



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
July 08, 2020

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * *

In re:)	Case No.: 20-12221-MKN
)	Chapter 11
ELITE AUTO DEALER, INC.,)	
)	Date: June 18, 2020
Debtor.)	Time: 9:30 a.m.
)	

**ORDER ON APPLICATION FOR ORDER APPROVING THE
EMPLOYMENT OF KUNG & BROWN AS ATTORNEYS FOR DEBTOR¹**

On June 18, 2020, the court heard arguments on the Application for Order Approving the Employment of Kung & Brown as Attorneys for Debtor (“Application”), brought by Elite Auto Dealer Inc. (“Elite Auto” or “Debtor”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On May 5, 2020, Debtor filed a voluntary Chapter 11 petition. (ECF No. 1).

On May 12, 2020, creditor LV.Net, LLC (“LV.Net”) filed a motion for relief from stay (“RAS Motion”). (ECF No. 15). Among other things, the RAS Motion alleges that the Debtor and its sole owner, Anderson Voss (“Voss”), used various credit cards to embezzle funds from LV.Net, through the unauthorized purchase of personal vehicles, personal travel, and payment of other personal expenses. See RAS Motion at ¶ 23.

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

1 On May 14, 2020, Debtor filed its schedules of assets and liabilities (“Schedules”) and
2 statement of financial affairs (“SOFA”). (ECF Nos. 20 and 21). On its creditor Schedule “E/F,”
3 Debtor lists LV.Net as a disputed, nonpriority claim in an unknown amount.

4 On May 15, 2020, Debtor filed the instant Application. (ECF No. 26). Attached as
5 “Exhibit 1” to the Application is the fee agreement (“Fee Agreement”) between Kung & Brown
6 (“K&B”) and Debtor. Attached as “Exhibit 2” to the Application is the Declaration of Brandy
7 Brown, Esq. of Kung & Brown in Support of Debtor’s Application for Order Approving the
8 Employment of Kung & Brown as Attorneys for the Debtor (“First Brown Declaration”).

9 On May 27, 2020, LV.Net, LLC (“LV.Net”) filed an opposition to the Application (“LV
10 Opposition”). (ECF No. 49).

11 On June 3, 2020, the Office of the United States Trustee (“UST”) filed an objection to the
12 Application (“UST Objection”). (ECF No. 62).

13 On June 10, 2020, Elite Auto filed an “omnibus” reply to both the Opposition and the
14 Objection (“Reply”). (ECF No. 69). On the same date, Elite Auto filed an “omnibus”
15 Declaration of Anderson Voss (“Voss”), Individually and as Owner of Elite Auto Dealer Inc.
16 (“Voss Declaration”), a Supplement to Application for Order Approving the Employment of
17 Kung & Brown as Attorney for Debtor (“Supplement”), and another Declaration of Brandy
18 Brown, Esq. (“Second Brown Declaration”). (ECF Nos. 69, 72, and 73).

19 DISCUSSION

20 By the instant Application, Elite Auto seeks to employ K&B as counsel for the debtor in
21 possession pursuant to Sections 327 and 328 and FRBP 2014(a). By its opposition, LV.Net
22 opposes the employment of K&B as counsel for failure to disclose required information and
23 suggests that K&B must disgorge a preferential transfer received from Voss. LV.Net also seeks
24 to impose sanctions against K&B for violation of the Nevada Rules of Professional Conduct
25 (“NRPC”). By its objection, the UST seeks to deny employment of K&B as counsel for the
26 debtor in possession based on its lack of disinterested status.

27 I. Disclosure Requirements under FRBP 2014(a)

28 a. Legal Standard.

1 Under FRBP 2014(a), the application to employ an estate professional must:

2 [...] state the specific facts showing the necessity for the
 3 employment, the name of the person to be employed, the reasons for
 4 the selection, the professional services to be rendered, any proposed
 5 arrangement for compensation, and, to the best of the applicant's
 6 knowledge, all of the person's connections with the debtor, creditors,
 7 any other party in interest, their respective attorneys and
 8 accountants, the United States trustee or any person employed in the
 9 office of the United States trustee. The application shall be
 10 accompanied by a verified statement of the person to be employed
 11 setting forth the person's connections with the debtor, creditors, or
 12 any other party in interest, their respective attorneys and
 13 accountants, the United States trustee, or any person employed in
 14 the office of the United States trustee.

15 FED. R. BANKR. P. 2014(a) (emphasis added).

16 The Ninth Circuit applies the disclosure requirements set forth in FRBP 2014 “strictly”
 17 and “broadly.” Neben & Starrett, Inc. v. Chartwell Financial Corp. (In re Park–Helena Corp.),
 18 63 F.3d 877, 881 (9th Cir. 1995). Professionals seeking employment are required “to disclose all
 19 connections with the debtor, debtor-in-possession, insiders, creditors, and parties in interest
 20 They cannot pick and choose which connections are irrelevant or trivial No matter how old
 21 the connection, [and] no matter how trivial it appears.” In re EWC, Inc., 138 B.R. 276, 280–81
 22 (Bankr. W.D. Okla. 1992). Disclosure of all facts is necessary for the court to determine if a
 23 party is disinterested or holds an adverse interest. Id. at 280. Proper disclosure enables the court
 24 to make an informed decision as to whether the applicant meets the statutory requirements for
 25 employment under Section 327(a). See In re Park-Helena Corp. 63 F.3d at 811.

26 The failure to disclose, alone, is a sufficient basis for the court to deny employment. See
 27 Film Ventures Int’l, Inc. v. Asher (In re Film Ventures Int’l, Inc.), 75 B.R. 250, 252 (B.A.P. 9th
 28 Cir. 1987); In re Lee, 94 B.R. 172, 177 (Bankr. C.D. Cal. 1988), citing Diamond Lumber, Inc. v.
Unsecured Creditor’s Comm., 88 B.R. 773, 777 (N.D. Tex.1988). Negligent omissions do not
 excuse a party’s failure to disclose a possible conflict of interest. See In re Lee, 94 B.R. at 177.
 Thus, the disclosures required under FRBP 2014(a) must appear in the application and
 declaration and it “is not sufficient that the information might be mined from petitions,
 schedules, section 341 meeting testimony, or other sources.” In re B.E.S. Concrete, 93 B.R. 227,

1 236 (Bankr. E.D. Cal. 1988).

2 **b. Analysis.**

3 By its Application, Elite Auto seeks to employ K&B as counsel for the debtor in
4 possession in this Chapter 11 proceeding. In pertinent part, the Application states:

5 5. To represent any interest adverse to the Debtor’s estate and
6 K&B, and its attorneys are disinterested within the meaning of
7 Section 101(14) of the Bankruptcy Code.

8 7. K&B does not represent any creditor or party in interest in
9 these proceedings. Prior to commencing representation of Debtor
10 prepetition, K&B discussed with Debtor its primary creditors, and
11 reviewed the initial creditor and equity security lists to determine
12 any prior or present representation of creditors or parties-in-interest.
13 From such initial review, K&B has not identified any present or
14 previous representations of creditors or parties-in- interest, as such
15 K&B does not believe it has any conflict with respect to any
16 previous or representations of creditors or parties in interest.

17 Application at ¶¶ 5 and 7 (emphasis added).

18 In its opposition, LV.Net identified two deficiencies in the Application. First, the
19 Application fails to disclose K&B’s representation of Voss, individually, in a civil action
20 brought by LV.Net against Elite Auto and Voss, pending in the Eighth Judicial District Court,
21 Clark County (“State Court Action”).² Second, the Application fails to provide proof that the
22 K&B has restricted its representation of Elite Auto as Chapter 11 debtor in possession despite
23 the firm’s representation of Voss in the State Court Action.

24 In response, the Supplement filed by Elite Auto argues:

25 18. K&B disclosed its representation in the State Court Action
26 but may have not been sufficient clear with respect to K&B’s
27 representation of Voss individually in that action.

28 ² The declaration attached to the Application attests, in pertinent part, that “Debtor
intends to employ K&B, to represent Debtor in the pending state court action wherein Debtor is
named defendant . . . Prior to the instant bankruptcy filing, K&B was retained by Debtor to
represent Debtor in the State Court Action and K&B was successful in dissolving the temporary
restraining order (“TRO”) previously issued in the State Court Action.” See First Brown
Declaration at ¶5. No mention is made that K&B already appeared in that action on behalf of
both the Debtor and Voss. See Exhibit “1” to Declaration of Melinda R. Davis attached to UST
Objection (docket of State Court Action). Additionally, no mention is made of any other
services previously provided to the Debtor or to any related entity.

1 19. K&B's failure was not intentional or purposefully done, and
2 was not perceived by K&B until LV.Net filed its Opposition to
3 K&B's Application to Employ.

4 20. K&B submits that it remains disinterested and qualified to
5 represent Debtor in these proceedings because K&B is not a
6 creditor, an equity security holder, or an insider of Debtor.
7 Additionally, K&B is not and was not, within 2 years before the date
8 of the filing of the petition, a director, officer, or employee of the
9 debtor; and K&B does not have an interest materially adverse to the
10 interests of the estate or of any class of creditors or equity security
11 holders, by reason of any direct or indirect relationship to,
12 connection with, or interest in, the debtor or for any other reason.

13 21. K&B submits that its continued representation of both
14 Debtor and Voss in the State Court Action is appropriate and that
15 there is no conflict of interest between Debtor and Voss since Voss
16 is the sole owner of Debtor and their interests are aligned.

17 22. However, if the Court perceives a conflict, or otherwise
18 disapproves of continued joint representation in the State Court
19 Action, K&B will immediately seek withdrawal as Voss' counsel in
20 the State Court Action.

21 23. Both Debtor and Voss consent to K&B's continued joint
22 representation in the State Court Action, and agree that K&B will
23 immediately seek withdrawal as counsel for Voss in said action if
24 the Court disapproves of continued joint representation by K&B.

25 Supplement at ¶¶ 18–23 (emphasis added).

26 LV.Net is correct in that K&B failed to meet the disclosure requirements pursuant to
27 FRBP 2014(a) in its Application. However, in its subsequent Reply and Supplement, K&B
28 describes in sufficient detail its representation of Voss individually in the State Court Action.

The Ninth Circuit has held that “failure to comply with the disclosure rule is a
sanctionable violation, even if proper disclosure would have shown that the attorney had not
actually violated any Bankruptcy Code provision or any Bankruptcy Rule.” In re Park-Helena
Corp, 63 F.3d at 880. However, the court has broad authority and discretion to impose and tailor
sanctions for violations of FRCP 2014. See In re Imperial Corp. of Am., 181 B.R. 501, 507
(Bankr. S.D. Cal. 1995). Examples of sanctions the court could impose include denial of fee
applications, disgorgement fees, and the appointment of a bankruptcy trustee. Id. at 508.

Although K&B initially failed to meet the disclosure requirements under FRBP 2014(a),
it subsequently provided the proper disclosures in its Reply, Supplement and additional

1 declaration from counsel. Thus, the court will not impose sanctions pursuant to K&B's failure to
 2 disclose under FRBP 2014(a). Instead, the court will require that K&B withdraw as counsel for
 3 Voss in the State Court Action. Additionally, to ensure that Voss cannot exert any financial
 4 influence or control over counsel, K&B will be required to return the vehicles and any other
 5 property it received from Voss for its representation of the debtor in possession in this Chapter
 6 11 proceeding.

7 **II. Avoidance of Preferential Transfers**

8 **a. Legal Standard.**

9 Under Section 547(b), an avoidable preference involves:

10 . . . any transfer of an interest of the debtor in property—(1) to or for
 11 the benefit of a creditor; (2) for or on account of an antecedent debt
 12 owed by the debtor before such transfer was made; (3) made while
 13 the debtor was insolvent; (4) made—(A) on or within 90 days before
 14 the date of the filing of the petition; or (B) between ninety days and
 15 one years before the date of the filing of the petition, if such creditor
 16 at the time of such transfer was an insider; and (5) that enables such
 17 creditor to receive more than such creditor would receive [in a
 18 Chapter 7 distribution].

19 11. U.S.C. § 547(b).

20 The avoidance of preferential transfers is intended to prevent debtors from depleting the
 21 estate by paying favored creditors with the estate's assets that should be distributed amongst
 22 creditors pursuant to the Bankruptcy Code's prioritization scheme. See In re Pillowtex, Inc., 304
 23 F.3d 246, 252 (3d Cir. 2002).

24 **b. Analysis.**

25 The Fee Agreement states: "Client has delivered and transferred to attorney, a 1999
 26 Porsche 911." (emphasis added). In its opposition, LV.Net argues that the transfer of the 2007
 27 Chevrolet Silverado ("Chevrolet") and the 1999 Freightliner FL60 ("Freightliner") by Voss and
 28 the 1999 Porsche 911 ("Porsche") by Elite Auto constitute potential preferential transfers that
 may be recovered for the benefit of the Chapter 11 estate.

The transfers disclosed in the Fee Agreement are "potential" preferential transfers
 because the ownership and dates of the transfers are unknown. The language from the Fee
 Agreement indicates that the two vehicles transferred by Voss occurred prior to or

1 contemporaneous with the execution of the Fee Agreement. Whether K&B was paid on an
2 antecedent debt required under Section 547(b)(2) is unknown.³ Furthermore, the Second Brown
3 Declaration also indicates that the transfer of the Porsche occurred after the dissolution of a
4 temporary restraining order entered in the State Court Action.⁴ There is insufficient evidence
5 before the court at this point to determine whether K&B is the current holder of a preferential
6 transfer.⁵

7 As the Chapter 11 debtor-in-possession, Elite Auto has a fiduciary duty to all creditors
8 and not to individual members of the petitioner. See, e.g., In re CWNevada, LLC, 602 B.R. 717,
9 726 (Bankr. D. Nev. 2019), citing Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839
10 F.2d 610, 614 (9th Cir. 1988). That fiduciary duty also extends to counsel for the debtor in
11 possession. See Everett v. Perez (In re Perez), 30 F.3d 1209, 1219 (9th Cir. 1994); see also In re
12 J.T. Thompson, USA, 2012 WL 4461650, at *4 (Bankr. C.D. Cal. Sep. 25, 2012) (“The majority
13 of courts view an attorney for a debtor in possession as a fiduciary of the bankruptcy estate . . .
14 An attorney for the debtor in possession has fiduciary obligations to the estate stemming from his
15 fiduciary duties to the debtor in possession and his responsibilities as an officer of the court . . .
16 These obligations exist and must be discharged whether or not a creditors’ committee or the
17 United States trustee is actively involved in the case . . .”). As debtor in possession, Elite Auto
18 has all the rights and powers, and shall perform the duties, of a Chapter 11 trustee. See 11
19 U.S.C. §1107(a). Those rights, powers, and duties include, *inter alia*, the investigation of the
20 acts, conduct, assets, liabilities and financial condition of the debtor. See 11 U.S.C. §§ 1106(a)

21 ³ According to Part 2 of the SOFA, K&B did not receive payment on an outstanding
22 unsecured debt within ninety days before the bankruptcy was commenced as required by Section
23 547(b)(4)(A).

24 ⁴ According to the docket in the State Court Action, see note 2, supra, the order
25 dissolving the temporary restraining order was entered after the Chapter 11 petition was filed. If
26 the Porsche was transferred to K&B by Elite Auto after the case was commenced, then the
27 requirement for a pre-petition transfer under Section 547(b)(4)(A) would not be met. Arguably,
28 transfer of the Porsche may be an unauthorized post-petition transfer of estate property that is
recoverable under Section 549(a).

⁵ Should Elite Auto choose to pursue an action to avoid a preferential transfer, it has two
years to do so. See 11 U.S.C. §546(a)(1)(A).

1 Therefore, the investigation of a preferential transfer is within the fiduciary duties of a debtor in
2 possession.⁶

3 Because K&B may be the recipient of a preferential transfer, its continued representation
4 of the debtor in possession will require the appointment of special counsel to assist the Debtor in
5 determining whether pursue an avoidance claim.

6 **III. Compliance under NRPC 1.7**

7 **a. Legal Standard.**

8 Licensed attorneys in Nevada must comply with the duties set forth in the NRPC. Under
9 NRPC 1.13(g), a lawyer representing an organization may partake in multiple representation for
10 the organizations directors, officers, employees, members, shareholders or other constituents,
11 subject to the provisions of NRPC 1.7. NEV. R. PROF. COND. 1.13(g). NRPC 1.7 pertains to
12 conflict of interest between current clients and provides that a lawyer shall not represent a client
13 if there is a conflict of interest where the counsel's representation of a client will be adverse to
14 another client or there is a significant risk that a counsel's representation of a client will be
15 limited due to its responsibilities to another client, former client, or third person of personal
16 interest. NEV. R. PROF. COND. 1.7(a). However, a lawyer may represent a client despite the
17 existence of concurrent conflict of interest if:

- 18 (1) The lawyer reasonably believes that the lawyer will be able to
19 provide competent and diligent representation to each affected
20 client;
- 21 (2) The representation is not prohibited by law;
- 22 (3) The representation does not involve the assertion of a claim by
one client against another client represented by the lawyer in the

23 ⁶ That K&B apparently believes that there is no conflict of interest between Elite Auto, as
24 debtor in possession, and Voss, as sole owner, is troubling. See Second Brown Declaration at ¶¶
25 24 and 34. K&B apparently believes that it could continue to represent both the Debtor and Voss
26 in the State Court Action. As previously mention at 1, supra, LV.Net alleges in the RAS Motion
27 that the Debtor is liable for Voss's embezzlement of funds from LV.Net for his personal
28 expenses rather than for the business. Debtor apparently has a potential claim against Voss
regardless of Voss's personal belief. Whether K&B could represent both defendants in the State
Court Action despite an apparent and significant conflict is immaterial. A Chapter 11 debtor in
possession, however, has a fiduciary duty of all creditors rather than just its owner. Because of
that unique status in Chapter 11, K&B's representation of both the Debtor and Voss is
impermissible.

1 same litigation or other proceeding before a tribunal; and
2 (4) Each affected client gives informed consent, confirmed in
3 writing.

4 NEV. R. PROF. COND. 1.7(b).

5 Under NRPC 1.0A(c), the court may consider various factors in imposing sanctions,
6 including: “the willfulness and seriousness of the violation, extenuating factors and whether
7 there have been previous violations.” NEV. R. PROF. COND. 1.0A(c).

8 **b. Analysis.**

9 LV.Net argues that K&B holds concurrent conflicting interests in its representation of
10 both Voss and Debtor in violation of NRPC 1.7. No written, informed consent waiving the
11 conflict has been provided or is even suggested.⁷ K&B argues that the interests of Debtor and
12 Anderson in the State Court Action were aligned and therefore, the firm did not hold a
13 concurrent conflict of interest. Notwithstanding its denial of a conflict, K&B offers to withdraw
14 from representation of Voss in the State Court Action so that it can continue to represent Elite
15 Auto as debtor in possession in this Chapter 11 proceeding.

16 The violation of NRPC 1.7 is a sanctionable offense. Counsel attests, however, that
17 K&B’s failure to clearly disclose its representation of both Elite Auto and Voss personally in the
18 State Court Action was not intentional or purposeful. See Second Brown Declaration at ¶¶5, 31,
19 32, 37, and 38.⁸ The court is not aware of any previous violations by counsel nor of any
20 deficiencies in their competent performance before this court. Nor does the court have any
21 reasons to doubt counsel’s reputation in the community. Because the court already has
22 determined that K&B may be employed a bankruptcy counsel for the Chapter 11 debtor in
23 possession under the conditions prescribed, no monetary sanctions will be imposed under NRPC
24 1.0A(c), nor will the matter be reported to the State Bar of Nevada.

25 ⁷ Because Section 327(a) authorizes as trustee or debtor in possession to employ
26 professionals who do not represent interests adverse to the bankruptcy estate “and that are
27 disinterested persons,” conflict waivers permitted under state law have limited utility in view of a
28 Chapter 11 debtor’s fiduciary duty to all creditors.

⁸ The Second Brown Declaration also disclosed that K&B previously represented the
Debtor and a related non-bankruptcy entity, Voss Motors LLC, in connection with sales tax
disputes with the Nevada Department of Taxation.

1 Based on the foregoing, the objections raised by LV.Net and the UST are overruled. The
2 court will approve of the employment of K&B as bankruptcy counsel for the Chapter 11 debtor
3 in possession on the condition that K&B withdraws from representation of Voss individually in
4 the State Court Action, and that K&B returns any vehicles or other property received from Voss
5 as a retainer for representation of the debtor in possession in this Chapter 11 proceeding.

6 **IT IS THEREFORE ORDERED** that Application for Order Approving the
7 Employment of Kung & Brown as Attorneys for Debtor, brought by the above-captioned Debtor,
8 Docket No. 26, be, and the same hereby is, **GRANTED UNDER THE CONDITIONS**
9 **PROVIDED HEREIN.**

10 **IT IS FURTHER ORDERED** that no later than fourteen calendar days from the entry of
11 this order, the law firm of Kung & Brown must file a serve a statement of its compliance with the
12 conditions set forth above. If the event a statement of compliance is not filed, LV.Net, LLC, the
13 Office of the United States Trustee, or any other party in interest, may seek appropriate relief.

14 **IT IS SO ORDERED.**

15
16 Copies sent via CM/ECF ELECTRONIC FILING

17 Copies sent via BNC to:

18 ELITE AUTO DEALER, INC.
19 ATTN: OFFICER OR MANAGING AGENT
20 3115 FREMONT STREET
21 LAS VEGAS, NV 89104

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