

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re: Lodging Enterprises, LLC,

Debtor.

Case No. 24-40423-11

**United States Trustee's Objection to Debtor's Application to
Employ 12588391 Canada, Inc.**

Under 11 U.S.C. § 327 and Fed. R. Bankr. P. 2014, the United States Trustee objects to the debtor's application to employ Tom Wenner and 12588391 Canada, Inc., as Chief Restructuring Officer¹ because Wenner is not disinterested.

Background

Debtor Lodging Enterprises, LLC, is a real-estate holding company for 44 hotels and 27 restaurants. On June 17, it "engaged the services of Mr. Tom Wenner, through an agreement with Mr. Wenner's wholly-owned company Canada, Inc. to act as its Chief Restructuring Officer."² A little over a week later, on June 26, Lodging filed its petition in

¹ Doc. #132.

² *Id.* at 1 ¶2.

chapter 11. On July 26, Lodging filed an application to employ Wenner and his company as its Chief Restructuring Officer.³

In that application, Lodging notes that Wenner is currently the Chief Financial Officer of VCM Global Asset Management, Inc., a non-debtor affiliate of Lodging that is also owned by Tom Vukota, the ultimate owner of the debtor.⁴ Lodging also discloses that Wenner was the Vice President and Treasurer of Lodging from February 3, 2021, until he resigned on June 1, 2024.⁵ In his affidavit, Wenner declares that in his employment at VCM Global Asset Management, he “participates in the oversight of the accounting, finance, investment reporting and risk management of VCM and some affiliates.”⁶ That has included periodic review of Lodging’s public and non-public documents and discussions with Lodging’s management team.⁷

Lodging has no employees. But at the first § 341 meeting of creditors, Wenner testified that Lodging has a slate of officers.

³ Doc. #132.

⁴ *Id.* at 3 ¶7.

⁵ *Id.* at 3 ¶8.

⁶ *Id.* at 7 ¶6.

⁷ *Id.*

Historically, it has been 3-5 people. Right now, the three officers are Vukota and two employees of Avantic who are involved in the day-to-day operations of Lodging. The Avantic employees are Brett Sundstrom, Avantic's COO, and Lurie Jackle, Avantic's Vice President of Finance. Wenner used to be one of those officers of Lodging, but resigned in June because he was "paranoid" about "being an officer in a company that is filing chapter 11."

When asked who he reported to, Wenner testified he didn't report to anyone, but when there is something he doesn't have authority to do, he checks with those three officers.

The entity 12588391 Canada, Inc. is Wenner's personal company—it's just him. Wenner uses it to do consulting. Wenner and his consulting firm have never been a CRO before.

Lodging asserts on information and belief that "Canada Inc." is a disinterested person under the Bankruptcy Code.⁸ And Wenner agrees.⁹ Neither Lodging nor Wenner address whether Wenner is a

⁸ Doc. #132 at 3 ¶6.

⁹ *Id.* at 7 ¶8.

disinterested person under the Bankruptcy Code. And neither the application to employ nor the affidavit address connections.

On July 19, counsel for the U.S. Trustee requested a copy of any agreements between Lodging and Wenner or Wenner's company. On July 26, Lodging filed its application to employ Wenner and his company. Attached to the application is an "amended and restated" agreement that is dated July 24. The agreement contemplates a flat fee of \$25,000 per month, plus expenses.¹⁰ If Lodging terminates the agreement, it agreed to pay a \$40,000 penalty.¹¹ The agreement purports to require Lodging to pay for insurance coverage during and after the contract period, and to provide robust indemnity, with no exception for gross negligence, willful conduct, or gross negligence.¹²

After Lodging filed the retention application, counsel for the U.S. Trustee followed up regarding the original Wenner agreement. Lodging produced it. Comparing the two agreements, there are several important changes. The new agreement gives Wenner authority to bind

¹⁰ *Id.* at 13 ¶¶4-5.

¹¹ *Id.* at 17 ¶14(e).

¹² *Id.* at 15-16 ¶11.

Lodging and requires him to oversee professionals in the bankruptcy case and review and approve filings in the bankruptcy case. The parties eliminated a portion of the old agreement that provided Wenner a \$150,000 incentive for any of the following outcomes:

- an “agreement (other than temporary or interim agreements) with its largest creditor to permit the Company to continue its business operations, in whole or in part”;
- Lodging’s owner retaining “a continuing equity interest in” Lodging; or
- “any distribution, whether payment of cash or other consideration, is completed by the Company to its owner, regardless of the form of the distribution.”

On August 7, Lodging filed its schedules and statement of financial affairs. In them, it confirmed Wenner’s testimony about Lodging’s officers¹³ and Wenner’s recent resignation as one of those officers.¹⁴ And it confirmed that it paid 12588391 Canada, Inc. a \$50,000 retainer on June 20, 2024,¹⁵ of which \$43,333.33 was left at the time of filing a week later.¹⁶

¹³ Doc. #164 at 170 ln. 28.

¹⁴ *Id.* at 170 ln. 29.

¹⁵ *Id.* at 3 and 118.

¹⁶ Doc. #163 at 7.

Argument

I. Wenner and his company are not disinterested.

To be retained for the bankruptcy estate, a professional must be disinterested and must not hold or represent an interest adverse to the estate.¹⁷ The party seeking employment bears the burden of establishing that it satisfies both of these prongs.¹⁸

Under the Bankruptcy Code, the term “disinterested person” excludes anyone who is or was in the last two years a director, officer, or employee of the debtor.¹⁹ It also excludes an insider.²⁰ When the debtor is a corporation, as in this case, insider includes any director, officer, or person in control of the debtor.²¹ Thus, a current or former officer, director, employee, or person in control of the debtor is not disinterested under the Code. Insider also includes an affiliate or an insider of an affiliate.²²

¹⁷ 11 U.S.C. § 327(a).

¹⁸ *Interwest Bus. Equip. v. United States Trustee (In re Interwest Bus. Equip.)*, 23 F.3d 311, 318 (10th Cir. 1994).

¹⁹ 11 U.S.C. § 101(14)(A).

²⁰ *Id.* at § 101(14)(B).

²¹ *Id.* at § 101(31)(B).

²² *Id.* at § 101(31)(E).

A disinterested person also does not have an interest materially adverse to the interest of the estate, 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.”²³

Here, the application to employ should be denied because the applicant does not meet the Bankruptcy Code’s disinterested standard. Wenner was an officer of the debtor until the eve of bankruptcy. Because that was within two years of the filing, Winner is not a disinterested person under § 101(14)(B). Wenner is also an insider both because at the time of bankruptcy filing he was the Chief Restructuring Officer and because he appears to be the person in control of the debtor. In addition, as CFO of VCM Global Asset Management, Inc., Wenner is an insider of an affiliate. Thus, Wenner is not a disinterested person under § 101(14)(A).

Although Lodging’s application to employ does not address any of this, if Lodging is trying to skirt these defects by hiring 12588391 Canada, Inc. rather than Wenner directly, it does not alter the analysis. The Bankruptcy Code is not so easily manipulated. As a preliminary

²³ *Id.* at § 101(14)(C).

matter, the statute's definition of insider "includes" certain specified people, which indicates that the list is instructive but not exhaustive.²⁴ And the focus for analysis is the actual situation, not titles. In addition, it is clear that 12588391 Canada, Inc. is wholly owned by Wenner and nothing more than Wenner's alter ego.

Further, it is common for attorneys to be indirectly disqualified when they are associated with other attorneys who are directly disqualified, such that an attorney's disqualification under § 327(a) disqualifies the law firm and all its other attorneys.²⁵ "In the case of a one-man corporation ... courts have shown great liberality in lifting the veil of the corporate entity and holding the sole shareholder and the corporation to be one and the same."²⁶ In *Prado Verde*, the bankruptcy court rejected an application to employ a real estate broker because the broker's 50% owner was the step-daughter of the debtor's principal.²⁷

²⁴ See *U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 390 (2018) (noting § 102(3)'s rules of construction that includes and including are not limiting).

²⁵ See, e.g., *In re Essential Therapeutics, Inc.*, 295 B.R. 203, 210 (Bankr. D. Del. 2003); *In re Wells Benrus Corp.*, 48 B.R. 196, 198-99 (Bankr. D. Conn. 1985).

²⁶ *In re Landbank Equity Corp.*, 83 B.R. 362, 371-72 (E.D. Va. 1987).

²⁷ *In re Prado Verde Ranch, Inc.*, 250 B.R. 127 (Bankr. D.N.M. 2000).

“Her insider status disqualifies her and the corporation of which she is President and 50% shareholder.”²⁸

As a practical matter, the filings in this case to date indicate it is Wenner himself who is acting as CRO.

Nor is Wenner saved by § 1107(b), which says that a person is not disqualified solely because he was employed by or represented the debtor before bankruptcy. That statute is narrowly construed to situations where there are no other reasons to disqualify.²⁹ Here, Wenner was an officer, is the person in control of the debtor, and is an insider in at least three different ways.

Finally, it appears Wenner and 12588391 Canada, Inc. have an interest materially adverse to the interest of the estate and creditors. Before bankruptcy—and for the first month after commencing bankruptcy—Wenner and 12588391 Canada, Inc. were eligible for a substantial bonus payment if they found a resolution that resulted in the principal maintaining its equity in the debtor or receiving a cash payment. Although the agreement was revised a month into the

²⁸ *Id.*

²⁹ See, e.g., *In re Essential Therapeutics, Inc.*, 295 B.R. 203, 207-08 (Bankr. D. Del. 2003).

bankruptcy, it is clear that Wenner and 12588391 Canada, Inc. are working for the debtor's principal—the ultimate owner of whom is also Wenner's boss at VCM Global Asset Management, Inc. Thus, Wenner and 12588391 Canada, Inc. fail § 101(14)(A), (B), and (C).

Because Wenner and his consulting entity are not disinterested, the application to employ them must be denied.

II. The disclosures do not even address connections.

Even if Wenner and his company were not ineligible because he is not disinterested, his disclosure of connections is insufficient. Under Rule 2014(a), a professional seeking employment under 11 U.S.C. § 327 must file a verified statement of—among other things—the name of the person to be employed and “all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.” The duty of disclosure is sacrosanct because complete and candid disclosure is indispensable to the court's discharge of its duty to assure a professional's eligibility for employment—or, in the language of Rule 2014(a), whether the employment is necessary.

Without exception, the rule requires complete disclosure of all connections, not merely those rising to the level of a conflict of interest.³⁰ The professional may not leave the court or other parties in interest to search the record for such relationships or otherwise ferret them out.³¹ Nor may the professional disclose only those connections that it subjectively believes are relevant.³² In determining whether an applicant has complied with the rule, it is the degree of completeness of the disclosure, rather than the applicant's subjective intent or state of mind, that is material.³³ Failure to be meticulous in disclosing all connections with the debtor and other parties justifies a court in taking significant punitive or corrective action, even if there was no prejudice

³⁰ *In re Keller Fin. Servs. of Florida, Inc.*, 248 B.R. 859, 897 (Bankr. M.D. Fla. 2000); *In re Granite Partners, L.P.*, 219 B.R. 22, 35 (Bankr. S.D.N.Y. 1998).

³¹ *In re BH&P, Inc.*, 949 F.2d 1300, 1317–18 (3d Cir. 1991). *See also In re Matco Elecs. Group, Inc.*, 383 B.R. 848, 853–54 (Bankr. N.D.N.Y. 2008) (stating that Rule 2014 “is not intended to condone a game of cat and mouse, where the professional seeking appointment provides only enough disclosure to whet the appetite of the UST, the court or other parties in interest, and then the burden shifts to those entities to make inquiry in an effort to expand the disclosure”); *In re Granite Partners, L.P.*, 219 B.R. at 35 (stating that a court should not have to “rummage through files or conduct independent fact finding investigations” to determine whether a professional should be disqualified).

³² *In re Matco Elecs. Group, Inc.*, 383 B.R. 848 at 853.

³³ *In re Begun*, 162 B.R. 168, 177 (Bankr. N.D. Ill. 1993).

in the end.³⁴ And the duty to disclose continues throughout the case, requiring “spontaneous, timely, and complete disclosure.”³⁵

Here, the employment application and declaration fall short of the standard of complete, candid disclosure. In his affidavit, Wenner does not even address conflicts or connections. It is clear there are connections between Wenner and the debtor and its affiliates, but Wenner does not address creditors, professionals, or any of the other parties mentioned in Rule 2014.

Under Rule 2014(a), it is not up to the United States Trustee to ferret out that information; it is the duty of the debtor and its proposed professionals to be transparent upfront. Compliance with the rule demands more than leaving it up to the Court or another party to find that information elsewhere. This silence on matters specifically required by Rule 2014 does not comport with the letter or the spirit of

³⁴ *In re Byington*, 454 B.R. 648, 657 (Bankr. W.D. Va. 2011). *See also* 9 *Collier on Bankruptcy* ¶ 2014.03 (16th ed. 2020) (“[A] failure to disclose any fact that may influence the court’s decision may result in a later determination that disclosure was inadequate and that sanctions should be imposed on the professional.”) (citing *In re Leslie Fay Cos.*, 175 B.R. 525 (Bankr. S.D.N.Y. 1994); *In re B.E.S. Concrete Prods., Inc.*, 93 B.R. 228 (Bankr. E.D. Cal. 1988); *In re D.L. Enters.*, 89 B.R. 107 (Bankr. C.D. Cal. 1988)).

³⁵ *In re The Harris Agency*, 462 B.R. 514, 524 (E.D. Pa. 2011 (citation omitted)).

the rule. Without this information, the Court cannot “evaluate fully whether the professional is actually disinterested.”³⁶

III. The employment application has other issues as well.

In addition to the above, there are several other problems with Lodging’s application to employ Wenner and 12588391 Canada, Inc., as Chief Restructuring Officer:

- If Lodging terminates the agreement, it would have to pay a \$40,000 penalty. This is unreasonable under § 328, 330, and 331.
- Lodging seeks to pay a flat fee of \$25,000 per month. Nothing in the application addresses the anticipated hours, what kind of hourly rate this might equate to, or how the proposed fee is reasonable. It is Lodging’s burden to show the reasonableness of the arrangement, and it has not carried its burden.
- The indemnity provision contains no exception for gross negligence, willful conduct, or gross negligence. There is no basis to shift that liability from the professional to the estate and creditors.
- Wenner would have authority to bind the company and basically no one to report to. Rather than hiring a CRO to report to its management, Lodging is seeking to outsource its debtor-in-possession duties to a third party—one closely aligned with the ultimate owner. If the debtor-in-possession is not going to operate the company during bankruptcy, the only other person authorized to do so by the Bankruptcy Code would be a chapter 11 trustee. No

³⁶ *Jensen v. United States Trustee (In re Smitty’s Truck Stop, Inc.)*, 210 B.R. 844, 850 (10th Cir. BAP 1997).

specific Code section provides for the appointment of a CRO, and the Bankruptcy Code does not afford a CRO any independent powers—the only types of chapter 11 fiduciaries provided under the Code are debtors-in-possession, trustees, and examiners.³⁷ A CRO does not displace the debtor-in-possession and is not the representative of the debtor under the Bankruptcy Code and therefore cannot be given the authority to make decisions on behalf of the debtor.³⁸ For example, the Bankruptcy Code does not define whether a CRO is able to hire professionals, to pursue chapter 5 causes of action, or to carry out the functions normally reserved to debtors-in-possession or chapter 11 trustees. By contrast, a debtor-in-possession and a chapter 11 trustee have clearly defined powers under the Bankruptcy Code to hire professionals, to pursue causes of action, and to file a plan.

The application to employ should be denied because the applicant is not disinterested. But even if he were disinterested, the employment application should not be approved on those problematic terms.

Conclusion

The burden of proving the facts necessary to support the employment application falls on the debtor. While hiring Wenner and his company would be convenient for Lodging—or at least Lodging's

³⁷ See 11 U.S.C. § 1104; see also *In re Adelpia Commc'ns Corp.*, 336 B.R. 610, 664 (Bankr. S.D.N.Y. 2006) (holding that court could not appoint independent fiduciary because there is no basis in Bankruptcy Code for such appointment).

³⁸ See 11 U.S.C. § 1107.

owner—convenience to the debtor or its owner is not a factor for § 327 employment. Because the applicant is not disinterested, the application to employ should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 12, 2024, a true and correct copy of this **Objection** was electronically filed with the Court using the CM/ECF system, which sends notification to all parties of interest participating in this case through the CM/ECF system.

By: s/Richard A. Kear