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HON. FRANK L. KURTZ

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In re:	Case No. 19-01189 FLK 11 Chapter 11
ASTRIA HEALTH, et.al. [1]	Jointly Administered
Debtors in Possession,	OBJECTION TO THE EMPLOYMENT APPLICATION OF PIPER JAFFRAY & CO

The Acting United States Trustee objects to the employment of Piper Jaffray & Co for the following reasons:

The disclosures fall short of the requirements of 11 U.S.C. §§ 327, 330, 331 and Rule 2014, the scope of duties are inconsistent between the Application,

1 The Debtors, along with their case numbers, are as follows: Astria Health (19-01189), Glacier Canyon, LLC (19-01193), Kitchen and Bath Furnishings, LLC (19-01149), Oxbow Summit, LLC (19-01195), SHC Holdco, LLC (19-01196), SHC Medical Center-Toppenish (19-01190), SHC Medical Center-Yakima (19-01192), Sunnyside Community Hospital Association (19-01191), Sunnyside Community Hospital Home Medical Supply, LLC (19-01197), Sunnyside Home Health (19-001198), Sunnyside Professional Services, LLC (19-01199), Yakima Home Care Holdings, LLC (19-01201), and Yakima HMA Home Health, LLC (19-01200).

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Declaration and the Engagement Letter and appear to partially duplicate the employment of the debtor's CRO, and the proposed section 328 provisions of employment effectively waives oversight of the proposed applicant's fees and expenses. The real guts of this application is the Engagement Letter, much of which is not expressly disclosed in the notice or the Application. The Supplemental Declaration of Terri Stratton filed on August 6 provides some summary disclosures about connections but it is too late for proper notice purposes and further asks for permission to hide connections.

1. THE PROPOSED LACK OF TRANSPARENCY IS UNACCEPTABLE.[2]

One of the most urgent teachings of the conflict cases in bankruptcy practice is the importance of full disclosure to the court. J. Ayer, The Responsibility of the Lawyer in Bankruptcy Practice, Norton Bankr. L. & Prac. Monograph 1988-1 at 43 (1988). *In re Lewis*, 113 F.3d 1040 (9th Cir. 1997); *In re Park-Helena Corp*., 63 F.3d 877 (9th Cir. 1995) Although Bankruptcy Rule 2014's primary purpose is to facilitate compliance with section 327, the rule is much broader than section 327.

2. The disclosure aspects of this objection may be solved by additional language which has been communicated from debtor's counsel to the applicant. Any agreement was not known at the time of the deadline to file this objection.

"The disclosure requirements of Rule 2014(a) are broader than the rules governing disqualification, and an applicant must disclose all connections regardless of whether they are sufficient to rise to the level of a disqualifying interest under Section 327(a)." *In re Am. Int'l Refinery, Inc.*, 676 F.3d 455, 465 (5th Cir. 2012) (*citing In re Cornerstone Prods., Inc.*, 416 B.R. 591, 608 (Bankr. E.D. Tex. 2008) (stating that "all" connections must be disclosed). *Haldeman Pipe & Supply, Inc.* , 417 F.2d 1302, 1304 (9th Cir. 1969). The burden of adequate disclosure rests with the applicant alone, and it is not the job of the Court, creditors or parties in interest to wrestle this information from proposed professionals. *Official Creditor's Committee of Fox Markets, Inc. v. Ely*, 337 F.2d 461, 465 (9th Cir. 1964). *York International Building v. Chancey*, 527 F.2d 1061, 1068 (9th Cir. 1975). This obligation is nothing new in the law. "Judges are not like pigs, hunting for truffles buried in briefs." *See, Greenwood v. FAA*. 28 F.23d 971, 977 (9th Cir. 1994)(judges will not search for issues on appeal.). *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991). Rigorous compliance with professional retention rules is critical to the integrity and transparency required of the bankruptcy system. All professionals should be held to the same baseline standards of transparent and complete disclosures. And all professionals must meet the Bankruptcy Code's requirements for retention, including that they be free from conflict and satisfy the

standards for disinterestedness.

The burden of showing that the proposed 328 provisions are reasonable remains on the applicant and the debtor. The typical factors used to show the foundation for the employment of a financial advisor or investment banker are numerous. See, *In re Drexel Burnham Lambert Group, Inc.*, 133 B.R. 13 (Bankr. S.D.N.Y. 1991); *In re High Voltage Engineering Corp.*, 311 B.R. 320,332 (Bankr. D. Mass. 2004).

Here, the applicant does not provide the details regarding the statements that the applicant "may represent claimants and parties in interest in these chapter 11 cases" and "may…be represented by several attorneys and law firms….some of whom may be involved in these proceedings." The applicant promises not to take an engagement that has "direct connection" to this case. That promised scope is not the same scope of Rule 2014 and section 327.

Here, the application's declaration asks the court to waive the obligation to file fee applications, explaining it charges "all disbursements and expenses incurred in rendition of its services to the client." Further, it does not keep detail time records similar to those kept by attorneys.

The oversight for non-disclosure remains in Sections 330 and 331 which are the exclusive Code provisions authorizing payments to professionals. *In re*

Ferguson, 445 B.R. 744, 751 (Bankr. N.D. Tex. 2011). "While section 330(a)(1) makes an award of compensation 'subject to sections 326, 328, and 329,' **sections 330 and 331 are the only provisions of the Code which authorize the payment of professionals**" employed under sections 327 or 1103. *Id.* (emphasis added).

However, in the Application and the Engagement Letter, a larger waiver is requested. The Engagement Letter provides a more expansive description of the expenses it intends to charge the debtors. See part 3 of the Engagement Letter. Included in that description (and excluded any review) is the travel costs of the applicant and an undefined right to "reasonable allocation of database, courier and communication costs." Later in the Engagement Letter's part 13, the applicant expressly disclaims any fiduciary relationship to the debtors and is granted the unfettered use of, and employment of, its affiliates and the use of affiliates to potentially acquire other services from third parties which would be billed through it to the applicants and the debtors. Further, the applicant may trade in the debtors' debt or equity securities. This would seem to be contrary to the teaching of *In re Roberts*, 46 B.R. 815, 827 and 838 (Bankr. D. Utah 1985), *aff'd* 75 B.R. 402 (D. Utah 1987) in allowing the future possibility of allowing a conflicting position to be held. It would seem to permit dual representation not countenanced under bankruptcy law. See, *Rome v. Braunstein*, 19 F.3d 54 (1st Cir. 1994); *In re Marine*

Power & Equipment Co., Inc. , 67 B.R. 643 (Bankr. W.D. Wash. 1986).

Further, the applicant may have conflicts as long as it does not "furnish" "confidential information of the debtors" to other companies. The term of confidential information is not formally defined but may be defined by part 14 in paragraph 2.

The applicant may hold voting rights or have a fiduciary relationship in potential buyers of the debtor, without any apparent disclosure to anyone in these cases. See para. 13. This would seem to be contrary to the teaching of *In re Roberts*, 46 B.R. 815, 827 and 838 (Bankr. D. Utah 1985), aff'd 75 B.R. 402 (D. Utah 1987) in allowing the future possibility of allowing a conflicting position to be held.

This limited disclosure as offered by the applicant is clearly at odds with Bankruptcy Rule 2014, which "is not intended to condone a game of cat and mouse, where the professional seeking appointment provides only enough disclosure to whet the appetite of the UST, the court or other parties in interest, and then the burden shifts to those entities to make inquiry in an effort to expand the disclosure." *In re Matco Electronics Group Inc.*, 383 B.R. 848, 853-54 (N.D.N.Y. 2008). There is no ambiguity in the Code and equitable principles may not be used to disregard the unambiguous language prohibiting DIPs and trustees from

employing professionals who are not disinterested. *U.S. Trustee v. Price Waterhouse*, 19 F.3d 138 (3rd Cir. 1994).

This section 328 request of waiving or not having any review of the applicant's fees and expenses seems to include the ability to charge for defending one's fee application, which is prohibited by *Baker Botts LLP v. ASARCO LLC*, ___ U.S. ___, 135 S. Ct. 2158 (2015).

The United States Trustee contends these various provisions are not reasonable and do not provide the transparency and oversight envisioned by Title 11. Professionals' employment and compensation rights in bankruptcy are not bestowed by "contract." Instead, the retention and payment of professionals is governed by statute, which is why section 328 provisions authorizes courts to approve "reasonable terms and conditions of employment…under section 327…of this title." The court should not grant the application permitting the applicant to waive full disclosures under Rule 2014 and 11 U.S.C. § 327, and the application of section 330 and 331 regarding the review of the reasonableness of their time and fees.

2. LACK OF DISCLOSURE OF "CONFIDENTIAL CLIENTS" IS NOT PERMISSIBLE.

The supplemental declaration of Terri Stratton refers to Confidential Clients. The use of "Confidential Client" in the Application does not comport with Bankruptcy Rule 2014 and circumvents its transparency and mandatory disclosure requirements. An indeterminate statement of "connections with a creditor" does not satisfy Bankruptcy Rule 2014. *See In re Leslie Fay Companies, Inc*., 175 B.R. 525 (Bankr. S.D.N.Y. 1994). Disclosing the existence of a connection without disclosing the identity of the connection is insufficient. *In re Brennan*, 187 B.R. 135, 144 (Bankr. D.N.J. 1995), *rev'd on other grounds sub nom, In re First Jersey Securities, Inc.*, 180 F.3d 504 (3d Cir. 1999) ("must also be disclosure of the identities").

Noting in the statute or rule permits the waiver of proper disclosures or review of the connections by an objective standard. The promise by the applicant for confidentiality to another client cannot side-step or trump the requirements of Title 11. There is no applicable privilege in this setting to shield this disclosure.

3. THE INDEMNITY PROVISION SHOULD NOT BE APPROVED.

The indemnity provisions are unreasonable under the circumstances of this

case. They expose the estate to unknown, and potentially unlimited liability. If employed, Piper Jaffray will be handsomely compensated for its efforts, and should be held fully accountable for its actions and work product. *See In re Allegheny Int'l, Inc.*, 100 B.R. 244, 246 (Bankr. W.D. Pa. 1989) (not unreasonable to expect professional who is handsomely compensated from estate to provide services with a high degree of professionalism).

Many courts have disfavored indemnity, exculpation and other similar liability protections in employment applications for bankruptcy professionals. *See In re Thermadyne Holdings Corporation,* 283 B.R. 749 (8th Cir. B.A.P. 2002) (bankruptcy court did not abuse its discretion in finding indemnity and exculpation provisions to be unreasonable under the circumstances of the case); *In re Metricom*, 275 B.R. 364 (Bankr. N.D. Cal. 2002) (Houlihan Lokey failed to meet its burden to show that indemnity, contribution and exculpation provisions in employment agreement were reasonable under the circumstances of the case); *In re Gillett Holdings, Inc.*, 137 B.R. 452, 458 (Bankr. D. Colo. 1991) (indemnity provision construed as improper attempt to shield professionals from their own errors and omissions, their own negligence); *In re Drexel Burnham Lambert Group, Inc.*, 133 B.R. 13, 27 (Bankr. S.D.N.Y. 1991) ("[s]imply stated, indemnification agreements are inappropriate"); *In re Mortgage & Realty Trust,*

123 B.R. 626, 631 (Bankr. C.D. Cal. 1991) ("[i]ndemnification is not consistent with professionalism"); *In re Allegheny Int'l, Inc.*, 100 B.R. 244, 247 (Bankr. W.D. Pa. 1989) ("holding a fiduciary harmless for its own negligence is shockingly inconsistent with the strict standard of conduct for fiduciaries").

Further, the indemnity provision appears to include recovery of its fees for litigating its fees which, again, violates *Baker Botts LLP v. ASARCO LLC*, ___ U.S. ___, 135 S. Ct. 2158 (2015). Section 328 does not create an exception to section 330 or the "…the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." Id at 2164 (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–253 (2010)). Any statutory departures from the American Rule must be contained in "specific and explicit provisions." *Id*. Nor can these fees be reimbursed as expenses. Section 330(a)(1)(B) allows the award of "necessary" expenses. But those expenses must relate and be incident to the client services for which the professional can be compensated under section 330(a)(1)(A). Because legal fees for defending fee application objections cannot be paid as compensation, those same legal fees cannot be reimbursed as expenses.

Professionals' employment and compensation rights in bankruptcy are not bestowed by "contract." Instead, the retention and payment of professionals is

governed by statute, which is why section 328 provisions authorizes courts to approve "reasonable terms and conditions of employment…under section 327…of this title." This proposed provision for indemnity is not reasonable.

Further, the often cited Third Circuit's decision in *United Artists Theatre Co. v. Walton*, 315 F.3d 217 (3d Cir. 2003), does not compel a different result. In that case, the Third Circuit held that the bankruptcy court was authorized (but not required) to approve a reasonable, "market-driven" indemnification provision in a financial advisor's retention application, which purported to give the non-attorney professionals *serving as corporate officers* the same rights of indemnification enjoyed by the debtor's officers in the event they were sued for negligence. *Id.* at 230. Piper Jaffray is not serving as a corporate officer and indeed in the Engagement Letter denies owing any fiduciary duty to the debtors, and by contract only provides advice to the Board of Directors rather than the bankruptcy estate. See part 10 of the Engagement Letter. Further, while the *United Artist* court used the "market driven" phrase, it did not say the market *determines* the proper scope of the conditions of employment.

Piper Jaffray and the Debtor (the moving party) have the burden of demonstrating that the indemnity provision is reasonable under the circumstances of this case. *In re Metricom, Inc.*, 275 B.R. at 371. They have made no showing

whatsoever that the indemnity provision is either reasonable or necessary. The indemnity provision should not be approved.

Wherefore, the court is respectfully requested to decline to approve the employment of Piper Jaffray & Co. pursuant to this present application.

Dated: August 19, 2019

Respectfully submitted,

GREGORY M. GARVIN
ACTING UNITED STATES TRUSTEE

/s/ Gary W. Dyer
Gary W. Dyer
Assistant US Trustee