Dated: August 27, 2018
The following is SO ORDERED:

David S. Kennedy
UNITED STATES CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re	
William H. Thomas, Jr.,	**Case No. 16-27850-K**
Debtor.	**Chapter 11**
SSN: xxx-xx-8251	

MEMORANDUM AND ORDER RE APPLICATION TO EMPLOY THE LAW FIRM OF BUTLER SNOW LLP AS SPECIAL COUNSEL FOR DEBTOR COMBINED WITH ENTRY OF THE NOTICE THEREOF

INTRODUCTION

The above-named Debtor, William Thomas, Jr., seeks to employ Jonathan Skrmetti, Esquire and Adam Langley, Esquire (collectively "Butler Snow") to represent him in pending adversary proceedings involving Creditors Clear Channel Outdoor, Inc. (case no. 16-260) and Tennison Brothers, Inc. (case no. 16-261) (collectively "Adversary Proceedings") and possible

future bankruptcy issues in the main case. (Dkt. no. 395.) The United States Trustee for Region 8 filed an objection to this employment application (dkt. no. 404) to which Creditors Clear Channel Outdoors, Inc. and Tennison Brothers, Inc. both joined. (Dkt. nos. 407 & 408.) For the reasons outlined below, the Court sustains the United States Trustee's objection and denies the application to employ.

JURISDICTION

This Court has jurisdiction to hear and determine the instant proceedings under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

BACKGROUND FACTS

Prior to filing his Chapter 11, Mr. Thomas was involved in highly contentious litigation with Clear Channel Outdoors and Tennison Brothers which spanned over a decade. This litigation involved tort claims in Tennessee State Court and a constitutional challenge in the United States District Court for the Western District of Tennessee.

Mr. Thomas filed a voluntary Chapter 11 petition on June 2, 2016. (Dkt. no. 1.) The Adversary Proceedings were both filed by these Creditors on September 26, 2016 and each sought a judgment that the damages awarded in the Tennessee State Court litigation were non-dischargeable under 11 U.S.C. § 523(a)(6). On January 23, 2017, the Court ordered that the Adversary Proceedings would be held in abeyance until the State Court litigation was finalized.

On April 23, 2018, the Tennessee Supreme Court denied Mr. Thomas's application for permission to appeal the Tennessee State Court of Appeal's opinion, and Mr. Thomas declined to appeal to the United States Supreme Court, effectively ending the State Court litigation. At the moment, the constitutional challenge is on appeal with the Sixth Circuit Court of Appeals.

With the completion of the State Court litigation, motions were filed by these Creditors in the Adversary Proceedings to lift the stay and proceed in those matters in this Court. These motions were unopposed by Mr. Thomas. At a joint hearing on June 21, 2018, the Court questioned whether the doctrine of collateral estoppel might ultimately prevent Mr. Thomas from successfully defending the Adversary Proceedings in the Bankruptcy Court as the Bankruptcy Court is not a reviewing (or relitigation) court. Tennison Brothers and Clear Channel Outdoors expressed their beliefs that collateral estoppel does apply here and offered to file motions for summary judgments. Mr. Thomas, obviously, disagreed. The Court continued the matter until July 17, 2018. At this hearing, the Court announced a schedule for the filing of the motions for summary judgment (July 27, 2018), the filing of any responses (August 27, 2018), and set a date for the hearing on the prospective motions (August 28, 2018).

The motions for summary judgment were timely filed by these Creditors. On August 9, 2018, Mr. Thomas filed an application to employ Butler Snow. (Dkt. no. 396.) In each of the Adversary Proceedings, he filed an emergency motion to extend time to respond. The United States Trustee objected to the application to employ Butler Snow and both Tennison Brothers and Clear Channel Outdoors joined that objection.

At the hearing on the application to employ Butler Snow, Mr. Thomas amended his motion to employ Butler Snow under § 327(a) instead of § 327(e). Mr. Thomas wishes to present "novel theories" of collateral estoppel and feels that Butler Snow has the expertise necessary to do so. When asked if Butler Snow's representation would be limited to responding to the motions for summary judgment, it was presented to the Court that Butler Snow would not only represent Mr. Thomas in responding to the motions for summary judgment but also in

objecting to the claims of Tennison Brothers and Clear Channel Outdoors and possible counter-claims against them, along with discovery requests.

The application to employ Butler Snow called for a non-bankrupt entity (wholly owned by Mr. Thomas) to provide Butler Snow with $50,000 as a secured retainer. Butler Snow would then bill Mr. Thomas using the procedures outlined in the Bankruptcy Code and Federal Rules of Bankruptcy Procedure.

DISCUSSION

Section 327(a) of the Bankruptcy Code allows a debtor in possession[1] to employ one or more attorney to represent the debtor in possession in carrying out the debtor in possession's statutory duties. Section 327(e) allows a debtor in possession to employ an attorney for a specialized purpose, other than generally representing the debtor in possession in conducting the case. Each section has qualifications that the prospective attorney must meet. At the hearing on this motion, there was no dispute that Butler Snow meets these requirement.

Mr. Thomas's application to employ Butler Snow originally sought employment under § 327(e), but at the hearing, the application was amended to seek employment under § 327(a). The Court will not address which is the appropriate subsection, but will give Mr. Thomas the benefit of the doubt and assume that the appropriate subsection was used. However, considering a totality of the particular facts and circumstances, the application should be denied under either subsection.

As a general rule, parties should be able to hire any attorney they wish; however, subsections 327(a) and (e) require court approval. Such approval is at the discretion of the

[1] Section 327 refers to the trustee; however, section 1104 treats a debtor in possession as a trustee. Section 1101 states debtor in possession means debtor. Therefore, the court will use the terms interchangeably depending on the circumstances.

bankruptcy court. *See, for example, In re Delaney House, LLC*, 312 B.R. 1, 4 (Bankr. D. Mass. 2004). When determining if an application to employ should be granted, the Court must consider a number of factors:

> Thus, once the trustee meets the burden of demonstrating that an applicant for professional employment is qualified under § 327, *see* Bankr. Rule 2014(a), the discretion of the bankruptcy court must be exercised in a way that it believes best serves the objectives of the bankruptcy system. Among the ultimate considerations for the bankruptcy courts in making these decisions must be the protection of the interests of the **bankruptcy estate** and its creditors, and **the efficient, expeditious, and economical resolution of the bankruptcy proceeding.** *Cf. In re BH & P*, 949 F.2d at 1316.

In re Harold & Williams Dev. Co., 977 F.2d 906, 910 (4th Cir. 1992) (emphasis added).

Mr. Thomas's application to employ Butler Snow fails this test on two fronts: it fails to protect the interests of the § 541(a) estate and does not lead to the efficient, expeditious, and economical resolution of the bankruptcy proceedings. *See* Fed. R. Bankr. P. 1001.

Michael Coury, Mr. Thomas's current attorney in the bankruptcy matters, did not represent Mr. Thomas in the State Court litigation; however, he has been involved in the bankruptcy matters in this case for over two years. He has a complete understanding about Mr. Thomas's affairs. The estate has already compensated him for his time so far in developing that understanding. 11 U.S.C. § 331. Yet, Mr. Thomas wants to bring on new attorneys just a few weeks before the motions for summary judgment are to be argued and decided. It will take time for these attorneys to familiarize themselves with the case. Time that will be billed to Mr. Thomas as debtor in possession and will be paid for with assets of the estate. Even if Mr. Thomas fails to pay Butler Snow, the attorneys will bill against the secured retainer. That retainer is to be paid by an entity that is wholly owned by Mr. Thomas, meaning the entity is an

asset of this estate and loses value if the retainer is not returned. In short, the estate is diminished by the hiring of Butler Snow.

Mr. Thomas argues that Butler Snow will present "novel theories" to defeat the motions for summary judgment. Even if the motions for summary judgment are denied, Mr. Thomas still has to defend the Adversary Proceedings at trial and the only possible benefit to the estate would be if he can successfully object to the claims of Tennison Brothers and Clear Channels Outdoors and/or present counter-claims. Based on this record, the Court has serious doubts that either of these things are possible. First, even if the doctrine of collateral estoppel does not settle the issue of dischargeability of the Tennessee State Court judgment, the judgment is still a valid claim by its mere existence. This Court is not the appropriate forum to review state court judgments. Second, the Court doubts that Mr. Thomas can raise counterclaims because of the doctrine of res judicata.

In short, employing Butler Snow will have a high cost to the estate that cannot be avoided. The potential reward to the estate is also very high; however, it is so unlikely that the expected value is likely lower than the cost of employing Butler Snow. It is Mr. Thomas's burden to show that employing Butler Snow protects the interest of the estate. He has failed to do so.

Mr. Thomas has also failed to demonstrate how employing Butler Snow leads to the efficient, expeditious, and economical resolution of the bankruptcy proceedings. *See Fed. R. Bankr. P.* 1001. He proposes employing Butler Snow to file responses to the motions for summary judgment filed in the Adversary Proceedings. These responses will present "novel defenses" to the claims of collateral estoppel. Butler Snow's Jonathan Skrmetti, Esquire is an expert in this area of law. His legal background is very impressive. Mr. Thomas considers Mr.

Skrmetti to be the most qualified attorney for such work and wants to hire the best. The Court does not begrudge him in this desire. What the Court does take issue with is the timing of the request.

Mr. Thomas has been involved in State Court litigation with these Creditors for over a decade. For over a year, this Court held the Adversary Proceedings in abeyance until those State Court matters were resolved. On April 23, 2018, the Tennessee Supreme Court denied Mr. Thomas's application for permission to appeal the State Court of Appeal's opinion. This Court held two hearings, June 21, 2018 and July 17, 2018, to consider lifting the abeyance, which it did at the later hearing. At the later hearing, the Court established a schedule for these Creditors to file motions for summary judgment, for Mr. Thomas to respond, and for hearings to be held on each motion for summary judgment. The Court also noted that it felt that the doctrine of collateral estoppel would be the pivotal issue in the Adversary Proceedings. Neither side was seemingly surprised by the Court's opinion. At the hearing on the application to employ Butler Snow, Mr. Thomas stated that he has known of Mr. Skrmetti for a while. All of this leads the Court to wonder why, if Mr. Thomas knew of Mr. Skrmetti and that collateral estoppel was a pivotal issue, did he wait until 18 days before his response was due to file a motion to employ Butler Snow?

Mr. Thomas, who is also an attorney, should have known that collateral estoppel would be a major issue since this Chapter 11 case and the Adversary Proceedings were first filed, but even, if the Court gives him the benefit of the doubt, the issue was raised at the June 21st hearing. Yet it took him over 40 days to file an application to employ Butler Snow. In fact, the application was filed so late that Butler Snow would be unable to respond to the motions for

summary judgment by the deadline established by the Court. So, Mr. Thomas sought an extension of that deadline.

The United States Trustee and these Creditors both expressed concern that Mr. Thomas is simply seeking to delay the Adversary Proceedings. Mr. Thomas denies this; however, he sought extensions of his deadlines and continuances for the motions for summary judgment, automatically delaying the Adversary Proceedings. Further, Mr. Thomas declined to limit Butler Snow's employment to the motions to summary judgment with the option to seek employment on future matters should he prevail on the motions for summary judgment. Instead, he insisted that Butler Snow be employed for the remainder of the Adversary Proceedings plus possible claims objections and counter-claims. The Court expresses no opinion on whether Mr. Thomas will be successful on any of these matters, but considering a totality of the facts and circumstances, it does not appear that employing Butler Snow will lead to the expeditious resolution of these proceedings.

Additionally, the Court must note that Mr. Thomas is represented by one of the best bankruptcy attorneys in the city, if not the country. Mr. Thomas himself admitted that Mr. Coury has done a fine job. There has been no showing that Mr. Coury or his office is unable to adequately respond to the motions for summary judgment.

In short, the Court is somewhat at a lost as to why Mr. Thomas would seek to employ Butler Snow a mere 18 days before his responses are due. Therefore, the objection of the United States Trustee is sustained, and the application to employ Butler Snow is denied.

CONCLUSIONS

Mr. Thomas has failed to show how employing Butler Snow will protect the interests of the estate and its creditors. He also has failed to show how employing Butler Snow will lead

leads to the efficient, expeditious, and economical resolution of the bankruptcy proceedings. The Court agrees with the United States Trustee and sustains his objection. Therefore, the Court does not believe it is appropriate to approve the application to employ Butler Snow.

Accordingly, based on all the foregoing, IT IS ORDERED AND NOTICE IS HEREBY GIVEN that:

1. The application to employ Butler Snow is hereby denied.

2. The Bankruptcy Court Clerk shall cause a copy of this Memorandum, Orders, and Notice of the entry thereof to be sent to the following interested entities:

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