

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT**

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|-----------------|---|-----------|----------------|
| IN RE: | : | CASE Nos. | 18-50122 (JAM) |
| | : | | |
| HANDSOME, INC., | : | CHAPTER | 11 |
| | : | | |
| DEBTOR. | : | ECF No. | 3 |

ORDER DENYING DEBTOR’S APPLICATION TO EMPLOY HARLOW, ADAMS & FRIEDMAN, P.C. AS ATTORNEYS FOR THE DEBTOR

I. Procedural Background

On February 1, 2018, Handsome, Inc. (the "Debtor"), filed an Application to Employ Harlow, Adams & Friedman P.C. as Attorneys for Debtor (the "Application," ECF No. 3). On February 16, 2018, the United States Trustee (the "UST"), filed an Objection to the Application (the "Objection," ECF No. 23). The Objection asserts that Harlow, Adams, & Friedman ("HAF"), is unable to satisfy the requirements of 11 U.S.C. § 327(a) and Federal Rule of Bankruptcy Procedure 2014(a) because there is a conflict of interest due to HAF's undisclosed attorney/client relationship with Cascella & Son Construction, Inc. ("Cascella & Son"), an affiliate of the Debtor.

On March 8, 2018, the Debtor filed a Reply to the Objection (the "Reply," ECF No. 34), followed on March 15, 2018 by a Supplemental Affidavit in Support of Application to Employ (the "Supplemental Affidavit," ECF No. 37). In the Reply, the Debtor argues that (i) the failure to disclose relevant information should be excused because the Debtor’s petition was filed under emergency circumstances four days prior to the redemption period of a tax sale conducted by the

Town of Monroe; (ii) that Cascella & Son is not an affiliate of the Debtor, is not a tenant of the Debtor, and no tenancy between the two companies ever existed; and (iii) the Debtor has no claim against Cascella & Son. In the Supplemental Affidavit, Attorney James Nugent (“Attorney Nugent”): (i) disclosed his previous representations of Mr. Todd Cascella (“Mr. Cascella”), and Mrs. Mona Cascella (“Mrs. Cascella”); (ii) stated that Mr. Cascella is a guarantor for several of the Debtor’s corporate liabilities; and (iii) argues that the Debtor and Cascella & Son are not affiliates. The Supplemental Affidavit also includes a conflict waiver signed by Mr. Cascella on behalf the Debtor.

After an initial continuance requested by the Debtor, and a second continuance based on inclement weather, the hearing on the Application was held on March 27, 2018. At the conclusion of the hearing, the Court continued the matter to allow the parties to brief the issues of whether the proposed employment of HAF and Attorney Nugent violates 11 U.S.C. § 327(a) and Federal Rule of Bankruptcy Procedure 2014(a), and whether the Debtor and Cascella & Son are affiliates. On April 17, 2018, the Debtor filed a Brief Re: Affiliate Status and Alleged Conflict of Interest (the “Debtor’s Brief,” ECF No. 42). On May 1, 2018, the UST filed a Reply Brief Re: Debtor’s Response to the Trustee’s Objection to the Debtor’s Application to Employ (the “UST’s Reply,” ECF No. 50). After the continued hearing held on May 22, 2018, the Court took the matter under advisement.

II. Factual Background

On February 1, 2018, the Debtor filed a voluntary Chapter 11 petition. The Debtor is operating as a debtor in possession and no Official Committee of Unsecured Creditors has been appointed in this case. The Debtor’s Amended Schedule A/B (ECF No. 20), states the Debtor owns in fee simple undeveloped real property commonly known as 125 Garder Road, Monroe,

Connecticut (the "Garder Road Property")¹ and 490 Fan Hill Road, Monroe, Connecticut (the "Fan Hill Road Property"). The Debtor's Amended Petition (ECF No. 31), Amended Schedules A/B, H, and E/F (ECF Nos. 20, 21, and 59, respectively), and Statement of Financial Affairs (ECF No. 32), are all signed by Mr. Cascella in his capacity as the Debtor's President and sole shareholder.

Mr. Cascella is also the President and sole shareholder of Cascella & Son, which filed its own Chapter 11 petition on April 7, 2014. *See In re Cascella & Sons, Inc.*, Case No. 14-50518. Attorney Nugent was appointed as counsel to Cascella & Son in its Chapter 11 case. *See* Case No. 14-50518, ECF Nos. 33 and 36. Cascella & Son operates a quarry and excavation business at the Garder Road Property. *See* Cascella & Son's Third Amended Disclosure Statement. ("Cascella & Son's Third Disclosure Statement," Case No. 14-50518 ECF No. 213).

According to the Debtor's Amended Schedule H, Cascella & Son is a codebtor on debts owed to TD Bank in the amount of \$1,115,000.00, and to MD & Blasting in the amount of \$5,000.00. In addition, Mr. Cascella is a codebtor on eleven debts with the Debtor, including both of those owed by the Debtor and Cascella & Son to TD Bank and MD & Blasting. Mrs. Cascella is also a codebtor on several of the Debtor's debts.² *See* Amended Schedules H, EF (ECF Nos. 21 and 59). There is no evidence of any payments from Cascella & Son to the Debtor for the use of the Garder Road Property or for the materials excavated. Furthermore, the Debtor

¹ It was brought to the Court's attention at a July 24, 2018 hearing on the Town of Monroe's Motion to Intervene in the Debtor's adversary proceeding, *Handsome, Inc. v. Marek, et al*, Case No. 18-5027, that the Debtor does not hold fee simple title to the Garder Road Property, despite its clear representation to the contrary in its Schedule A/B. *See* ECF No. 20. Whatever title interest the Debtor had in the Garder Road Property was foreclosed when the law days passed after a judgment of strict foreclosure entered on June 10, 2010 in favor of the Plaintiff, MD Drilling. *See Handsome, Inc. v. Planning and Zoning Comm'n of Town of Monroe*, 317 Conn. 515, 530 (2015).

² Mrs. Cascella filed a Chapter 11 case on May 25, 2017. The case was converted to Chapter 7 on April 26, 2018. *See In re Mona Cascella*, Case No. 17-50598.

has stated that no such payments were ever part of an agreement between the two companies.

See Reply, 4-5.

Common debts owed to various creditors by the Debtor, Cascella & Son, Mr. Cascella, and Mrs. Cascella, as well as common facts related to the Debtor's bankruptcy estate, the bankruptcy estate of Cascella & Son, and/or of Mr. Cascella and Mrs. Cascella are as follows:

| <u>Common Debts</u> | | | | |
|--|---|--------------------------|------------------------|-------------------------|
| Creditor listed on Debtor's Amended Schedule H | Amount (Debtor's Second Amended Schedule E/F, ECF No. 59) | Co-Debtor Cascella & Son | Co-Debtor Mr. Cascella | Co-Debtor Mrs. Cascella |
| TD Bank | \$1,115,000.00 | X | X | X |
| MD & Blasting | \$5,000.00 | X | X | |
| Bank of America | \$22,000.00 | | X | X |
| Community Capital Fund, Inc. | \$130,000.00* | | X | X |
| Juda Epstein, Esq. | \$25,000.00 | | X | X |
| Naugatuck Valley Savings | \$1,200,000.00* ³ | | X | X |
| Shipman & Goodwin | \$85,000.00 | | X | X |
| Webster Bank | \$160,000.00 | | X | X |
| BCI Financial Corp. | \$18,000.00 | | X | |
| GMAC Loan | \$12,000.00 | | X | |
| Spath-Bjorklund Assoc., Inc. | \$49,600.00 ⁴ | | X | |

³ *The Debtor's Second Amended Schedule E/F, ECF No. 59, which was filed on July 17, 2018, does not list the debts owed to Community Capital Fund, Inc. or Naugatuck Valley Savings, even though both of those creditors are listed in the Debtor's Amended Schedule H, ECF No. 21. In the Debtor's First Amended Schedule E/F, ECF No. 33, paragraph 2.1 lists Community Capital Fund, Inc.'s claim amount at \$130,000.00, and paragraph 2.3 lists Naugatuck Valley Savings' claim amount at \$1,200,000.00.

⁴ See Debtor's Amended Schedule D, ECF No. 33 at ¶ 2.4.

| <u>Common Facts</u> | | | | |
|--|--|--|--|--|
| Assets | Debtor's Chapter 11 Case | Cascella & Son Chapter 11 Case No. 14-50518 | Mr. Cascella | Mrs. Cascella Case No. 17-50598 |
| 2 Easton Heights Lane, Easton, CT (the "Easton Heights Property") | Debtor's Principal Place of Business (ECF No. 1) | Cascella & Son's Principal Place of Business. <i>See</i> Cascella & Son's Petition (Case No. 14-50518 ECF No. 1). | Defendant in <i>Com Link Inc. v. Todd Cascella, et al.</i> FBT-CV-14-6042811-S | Resides at Easton Heights Property; Defendant in <i>Com Link Inc. v. Todd Cascella, et al.</i> FBT-CV-14-6042811-S |
| Garder Road Property | Claims to own in Fee Simple (ECF No. 20). | Operates quarry business on Garder Road Property. <i>See</i> Cascella & Son's Third Disclosure Statement, 4 (Case No. 14-50518 ECF No. 213). | President, Principal in, and 100% Owner of the Debtor and Cascella & Son | |
| Lawsuit: <i>Handsome Inc. et al. v. Town of Monroe et al.</i> , Case No. 3:11-cv-01288-RNC | Plaintiff in Lawsuit | The Debtor has committed to investing \$200,000 to \$350,000 from recovery to fund the Chapter 11 Plan in the Cascella & Son's case. <i>See</i> Cascella & Son's Third Disclosure Statement, 6, 9-10, Ex. B (Case No. 14-50518 ECF No. 213). | Plaintiff in Lawsuit | Plaintiff in Lawsuit |
| Lawsuit: <i>Handsome Inc. et al. v. Town of Monroe et al.</i> , Case No. 3:14-cv-00622-RNC | Plaintiff in Lawsuit | The Debtor has committed to investing \$200,000 to \$350,000 from recovery to fund the Chapter 11 Plan in the Cascella & Son's case. <i>See</i> Cascella & Son's Third Disclosure Statement, 6, 9-10, Ex. B (Case No. 14-50518 ECF No. 213). | Plaintiff in Lawsuit | Plaintiff in Lawsuit |

III. Discussion

A. Legal Standard

Section 327 of the Bankruptcy Code governs a debtor's ability to retain professionals to represent the estate. 11 U.S.C. § 327. Subsection (a) provides a two part test requiring that all

professionals employed (1) “do not hold or represent an interest adverse to the estate,” and (2) are “disinterested persons.” 11 U.S.C. § 327(a); *In re AroChem Corp.*, 176 F.3d 610, 621 (2d Cir. 1999). The purpose of Section 327 is to ensure that all professionals “tender undivided loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities.” *In re AroChem*, 176 F.3d at 621 (quoting *In re Leslie Fay Companies*, 175 B.R. 525, 532 (Bankr. S.D.N.Y. 1994)). A bankruptcy court “should exercise its discretionary powers over the approval of professionals in a manner which takes into account the particular facts and circumstances surrounding each case and the proposed retention before making a decision.” *Id.* (citations omitted).

i. Adverse Interest

The Bankruptcy Code does not define what it means to “hold or represent an interest adverse to the estate,” but in *AroChem*, the Second Circuit adopted the definition articulated in the case *In re Roberts*, 46 B.R. 815, 827 (Bankr. D. Utah 1985), *aff’d in relevant part and rev’d and remanded in part on other grounds*, 75 B.R. 402 (D. Utah 1987). *In re AroChem*, 176 F.3d at 623. Accordingly, in the Second Circuit, to hold or represent an adverse interest means

(1) to possess or assert any economic interest that would 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 (2) to possess a predisposition under circumstances that render such a bias against the estate.

Id. (quoting *In re Roberts*, 46 B.R. at 827). Determining whether an adverse interest exists is a case-by-case inquiry. *Id.*; *In re CF Holding Corp.*, 164 B.R. 799, 806 (Bankr. D. Conn. 1995). “The question of adverse interest ultimately turns on whether the particular facts at issue within the scope of the proposed employment call into question the incentive of counsel to act with undivided loyalty to the estate.” *In re AroChem Corp.*, 181 B.R. 693, 700 (Bankr. D. Conn. 1995), *subsequently aff’d*, 176 F.3d 610 (2d Cir. 1999).

Rather than worry about the potential/actual dichotomy it is more productive to ask whether a professional has ‘either a meaningful incentive to act contrary to the best interests of the estate and its sundry creditors—an incentive sufficient to place those parties at more than acceptable risk—or *the reasonable perception of one.*’

In re Leslie Fay Companies, Inc., 175 B.R. 525, 533 (Bankr. S.D.N.Y. 1994) (quoting *In re Martin*, 817 F.2d 175, 180–81 (1st Cir. 1987)) (emphasis added). “In other words, if it is plausible that the representation of another interest may cause the debtor's attorneys to act any differently than they would without that other representation, then they have a conflict and an interest adverse to the estate.” *Id.*

ii. Disinterested Person

The Bankruptcy Code defines a “disinterested person” as a person that “(A) is not a creditor, an equity security holder, or an insider; . . . and (C) does not have an interest materially adverse to the interest of the estate or of any class of creditors . . . 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. § 14(A), (C). The two requirements of 11 U.S.C. § 327(a) “obviously overlap,” *In re CF Holding Corp.*, 164 B.R. at 806, “are duplicative . . . and form a single test to judge conflicts.” *In re Granite Partners, L.P.*, 219 B.R. 22, 33 (Bankr. S.D.N.Y. 1998).

Bankruptcy Rule 2014(a) supplements section 327(a), and states that an order approving the employment of an attorney will only be made on application. The rule requires that an application for employment 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.

Fed. R. Bankr. P. 2014(a).

B. Analysis

The UST argues: (i) there is an inherent conflict of interest because Cascella & Son is an affiliate of the Debtor; and (ii) the failure of the Debtor, HAF, and Attorney Nugent to fully disclose the myriad of relevant connections among the Debtor, Cascella & Son, Mr. Cascella, Mrs. Cascella, HAF, and Attorney Nugent violate Federal Rule of Bankruptcy Procedure 2014(a). *See* Objection, 4 n. 1. In response, the Debtor and Attorney Nugent dispute that the Debtor and Cascella & Son are affiliates. Reply, 2.

The term “affiliate” means

corporation 20 percent or more of whose outstanding securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor . . .

11 U.S.C. § 101(2)(B). Cascella & Son is a corporation in which 20 percent or more of its outstanding securities are directly owned, controlled, or held with the power to vote by Mr. Cascella. Mr. Cascella also directly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the Debtor. Cascella & Son and the Debtor are clearly affiliates as defined in 11 U.S.C. § 101(2)(B).

Despite the representations made by Attorney Nugent in **this case**, in Cascella & Son’s Third Disclosure Statement, Cascella & Son represents that the Debtor **is its affiliate**. *See* Cascella & Son’s Third Disclosure Statement, Case No. 14-50518 ECF No. 213. Cascella & Son asserts that its plan feasibility is “dependant [sic] on a successful result in the lawsuit filed by the **Debtor’s affiliate** which has sued the Town of Monroe.” *Id.* at 9 (emphasis added). Cascella & Son’s Third Disclosure Statement also provides:

Affiliates’s [sic] obligation to fund the Plan. **Handsome, Inc., an affiliate of the Debtor**, has committed to fund the plan. The Owner and Principle of it and of the Debtor [Cascella & Son], Todd Cascella, has submitted his Declaration in Support

of the Plan in which he commits to cause Handsome, Inc. to provide up to \$350,000.00 in funding.

Id. at 10. *See also* Cascella & Son's Third Amended Plan of Reorganization (Case No. 14-50518 ECF No. 214) at 13 ("the Debtor's owner's related company, called Handsome Inc., will loan funds from its anticipated successful recovery in a lawsuit against the Town of Monroe," and "[t]he **affiliate** will capitalize the Debtor with a minimum of \$200,000.00 and up to \$350,000.00 . . ."); *id.* at 14-15.

In addition to the Debtor and Cascella & Son being affiliates, the intertwining nature of their businesses and HAF's and Attorney Nugent's past and present representation of the Debtor, Cascella & Son, Mr. Cascella, and Mrs. Cascella call into question HAF's and Attorney Nugent's incentive to act with "undivided loyalty" to the Debtor's estate. *See In re AroChem*, 181 B.R. at 700. Under the particular facts of this case, it is plausible that there is an incentive for HAF and Attorney Nugent to act contrary to the best interests of the Debtor's estate and its creditors. At the very least, the circumstances create the reasonable perception of such an incentive.

Mr. Cascella has competing fiduciary duties to both of his companies, and HAF's and Attorney Nugent's loyalty to each will similarly compete if they serve as general counsel to both. The Debtor is allowing Cascella & Son to excavate and remove materials from the Garder Road Property without payment. Even if this is a business model that Mr. Cascella as the President and the sole shareholder of both companies has employed in the past, it is not in the best interest of the Debtor's creditors. The excavated materials could potentially generate revenue for the Debtor's estate. Finally, Cascella & Son's Third Amended Plan of Reorganization relies on the anticipated recovery of funds from the pending lawsuit against the Town of Monroe, a lawsuit in which the Debtor is a party but Cascella & Son is not. If the Debtor prevails in the Town of

Monroe lawsuit, the Debtor and Cascella & Son will be adverse to each other because both bankruptcy estates will claim an interest in any monetary judgment.

Based on the particular facts of this case, it is certainly plausible that the concurrent representation of the Debtor and Cascella & Son will cause HAF and Attorney Nugent to act differently than they would if they were not also representing Cascella & Son. *See In re Leslie Fay Companies, Inc.* 175 B.R. at 533; MODEL RULES OF PROF'L CONDUCT, r. 1.7 (AM. BAR. ASS'N 2016). The incentive of HAF and Attorney Nugent to act with undivided loyalty to the Debtor's estate and its creditors is necessarily called into question in this case. Accordingly, the Application to Employ is denied.

IV. Conclusion

After careful consideration of the Application, the Objection, the Reply, the Supplemental Application, the Debtor's Brief and the UST's Reply, the arguments presented by both parties at the hearing held on May 22, 2018, and the facts of this case, it is hereby

ORDERED: the Application is **DENIED**; and it is further

ORDERED: the Debtor must file an Application to Employ new counsel within thirty (30) days of the entry of this order or the Debtor's Chapter 11 Case may be dismissed without further hearing.

Dated at Bridgeport, Connecticut this 14th day of August, 2018.

Julie A. Manning
Chief United States Bankruptcy Judge
District of Connecticut