

SO ORDERED.

SIGNED this 31 day of March, 2020.



Austin E Carter

**Austin E. Carter
United States Bankruptcy Judge**

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

In re:)
) Case No. 19-10976-AEC
Thrush Aircraft, Inc.,)
) Chapter 11
Debtor.)
)

**OPINION AND ORDER ON
AMENDED APPLICATION TO EMPLOY**

Before the Court is Debtor Thrush Aircraft, Inc.’s (“Debtor”) *Amended Application to Employ Logue Law, P.C. as Special Counsel for Debtor* (Doc. 186), to which the United States Trustee (“Trustee”) has objected (Doc. 228). The Official Committee of Unsecured Creditors (“Committee”) has joined the Trustee’s Objection (Doc. 233). Counsel for each of these parties appeared at the hearing on this matter.

The Debtor seeks to employ A. Keith Logue of Logue Law, P.C. (“Logue”) as an attorney in the case. In its initial application (Doc. 12), the Debtor asserted that Logue is a disinterested person; however, following the Trustee’s objection (Doc. 178), the Debtor and Logue now acknowledge that Logue is an insider and, therefore, not a disinterested person, based on his familial relationship to an officer of the Debtor. Thus, in its amended application the Debtor seeks to employ Logue

for a special purpose pursuant to 11 U.S.C. § 327(e).¹ The Trustee objects on the grounds that the proposed special purpose is too broad and amounts to conducting the case, which is proscribed by § 327(e).

I. Factual Background

After filing this case, the Debtor filed applications to employ both Stone & Baxter, LLP and Logue to serve as its general bankruptcy counsel. The application to employ Stone & Baxter, LLP was approved, but the Trustee objected to the application to employ Logue, asserting that by virtue of Logue's familial relationship to D. Stanley Logue, the Debtor's chief financial officer, Logue is an insider and cannot be employed under § 327(a). Following the Trustee's objection, the Debtor filed its amended application, restricting the proposed scope of Logue's representation and outlining pre-petition work Logue completed on behalf of the Debtor. This pre-petition representation included assistance in restructuring debt, participation in negotiations and communications with Wells Fargo (the Debtor's primary secured lender), creating a build-out budget for inventory, preparing drafts of bankruptcy filing documents such as schedules and statements of financial affairs, identifying potential liquidators and gathering proposals for liquidation, creating a detailed liquidation plan and liquidation budget, summarizing compliance efforts and strategies for ensuring compliance with applicable labor and wage laws, and gathering voluminous information and documents to create the Debtor's bankruptcy schedules.

The amended application seeks to retain Logue to render specific services as special counsel to the Debtor under § 327(e). These services include: (1) advising and assisting the Debtor with respect to general human resources and labor

¹ Unless otherwise indicated, all references herein to "section" or "§" refer to a corresponding section of the Bankruptcy Code, and all references to the "Bankruptcy Code" or the "Code" refer to Title 11 of the United States Code.

matters including compliance with WARN Act and FLSA; (2) advising and assisting the Debtor in working with litigation counsel—other than bankruptcy litigation—in reaching favorable conclusions to outstanding and threatened liability lawsuits; (3) drafting, revising, and amending of Debtor’s schedules and statement of financial affairs;² (4) providing, in cooperation with the Debtor, the Trustee with all required documents and attending the Initial Debtor Interview; (5) advising the Debtor’s bankruptcy counsel regarding previous efforts to workout, negotiate, and resolve forbearance and other agreements with Wells Fargo, to ensure a smooth transition to bankruptcy counsel; and (6) performing all other necessary legal services to the Debtor in connection with the foregoing. The Debtor argues that these proposed services amount to a limited, special purpose.

II. Analysis

Pursuant to §§ 327(a) and 1107(a), a debtor-in-possession holds most rights and responsibilities of a trustee and may employ professional persons, including attorneys, with the court’s approval provided these professional persons (1) hold no interest adverse to the estate and (2) are disinterested persons. However, § 327(e) carves out an exception to the disinterested person requirement, stating:

The trustee, with the court’s approval, may employ, for a specified special 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.

11 U.S.C. § 327(e).

The Debtor carries the burden under § 327(e) to show that: (1) the proposed employment is only for a specified special purpose other than conducting the case,

² When the Debtor filed its petition, its schedules and statement of financial affairs were not complete.

or hold any interest adverse to the debtor or estate with respect to the specified purpose of the proposed employment; and (3) the proposed employment is in the best interest of the estate. *In re Running Horse, LLC*, 371 B.R. 446, 451 (Bankr. E.D. Cal. 2007). The Trustee’s objection is limited to the first element, whether the proposed employment would amount to “conducting the case.”³

Because “conducting the case” is not defined in the Bankruptcy Code, interpretation of that phrase varies among courts. *Collier on Bankruptcy* offers:

The reference to “conducting the case” in section 327(e) includes those matters that form a part of the administration of the case under the Code. In a reorganization case, these matters include assisting in formulating a plan and assisting the trustee in carrying out required investigations; in a liquidation case, these matters may include examining the validity of liens and claims and collecting the assets of the estate when legal action is required. Thus, an attorney retained as special counsel may receive compensation only for those services directly related to the limited scope of retention and not for services rendered generally to the debtor in connection with its bankruptcy case. Attorneys who render services beyond the specified scope of their retention risk denial of compensation for such unauthorized services

3 COLLIER ON BANKRUPTCY (16th ed.), ¶327.04[9][c].

Some courts construe “conducting the case” to include assisting with formulating and negotiating a plan and disclosure statement, assisting the trustee with investigating and objecting to claims, liquidating the estate, and other matters that are “tantamount to representing the debtor in the conduct of the case.” *See In*

³ In addition to joining the Trustee’s objection on this ground, the Committee also objected to the proposed employment on the grounds that Logue received payments that were within the ninety-day preference period before the commencement of this case. The Court announced at the hearing on this matter that it was not persuaded by this argument, as the proposed employment has no relation to potential preference recoveries by the estate. Although receipt of potentially preferential payments would impact proposed employment under § 327(a), “the standard for approving special counsel [under] § 327(e) has not been violated by its receipt of the potential preference.” *In re Servico, Inc.*, 149 B.R. 1009, 1013 (Bankr. S.D. Fla. 1993).

re Tidewater Mem'l Hosp., 110 B.R. 221, 228 (Bankr. E.D. Va. 1989) (citing 3 COLLIER ON BANKRUPTCY (15th ed.), ¶327.03); *In re Running Horse, LLC*, 371 B.R. at 453 (denying employment of special counsel where specified special purpose was not sufficiently disconnected from reorganization effort); *In re Hart Oil & Gas, Inc.*, No. 11-12-13558 TA, 2013 Bankr. LEXIS 3128, at *9 (Bankr. D.N.M. Aug. 2, 2013) (holding that drafting and seeking confirmation of liquidating plan, drafting and seeking approval of 363 Motion, litigating and objecting to claims and competing plans are “plainly part of the Trustee’s duties to conduct the case”). On the other hand, some courts approve employment of special counsel where the scope of employment is narrowly defined, and the employment does not substantially overlap with those functions of general bankruptcy counsel, i.e., “conduct[ing] the basics of [the] case.” *See Stapleton v. Woodworkers Warehouse, Inc. (In re Woodworkers Warehouse, Inc.)*, 323 B.R. 403, 407 (D. Del. 2005). Where the representation is narrowly tailored for a purpose beyond general representation, “appointment of [special counsel] is consistent with the purpose behind Section 327(e) which is to avoid the ‘unnecessary duplication of services at the expense of the estate.’” *Id.* (citing *DeVlieg-Bullard, Inc. v. Natale (In re DeVlieg)*, 174 B.R. 497, 503 (N.D. Ill. 1994)).

In support of her position, the Trustee cites *In re Running Horse, LLC*, in which the debtor attempted to employ an attorney as special counsel to handle various real estate matters. 371 B.R. 446. There, the application provided only a vague description of the proposed employment, to “represent the Debtors on real estate and business transaction matters.” *Id.* at 450. Upon further inquiry by the United States Trustee, the proposed special counsel offered only that his services would be “limited to providing real estate background and support to [the debtor’s general bankruptcy counsel] and the debtor-in-possession.” *Id.* In denying the application for employment, the court held that application was “far too expansive”

to fit under § 327(e), and observed that the application appeared to seek employment to assist and serve as general co-counsel alongside the retained bankruptcy counsel. *Id.* at 452-54. The court held that “[a] professional whose services may be vital to the debtor’s reorganization effort, but who is not ‘disinterested’ and eligible for employment under § 327(a), cannot circumvent that requirement by trying to characterize the employment as ‘special counsel’ under § 327(e).” *Id.* at 452 (citing *In re Tidewater Mem’l Hosp., Inc.*, 110 B.R. at 228).

With consideration of the facts and circumstances unique to this case,⁴ the Court has reviewed the cited (and other) cases and applicable authority and finds the Trustee’s argument persuasive as to: (1) completing the drafting, revising, and amending of Debtor’s schedules and statement of financial affairs; and (2) providing, in cooperation with the Debtor, the Trustee with all required documents and attending the Initial Debtor Interview. However, the Court finds that the Debtor has met its burden under § 327(e) with respect to Logue’s representation related to (1) general human resources and labor matters including compliance with WARN Act and FLSA, (2) representation in non-bankruptcy related outstanding and threatened liability lawsuits, and (3) advising the Debtor’s bankruptcy counsel regarding previous efforts to work-out, negotiate, and resolve forbearance and other agreements with Wells Fargo.

First, the Court addresses Logue’s application as it pertains to drafting, revising, and amending the Debtor’s bankruptcy schedules and statement of financial affairs. The Debtor asserts that preparation of the bankruptcy schedules suffices as a specified special purpose under § 327(e). The Trustee, on the other hand, argues that drafting the bankruptcy schedules amounts to “conducting the case.” In his testimony, Logue revealed that his firm gathered information and

⁴ In assessing the proposed retention, the court should consider the facts and circumstances of the subject case. *In re Johnson*, 433 B.R. 626, 635 (Bankr. S.D. Tex. 2010).

prepared the Debtor's bankruptcy schedules, but that its general bankruptcy counsel subsequently reviewed and commented on the schedules prior to their filing. The Court agrees with the Trustee's position. The Court considers the drafting of a debtor's schedules and statement of financial affairs as so fundamental to a debtor's chapter 11 case, that it must be characterized as "conducting the case," and outside the scope of § 327(e). Indeed, filing the schedules and statement of financial affairs are statutory requirements of a debtor under § 521 and Bankruptcy Rule 1007. These tasks—which are essential to any bankruptcy case—are without question "conducting the case." The Court agrees with the Trustee's position that a disinterested attorney should not be employed to prepare a debtor's schedules or statement of financial affairs.

With respect to Logue's representation of the Debtor at the Initial Debtor Interview and provision of required documents, the Court also finds the scope of this representation tantamount to conducting the case. In chapter 11 cases, the United States trustee conducts this interview which serves the purpose of, among other things, providing information to allow an early assessment as to the accuracy of the debtor's schedules and statements as well as the debtor's financial ability to reorganize, and also serves to inform the debtor of its fiduciary responsibilities arising under the Bankruptcy Code and the United States trustee's role in administering the case. ROBERT E. GINSBERG, ROBERT D. MARTIN & CATHERINE J. FURAY, GINSBERG & MARTIN ON BANKR. § 13.09 (Aspen Publishers, 5th ed. 2019-3 Supplement). Further, at the interview, the trustee may advise the debtor of the circumstances under which the trustee will take action to protect creditors' interests. UNITED STATES DEPARTMENT OF JUSTICE, *United States Trustee Program Policy and Practices Manual: Volume 3, Chapter 11 Case Administration*, (February 2020), <https://www.justice.gov/ust/united-states-trustee-program-policy-and-practices-manual>. Because the Initial Debtor Interview is integral to the

administration of the estate, and in establishing the relationship between the Trustee and the Debtor, and because the “required” documents are by their nature essential to a chapter 11 case, the Court finds that attending the Initial Debtor Interview on behalf of the Debtor qualifies as “conducting the case” under § 327(e).

With respect to general human resources matters, WARN Act, FLSA and assisting with non-bankruptcy related litigation, the Court agrees with the Debtor that these matters are permissible under § 327(e). Logue’s representation as to these specific items is limited to non-bankruptcy related litigation and labor and employment matters that require specialized knowledge. *See, e.g., In re Covenant Fin. Grp. of Am., Inc.*, 243 B.R. 450 (Bankr. N.D. Ala. 1999) (approving representation under § 327(e) based on specialized knowledge related to legal malpractice litigation). Therefore, the Court finds that this representation suffices as a “specified special purpose other than conducting the case.” 11 U.S.C. § 327(e).

Likewise, Logue’s proposed service to advise bankruptcy counsel regarding efforts to negotiate and resolve agreements with Wells Fargo meets the standard required under § 327(e). Although Wells Fargo holds the largest secured claim in the case, this proposed service is properly limited in scope so as to constitute a “specified special purpose,” and not conducting the case. *See DeVlieg-Bullard, Inc. v. Natale (In re DeVlieg, Inc.)*, 174 B.R. 497 (N.D. Ill. 1994) (affirming bankruptcy court’s approval of interested law firm to represent trustee in connection with litigating certain causes of action and claim objections).

III. Conclusion

For the aforementioned reasons, the Trustee’s objection is SUSTAINED IN PART and OVERRULED IN PART, and the Debtor’s amended application to employ Logue is DENIED IN PART and GRANTED IN PART. The amended application is denied as to: (1) the drafting, revising, and amending of Debtor’s schedules and statement of financial affairs; and (2) providing, in cooperation with

the Debtor, the Trustee with all required documents and attending the Initial Debtor Interview. The Debtor's amended application is granted with respect to (1) general human resources and labor matters including compliance with WARN Act and FLSA, (2) representation in non-bankruptcy related outstanding and threatened liability lawsuits, and (3) advising the Debtor's bankruptcy counsel regarding previous efforts to work-out, negotiate, and resolve forbearance and other agreements with Wells Fargo.

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