

**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI**

IN RE:

**WINTERVILLE MARINE SERVICES, INC.,
A CORPORATION,**

CASE NO. 05-13815-NPO

DEBTOR.

CHAPTER 7

**MEMORANDUM OPINION AND ORDER GRANTING
THE TRUSTEE'S FIRST AMENDED APPLICATION TO EMPLOY
ASPERGER ASSOCIATES LLC**

This matter came before the Court for hearing on March 12, 2008, (the "March Hearing") on The Trustee's First Amended Application to Employ Asperger Associates LLC (the "First Amended Application") (Dk. No. 36) filed by Stephen P. Livingston, the chapter 7 trustee (the "Trustee"); the Memorandum in Opposition to Trustee's First Amended Application to Employ Asperger Associates LLC (the "Response to First Amended Application") (Dk. No. 41) filed by Navigators Management Company, Inc. f/d/b/a Somerset Marine, Inc. ("Navigators") and American Home Assurance Company ("American Home"); and the Joinder of the Opposition to Trustee's First Amended Application to Employ Asperger Associates, LLC filed by American Milling Company ("American Milling") (Dk. No. 42) in the above-referenced chapter 7 bankruptcy case. At the March Hearing, the Trustee represented himself, William R. Armstrong, Jr. and Kevin J.B. O'Malley represented Navigators and American Home, and John Halpern represented American Milling. The Court, having considered the pleadings, testimony, exhibits, and arguments of counsel presented at the March Hearing, finds that the First Amended Application is well taken and should be granted

as set forth herein. Specifically, the Court finds as follows:¹

Jurisdiction

This Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). Notice of the Hearing on the First Amended Application was proper under the circumstances.

Facts

The following undisputed facts were taken from the First Amended Application and the Response to First Amended Application:

1. Prior to filing its chapter 7 petition in bankruptcy, Winterville Marine Services, Inc., a Corporation (the “Debtor”), was engaged in the business of providing various marine services, including providing crews for inland river tow boats.

2. On April 4, 1998, the M/V Anne Holly (the “Anne Holly”) - a tow boat that was owned by American Milling and crewed by the Debtor - allided with a pier supporting a bridge that spans across the Mississippi River in St. Louis, Missouri.

3. John O. Johnson (“Captain Johnson”), an employee of the Debtor, was captain of the Anne Holly at the time of the allision.

4. As a result of the allision, several of the barges being towed by the Anne Holly broke loose and began to drift down-river. The barges smashed into a nearby riverboat casino, the Admiral. At the time, the Admiral was owned by President Riverboat Casino-Missouri, Inc. (the “President Casino”).

¹ The following constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, which is made applicable to contested matters by Federal Rule of Bankruptcy Procedure 9014.

5. Following the foregoing events (the “Anne Holly Casualty”), President Casino and numerous other parties, including Essex Insurance Company (“Essex”),² asserted liability claims (the “Claimants”) against the Debtor, American Milling, and Captain Johnson for their roles in the Anne Holly Casualty. In response, the Debtor and American Milling filed suit in the United States District Court for the Eastern District of Missouri (the “Eastern District of Missouri”), seeking to limit their potential liability to the value of the Anne Holly (the “Limitation Action”). Eventually, American Milling’s liability was limited to the asserted value of the Anne Holly, but the Debtor and Captain Johnson were determined not to be entitled to limit their liability. Accordingly, the Debtor and Captain Johnson may be subject to liability to the full extent of the Claimants’ damages. Asperger Associates LLC (“Asperger”) represents Essex and President Casino in the Limitation Action.

6. Prior to the Anne Holly Casualty, American Milling had entered a contract to provide the Debtor with liability insurance coverage protecting the Debtor from claims which might arise from its operation of the Anne Holly. American Milling thus obtained primary and excess insurance coverage for itself and the Debtor for liability claims arising from their operation of the Anne Holly. The excess insurance (the “Bumbershoot Policy”) was provided by Navigators and American Home.

7. Navigators and American Home, however, denied coverage under the Bumbershoot Policy to the Debtor and Captain Johnson for the Anne Holly Casualty, contending that the Debtor and Captain Johnson never were intended to be additional insureds with American Milling. On August 7, 2003, the Debtor entered into a Waiver and Release Agreement (the “Waiver and

² Essex had issued a business interruption insurance policy to President Casino and, by virtue of having paid out the proceeds of the policy, is subrogated to certain claims arising in favor of President Casino in connection with the Anne Holly Casualty, including certain claims against the Debtor.

Release”) with Navigators, American Home, and American Milling whereby the Debtor purported to waive and release its right to coverage under the Bumbershoot Policy. The Waiver and Release also purportedly released any potential breach of contract claim the Debtor might have against American Milling for failing to ensure that the Debtor was covered under the Bumbershoot Policy.

8. In addition to representing Essex in the Limitation Action, Asperger represents Essex³ in the United States District Court for the Eastern District of Missouri in connection with a separate, but related, declaratory judgment action brought by Navigators and American Home. Navigators and American Home seek a finding that the liability coverage provided under the Bumbershoot Policy does not extend to the Debtor or Captain Johnson pursuant to the Waiver and Release signed by the Debtor.

9. On June 1, 2005, the Debtor filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code.⁴ Thereafter, the Trustee initiated an adversary proceeding (the “Adversary”)⁵ by filing a complaint (the “Adversary Complaint”) against Navigators, American Home, and American Milling. In the Adversary, the Trustee seeks to “avoid and nullify the Debtor’s waiver of coverage under the Bumbershoot Policy or, alternatively, to avoid the release and recover the value of the Debtor’s breach of contract against American Milling.” (First Amended Application, p. 5, ¶ 22).

10. The Trustee also filed his original Trustee’s Application to Employ Asperger

³ Asperger also represents St. Paul Fire and Marine Insurance Company (“St. Paul”), another subrogee of President Casino.

⁴ Hereinafter all code sections refer to the United States Bankruptcy Code located at Title 11 of the United States Code unless otherwise noted.

⁵ The Adversary is currently pending before this Court as adversary proceeding number 07-01085, Stephen P. Livingston v. Navigators Management Company, Inc. f/d/b/a Somerset Marine, Inc., American Home Assurance Company, and American Milling Company.

Associates LLC as Special Counsel Pursuant to 11 U.S.C. § 327(e) (the “Application”) (Dk. No. 18) seeking to employ Asperger as special counsel to prosecute the Adversary.⁶ Navigators and American Home filed a Memorandum in Opposition to Trustee’s Application to Employ Asperger Associates LLC as Special Counsel Pursuant to 11 U.S.C. § 327(e) (Dk. No. 25) objecting to the employment of Asperger, to which American Milling filed a Joinder (Dk. No. 26). The Trustee also filed a Reply Brief (Dk. No. 28).

11. On November 28, 2007, the Court held a hearing (the “November Hearing”) on the Application and related pleadings. After considering the arguments of counsel and the exhibits presented at November Hearing, the Court determined that the Application should be denied because a) the Trustee brought the Application under § 327(e)⁷, an inapplicable section of the Bankruptcy Code; b) the Trustee failed to demonstrate that Asperger had satisfied the standards set forth in

⁶ The pleadings reflect that Asperger has agreed to represent the Trustee with respect to Count I of the Adversary Complaint, *i.e.*, the count seeking to avoid the Waiver and Release to establish coverage under the Bumbershoot Policy, without any fee or charge to the bankruptcy estate. The pleadings further reflect that in the event the Trustee does not succeed in avoiding the Waiver and Release to establish coverage under the Bumbershoot Policy, Asperger has agreed to represent the Trustee with respect to Count II of the Adversary Complaint, *i.e.*, the count seeking to avoid the Waiver and Release to pursue the breach of contract claim against American Milling, on a contingency-fee basis of one-third (1/3) of any amounts recovered by the Trustee on Count II, plus Asperger’s out-of-pocket expenses.

⁷ Section 327(e) provides:

(e) The trustee, with the court’s approval, may employ, for a specified purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

In that Asperger had not represented the Debtor previously, the Court found § 327(e) to be inapplicable to the Application at hand.

§ 327(a); c) the Trustee failed to present evidence that Asperger's clients had waived any conflicts of interest; and d) the Trustee failed to demonstrate that he was unable to employ other special counsel to prosecute the Adversary. Consequently, the Court entered an Order denying the Application (Dk. No. 32).

12. The Trustee subsequently filed the First Amended Application wherein he addressed the concerns raised by the Court at the November Hearing. Following the filing of the responsive pleadings noted previously, the Court conducted the March Hearing.⁸ Each of the issues raised at the March Hearing will be considered herein.

Discussion

I. Section 327(a)

In the First Amended Application, the Trustee seeks to employ Asperger pursuant to § 327(a). Section § 327(a) provides that “the trustee, with the court’s approval, may employ one or more attorneys, . . . 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.” 11 U.S.C. § 327(a). Cases have interpreted this provision to apply “both to the trustee’s general counsel and to counsel hired for specified, limited purposes.” See In re Contractor Technology, Ltd., 2006 WL 1492250, *5 (S.D. Tex. May 30, 2006) (citing In re West Delta Oil Co., Inc., 432 F.3d 347, 355 (5th Cir. 2005)). In his Affidavit, the Trustee states that he seeks to retain Asperger for the limited purpose of representing the Trustee in the Adversary. (First Amended Application, Ex. C, ¶ 2). Given that Asperger will be limited to representing the Trustee in the

⁸ No one appeared on behalf of Asperger at the November Hearing. Bary L. Gassman testified on behalf of Asperger at the March Hearing.

Adversary, the Court finds that the Application properly is brought under § 327(a).

II. Section § 327(a) Requirements

As noted, § 327(a) provides that attorneys employed by a trustee may “not hold or represent an interest adverse to the estate,” and must be “disinterested” persons. 11 U.S.C. § 327(a); *see also In re Contractor Technology, Ltd.*, 2006 WL 1492250, *5 (S.D. Tex. May 30, 2006) (citing *In re West Delta Oil Co., Inc.*, 432 F.3d 347, 355 (5th Cir. 2005) (“The attorney must (i) ‘not hold or represent an interest adverse to the estate’ and (ii) be ‘disinterested.’”). Bankruptcy courts have defined the term “hold an adverse interest to the estate” as:

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

In re Contractor Technology, Ltd., 2006 WL 1492250, *6 (S.D. Tex. May 30, 2006); *In re West Delta Oil Co., Inc.*, 432 F.3d 347, 354 (5th Cir. 2005). “Whether an adverse interest exists is best determined on a case-by-case basis.” *Id.* Moreover, the “concept of ‘adverse interest’ has also been articulated in terms of motivation: whether the attorney possesses ‘a meaningful incentive to act contrary to the best interests of the estate and its sundry creditors.’” *Id.* “[W]here the interest of the special counsel and the interest of the estate are identical with respect to the matter for which the special counsel is retained, there is no conflict and the representation can stand.” *Id.* (citing *In re AroChem Corp.*, 176 F.3d 610, 622 (2d Cir. 1999)).

Should Asperger successfully represent the Trustee in setting aside the Waiver and Release, a determination may be made as to whether the liability coverage provided under the Bumbershoot Policy extends to the Debtor (or Captain Johnson). If liability coverage does extend to the Debtor,

the Claimants of the Anne Holly Casualty may recover damages under the Bumbershoot Policy.⁹ Thus, in the Adversary, the interests of President Casino, Essex, and St. Paul are aligned with the Debtor's estate because each party seeks to set aside the Waiver and Release to attempt to establish coverage for the Debtor under American Milling's excess insurance policy, which was underwritten by Navigators and American Home. To that end, the Court concludes that in the Adversary, Asperger does not hold or represent an interest adverse to the estate.¹⁰

As further observed in In re Contractor Technology, Ltd., 2006 WL 1492250, *7 (S.D. Tex. May 30, 2006), “[s]ection 327(a) also requires that counsel for the trustee be disinterested.” The Bankruptcy Code defines a ‘disinterested’ person as one who “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.” 11 U.S.C. § 101(14)(E). Moreover, “to violate the requirements of § 101(14)(E), the professional *personally* must ‘have’ the prohibited interest;” Id. at *7 (emphasis added). To that end, Asperger avers in his Affidavit that neither he nor any member of his law firm has any connection or affiliation with

⁹ Alternatively, should Asperger successfully represent the Trustee in setting aside the Waiver and Release, the Trustee may prosecute the action against American Milling for its alleged breach of contract in failing to provide the excess insurance coverage to the Debtor, thereby creating a potential asset for distribution to creditors.

¹⁰ As noted by the Trustee, it is possible that the interests of the Trustee and President Casino and its subrogees could become adverse to one another if, for instance, the Trustee “were to dispute the nature and extent of one or more of the President Parties’ claims against the Debtor.” (First Amended Application, p. 15, ¶ 53). Yet, as further noted by the Trustee, the adjudication of any such dispute would be beyond the narrow scope of Asperger’s limited engagement in the Adversary, *i.e.*, assisting the Trustee in prosecuting the Adversary to set aside the Waiver and Release of coverage under the Bumbershoot Policy or, alternatively, to set aside the Waiver and Release of the alleged breach of contract cause of action against American Milling. Id.; *see also* First Amended Application, Ex. C, ¶ 3.

the Debtor, creditors of the Debtor, parties-in-interest of the Debtor's estate, any of said parties' respective attorneys or accountants, or with the United States Trustee or any person employed in the office of the United States Trustee, except as otherwise disclosed herein. Consequently, Asperger has met the disinterestedness requirement.

Given that the interests of President Casino and its subrogees are aligned with those of the Debtor in the Adversary, and that Asperger has met the disinterestedness standard, the Court finds that the requirements of § 327(a) have been satisfied.

III. Waiver of Conflicts

The Trustee has attached to the First Amended Application the Affidavit of Jeffrey Asperger, who avers that his law firm's representation of the Trustee will not adversely affect its representation of the President Casino, its subrogees, or the Trustee. Also attached are the affidavits of the Trustee; Ralph Vaclavik, on behalf of President Casino; David L. Cushing, on behalf of Essex; and Richard McLaughlin on behalf of St. Paul. Each of those affidavits reflects that Asperger has met with the parties and explained the implications of simultaneous representation with the Trustee. Each party has knowingly waived any claim of conflict of interest and has provided his informed consent to Asperger's simultaneous representation of the parties. Thus, to the extent that any conflicts of interest do exist, the affected parties have waived those conflicts.

However, as observed by Navigators and American Home, the affidavits from Essex and St. Paul technically are insufficient to provide those parties' consent to Asperger's simultaneous representation. That is, the affidavits were executed by a "Senior Claims Examiner" and a "Claims Specialist" respectively, and neither affiant avers that he has authority to bind his company. Accordingly, the Court finds that, subject to the submission to the Court within ten (10) days of this

Memorandum Opinion and Order of amended affidavits by company representatives who specifically state they have authority to bind Essex and St. Paul, the Trustee has allayed the concerns of the Court with regard to his obtaining waivers of conflicts of interest.

IV. The Trustee's Inability to Employ Other Special Counsel

The Trustee testified at the Hearing that he has been unable to find special counsel other than Asperger to represent him in the Adversary because Asperger has an interest, specific to his clients, to set in motion a chain of events: first, to set aside the Debtor's Waiver and Release of the Bumbershoot Policy so that, secondly, a court may determine whether the Bumbershoot Policy provided insurance coverage for the Debtor, which, thirdly, could potentially increase a recovery for Asperger's clients from the proceeds of the Bumbershoot Policy. Accordingly, it is apparent to the Court why the Trustee has been unable to obtain other counsel to pursue the Adversary for him: no other special counsel has a vested interest in recovery of the potential insurance proceeds under the Bumbershoot Policy, which could be payable to Asperger's clients, such as President Casino and Essex.¹¹ Consequently, the Trustee has satisfied the Court's concerns regarding the employment of alternative special counsel.¹²

¹¹ Of course, as an alternative observed in note 9 *infra*, Asperger could represent the Trustee in prosecuting the alleged breach of contract action against American Milling, which could potentially benefit all creditors, not just Asperger's clients.

¹² In the Response to First Amended Application, Navigators and American Home, and American Milling through its Joinder, also maintain that the Amended Application should be denied because "allowing Asperger Associates to represent the Trustee would give that firm . . . access to documents and information that are protected from disclosure by the attorney-client privilege, the joint defense privilege and the work product doctrine." (Response to First Amended Application, p. 6). This Court finds it unnecessary to address those assertions within the context of this Memorandum Opinion and Order. However, if Navigators, American Home, or American Milling are concerned in the future that Asperger may have access to protected documents or information, they should seek appropriate relief in the Eastern District of Missouri.

Conclusion

For the foregoing reasons, the Court finds that the First Amended Application is well taken and should be granted.

A separate final judgment will be entered in accordance with Federal Rule of Bankruptcy Procedure 9021.

IT IS, THEREFORE, ORDERED that the First Amended Application is granted, subject to the filing of waivers of conflicts with attached amended affidavits by company representatives who specifically state they have authority to bind Essex and St. Paul within ten (10) days of the date of this Memorandum Opinion and Order.

SO ORDERED, this the 16th day of April, 2008.

/ s / Neil P. Olack

NEIL P. OLACK

U.S. BANKRUPTCY JUDGE