



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
March 15, 2019

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re:) Case No.: 18-17155-MKN
) Chapter 11
DANIEL H. ROSENBLUM,)
) Date: January 9, 2019
Debtor.) Time: 9:30 a.m.
)
)

**ORDER REGARDING APPLICATION FOR ORDER APPROVING THE
EMPLOYMENT OF GREENSPOON MARDER AS ATTORNEYS FOR DEBTOR
UNDER GENERAL RETAINER NUNC PRO TUNC¹**

On January 9, 2019, the court heard the Application for Order Approving the Employment of Greenspoon Marder as Attorneys for Debtor under General Retainer Nunc Pro Tunc (“Employment Application”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On December 1, 2018, Daniel H. Rosenblum (“Debtor”) filed a voluntary Chapter 11

¹ In this Order, all references to “ECF No.” are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “FRBP” are to the Federal Rules of Bankruptcy Procedure. All references to “FRE” are to the Federal Rules of Evidence. All references to “NRS” are to the provisions of the Nevada Revised Statutes.

1 bankruptcy petition along with his schedules of assets and liabilities (“Schedules”),² Statement of
2 Financial Affairs (“SOFA”), and other required information. (ECF No. 1).

3 On the same date, a notice of the Chapter 11 filing was issued scheduling a meeting of
4 creditors for January 3, 2019, and notifying creditors of various deadlines.³ An “Amended
5 Notice of Meeting of Creditors” was then filed on December 18, 2018, notifying interested
6 parties, the Trustee and the court that the initial meeting of creditors had been moved to January
7 8, 2019 at 2:00 p.m. (ECF Nos. 3 and 29).

8 On December 10, 2018, the instant Employment Application was filed, along with the
9 supporting Declaration of Vincent J. Aiello (“Aiello Declaration”). (ECF Nos. 14 and 17). By
10 the Employment Application, Debtor seeks authorization to employ the law firm of Greenspoon
11 Marder, Attorneys at Law (“GM Firm”), to serve as his general bankruptcy counsel, under the
12 terms of a letter dated December 1, 2018 (“Retainer Agreement”).⁴ On the same date, Debtor
13 filed a separate motion regarding the automatic stay, and another motion regarding the use of
14 cash collateral. (ECF Nos. 12 and 13). All three matters (collectively, “First Day Motions”)
15 were noticed to be heard on January 9, 2019. (ECF Nos. 15, 16, and 18).⁵

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19 ² On his Schedule “A/B,” Debtor’s personal property interest with the highest current
20 value is his 100% interest in shares in non-publicly traded stock of EDF Man Group PLC that he
21 values at \$60,000,000. On his Schedule “C,” Debtor does not claim an exemption in that
22 property. On his Schedule “D,” Debtor lists only one creditor, Russell Rosenblum, as having a
23 claim secured by a security interest in EDF Man, PLC, in the amount of \$4,000,000. On his
24 Schedule “E/F,” Debtor also lists Russell Rosenblum as having a nonpriority unsecured claim in
25 the amount of \$1,500,000.

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27 ³ A deadline of April 3, 2019, was set for non-governmental creditors to file proofs of
28 claim. A separate deadline of May 30, 2019, was set for governmental creditors to file proofs of
claim. Under FRBP 3003(b)(1), filing a proof of claim is not required for creditors whose claims
are not listed in the Debtor’s Schedules as being disputed, contingent, or unliquidated.

⁴ A copy of the Retainer Agreement is attached as Exhibit “1” to the Employment
Application and the Aiello Declaration. The exhibit consists of a letter from the GM Firm dated
December 1, 2018, including an addendum, setting forth the terms of services to be provided.
Both the letter and the addendum bear the Debtor’s signature approving and agreeing to those
terms.

1 On December 19, 2018, an order was entered approving a stipulation extending time for
 2 Sheila Rosenblum, who is the former wife and a current creditor of the Debtor, to file a response
 3 to First Day Motions, and for the Debtor to file any replies. (ECF No. 31).⁶

4 On December 21, 2018, Sheila Rosenblum filed a separate motion to dismiss the Chapter
 5 11 proceeding (“Dismissal Motion”), supported by the declarations of Sheila Rosenblum
 6 (“Sheila Declaration”), Daniel M. Lipschutz (“Lipschutz Declaration”), and Daniel Hemming
 7 (“Hemming Declaration”). (ECF Nos. 42, 43, 44, and 45). Sheila Rosenblum requested that the
 8 Dismissal Motion be heard on shortened time, but that request was denied by an order entered on
 9 December 28, 2018. (ECF No. 62). The Dismissal Motion was then noticed to be heard on
 10 January 30, 2019. (ECF No. 68).

11 On December 21, 2018, Debtor filed his declaration in support of the First Day Motions
 12 (“Debtor First Day Declaration”). (ECF No. 46). On the same date, Debtor also filed
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16 ⁵ On December 22, 2018, a partial “shutdown” of the federal government commenced as
 17 a result of a failure to renew appropriations for certain operations. Included in the shutdown is
 18 the Office of the United States Trustee (“UST”) within the U.S. Department of Justice. The UST
 19 is tasked to oversee the administration of bankruptcy cases and private bankruptcy trustees. The
 20 UST has standing to appear and be heard in all bankruptcy cases, see 11 U.S.C. § 307, and
 frequently appears in connection with the employment of counsel in Chapter 11 proceedings.

21 ⁶ On December 21, 2018, Sheila Rosenblum filed a proof of claim number 3-1
 22 (“POC#3”) in the total amount of \$190,787,212.18, of which \$65,038,695.31 is alleged to be
 23 secured and the remaining \$125,748,516.87 is alleged to be unsecured. The basis for the claim is
 24 identified as “Charging orders and London judgments,” copies of which are attached to POC#3
 25 as required by FRBP 3001(c)(1). The claim further states that the total amount owed by the
 26 Debtor includes \$14,102,391.78 in domestic support obligations entitled to priority under Section
 27 507(a)(1), plus another \$2,850.00 in deposits toward the purchase, lease, or rental of property or
 28 services for personal, family, or household use entitled to priority under Section 507(a)(7).
 POC#3 is signed under penalty of perjury by Sheila Rosenblum. Under Section 502(a), the
 claim is deemed allowed unless an interested party objects to the proof of claim. Under FRBP
 3001(f), a proof of claim constitutes prima facie evidence of the validity and amount of the
 claim. Under FRBP 3003(c)(4), the filing of the claim by Sheila Rosenblum supersedes any
 scheduling of her claim by the Debtor. Principles of res judicata typically bar re-litigation of
 issues and claims resolved by final orders and judgments entered prior to commencement of
 bankruptcy proceedings.

1 amendments to certain Schedules⁷ and to the SOFA (“Amended Schedules” and “Amended
2 SOFA”).⁸ (ECF No. 47).⁹

3 On December 28, 2018, an opposition to the instant Employment Application
4 (“Opposition”) was filed by Sheila Rosenblum. (ECF No. 67).¹⁰

5 On January 4, 2019, a reply to the Opposition (“Reply”) was filed by Debtor. (ECF No.
6 72). The Reply is accompanied by a supplement to the Aiello Declaration (“Aiello
7 Supplement”). (ECF No. 71).

8 On January 7, 2019, a joinder to Debtor’s reply (“Joinder”) was filed by Russell
9 Rosenblum, who is the son and a current creditor of the Debtor, as well as former stepson to
10 Sheila Rosenblum. (ECF No. 76).¹¹

11 **APPLICABLE LEGAL STANDARDS**

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14 ⁷ On his Amended Schedule “A/B,” Debtor now states that he owns a 100% interest in
15 approximately 11,827,919 shares of stock in EDF Man Group PLC (“EDF Man Shares”) that
16 have a current value of \$47,311,676. On his amended Schedule “C,” Debtor does not claim an
exemption in that property.

17 ⁸ On his Amended Schedule “D,” Debtor now lists two creditors whose claims are
18 secured by the EDF Man Shares: Russell Rosenblum and EDF Man, PLC, with each claim in the
19 amount of \$4,000,000. On his Amended Schedule “E/F,” Debtor again lists Russell Rosenblum
as having a nonpriority unsecured claim in the amount of \$1,500,000.

20 ⁹ The cover sheet to the Amended Schedules indicates that there are no amendments to
21 the creditor Schedules “D” and “E/F.” That is incorrect. Numerous amendments were made to
each of those Schedules.

22 ¹⁰ The Opposition incorporates portions of the testimony included in the declarations filed
23 by Sheila Rosenblum in support of her Dismissal Motion, as well as her POC#3.

24 ¹¹ On January 8, 2019, the day before the hearing on the Employment Application,
25 Russell Rosenblum commenced an action in this bankruptcy court against Sheila Rosenblum,
denominated Adversary Proceeding No. 19-01002-MKN (“Russell Adversary Proceeding”).
26 The adversary complaint (“Russell Adversary Complaint”) alleges, *inter alia*, that Sheila
27 Rosenblum fraudulently or intentionally failed to inform Russell Rosenblum of certain
28 restrictions arising out of the New York divorce proceeding between Sheila Rosenblum and the
Debtor. As a result of the alleged omission, the complaint alleges that Russell Rosenblum made
two separate loans to the Debtor for which Russell Rosenblum has been damaged in attempting
to collect.

1 The instant Employment Application is brought pursuant to Sections 327 and 328. In
2 pertinent part, Section 327 provides:

3 (a) Except as otherwise provided in this section, the trustee, with
4 the court's approval, may employ one or more attorneys...that
5 do not hold or represent an interest adverse to the estate, and
6 that are disinterested persons,¹² to represent or assist the trustee
7 in carrying out the trustee's duties under this title."

8 (b) ****

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

15 (d) ****

16 (e) The trustee, with the court's approval, may employ, for a
17 specified special purpose, other than to represent the trustee in
18 conducting the case, an attorney that has represented the
19 debtor, if in the best interest of the estate, and if such attorney
20 does not represent or hold any interest adverse to the debtor or
21 to the estate with respect to the matter on which such attorney
22 is to be employed.

23 11 U.S.C. § 327(a), (c) and (e). (Emphasis added).

24 In pertinent part, Section 328 provides:

25 ¹² Under the Bankruptcy Code, "The term 'disinterested person' means a person that -
26 (A) is not a creditor, an equity security holder, or an insider; (B) is not and was not, within 2
27 years before the date of the filing of the petition, a director, officer, or employee of the debtor;
28 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." 11 U.S.C. § 101(14). As the Ninth
Circuit Bankruptcy Appellate Panel has observed, "A disinterested professional is one that can
make unbiased decisions, free from personal interest, in any matter pertaining to the estate." First Interstate Bank of Nevada, N.A. v. CIC Inv. Corp. (In re CIC Inv. Corp.), 192 B.R. 549,
553 (B.A.P. 9th Cir. 1996), quoting In re Dyanmark, Ltd., 137 B.R. 380, 381 (S.D. Cal. 1991).

(a) The trustee, ...with the court's approval, may employ...a professional person under section 327...of this title, ...on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

(b) ****

(c) Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services...of a professional person employed under section 327...if, at any time during such professional person's employment under section 327...of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

11 U.S.C. § 328(a) and (c). (Emphasis added.) See, e.g., Fann Contracting, Inc. v. Garman Turner Gordon LLP (In re Grand Canyon Ranch, LLC), 593 B.R. 625, 633 (D. Nev. 2018).

To enable a bankruptcy court to determine a professional's suitability for employment, FRBP 2014 provides in pertinent part:

An order approving the employment of attorneys...or other professionals under § 327...shall be made only on application of the trustee or committee...The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, 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 accounts, 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 accounts, the United States trustee, or any person employed in the office of the United States trustee.

1 Fed.R.Bankr.P. 2014(a). (Emphasis added). The United States Court of Appeals for the Ninth
 2 Circuit (“Ninth Circuit”) has stated that ““The duty of professionals is to disclose all connections
 3 with the debtor, debtor-in-possession, insiders, creditors, and parties in interest...They cannot
 4 pick and choose which connections are irrelevant or trivial...No matter how old the connection,
 5 no matter how trivial it appears, the professional seeking employment must disclose it.”” Neben
 6 & Starrett, Inc. v. Chartwell Fin. Corp. (In re Park-Helena Corp.), 63 F.3d 877, 882 (9th Cir.
 7 1995), quoting In re EWC, Inc., 138 B.R. 276, 280-81 (Bankr. W.D. Okla. 1992).

8 The purpose of the verified statement of the applicant’s connections is to enable the
 9 bankruptcy court to determine whether the proposed attorney represents or holds an adverse
 10 interest, is a disinterested person, or has an actual conflict of interest as described in Section 327.
 11 Those determinations are made by the bankruptcy court rather than the applicant. See In re
 12 Sundance Self Storage-El Dorado LP, 482 B.R. 613, 630-31 (E.D. Cal. 2012) (“It is the
 13 bankruptcy court that determines whether a professional’s connections render him or her
 14 unemployable under § 327(a) – not the other way around.”). Compare, e.g., Tevis v. Wilke,
 15 Fleury, Hoffelt, Gould & Birney, LLP (In re Tevis), 347 B.R. 679 (B.A.P. 9th Cir. 2006)
 16 (adequate disclosure of connections required for court to determine disinterestedness status for
 17 purpose of awarding professional compensation). Thus, attestations by a proposed attorney that
 18 he or she does not have an adverse interest, or that he or she is a disinterested person, are simply
 19 irrelevant expressions of favorable opinion.

20 Because it remains in possession of property of its bankruptcy estate, and because it has
 21 the rights, powers and duties of a bankruptcy trustee, see 11 U.S.C. § 1107(a), a Chapter 11
 22 debtor in possession has a fiduciary responsibility to all the creditors of the bankruptcy estate.
 23 See Woodson v. Fireman’s Fund Ins. Co. (In re Woodson), 839 F.2d 610, 614 (9th Cir. 1988)
 24 (“[Debtor’s] failure to notice his creditors of the \$1 million in a timely fashion is troubling
 25 because [Debtor] is not an ordinary litigant. As debtor in possession he is the trustee of his own
 26 estate and therefore stands in a fiduciary relationship to his creditors.”). That fiduciary
 27 responsibility also rests with bankruptcy counsel for the debtor in possession. See Everett v.
 28 Perez (In re Perez), 30 F.3d 1209, 1219 (9th Cir. 1994). As part of its fiduciary obligations, a
 debtor in possession is accountable for all property received. See 11 U.S.C. §§ 1107(a),

1 1106(a)(1), and 704(a)(2). As a fiduciary to creditors of the estate, a debtor in possession is
 2 accountable for assets of the bankruptcy estate that are expended on professional services that are
 3 not necessary or beneficial to the estate. See In re Hartland MMI, LLC, 2018 WL 6980931, at
 4 *4 (Bankr. D. Nev. Dec. 10, 2018).

5 The professional seeking approval of its employment by a bankruptcy estate has the
 6 burden of proving that he or she meets the requirements under Section 327. See, e.g., EZ Links
 7 Golf Club LLC, 317 B.R. 858, 862 (Bankr. D. Colo. 2004).

8 **THE EVIDENTIARY RECORD¹³**

9 The evidence offered by the Debtor in support of the Employment Application consists of
 10 the Aiello Declaration, the Retainer Agreement, the Aiello Supplement, the Debtor First Day
 11 Declaration, the Schedules, and the SOFA. The evidence offered by Sheila Rosenblum in her
 12 Opposition consists of portions of the Sheila Declaration, Lipschutz Declaration and Hemming
 13 Declaration, as well as POC#3.

14 Debtor apparently engaged the services of the GM Firm on November 30, 2018, to
 15 represent him in the Chapter 11 proceeding. See Aiello Declaration at ¶ 8. The Retainer
 16 Agreement was executed, see note 4, supra, and the GM Firm received \$35,000 from Russell
 17 Rosenblum as an initial engagement fee. See Aiello Declaration at ¶ 8. Those funds apparently
 18 are not property of the Chapter 11 estate. Id.

19 The Retainer Agreement provides that the \$35,000 initial retainer is not a flat fee, that the
 20 funds will be held in the law firm trust account, and that fees exceeding that amount may be
 21 billed by the GM Firm. See Retainer Agreement at ¶ 3. It also expressly provides that Debtor
 22 and Russell Rosenblum are jointly and severally liable for payment of the services rendered to
 23 the Debtor in the Chapter 11 case. Id. at ¶ 5. The Retainer Agreement also states that while
 24 Russell Rosenblum is responsible for payment of the attorney's fees, he is not a client of the GM
 25 Firm. Id. at 6.

26 Russell Rosenblum has separate connections with the GM Firm. He is a manager of

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 28 ¹³ The court takes judicial notice of the papers and materials on the docket in connection
 with this bankruptcy proceeding pursuant to FRE 201. See U. S. v. Wilson, 631 F.2d 118, 119
 (9th Cir. 1980); Conde v. Open Door Mktg., LLC, 223 F.Supp.3d 949, 970 n.9 (N.D. Cal. 2017);
Gree v. Williams, 2012 WL 3962458, at 1 n.1 (D. Nev. Sep. 7, 2012).

1 RMR5 Nevada, LLC, an entity that was represented by the lead attorney at the GM Firm in
 2 certain state court litigation that settled in 2017. See Aiello Supplement at ¶ 5(a). Additionally,
 3 he is the manager of 15 Echo Peak, LLC, an entity that currently is represented by the GM Firm
 4 as co-counsel on a contingency fee basis, in certain construction defect litigation pending in state
 5 court. Id. at ¶ 5(b).

6 During the two years preceding the filing of the Chapter 11 petition, Debtor apparently
 7 borrowed funds from Russell Rosenblum to meet his living expenses and has resided in a
 8 residence rented by Russell Rosenblum. See Debtor First Day Declaration at ¶ 4. At some time
 9 in 2014, Debtor entered into a security agreement with Russell Rosenblum encumbering some of
 10 the EDF Man Shares with respect to an obligation in the amount of \$4,048,000 owed to Russell
 11 Rosenblum. Id. at ¶ 5(c). Debtor also owes Russell Rosenblum an additional \$48,000 secured
 12 by an interest in a 2018 Audi Q5 automobile. Id.¹⁴

13 Russell Rosenblum is now scheduled to have a claim incurred in 2014 and 2015 in the
 14 amount of \$4,000,000, secured by the EDF Man Shares. See Amended Schedule “D” at 2.3.
 15 Although the claim previously was scheduled as unliquidated, see Schedule “D” at 2.1, it is now
 16 scheduled as not being contingent, unliquidated, or disputed.¹⁵

17 Russell Rosenblum also is scheduled to have an unsecured claim incurred in 2016 in the
 18 amount of \$1,500,000, apparently as a personal loan to the Debtor for rents, leases, insurance and
 19 living expenses. See Schedule “E/F” at 4.16. The claim is not scheduled as being contingent,
 20 unliquidated, or disputed.¹⁶

21 Russell Rosenblum, along with the Debtor, ED&F Man Holdings Inc., and ED&F Man
 22 Holdings Limited, also are respondents to a claim brought by Sheila Rosenblum, in the High

23 ¹⁴ It appears that the debt secured by the vehicle already is included in the debt secured
 24 by the EDF Man Shares.

25 ¹⁵ Because Russell Rosenblum’s claim is no longer scheduled as being unliquidated, he
 26 no longer would be required to file a proof of claim. See note 3, supra.

27 ¹⁶ At the hearing, Russell Rosenblum’s counsel represented that his client is not expecting
 28 repayment of funds provided to the Debtor during the Chapter 11 proceeding and it is unclear
 whether he is expecting repayment of the funds loaned to the Debtor prior to the bankruptcy for
 the Debtor’s living expenses.

1 Court of Justice, denominated Claim No. HC-2017-001678 (“London Litigation”). See
 2 Amended SOFA at Item 9.¹⁷ That claim is currently pending but apparently has been stayed by
 3 the High Court as a result of the Debtor’s commencement of this Chapter 11 proceeding. See
 4 Hemming Declaration at ¶¶ 29-37.¹⁸

5 Sheila Rosenblum and the Debtor continue to litigate various matters in a long running
 6 marital dissolution proceeding that was commenced in New York in 2013 (“New York Divorce
 7 Action”). See Sheila Declaration at ¶¶ 16-34. Numerous judgments and orders have been
 8 entered by the New York court in connection with both spousal and child support, and for
 9 property division. See Lipschutz Declaration at ¶¶ 15-27. Shortly before the Chapter 11
 10 proceeding was commenced, Sheila Rosenblum undertook efforts in the New York Divorce
 11 Action to be appointed as a receiver to effectuate a sale of the EDF Man Shares. See Sheila

16 ¹⁷ Presumably, the abbreviated description of the foreign court appearing in the Amended
 17 SOFA is more thoroughly described as “the English Court in the United Kingdom before the
 18 High Court of Justice, Business and Property Courts of England and Wales, Business List
 19 (Chancery Division). See Declaration of Ogonna M. Brown in Support of Ex Parte Application
 for Order Shortening Time, etc., at ¶ 6, filed December 24, 2018. (ECF No. 52).

20 ¹⁸ The High Court’s stay of the London Litigation apparently applies to Sheila
 21 Rosenblum’s claims against Russell Rosenblum, ED&F Man Holdings Inc. and ED&F Man
 22 Holdings Limited, as well as the Debtor. The automatic stay under Section 362, however,
 23 applies only to the person who filed the bankruptcy petition as well as property of the bankruptcy
 24 estate. Only the Debtor filed the Chapter 11 petition on December 1, 2018, and continuation of
 25 the London Litigation is stayed as to the Debtor. The London Litigation is not stayed as to the
 26 other parties except to the extent, *inter alia*, those parties seek: to enforce a judgment against
 27 property of the estate; to obtain possession of or exercise control over property of the estate; or,
 28 to create, perfect or enforce a lien against property of the estate. See 11 U.S.C. § 362(a)(2, 3 and
 4). There is no dispute that the Debtor’s interest in the EDF Man Shares are property of the
 estate. Relief from the automatic stay, by terminating, annulling, modifying, or conditioning the
 stay, may be sought on the grounds set forth in Section 362(d). See 11 U.S.C. § 362(d)(1, 2, 3
 and 4). The Dismissal Motion brought by Sheila Rosenblum seeks, in the alternative, relief from
 the automatic stay to permit completion of the London Litigation as well as proceedings to
 appoint a receiver in connection with divorce proceeding between the Debtor and Sheila
 Rosenblum.

Declaration at ¶¶ 128-132; Lipschutz Declaration at ¶¶ 28-71.¹⁹

Sheila Rosenblum attests in her POC#3 that the various judgments and charging orders have awarded separate amounts totaling \$190,787,212.18, including the amount of \$14,102,391.78 in domestic support obligations under Section 101(14A), that is entitled to priority of payment under Section 507(a)(1). See discussion at note 6, supra.²⁰

DISCUSSION

Clients typically employ legal counsel of their own choosing. If a conflict of interest exists due to counsel's representation of another client, the other client can waive the conflict to permit the representation. This is not true in Chapter 11 proceedings, however, because a debtor in possession has a fiduciary duty to all of its creditors rather than just one other client of its chosen counsel.

The court having considered the entire record concludes that the GM Firm holds an interest that is adverse to the bankruptcy estate under Section 327(a). As a result, it is precluded

¹⁹ At the hearing, the court inquired whether contempt proceedings in the New York Divorce Action were pending at the time the Chapter 11 was commenced. The court inquired because the attachments to the POC include various judgments and orders resulting from contempt proceedings brought by Sheila Rosenblum against the Debtor. In this circuit, a pre-bankruptcy civil contempt proceeding brought to enforce a prior state court order imposing discovery sanctions falls within the police or regulatory power exception to the automatic stay. 11 U.S.C. § 362(b)(4). See Dingley v. Yellow Logistics, LLC (In re Dingley), 852 F.3d 1143, 1147 (9th Cir. 2017); In re Montee, 2018 WL 2176075, at *4-5 (Bankr. D. Idaho May 10, 2018). The Dismissal Motion seeks, *inter alia*, relief under stay based on cause under Section 362(d)(1) rather than an exception to the automatic stay.

²⁰ If the figure represents a domestic support obligation, it is excepted from discharge through Chapter 11 under Sections 523(a)(5) and 1141(d)(3). If it is a priority debt under Section 507(a)(1), it is subject to the treatment required for plan confirmation under 1129(a)(9)(B). If the remaining balance of POC#3, i.e., \$176,684,820.40, is not a domestic support obligation but was incurred by the Debtor in connection with a divorce decree, it still is excepted from discharge under Sections 523(a)(15) and 1141(d)(3). The latter portion, however, would not be entitled to priority of payment under Section 507(a)(1) and would be paid as a general unsecured claim to the extent it is not supported by a lien against property of the bankruptcy estate.

1 from employment as general bankruptcy counsel to the debtor in possession.²¹ The language of
2 the statute as well as the record before the court compels this conclusion.

3 The GM Firm seeks to be employed under Section 327(a) and Section 328(a).²² See
4 Employment Application at 2:13-14. As quoted above, Section 327(a) sets forth only two
5 requirements: (1) that the professional applicant “not hold or represent an interest adverse to the
6 estate” and (2) that the applicant be a “disinterested person.” The second requirement does not
7 appear to be disabling in this case. Under the Bankruptcy Code, “The term ‘disinterested person’
8 means a person that - (A) is not a creditor, an equity security holder, or an insider; (B) is not and
9 was not, within 2 years before the date of the filing of the petition, a director, officer, or
10 employee of the debtor; and (C) does not have an interest materially adverse to the interest of the
11 estate or of any class of creditors or equity security holders, by reason of any direct or indirect
12 relationship to, connection with, or interest in, the debtor, or for any other reason.” 11 U.S.C. §
13 101(14).²³ These three conditions are in the conjunctive. Because there is no suggestion that the
14 GM Firm has violated the first two conditions of Section 101(14),²⁴ it appears that the only
15 remaining question under both Section 327(a) and Section 101(14) is whether the GM Firm
16 holds or represents an interest adverse to the estate or creditors of the estate.

17 The Retainer Agreement expressly provides that the Debtor and Russell Rosenblum are
18

19 ²¹ The GM Firm seeks employment as general bankruptcy counsel to the Chapter 11
20 debtor in possession solely under Section 327(a), and not as special counsel authorized under
21 Section 327(e). The court, therefore, does not examine adversity with respect to a specific matter
22 of employment. Rather, the GM Firm seeks to be employed to represent the Debtor in
23 connection with all matters, including the prosecution of actions on the Debtor’s behalf, the
preparation of objections to claims filed against the state, and the formulation of a Chapter 11
plan and disclosure statement. See Employment Application at 3:6-22.

24 ²² If the requirements for employment under Section 327 are met, Section 328(a) governs
25 the terms of compensation.

26 ²³ As the Ninth Circuit Bankruptcy Appellate Panel has observed, “‘A disinterested
27 professional is one that can make unbiased decisions, free from personal interest, in any matter
28 pertaining to the estate.’” First Interstate Bank of Nevada, N.A. v. CIC Inv. Corp. (In re CIC
Inv. Corp.), 192 B.R. 549, 553 (B.A.P. 9th Cir. 1996), quoting In re Dyanmark, Ltd., 137 B.R.
380, 381 (S.D. Cal. 1991).

²⁴ The GM Firm is not scheduled as a creditor and apparently has not been an employee
of the Debtor within two years of the filing of the Chapter 11 petition.

1 “jointly and severally liable” for prompt payment of all legal obligations to the GM Firm in this
 2 Chapter 11 proceeding. Although the Retainer Agreement is not signed by Russell Rosenblum,
 3 the GM Firm seeks to approval to be employed under its terms. At the hearing, Russell
 4 Rosenblum’s counsel also represented that his client has no expectation of being paid for any
 5 postpetition funds provided to the Debtor. If that is correct, the Debtor has little or no incentive
 6 to pay any postpetition fees incurred by the GM Firm because the parties expressly agreed that
 7 Russell Rosenblum is jointly liable, and Russell Rosenblum may be separately pursued for
 8 collection of the entire amount. See generally Mifflinburg Telegraph, Inc. v. Criswell, 277
 9 F.Supp.3d 750, 808 (M.D. Pa. 2017). See also Honeycutt v. U.S., 137 S.Ct. 1626, 1631
 10 (2017)(“A creature of tort law, joint and several liability ‘applies when there has been a
 11 judgment against multiple defendants.’...If two or more defendants jointly cause harm, each
 12 defendant is held liable for the entire amount of the harm; provided, however, that the plaintiff
 13 recover only once for the full amount.”). Thus, it appears that both legally and functionally,
 14 Russell Rosenblum is the source of payment for the legal services performed by the GM Firm as
 15 counsel for a Chapter 11 debtor in possession.

16 But the debtor in possession in this case scheduled Russell Rosenblum as having a claim
 17 of \$4,000,000 secured by the EDF Man Shares, as well as a claim of \$1,500,000 as a nonpriority
 18 unsecured debt. Debtor’s Schedules in this Chapter 11 case do not list any claims by Russell
 19 Rosenblum as being contingent, unliquidated or disputed. As a result, Russell Rosenblum has no
 20 obligation to file a proof of claim in this Chapter 11 proceeding.²⁵

21 In addition to committing to pay the fees incurred by the GM Firm, however, Russell
 22 Rosenblum commenced the Russell Adversary Proceeding against Sheila Rosenblum, in which
 23 he seeks declaratory relief, as well as compensatory and punitive damages against his former
 24 step-mother on a variety of theories. See note 11, supra. Instead of the \$4,000,000 amount

25
 26 ²⁵ FRBP 3001(c)(1) requires that a proof of claim based on a writing must include a copy
 27 of the writing. Russell Rosenblum’s scheduled claim of \$1,500,000 for a personal loan made in
 28 2016 for rents, leases, insurance and living expenses presumably was memorialized in a written
 loan agreement or promissory note in order to comply with the Statute of Frauds under Nevada
 law. See Nev.Rev.Stat. 111.220. An agreement that does not comply with the Statute of Frauds
 is void. Id.

1 scheduled by the Debtor under penalty of perjury, Russell Rosenblum alleges that he loaned
2 \$2,000,000 in February 2014, and another \$500,000 in October 2015, secured by 1,250,000 of
3 the EDF Man Shares pursuant to identical sets of documents. See Russell Adversary Complaint
4 at ¶¶ 1, 6 and 7. The third and fourth causes of action framed in the adversary complaint allege
5 that knowledge of a statutory stay arising from the New York divorce proceeding was
6 fraudulently concealed from Russell Rosenblum, resulting in his prepetition loans to the Debtor
7 that might not be secured by the EDF Man Shares. Id. at ¶¶ 32 through 36, and 42 through 45.²⁶
8 Under any reading of the complaint, however, it is possible that Sheila Rosenblum will seek to
9 assert an additional third-party claim against the Chapter 11 estate that arises out of the
10 transactions alleged in the Russell Adversary Proceeding. Thus, Russell Rosenblum's personal
11 litigation strategy may result in a direct increase in the priority administrative claims asserted
12 against this Chapter 11 estate. As a fiduciary to all creditors of the Chapter 11 estate, the debtor
13 in possession has a duty to prevent the estate from unnecessarily incurring administrative
14 expenses that are paid ahead of nonpriority unsecured claims.

15 Russell Rosenblum may have received a lien against the EDF Man Shares to secure \$4
16 million of debt within four years of the commencement of this Chapter 11 proceeding. As
17 previously discussed, Debtor attests that his \$4,000,000 obligation to Russell Rosenblum resulted
18 from a security interest and agreement reached in 2014. Russell Rosenblum, however, alleges
19 that he made two separate secured loans totaling \$2,500,000, one of which occurred in February
20 2014 and the other of which occurred in October 2015. The former transaction clearly occurred
21 beyond four years of the commencement of this Chapter 11 proceeding while the latter
22 transaction clearly occurred within four years.

24 ²⁶ Russell Rosenblum asserts that his former stepmother fraudulently or intentionally
25 failed to inform him of a stay under New York statutes prohibiting the transfer of assets during a
26 marital dissolution proceeding. He asserts that he would not have loaned funds to the Debtor,
27 secured by the EDF Man Shares, had Sheila Rosenblum informed him of the statutory stay.
28 While attacking his former stepmother, Russell Rosenblum offers no explanation why his father
would not be equally responsible to provide the same information when his father was the actual
borrower of the funds. Nothing in the complaint explains why the same theory of fraud or
intentional misrepresentation would not constitute a basis for Russell Rosenblum to pursue a
nondischargeability claim against his father under Section 523(a)(2).

Under Section 1115(a), property of an individual Chapter 11 debtor's estate includes the property described in Section 541. Under Section 541(a)(3), property of a bankruptcy estate includes any interest in property that is recoverable under Section 550. Under Section 550, interests in property may include property recovered from any third party through exercise of avoiding powers under Sections 544. Under Section 544(b)(1), a trustee may avoid any transfer of an interest of the debtor in property that is voidable under applicable law by a creditor holding an allowable unsecured claim. Under the Nevada Uniform Fraudulent Transfer statute, a "transfer made or obligation incurred by a debtor is fraudulent as to a creditor...if the debtor made the transfer or incurred the obligation...[w]ith actual intent to hinder, delay or defraud any creditor of the debtor..." Nev.Rev.Stat. 112.180(1)(a).²⁷ A variety of factors are considered in assessing a debtor's intent to hinder, delay or defraud another party, including whether the challenged transaction was with an insider, whether the debtor had been sued, whether substantially all of the debtor's assets were transferred, and whether the debtor recently incurred other substantial debt. See Nev.Rev.Stat. 112.180(2). An action to avoid such a transfer or obligation may be brought within four years thereafter. See Nev.Rev.Stat. 112.230(a)(1). Under Section 551, any transfers or liens that are avoided under Section 554 are preserved for the benefit of the bankruptcy estate.

Regardless of whether the Debtor engages the services of the GM Firm, the Debtor's obligation as a fiduciary to all creditors requires that he investigate whether these transactions with Russell Rosenblum are avoidable in bankruptcy. As the debtor in possession, he cannot favor the claims of his son while disfavoring only the claims of his ex-wife. A similar investigation must be considered in connection with his loan transaction with EDF Man, PLC, if

²⁷ According to his Amended Schedules, the Debtor apparently granted liens against all of the EDF Man Shares valued at \$47,311,676, to secure two claims of \$4,000,000 apiece. As previously mentioned, Debtor attests that he pledged only some of his shares to Russell Rosenblum. See discussion at note 8, supra. Also as previously mentioned, Russell Rosenblum alleges that he is a secured creditor with respect to 1,250,000 shares. See discussion at note 13, supra. Whether the transactions with Russell Rosenblum and EDF Man might be subject to avoidance under NRS 112.180(b), for failure to receive reasonably equivalent value in exchange for the loans, also must be considered by the debtor in possession.

1 it occurred within the avoidance period prescribed by Nevada law.²⁸

2 Russell Rosenblum also is the manager of a current client of the GM Firm in a pending
3 construction defect litigation that apparently does not involve the Chapter 11 estate. Russell
4 Rosenblum also is, or was, the manager of a former client of the GM Firm in a case that was
5 settled. As a result, the GM Firm has a past and current connection with Russell Rosenblum
6 where its receipt of financial compensation depends on Russell Rosenblum's satisfaction with its
7 services.

8 The involvement of Russell Rosenblum as a substantial secured and unsecured creditor of
9 the Debtor, as a litigant in both bankruptcy and non-bankruptcy proceedings related to the
10 Debtor, and as the subject of possible avoidance claims that are assets of the Chapter 11 estate,
11 are sufficient to conclude that adversity exists between his interests and the interests of the
12 Chapter 11 estate. His apparent willingness to pay the GM Firm for post-bankruptcy services to
13 the individual Chapter 11 debtor in possession, without expectation of repayment, is seemingly
14 generous but unpersuasive: under the Retainer Agreement, he already is jointly and severally
15 liable for the sums billed by the GM Firm for services to the Debtor in this case. More
16 important, the GM Firm's relationship with Russell Rosenblum creates other possibilities for
17 mischief in the representation of the Debtor.

18 In an individual Chapter 11 proceeding, the debtor's post-bankruptcy earnings are
19 property of the bankruptcy estate. See 11 U.S.C. § 1115. Like any Chapter 11 debtor, an
20 individual cannot use property of the estate outside of the ordinary course of business without
21 prior court authorization. See 11 U.S.C. § 363(b)(1).²⁹ Like any Chapter 11 debtor, an
22 individual must file a public report of his or her monthly income and expenditures. See

23 ²⁸ Like the Russell Rosenblum claim appearing on the amended Schedule "D," the
24 secured claim of EDF Man, PLC, is not designated as contingent, unliquidated or disputed. As a
25 result, EDF Man, PLC, also is not required to file a proof of claim in this Chapter 11 proceeding.

26 ²⁹ The use of an individual debtor's post-bankruptcy earnings to employ counsel in a
27 Chapter 11 proceeding is permitted upon court approval. At the hearing, Debtor's proposed
28 counsel represented that the Debtor recently increased his post-bankruptcy earnings substantially
and also has decreased his post-bankruptcy expenses substantially. Whether the Debtor's net
earnings would be sufficient to employ counsel other than the GM Firm, or whether the Debtor
will be required to borrow additional funds under Section 364, is not before the court.

1 Fed.R.Bankr.P. 2015(a); Region 17 United States Trustee Guidelines, § 4.5.2
 2 (<https://www.justice.gov/ust-regions-r17/file/guidelines.pdf/download>). To confirm a Chapter
 3 11 plan over the objections of a dissenting unsecured class, Section 1129(b) prohibits court
 4 approval unless the proposed plan complies with one of two alternatives: (1) the unsecured
 5 claims are paid in full, or (2) the debtor retains no non-exempt, pre-bankruptcy property of the
 6 estate. See 11 U.S.C. § 1129(b)(2)(B)(i and ii). The second alternative is known as the
 7 “absolute priority rule,” and, in this circuit, applies to individual as well as all other Chapter 11
 8 cases. See Zachary v. Cal. Bank & Trust (In re Zachary), 811 F.3d 1191 (9th Cir. 2016).
 9 Moreover, if the holder of an allowed unsecured claim objects to plan confirmation, the
 10 individual Chapter 11 debtor is required to pay his or her projected disposable income over a
 11 period of five years. See 11 U.S.C. § 1129(a)(15). When both requirements are brought into
 12 play by one or more objecting creditors, the individual debtor is subjected to a so-called “double
 13 whammy,” i.e., he or she cannot keep non-exempt pre-bankruptcy assets³⁰ and he or she cannot
 14 keep post-bankruptcy earnings. See In re Zachary, 811 F.3d at 1199.³¹ The only alternative to
 15 complying with the absolute priority rule is to pay off the creditors in the dissenting unsecured

18
 19 ³⁰ Debtor has not claimed the EDF Man Shares as exempt on his Schedule C, presumably
 20 because there appears to be no exemption available under Nevada’s exemption scheme other
 21 than the \$10,000 “wildcard.” See Nev.Rev.Stat. 21.090(1). Nevada has opted out of the federal
 22 bankruptcy exemptions listed under Section 522(d). See Nev.Rev.Stat. 21.090(3). Even the
 federal bankruptcy exemptions, however, would not encompass the EDF Man Shares except for
 the \$13,100 wildcard under Section 522(d)(5).

23 ³¹ Section 1129(a)(15) does not apply in Chapter 11 cases filed by non-individuals, e.g.,
 24 corporations, limited liability companies, or partnerships. That section was added to the
 25 Bankruptcy Code in 2005 because Congress thought individual Chapter 11 cases should be more
 26 like Chapter 13 relief that is available only to individuals. But confirmation of a Chapter 13 plan
 27 has never required and does not require compliance with the absolute priority rule. So while
 28 both Chapter 13 and Chapter 11 may require an individual to devote his or her future disposable
 income to payment of unsecured creditors over a maximum of five years, only Chapter 11
 provides that the debtor cannot retain any non-exempt prepetition property without paying all
 unsecured claims in full. The term “double whammy” may sound funny, but it is no laughing
 matter to individual Chapter 11 debtors who are faced with uncooperative creditors that are
 motivated to raise the available objections to plan confirmation.

1 class in full under Section 1129(b)(2)(B)(i), or, to dismiss the Chapter 11 case.³²

2 As an unsecured creditor whose non-priority claim is deemed allowed unless someone
3 objects, Russell Rosenblum has standing to object to plan confirmation under Section
4 1129(a)(15), which would require the Debtor to devote his disposable income to plan payments
5 for five years. Moreover, to be eligible to cast a ballot in a Chapter 11 proceeding, a creditor
6 must hold a claim that is impaired under Section 1124. In this circuit, a claim is impaired under
7 Section 1124(1), and therefore provides the holder a right to vote, if the rights of the claimant are
8 altered in any fashion, including by enhancing the rights of the holder. See In re L&J Anaheim
9 Associates, 995 F.2d 940, 942-43 (9th Cir. 1993). Thus, Russell Rosenblum has bargaining
10 chips in this Chapter 11 proceeding like no other creditor, because he can significantly influence
11 the confirmation process beyond impacting the prospects of payment for the GM Firm.

12 For these reasons, the court concludes that the GM Firm holds an adverse interest that
13 precludes its employment as general bankruptcy counsel under the existing Retainer Agreement.
14 Because the Employment Application is brought only under Section 327(a), it is unnecessary to
15 consider whether an actual conflict of interest exists under Section 327(c), nor whether there is
16 adversity with respect to a specific matter under Section 327(e).

17 Debtor will be permitted to seek employment of the GM Firm as general bankruptcy
18 counsel under a retainer agreement that does not create the adverse interests discussed above.
19 The GM Firm will be permitted to seek approval of its employment under circumstances that do
20 not raise the adverse interests discussed above. Additionally, Debtor will be permitted to seek
21 authorization to employ special counsel with respect to any claims and interests held in
22 connection with creditor Russell Rosenblum.

23 **IT IS THEREFORE ORDERED** that the Application for Order Approving the
24 Employment of Greenspoon Marder as Attorneys for Debtor under General Retainer Nunc Pro

25
26 ³² Conversion to Chapter 13 typically is unavailable to a high income individual debtor
27 because his or her debts exceed the limits for Chapter 13 eligibility under Section 109(e).
28 Likewise, conversion to a Chapter 7 liquidation might not be available to an above-median
income debtor because relief under Chapter 7 might be determined to be an “abuse” under
Section 707(b)(1). Conversion to Chapter 12 similarly is unlikely as the eligibility for relief
under Chapter 12 is limited to debtors whose income is derived from farming or fishing
operations.

1 Tunc, brought by Debtor, Docket No. 14, be, and the same hereby is, **DENIED**.

2 **IT IS FURTHER ORDERED** that the denial of approval herein is **WITHOUT**
3 **PREJUDICE** to a subsequent request for approval of employment by Greenspoon Marder,
4 Attorneys at Law, as proposed general bankruptcy counsel to the debtor in possession in this
5 proceeding.

6
7 Copies sent via CM/ECF ELECTRONIC FILING

8
9 Copies sent via BNC to:
10 DANIEL H. ROSENBLUM
11 3750 S. LAS VEGAS BLVD., #2604
12 LAS VEGAS, NV 89109

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