IT IS ORDERED as set forth below:

Date: May 1, 2014

Barbara Ellis-Monro
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	
BRANDYWINE TOWNHOUSES, INC.,	CASE NO. 13-75582-BEM
Debtor.	CHAPTER 11
BRANDYWINE TOWNHOUSES, INC.,	
Movant,	
v.	Contested Matter
UNITED STATES TRUSTEE,	
Respondent.	

O R D E R

This matter came before the Court for hearing (the "Hearing") on April 4, 2014, on Debtor's Application to Retain Bankruptcy Counsel (the "Application") [Doc. No. 5] and the Objection of United States Trustee to the Application (the "Objection") [Doc. No. 39]. Rodney Eason appeared on behalf of his firm, The Eason Law Firm (the "Firm") and as proposed counsel

for Brandywine Townhouses, Inc. (the "Debtor"). David Weidenbaum appeared on behalf of the United States Trustee. The United States Trustee seeks to disqualify the Firm from representing the Debtor in this case, because the United States Trustee alleges that the Firm failed to disclose an interest adverse to Debtor. After careful consideration of the pleadings of record, the evidence presented, applicable authorities and the argument of counsel, the Court now enters the following findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052.

Findings of Fact

1. Procedural and Background Facts

The Debtor, a Georgia non-profit company, owns a low and moderate-income housing cooperative. Debtor has been in operation for over forty years. The housing cooperative is comprised of two hundred thirty eight (238) housing units in four different housing projects. Debtor's housing units are considered Section 8 housing and are operated in accordance with the low-income affordability restrictions set forth in Section 236(e)(2) of the United States Housing Act of 1937. 42 U.S.C. § 1437(f). On or about September 19, 2013, at the behest of Debtor's secured lender, the State Court of Fulton County entered an Order appointing a receiver for Debtor's property.

Shortly thereafter, on November 25, 2013, Debtor filed this case. [Doc. No. 1]. Debtor filed several motions on the day the case was filed, notably the Application. The Application included an Affidavit of Rodney Eason that states in part:

> 2) In reviewing the definition of a "Disinterested Person" as defined by 11 USC § 101(13), I disclose the following:
>
> a) Prior to being consulted on the filing of the petition, my law firm did not have a business relationship with debtor….
>
> c) To the best of my knowledge, and other than as disclosed herein, neither I nor any member of my law firm (i) holds or represents an interest adverse to debtor's estate, (ii) has had any business,

> professional or other connections with debtor or any part at interest in this proceeding which would be adverse to the debtor's estate, or (iii) is related to any judge or this court or so connected now or in the past with any judge or this court as to render such appointment of employment improper.

[Doc. No. 5, p. 4]. On January 16, 2014, Debtor filed an Amended Application to Retain Bankruptcy Counsel (the "Amended Application") [Doc. No. 44].

The Amended Application disclosed that the Firm received a $5,000 retainer check from Alton Management Company ("Alton"), the property management company employed by Debtor prior to the receivership. The Amended Application stated that the $5,000 fee was used to pay the chapter 11 filing fee and initial attorney's fees. The Amended Application stated that Alton would only expect repayment of the retainer after obtaining approval of this Court and that Alton advanced the funds because Debtor did not have access to its own funds due to the receivership. The Amended Application also contained an amended affidavit from Mr. Eason affirming the source of the pre-petition retainer and that there was no prior relationship between the Firm and Alton.

The United States Trustee objected to the Application and sought to disqualify the Firm because of the potential conflict of interest between the Firm, Debtor and Alton. [Doc. No. 39]. The Trustee's concern was rooted in the fact that the Firm did not disclose payment of a retainer in the Application, as required by Federal Rule of Bankruptcy Procedure 2014(a). The Trustee was also concerned that the Debtor's filing of a Motion for Authority to Pay-Petition Claim of Critical Manager Alton Management Corporation (the "Critical Vendor Motion") indicated that the Firm was more concerned with Alton's interest than the Debtor's. [Doc. No. 4]. Through the Critical Vendor Motion, which was filed on the first day of the case, Debtor sought authority to pay a portion, $16,000, of the pre-petition claim owed to Alton. The Trustee argued that the Firm's lack of disclosure of the fee arrangement with Alton in the Application,

coupled with the filing of the Critical Vendor Motion, demonstrated the Firm's favoritism towards Alton, and as such showed that the Firm held an interest adverse to the Debtor and its estate. The Critical Vendor Motion was subsequently withdrawn. [Doc. No. 57].

2. The Application and Objection

After the receivership order was entered, Debtor began to consider filing a chapter 11 case. Mr. Bruce Weddell, Debtor's attorney in other matters, suggested that Debtor contact the Firm. Other than representing opposing parties in a prior bankruptcy the Firm and Mr. Weddell had no prior relationship. Mr. Eason was interviewed by the Debtor's board of directors. Unbeknownst to Mr. Eason, Alton's principal, Mr. Reynolds, was present at the interview. After interviewing Mr. Eason, the board held a closed-door meeting at which Mr. Reynolds agreed to loan Debtor $5,000 to pay the reduced retainer requested by the Firm. Debtor lacked access to its operating funds because of the receivership, thus the loan was necessary to fund a retainer.

After obtaining Mr. Reynold's agreement to loan the $5,000 to Debtor, Debtor decided to hire the Firm. On November 5th, the Firm received a $5,000 check, which Mr. Eason believed came from the Debtor but in fact was issued by another entity owned by Mr. Reynolds and sent directly to the Firm. Mr. Eason proffered that there was never any contact between the Firm and Alton, rather the Firm had contact with Mr. Weddell or the Debtor. Mr. Eason stated further that the Firm disclosed the payment of a retainer by Alton (or so he thought) as soon as he learned that the funds did not come from Debtor but had come from a third party. *See eg:* Amended Application [Doc. No. 44], 2014 Statement [Doc. No. 38], Statement of Financial Affairs [Doc. No. 38].

With regard to the Critical Vendor Motion, Mr. Eason's proffer was that the motion was filed because it was the Firm's understanding that Alton was the only property manager that would provide management services to Debtor and that there is a Housing and Urban Development requirement that an approved manager be employed by Debtor. Mr. Eason stated further that he believed that repayment of the funds advanced was required by Alton and thus, necessary to Debtor's ability to pursue reorganization. Consequently, the Critical Vendor Motion was filed. Mr. Eason proffered further that the filing of the Critical Vendor Motion was unrelated to Alton being the source of the Firm's retainer. Debtor did not pursue the Critical Vendor Motion, withdrawing it shortly after the United States Trustee filed its Objection. Finally, Mr. Eason proffered that the payment arrangement between Alton and the Firm had been disclosed in open Court during the first hearing held in this case, on December 16, 2013. Further, the payment from Alton was disclosed on Debtor's Statement of Financial Affairs, which was filed on December 30, 2013. [Doc. No. 38].

Applicable Legal Standard

The Trustee's central argument is that the Firm should be disqualified because the Firm is not disinterested as required by 11 U.S.C. § 327(a). Specifically, the Trustee argues that the Firm is not disinterested because, (1) Alton, or one of its principals, paid the $5,000 bankruptcy retainer; (2) Alton had a previous relationship with the Debtor as its property manager; (3) the Firm failed to disclose the source of the retainer payment in the Application; and (4) one of the first day motions filed by the Firm on behalf of Debtor was to pay part of a substantial pre-petition debt owed to Alton.

The Bankruptcy Code allows the debtor in possession to "employ one or more attorneys…. or other professional persons, that do not hold or represent an interest adverse to the

estate, and that are disinterested persons, to represent or assist" throughout the bankruptcy case. 11 U.S.C. § 327(a). The term "disinterested" is defined as a person (1) who "is not a creditor, an equity security holder, or an insider," (2) who "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 (3) who "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); In re American Intern. Refinery, Inc., 676 F.3d 455, 461 (5th Cir. 2012).

Although the term "adverse interest" is not defined in the Code, several courts have held that a party is "adverse" to the estate if they possess "either an '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….a predisposition under the circumstances that render such a bias against the estate.'" In re Prince, 40 F.3d 356, 361 (11th Cir. 1994) (citing Roger J. Au & Son, Inc. v. Aetna Ins. Co., 64 Bankr. 600, 604 (N.D. Ohio 1986)). *See also* In re West Delta Oil Co., Inc., 432 F.3d 347, 356 (5th Cir. 2005); In re AroChem Corp., 176 F.3d 610, 623 (2d Cir. 1999); In re Crivello, 134 F.3d 831, 835 (7th Cir. 1998). However, the determination of such an adverse interest is fact specific and must be evaluated on a case by case basis. American Intern. Refinery, 676 F.3d at 461.

What is not case-specific is the disclosure requirement set forth by Federal Rule of Bankruptcy Procedure 2014(a). Rule 2014(a) requires that a professional's application for employment "shall state….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 accountants, the United State trustee, or any person

employed in the office of the United States trustee." Fed. R. Bankr.P. 2014(a). A failure to disclose an applicant's possible adverse interest, as well as compensation arrangements, permits a court to deny the compensation of the professional on a discretionary basis: "[c]ourts may deny all compensation to professionals who fail to make adequate disclosure, and 'counsel who fail to disclose timely and completely their connections proceed at their own risk because failure to disclose is sufficient grounds to revoke an employment order and deny compensation.'" American Intern. Refinery, 676 F.3d at 465-66. (citing West Oil Delta, 432 F.3d at 355). Section 328(c) specifically states:

> Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 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(c).

Analysis

The failure to disclose a possible adverse relationship is a serious matter. Disclosure and transparency are required by the Code. Notwithstanding, there is no *per se* rule for disqualification. In this case, after careful consideration of the facts, the Court finds that the failure to disclose the retainer payment was unintentional. Once the Firm learned that the retainer had been paid by a third party, it disclosed the retainer payment that it thought was paid by Alton. At the Debtor's first appearance, Mr. Eason advised the Court that Alton had paid a $5,000 retainer. In addition, in the Firm's 2014 statement and the Debtor's Statement of Financial Affairs the same information was disclosed.

Further, the Court finds that there was no intent to favor, and the Firm did not favor, Alton over the Debtor's interest by filing the Critical Vendor Motion. Rather Mr. Eason thought that Alton was necessary to Debtor's ability to pursue reorganization. Given the emergency nature of the filing, the lack of direct contact with Alton and the fact that a management company was necessary for the Debtor to continue to operate it is understandable that a misunderstanding regarding Alton's position with respect to repayment of the funds occurred and resulted in the Critical Vendor Motion. The Court notes that the Critical Vendor Motion provides that Alton would not be paid until all essential payments, including adequate protection payments, are made. [Doc. No. 4, ¶ 8]. The Court does not believe that the Firm had an interest adverse to the Debtor, rather it appears the Firm sought to act in the Debtor's best interest but suffered under a misunderstanding which was caused, in part, by the Firm's failure to review the retainer check when it was received.

The Firm argued that withdrawal of the Critical Vendor Motion cured any failure to disclose or a conflict (if one had existed). This is not correct; withdrawal of a document is not sufficient. Rather, a close and thorough inspection of possible relationships and the source of retainer funds are necessary. *See generally* In re EWC, Inc., 138 B.R. 276, 279-80 (Bankr. W.D. Okla. 1992) (holding that the court cannot adequately approve counsel unless full disclosure is provided by the professional to be employed); In re Saturley, 131 B.R. 509, 516 (Bankr. D. Me 1991) (holding that "a debtor's counsel has an affirmative duty punctiliously to disclose *all* its connections with the debtor"). Although the Court finds there was no adverse interest held by the Firm and there was no intent to hide the source and receipt of the retainer, the Firm did not disclose the fee arrangement in the Application and disclosed erroneous information in its Amended Application and Rule 2014 statement. The Firm's carelessness in investigating the

source of its retainer payment makes disgorgement of a portion of the retainer received appropriate. *See* 11 U.S.C. §328(c). Accordingly,

IT IS HEREBY ORDERED that the Firm shall disgorge $3,500 of the initial retainer to Debtor within ten (10) days of entry of this Order.

IT IS FURTHER ORDERED that the United States Trustee's Objection is OVERRULED, the Firm's Amended Application is GRANTED, and that Debtor is authorized to employ The Eason Law Firm as lead bankruptcy counsel in this Chapter 11 case.

IT IS FURTHER ORDERED that The Eason Law Firm shall not be reimbursed for expenses or paid compensation out of Debtor's estate during the pendency of this case until further Order of this Court.

Debtor's Counsel is directed to serve this Order on Debtor, the United States Trustee, all creditors, and any party-in-interest and file a Certificate of Service reflecting the same.

END OF ORDER