holds or represents an interest adverse to the interest of the estate with respect to the matter on which such professional is employed,” it is clear that actual conflicts of interest are *per se* disqualifying. In addition, while potential conflicts do not disqualify a professional *per se*, they are disfavored. See *In re Marvel Entertainment Group, Inc.*, 140 F.3d 463, 476 (3d Cir. 1998) (quoting *In re BH & P, Inc.*, 949 F.2d 1300, 1316-17 (3d Cir. 1991)); see also *In re Black and White Stripes, LLC*, 623 B.R. 34, 51-52 (Bankr. S.D.N.Y. 2020) (holding that proposed bankruptcy counsel’s prior representation in state court action of debtor’s principals disqualified it from retention because prior representation undermined counsel’s ability to perform as faithful bankruptcy counsel).

21. Additionally, it is settled law in the Third Circuit that receipt of a preferential transfer constitutes an actual conflict of interest between a professional and the debtor that requires a professional to be disqualified from retention. See *In re First Jersey Securities, Inc.*, 180 F.3d 504, 509 (3d Cir. 1999); *In re Pillowtex, Inc.*, 304 F.3d 246, 252 (3d Cir. 2002). As the Third Circuit specifically stated in *Pillowtex*: [t]he receipt of a preference by a creditor thus creates a

conflict with unpaid creditors, whose share of the remaining assets is diminished by the payment.”

Id.

22. Here, the BH Retention Application and declarations submitted in support do not provide sufficient disclosure under Rule 2014 to assess whether BH's prior representation of Mr. Thead or its receipt of hundreds of thousands of dollars in payments in the prepetition period create a disqualification issue under section 327 of the Code. The Rose Declaration does not provide pertinent information necessary to evaluate its former representation of Mr. Thead, such as (i) when that representation ended; (ii) whether BH has formerly withdrawn as counsel in that action; (iii) whether that action was related to the issues that led the Debtor to file this case; (iv) the extent of its representation of Mr. Thead in that action; (v) whether Mr. Thead has authorized BH to represent the Debtor in this case, and if so, the extent of such authorization; (vi) whether BH will be responsible or have any role in assisting the Debtor investigate potential causes of action the estate may have against Mr. Thead; (vii) whether such causes of action will be investigated at all; (viii) the date of Mr. Thead's resignation from the Debtor; (vix) whether the same attorneys from BH that represent the Debtor in this case represented Mr. Thead in the Texas action; and (x) who signed BH's engagement letter on behalf of the Debtor. Importantly, as detailed in the U.S. Trustee's Motion filed at D.I. 68, the Texas state court action in which BH represented Mr. Thead alleges, *inter alia*, that Mr. Thead (1) formed Sharity while an employee of Alieria and had a role in Sharity's business arrangement with Alieria; and (2) filed an application containing misleading information with the Internal Revenue Service when he formed Sharity. It is possible that an investigation of these allegations can result in the estate holding causes of action against Mr. Thead.

23. The 2016 Statement does not provide information sufficient to determine if BH is in receipt of preferential transfers. The Debtor's members who are, and have been, awaiting payment of approved share requests might have a conflict with BH if their share of remaining assets were diminished by the payments to BH.

24. Therefore, the U.S. Trustee submits that the BH Retention Application should be denied because the Debtor has not carried its burden under section 327(a) of the Code and Rule 2014

RESERVATION OF RIGHTS

25. The U.S. Trustee reserves any and all rights, remedies and obligations to, among other things, complement, supplement, augment, alter or modify this Objection, file an appropriate motion, or conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become apparent upon further factual discovery.

26. WHEREFORE, the U.S. Trustee requests that this Court deny the BH Retention Application.

Dated: July 29, 2021.
Wilmington, Delaware

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE

By: /s/ Rosa Sierra

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CERTIFICATE OF SERVICE

I, Rosa Sierra, hereby attest that on July 29, 2021, I caused to be served a copy of this Objection by electronic service on the registered parties via the Court's CM/ECF system and upon the following parties:

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