

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

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WESTERN DISTRICT OF TENNESSEE
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JUN-02 1998

IN RE:

XL SPORTS, LTD., LLC,
Debtor.

Case NO. W-371 19
Chapter 11

ED G. WEINT-RAUB
CLERK OF COURT
WESTERN DISTRICT OF TENN.

**MEMORANDUM OPINION AND ORDER APPROVING DEBTOR'S APPLICATION
TO EMPLOY ATTORNEY NUNC PRO TUNC BUT REDUCING AMOUNT OF
DEBTOR'S ATTORNEY'S FEES**

This core proceeding¹ was heard upon the application of Mark Selker, as managing member of the debtor in possession, XL Sports, Ltd., LLC ("XL Sports" and "debtor"), pursuant to 11 U.S.C. § 327 and FED. R. BANKR. P. 2014, to employ Larry E. Parrish, by and through the law firm of Larry E. Parrish, P.C., as legal counsel to advise and to assist the debtor with this chapter 11 bankruptcy case. The bankruptcy petition was filed on November 21, 1997, but no application to employ an attorney was submitted at that time. The application now before the Court was filed on January 26, 1998, and it seeks *nuncpro tunc* approval for employment of Larry Parrish as counsel for the debtor.

The debtor's application is opposed by the United States trustee, Larry Burton and Jerry Lawler, all parties in interest. Based on the testimony of Phyllis Selker, Mark Selker, and Eugene Selker, the deposition testimony of Robert Amsdell and Douglas Smorag, the schedules filed with the bankruptcy petition, the statements of Jerry Lawler, the statements of Mr. Parrish and other counsel, and the entire record in this cause, the Court finds that the debtor's application to employ Larry

¹ 28 U.S.C. § 157(b)(2)(A).

Parrish by and through the law firm of Larry E. Parrish, P.C., should be approved, but that Mr. Parrish's postpetition legal fees incurred to date should be reduced by \$10,000.00. This opinion and order contains the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

XL Sports is an Ohio limited liability company with its principal place of business in Memphis, Tennessee. The company has 24 equity interest owners, including Phyllis Selker, Eugene Selker and/or Eugene Selker IRA Trust, and Mark Selker. Eugene Selker and Phyllis Selker are married, and they are the parents of Mark Selker.

At some point in either October or November, 1997, Mark Selker and Eugene Selker contacted Mr. Parrish regarding legal representation in a RICO/fraud action to be filed by XL Sports in the United States district court in Ohio. At that time, Mr. Parrish, Mark Selker and Eugene Selker were also contemplating bankruptcy for XL Sports. Mr. Parrish agreed to undertake representation of XL Sports, and he entered into an engagement agreement which set forth the terms of Mr. Parrish's employment. Pursuant to the agreement, Mr. Parrish bills the company \$200.00 per hour for legal services rendered, and his associate bills the company at an hourly rate of \$150.00. The agreement further provides that paralegals will bill \$40.00 per hour and law clerks will bill \$ 15 .00 per hour for their services. XL Sports is also responsible for the payment of all expenses incurred during the course of Mr. Parrish's representation.

The RICO/fraud suit was filed in the United States district court in Ohio, and was then dismissed. Mr. Parrish and Mark Selker decided to initiate bankruptcy proceedings in this Court, and the debtor's chapter 11 petition was filed by Mr. Parrish on November 21, 1997. The debtor subsequently refiled the RICO/fraud suit in the United States district court in Memphis, and it appears

at this time that the major asset in the bankruptcy estate is the debtor's pending or anticipated litigation.

Phyllis Selker's testimony established that she borrowed \$100,000.00 from longtime family friend, Robert Amsdell, for the use and benefit of the Selker family, to assist them through the family's financial **difficulties**. Mr. Amsdell has no other connection to this debtor. At Phyllis Selker's direction and on her behalf, Mr. Amsdell's agent wired to Mr. Parrish \$32,000.00 of the \$100,000.00 loan in satisfaction of Mr. Parrish's prebankruptcy legal fees incurred by XL Sports. In addition, at some point prior to the November 20, 1997 wire transfer by Mr. Amsdell, Mr. Parrish had received a payment of \$8,000.00 from Phyllis Selker for legal fees and expenses incurred by XL Sports.

On January 26, 1998, approximately 66 days after the bankruptcy petition was filed, Mark Selker, pursuant to the mandate of Bankruptcy Code §327 and FED. R. BANKR. P. 2014, and as managing member of XL Sports, filed an application seeking this Court's *nunc pro tunc* approval of the debtor's employment of Larry E. Parrish as its attorney of record.

In addition to the two prepetition fee payments of \$8,000.00 and \$32,000.00, Mr. Parrish is now seeking postpetition legal fees and expenses for the period November 21, 1997 through January 6, 1998, amounting to \$34,450.17. The majority of this latter amount represents fees and expenses incurred in Mr. Parrish's representation of the debtor in the **RICO/fraud** actions.

As stated, the debtor's application for approval of the employment has been met with strenuous opposition from the United States trustee, Larry Burton, and Jerry Lawler, who correctly assert that the debtor's application was not timely made, and who also question Mr. Parrish's "disinterestedness" in this bankruptcy case. Bankruptcy Code §327 states, in pertinent part:

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may 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 the trustee in carrying out the trustee's duties under this title.

(c) In a case under chapter 7, 11 or 12 of this title, a person is not disqualified for employment under this section solely because of such person's 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.

Further, FED. R. BANKR. P. 2014(a), regarding employment of professional persons, sets forth the procedure for obtaining the bankruptcy court's approval of the proposed employment:

(a) Application for an Order of Employment. An order approving the employment of attorneys ... or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and . . . a copy of the application shall be transmitted by the applicant to the United States trustee. 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 other person employed in the office of the United States trustee.

In a chapter 11 bankruptcy case, because no trustee is generally appointed, the debtor in possession has all of the rights, powers and duties of a bankruptcy trustee serving in the case. 11 U.S.C. § 1107(a). Therefore, in most cases, it is the chapter 11 debtor in possession that must make

application for employment of its attorney.

Although Bankruptcy Rule 2014 does not impose a specific deadline for filing the application for the employment of an attorney, this Court has previously determined that 30 days from the date of filing the bankruptcy petition is a reasonable amount of time for presenting *nunc pro tunc* employment applications, and that such applications filed later than 30 days after commencement of the case will require a “clear and convincing showing by counsel of a reasonable explanation for the delay.” *In re Martin*, 102 B.R. 653, 656 (Bankr. W.D. Tenn. 1989). There are good reasons for demanding a prompt filing of employment applications, and this case illustrates a critical reason. The greater the delay in filing the application, the more time is spent by debtor’s counsel at the risk of non-approval and non-payment, and there is more risk to the debtor of large expenses for professional services when the professional’s employment may be subject to objection by interested parties. In chapter 11 especially, where much work is done necessarily at the inception of the case, employment of the attorney must be submitted to the court promptly for approval.

As stated, in this case Mark Selker submitted the debtor’s application for employment of Larry E. Parrish and his law firm approximately 66 days after the date of filing the petition. The lengthy application enumerates several reasons for the debtor’s failure to file the application prior to the law firm’s employment, including the facts that the debtor filed a disclosure form with its petition indicating that Mr. Parrish is the debtor’s attorney; the debtor made an inquiry of the United States trustee regarding Mr. Parrish’s employment and compensation; and, in light of the complexity of the issues in the RICO/fraud action, Mr. Parrish made the district court lawsuit his first priority, apparently putting the bankruptcy case on the “back burner.” Mark Selker asserts, however, that he diligently worked to file the debtor’s application as promptly as possible after receiving some

guidance from the United States trustee.

This Court has adopted the criteria for consideration of *nunc pro tunc* employment applications set forth by Judge Calhoun in *In re McDaniels*, 86 B.R. 128, 131 (Bankr. S.D. Ohio 1988), and has added an additional factor for consideration. *See Martin* at 657. Those criteria are as follows:

- (1) The application must be one which would have been approved originally by the Court, measured by the requirements of 11 U.S.C. § 327 and Bankruptcy Rule 2014 at or before the time the services were actually commenced;
- (2) Evidence must appear in the record of the case which demonstrates that the Court and other interested parties had actual knowledge of the legal services being rendered by the applicant;
- (3) An application seeking an order *nunc pro tunc* must be filed as soon as the matter is brought to the attention of the applicant;
- (4) The party for whom the work was performed approves the entry of the *nunc pro tunc* order;
- (5) The applicant has provided notice of the application for the *nunc pro tunc* order to creditors and parties in interest and has provided an opportunity for filing objections;
- (6) No creditor or party in interest offers reasonable objection to the entry of the *nunc pro tunc* order;
- (7) If the applicant is also seeking compensation at this point, the applicant must have provided notice of the application for fees to any parties in interest, thus providing an opportunity for objections as provided in 11 U.S.C. § 330;
- (8) A sustainable objection must not be filed to the applicant's request for attorney fees;
- (9) No actual or potential prejudice will inure to the estate or other parties in interest;

(10) The applicant's failure to seek pre-employment approval is satisfactorily explained;

(11) The applicant exhibits no pattern of inattention or negligence in seeking judicial approval for employment of professionals, measured in some degree by the applicant's experience in this field of law; and

(12) The denial of a *nunc pro tunc* application, with its concurrent denial of reasonable fees and expenses, would not have the effect of granting a windfall to the estate.

Id The debtor's application states that the applicant believes Mr. Parrish to be "uniquely suited" to meet the particular needs of the estate, and emphasizes its reliance on Mr. Parrish's experience and skill relating to the RICO/fraud litigation. Mr. Parrish is an experienced attorney, who is well aware of the rules and procedures for practice in this Court. Although his attention to the RICO/fraud action is admirable, the Court is confident that Mr. Parrish's calendar is no more crowded than the calendars of the majority of other attorneys who practice before this Court. Due to the financial condition of the bankruptcy estate, however, it is unlikely that Mr. Parrish will be paid fully, if at all, for his services rendered in this case regardless of the Court's ruling on the timeliness of the debtor's application. The more troublesome of the above factors is number 10, as a satisfactory explanation for the delay has not been given. Nevertheless, weighing the factors set forth above in light of the circumstances presented in this case, the Court finds that the *nuncpro tunc* employment application should be approved, conditioned upon a \$1 0,000.00 reduction in the fees of Mr. Parrish and Larry E. Parrish, P.C. This reduction is justified, as a timely application would have reduced the costs to this estate in litigating a portion of the objections to Mr. Parrish's employment, and Mr. Parrish rather than the estate, should bear that cost. As stated, the reduction is more symbolic than monetary, as the debtor has no present ability to pay any fee. Mr. Parrish essentially is in this case on a

contingency, relying upon the success of litigation. Subject to this reduction, Mr. Parrish's fees and expenses through January 6, 1998 are approved.

The Court now turns to the issue raised regarding Mr. Parrish's "disinterestedness" in the bankruptcy case pursuant to 11 U.S.C. §327(a). The parties raise this question in light of the fact that Phyllis Selker, mother of Mark Selker, arranged for the payment of Mr. Parrish's prepetition legal fees, and because Phyllis Selker is listed as a creditor on the bankruptcy schedules.

The Bankruptcy Code defines a "disinterested person" as "a person that 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)(E). The Third Circuit has recently addressed this issue and has refused to adopt a per se rule disallowing employment of a professional when the professional has merely a "potential" conflict of interest in the case. *In re Marvel Entertainment Group, Inc.*, 1998 WL 140098 (3rd Cir. March 25, 1998). Although *Marvel* involved the employment of a law firm to represent the chapter 11 trustee, that court's reasoning is equally applicable to this case.

In *Marvel*, the trustee moved for an order authorizing employment^v of a law firm that represented one of the bankruptcy creditors in an unrelated matter. The creditor expressly waived all potential conflicts of interest arising **from** the firm's representation of the trustee. The motion was met with strong objection, raising an issue of whether the firm was "disinterested" as required by 11 U.S.C. § 327(a). The trial court denied the employment, reasoning that the law **firm's** representation of the creditor "taint[ed] the image of objectivity that the trustee and his counsel should possess." Id at *4.

Upon appeal, however, the Third Circuit reversed the district court's ruling, applying a 3-part rule previously adopted by the court in *In re BH & P Inc.*, 949 F.2d 1300 (3rd Cir. 1991). The *Marvel* Court reiterated the rule as follows:

- (1) Section 327(a), as well as § 327(c), imposes a per se disqualification as trustee's counsel of any attorney who has an actual conflict of interest;
- (2) the district court may within its discretion - pursuant to § 327(a) and consistent with § 327(c) - disqualify an attorney who has a potential conflict of interest and
- (3) the district court may not disqualify an attorney on the appearance of conflict alone.

Id. at * 11. The court went on to note that "...denomination of a conflict as 'potential' or 'actual' and the decision concerning whether to disqualify a professional based upon that determination in situations not yet rising to the level of an actual conflict are matters committed to the bankruptcy court's sound exercise of discretion," *Id.* at *12 (citing *BH & P* at 13 16-13 17), and "to allow disqualification merely on the 'appearance of impropriety' indeed would allow 'horrible imaginings alone' to carry the day." *Id.* Based on the 3-part test set out above, the court determined that the law firm's conflict was not "potential" nor "actual," and that the firm should not be disqualified under Bankruptcy Code §§ 327(a) and 101(14)(E). *Id.* at *14.

This Court now employs the 3-part test as set forth by the Third Circuit in *Marvel* to determine whether a professional is appropriately employed pursuant to §§327(a) and 101(14)(E). Based upon the Court's analysis of the facts and circumstances surrounding the payment of Mr. Parrish's fees, the Court determines that the circumstances presented in this case create, at best, merely the appearance of a conflict or adverse interest on the part of Mr. Parrish, and that such "mere appearance" of conflicting interests does not warrant the disallowance of the debtor's application

Phyllis Selker's direct and indirect payments of Mr. Parrish's fees on behalf of the debtor puts her in the posture of a bankruptcy creditor. Both Eugene Selker and Phyllis Selker testified, however, that Phyllis Selker has withdrawn any claim that she may have against the estate, and that neither she nor Eugene Selker intend to pursue repayment of the legal fees paid on the debtor's behalf

Furthermore, Mark Selker, Phyllis Selker and Eugene Selker all demonstrated a clear understanding that Mr. Parrish, as attorney for the debtor, may be required at some point to pursue a fiduciary claim against Mark Selker and/or Eugene Selker as managing members of the debtor. The Selkers have effectively waived any conflict of interest that Mr. Parrish may have regarding any such potential claims. The Selkers also acknowledged that Mr. Parrish's representation of the debtor may require him to make decisions independent of or contrary to their wishes.

CONCLUSION

Based on the facts and analysis set forth above, the Court finds that Mr. Parrish is "disinterested" in this case as required by 11 U.S.C. § 327(a), and that the debtor's *nunc pro tunc* application to employ Larry E. Parrish by and through his law firm, Larry E. Parrish, P.C., is approved upon the condition that, as a sanction for not timely presenting the application to the Court as directed by FED. R. BANKR. P. 20 14, the amount of Mr. Parrish's legal fees due and owing at this time should be reduced by \$10,000.00. Except for this reduction, Mr. Parrish's and his firm's fees and expenses are approved through January 6, 1998.

SO ORDERED this 2^d day of June, 1998.


WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

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Mailed on 6-2-98 to:

Debtor, debtor's attorney, and trustee

Above listed parties

~~Nancy Cannon, Administrative Secretary
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