

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 02-31000

COY LEE McCARTER
SUSAN RYMER McCARTER

Debtors

Case No. 02-30999

GREAT SMOKIES MANAGEMENT COMPANY

Debtor

Case No. 02-30998

ECHOTA DEVELOPMENT, LP

Debtor

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MEMORANDUM ON APPLICATIONS TO EMPLOY ATTORNEY

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

Presently before the court are the April 5, 2002 Applications to Employ Attorneys Under General Retainer filed by Debtors Coy Lee McCarter and Susan Rymer McCarter (collectively, the McCarters), Great Smokies Management Company (GSMC), and Echota Development, LP (Echota). The Applications seek to simultaneously employ attorney Craig J. Donaldson and the law firm of Kennerly, Montgomery & Finley, P.C. (collectively, Donaldson), to represent the Debtors generally in the performance of all legal duties required in each of the three bankruptcy cases now at issue.

The United States Trustee (U.S. Trustee) objects to the Applications, contending that the three Debtors have adverse interests by virtue of a guarantor/codebtor relationship between the McCarters and the other two Debtors.¹ The parties have filed stipulations of fact and have briefed their positions to the court. An evidentiary hearing is not required.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A) (West 1993).

I

Each of the Debtors filed a Voluntary Petition under Chapter 11 on February 26, 2002. Debtor Coy Lee McCarter is the sole shareholder of GSMC, a Tennessee corporation, which was administratively dissolved on March 16, 2001. Coy Lee McCarter makes all decisions for GSMC.

Echota is a Tennessee limited partnership in which the McCarters are the limited partners. Echota's general partner, Echota Corporation, of which Coy Lee McCarter is the sole shareholder,

¹ The U.S. Trustee made her objections orally in open court at a May 2, 2002 hearing on the Applications. The court did not require the filing of a written objection.

was administratively dissolved on March 15, 2002, and, like GSMC, is currently classified as "inactive" by the Tennessee Secretary of State. Coy Lee McCarter makes all decisions for Echota.

None of the Debtors are creditors of one another. However, the McCarters are guarantors and/or codebtors of debts of both Echota and GSMC. Also, the McCarters are personally obligated on a note to National Bank of Tennessee, but the collateral pledged to secure the note is owned by Echota.

II

Section 327 of the Bankruptcy Code governs employment of professional persons by trustees in a bankruptcy case. Material to the present cases is § 327(a) which provides:

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, 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.

11 U.S.C.A. § 327(a) (West 1993) (emphasis added); *see also* 11 U.S.C.A. § 1107(a) (West 1993) (granting to the present Debtors, as debtors in possession, the rights, powers, and duties of a trustee). Thus, the Debtors may simultaneously employ Donaldson as their attorney only if he is a "disinterested person" who does not "hold or represent an interest adverse to the estate[.]" 11 U.S.C.A. § 327(a).

The phrase "disinterested person" is a defined term within the Bankruptcy Code. *See* 11 U.S.C.A. § 101(14)(A)-(E) (West 1993). The parties stipulate that only subsection 101(14)(E) is

relevant to the issue of Donaldson's "disinterestedness." That subsection provides in material part that a disinterested person:

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.A. § 101(14)(E). The U.S. Trustee's argument under § 327(a)'s "disinterestedness" prong is identical to her argument under the "adverse interest" prong - that the McCarters' roles as owners and guarantors create a conflict that disqualifies Donaldson from simultaneously representing the debtors in possession in all three bankruptcy cases.

III

Courts are divided as to whether representation of a "not disinterested" party also renders the attorney "not disinterested" under §§ 101(14)(E) and 327(a). *Compare Professional Dev. Corp. v. Childress (In re Professional Dev. Corp.)*, 140 B.R. 467, 470 (W.D. Tenn. 1992) ("A close reading of the statutes indicates that § 101(14)(E) defines 'disinterested' as 'having' an interest materially adverse to the estate and not 'representing' such an interest[.]" (emphasis added), *with Roger J. Au & Son, Inc. v. Aetna Ins. Co. (In re Roger J. Au & Son, Inc.)*, 64 B.R. 600, 604 (N.D. Ohio 1986) ("'[H]aving' an interest adverse to the estate, and 'holding or representing' an interest adverse to the estate, are identical considerations in the Court's view.") (emphasis added).

This court views "disinterestedness" and "adverse interest" as two clearly distinct prongs of § 327(a). *See Gustafson v. Alloyd Co., Inc.*, 115 S. Ct. 1061, 1069 (1995) (citing the "rather sensible rule[] of statutory construction" that courts must "avoid a reading which renders some

words altogether redundant”); *see also Professional Dev. Corp.*, 140 B.R. at 470. However, because the second prong of § 327(a) would be violated by Donaldson’s multiple representation, the court need not address the effect that such employment would have on his “disinterestedness.”

The McCarters, by virtue of their roles as guarantors and codebtors of GSMC and Echota, and by virtue of the Echota collateral securing the McCarters’ personal debt, hold “interest[s] adverse to the estate[s]” of GSMC and Echota. Section 327(a) prohibits Donaldson from simultaneously representing those adverse interests. That Coy Lee McCarter is the ultimate decision maker for both GSMC and Echota does not obviate the need for separate counsel to represent the conflicting interests of the McCarters and the unsecured creditors of the other two estates. *See Ford Motor Credit Co. v. Weaver*, 680 F.2d 451, 462 n.8 (6th Cir. 1982) (The trustee or debtor in possession owes a fiduciary duty to, and “primarily represents[,] the unsecured creditors of the estate.”) (citation omitted); *cf. Tennessee v. Locust*, 914 S.W.2d 554, 557 (Tenn. Crim. App. 1995) (“[A]ttorneys cannot represent conflicting interests or discharge inconsistent duties. They simply cannot serve two masters.”).

While Donaldson is disqualified from representing two of the three Debtors, he is not disqualified from representing all three. The court will accordingly allow the McCarters ten days to choose the case in which Donaldson’s employment is sought. At the time that choice is made, the court will expect the other two Debtors to withdraw their respective Applications or, if they

prefer, the court will deny them. In the event the McCarters fail to make a timely choice, the court will use its discretion and will arbitrarily deny two of the three Applications.²

An appropriate order will be entered.

FILED: June 12, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

² On June 4, 2002, the Debtors collectively filed a "Debtors' Motion for Substantive Consolidation or, in the Alternative, for Joint Administration" requesting that the court substantively consolidate the three cases pursuant to 11 U.S.C.A. § 105(a) (West 1993) or, alternatively, direct that they be jointly administered pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure. This motion is set for hearing on July 11, 2002. The court prefers that independent counsel for each Debtor consider the advisability of going forward on the difficult issue of substantive consolidation.

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ORDER

For the reasons set forth in the Memorandum on Applications to Employ Attorney filed this date, the court directs the following:

1. Craig J. Donaldson and the law firm of Kennerly, Montgomery & Finley, P.C., are disqualified from representing all three Chapter 11 Debtors.
2. The Debtors, within ten (10) days, will withdraw their Application to Employ Attorneys Under General Retainer filed April 5, 2002, in two of the three cases and will tender an order granting the Application to Approve Employment of Attorneys Under General Retainer in the third case.
3. Upon the Debtors' failure to timely comply with paragraph 2 above, the court, without further notice or hearing, will enter its order arbitrarily denying the Application to Employ Attorneys Under General Retainer in two of the three cases. Employment will be approved in the remaining case.

SO ORDERED.

ENTER: June 12, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE