

UNITED STATES BANKRUPTCY COURT
DISTRICT OF IDAHO

In re:

SAFE HAVEN HEALTH
CARE, INC.,

Debtor.

Case No.: 18-01044-JDP

(Chapter 11)

SUMMARY ORDER DENYING DEBTOR'S APPLICATION
TO EMPLOY ACCOUNTANTS

In this Chapter 11¹ case, on March 19, 2019, Debtor Safe Haven Health Care, Inc. ("Safe Haven"), acting pursuant to § 327(a), filed an Application to Employ Hansen Hunter & Co., P.C. ("Hansen Hunter"), as accountants for the estate. Dkt. No. 239. The United States Trustee ("UST") filed an objection to the Application on June 27, 2019. Dkt. No. 328. The Court conducted an hearing on the Application on July 2, 2019, and took the issues raised under advisement. After additional briefing by the parties, Dkt. Nos. 338 and 348, the Court concludes the Application must be denied.

¹Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, and all rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001–9037.

Debtor represents that Hansen Hunter should be employed because of its specialized experience with Debtor, coupled with Debtor's urgent need to file with regulators certain Medicare/Medicaid cost reports; Debtor also needs representation in audit procedures concerning prior reports. Hansen Hunter has apparently represented Debtor before the bankruptcy was filed and assisted in completing such reports and participating in such audits. In short, the record supports Debtor's need for professional services and its selection of Hansen Hunter for the job.

But there is a problem with Debtor's attempt to secure approval of Hansen Hunter's employment under § 327(a): Hansen Hunter holds a claim against Debtor, and has filed a proof of claim in the bankruptcy case for over \$43,000 in unpaid fees for prebankruptcy services. While willing to represent Debtor going forward, and to defer any payment by Debtor of its prepetition fees until Debtor confirms a plan, Hansen Hunter is apparently not willing to waive its prepetition claim.

The UST objected to the Application. It does not contest Debtor's need for professional services, nor its decision that Hansen Hunter is an appropriate choice to perform those tasks for Debtor; UST also does not object to the

proposed fee agreement between Hansen Hunter and Debtor. The UST's opposition to the Application is, instead, based solely upon the Bankruptcy Code: because Debtor owes Hansen Hunter unpaid fees, the UST argues, the accountant is a "creditor" as defined in § 101(10), is not "disinterested" as that term is explained in § 101(14)(A), and is therefore statutorily disqualified from employment by Debtor under § 327(a).

Debtor concedes that, generally, § 327(a) requires that in order to be employed to represent a bankruptcy estate, a professional, such as an accountant, must be both "disinterested" and "not hold or represent any adverse interest to the estate". However, Debtor argues that § 1107(b) provides an exception to the rule prohibiting creditors from representing estates:

Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before commencement of the case.

§ 1107(b). As the Court understands Debtor's argument, disqualifying Hansen Hunter from employment because it is owed prebankruptcy fees is tantamount to prohibiting its employment because it served as Debtor's prebankruptcy accountant. The Court disagrees. Regardless of the impact of disallowing

Hansen Hunter's employment under these facts, after due consideration of the parties' representations and arguments, the Court concludes that Hansen Hunter is not "disinterested" because it is a creditor in this case, and therefore, it is not eligible for employment as a professional by Debtor.

In reaching its conclusion, the Court adheres to the interpretation of the Code provisions in play in its prior decisions, including *In re Overacker*, 02.1 IBCR 55, 56-57 (Bankr. D. Idaho 2002) and *In re Dugger*, 99.1 IBCR 30, 32-33 (Bankr. D. Idaho 1999); see also *In re CIC Investment Corp.*, 175 B.R. 52, 56 (9th Cir. BAP 1994). In these decisions, the Court notes that the interplay of §§ 327(a), 101(14) and 101(10) unambiguously establish a rigid rule forbidding creditors from employment by a bankruptcy estate, including a chapter 11 debtor-in-possession. In other words, to become "disinterested" as required in § 327(a), a professional must waive its rights to any prebankruptcy claims it might have against the estate. *In re Am. Home Mortg. Holdings, Inc.* 411 B.R. 169, 176 (Bankr. D. Del. 2008).

Debtor makes a persuasive case here that, as a matter of fact, Hansen Hunter is best suited to represent its interests in filing required reports and representing it in any audit proceedings. But even this compelling cause for

Debtor's selection of this accountant cannot overcome the express prohibitions of the Code disqualifying Hansen Hunter from employment. It is of no moment that Debtor's view of the Code is the more practical one. As in the past, the Court declines "to volunteer to correct every impractical feature of the Code . . . [because] . . . this Court is not clothed . . . with constitutional or other authority to remedy every idiosyncrasy it identifies" *In re Omnisports*, 92 IBCR 147, 151-152 (Bankr. D. Idaho 1992), *aff'd in part, reversed in part, Arthur Anderson & Co. v. Fitzgerald (In re Omnisports)*, 93 IBCR 260 (D. Idaho 1993).

Contrary to Debtor's argument, § 1107(b) does not save Debtor in this case. First, the Court is not denying the proposed estate professional's employment "solely" because Hansen Hunter represented Debtor before the bankruptcy case was filed. Instead, Hansen Hunter is ineligible for employment here because it is a creditor in the bankruptcy case. In other words, Hansen Hunter could not be employed by Debtor to represent it in this bankruptcy case even had it not represented Debtor prebankruptcy. Therefore, § 1107(b)'s limited exception to § 327(a)'s disinterestedness requirement simply does not apply in this case.

Second, § 1107(b) provides ample evidence that when Congress wants to

make an exception to the § 327(a) disinterestedness rules it knows how to do so expressly. The Court concludes that had Congress intended that “creditors” be employed by chapter 11 debtors, but not by trustees, for example, or in cases under other chapters, it would have said so clearly. Given that it crafted one exception, the Court is unwilling to recognize others by “implication.”²

The Supreme Court has made it clear that the courts lack the authority to rewrite the Bankruptcy Code provisions governing employment and payment of professionals. *Baker Botts. L.L.P. v. Aasarco LLC*, ___ U.S. ___, 135 S.Ct 2158, 2169 (2015) citing *Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004). For whatever good reasons, in denying employment under § 327(a) of creditors as estate professionals in bankruptcy cases, Congress made a decision that efficiency be sacrificed to avoid the appearance of impropriety. *In re Gray*, 64 B.R. 505, 508 (Bankr. E.D. Mich. 1986). While application of that prohibition could prejudice some chapter 11 debtors, the Court may not just “look the other way”.

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² Under § 327(e), a trustee, or chapter 11 debtor-in-possession, may employ a creditor attorney “for a specified special purpose” even though the attorney is not disinterested. However, this exception to the usual rule applies only to attorneys, not to accountants. This provision is further evidence of Congressional awareness of the impact of the disinterestedness requirement in some cases.

Accordingly, for these reasons, **IT IS HEREBY ORDERED THAT**
Debtor's Application to Employ Hansen Hunter & Co., P.C., as accountants for
the estate, Dkt. No. 239, is hereby DENIED.

Dated: July 15, 2019



Honorable Jim D. Pappas
United States Bankruptcy Judge