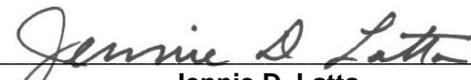


Dated: June 03, 2005
The following is ORDERED:





Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re:

MORRIS A. LEOVITZ, M.D.

Case No. 04-36171

Chapter 11

Debtor.

**ORDER GRANTING APPLICATION TO APPROVE EMPLOYMENT OF
ACCOUNTANT**

BEFORE THE COURT is the application of Morris A. Lebovitz, as debtor in possession (the “Debtor”), to employ Jimmie Fouts and the firm of Fouts and Morgan (collectively “Fouts”) as accountants pursuant to 11 U.S.C. § 327(a). Richard F. Clippard, United States Trustee for Region 8 (the “UST”), filed a written objection to the application alleging that Fouts is not a disinterested person and holds or represents an interest adverse to the estate. The court heard oral argument on May 12, 2005. On May 20, 2005, the UST filed an amended objection withdrawing as a basis for its objection the allegation that Fouts is not a disinterested person. For the following reasons, the application will be approved. This is a core proceeding. *See* 28 U.S.C. §157(b)(2)(A).

FINDINGS OF FACT

The Debtor filed his voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code on October 15, 2004. Pursuant to 11 U.S.C. §§ 1107 and 1108, the Debtor has remained in possession of the property of the estate and operates his business as debtor in possession. On April 15, 2005, the Debtor submitted an application for order approving employment of Fouts as accountants nunc pro tunc to March 1, 2005. In support of the application, Fouts individually submitted a verified statement in which he states that he is a certified public accountant licensed to practice in the state of Tennessee, and that he has practiced in Memphis, Tennessee for 39 years. Fouts further states that no member of his firm is not a disinterested person in connection with the bankruptcy case of the Debtor and no member of the firm holds or represents an interest adverse to the bankruptcy estate in connection with the matters upon which they are to be engaged. The statement discloses that the firm holds an unsecured claim in the amount of \$3,267.73 against Memphis Obstetrics & Gynecology, P.C., (also known as Obstetrics and Gynecology of Memphis, P.C.) (“OGM”) of which the Debtor is the sole shareholder. OGM is a professional corporation, the corporation through which the Debtor conducted his medical practice.

The UST asserts that the Debtor and OGM appear to have opposing financial interests. As examples, the UST recites that OGM is or has been a lessee of an office building owned by the Debtor. Further, OGM and the Debtor are co-defendants in an action brought against them by First Tennessee Bank. The UST alleges upon information and belief that the Debtor pledged an interest in real property to secure a pre-petition \$50,000 loan paid to OGM and that OGM paid the retainer to the Debtor’s counsel.

The Debtor asserts that employment of Fouts is in the best interest of the bankruptcy estate because Fouts has assisted the Debtor and OGM in tax and financial planning over the past 25 years. The Debtor seeks to employ Fouts to prepare his individual tax return and the corporate tax return for OGM, and to assist the Debtor in the preparation of monthly operating reports to be filed in connection with his bankruptcy case. In addition, the application discloses that Fouts will be engaged to prepare the books and records, including payroll records of OGM. Fouts proposes to charge a fee of \$200 per hour for the preparation of the Debtor's individual tax return, and a fee of \$75 per hour for the services of an employee of the firm who will assist in the preparation of monthly operating reports.

At the hearing to consider the application, counsel for the Debtor indicated that the Debtor no longer seeks nunc pro tunc approval of the application, and the court will not consider this issue. The remaining issue raised in the UST's amended objection is whether Fouts holds or represents an interest adverse to the bankruptcy estate.

CONCLUSIONS OF LAW

Pursuant to 11 U.S.C. §327(a), the trustee, with court approval, may employ "accountants . . . 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 the trustee in carrying out the trustee's duties under [title 11]." Pursuant to 11 U.S.C. § 1107, a debtor in possession has all the rights of a trustee, other than the right to compensation from the estate. The Debtor, as debtor in possession, has the right to employ an accountant to assist him in carrying out his duties as debtor in possession. The Debtor seeks to employ Fouts for this purpose. The UST asserts that Fouts may not be employed because he holds or represents an interest adverse to the estate.

"Adverse interest" has been defined as the possession or assertion of any 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 the possession of a predisposition under circumstances that render such a bias against the estate. *In re Metropolitan Environmental, Inc.*, 239 B.R. 871, 883 (Bankr. N.D. Ohio 2003) citing *Kravit, Gass & Weber, S.C. v. Michel (In re Crivello)*, 134 F.3d 831, 835 (7th Cir.1998). An adverse interest arises when two entities have a mutually exclusive economic interest. *In re Florence Tanners, Inc.*, 209 B.R. 439 (Bankr. E.D. Mich. 1997), *aff'd in part, vacated in part, and remanded by Halbert v. Yousif*, 225 B.R. 336 (E.D. Mich 1998). Bankruptcy Rule 2014 implements the requirements for the employment of professional persons. It stipulates that:

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 accountants, 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 accountants, the United States trustee, or any person employed in the office of the United States trustee.

Fed. R. Bankr. P. 2014.

The UST does not claim that the Debtor or Fouts failed to comply with the specific disclosure requirements of Rule 2014. Both the Debtor and Fouts disclosed the connection between the Debtor and OGM, the fact of Fouts ongoing engagement by OGM, and the fact that Fouts is a creditor of OGM. In fact, the UST does not claim that Fouts *holds* an interest adverse to the Debtor,

but only that he *represents* an interest adverse to the Debtor. The UST asserts that OGM and the Debtor have opposing financial interests because they appear to have a debtor-creditor relationship. In essence, the UST claims that Fouts may not represent the Debtor because he represents a creditor of the estate. Section 327(c) speaks directly to the representation of a creditor. It provides:

In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such persons employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

11 U.S.C. § 327(c). Fouts's engagement by OGM will not disqualify him from appointment as accountant for the Debtor unless there is an actual conflict of interest in these dual engagements. The UST has pointed to no actual conflict of interest. Fouts is proposed to be employed by the Debtor for a fairly limited purpose: to prepare tax returns and monthly operating reports. It is difficult to imagine that Fouts' employment by a professional corporation, owned by the Debtor, would result in any actual conflict of interest with his engagement by the Debtor, especially in light of the limited purpose for which he is to be employed.

CONCLUSION

For the foregoing reasons, the application to employ Fouts as accountant for the Debtor is **APPROVED.**