United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Judge: David D. Cleary

Appearance of Counsel:

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
GOLDEN FLEECE BEVERAGES, INC.,	)	Case No. 21 B 12228
	)	
Debtor.	)	Judge David D. Cleary

ORDER APPROVING DEBTOR'S APPLICATION TO EMPLOY COZEN O'CONNOR AS ITS SUBSTITUTE BANKRUPTCY COUNSEL AND TO APPROVE COMPENSATION ARRANGEMENT (EOD 49)

This matter comes before the court on the application of Golden Fleece Beverages, Inc. ("Debtor") to employ Cozen O'Connor ("Cozen") as its substitute bankruptcy counsel and to approve a compensation arrangement (the "Cozen Application"). As provided for in the Fourth Amended General Order No. 20-03, Court Proceedings During COVID-19 Public Emergency, the U.S. Trustee filed a Notice of Objection to the Cozen Application. He presented the arguments supporting the objection verbally during the court hearing on November 24, 2021. After hearing argument from the U.S. Trustee and the Debtor, the court approved the Cozen Application at the hearing and stated that a more detailed ruling would follow. Having read the Cozen Application, heard the arguments of the parties and reviewed applicable law as well as the docket in this case, the basis for the court's ruling follows below.

BACKGROUND

Debtor filed for relief under subchapter V of chapter 11 on October 27, 2021. That same day, Debtor sought and received permission to file several motions on an emergency basis. On November 1, 2021, the court conducted a hearing on Debtor's motion to obtain credit and incur debt ("Postpetition Financing Motion"), motion for authority to maintain existing bank accounts and motion for authorization to pay prepetition employee obligations (collectively, the "First Day Motions"). The allegations in the First Day Motions were supported by the Declaration of

Candace MacLeod, Debtor's president ("Declaration"). Her Declaration was over 20 pages long and supported by more than one thousand pages of exhibits.

Two days after filing the petition, Debtor filed an application to employ Sugar Felsenthal Grais & Helsinger LLP ("SFGH") as its counsel (the "SFGH Application"). Debtor had retained SFGH about six weeks before filing the petition. It had paid – and SFGH worked down – an advance payment retainer of $100,000. Pursuant to two addenda to their engagement agreement, Debtor agreed to pay a postpetition retainer of $70,000 to SFGH, to be held in escrow pending interim approval of SFGH's fees by the court. The retainer would be paid from the loan proceeds described in the Postpetition Financing Motion. Debtor noticed the SFGH Application for November 24, 2021.

While two of the First Day Motions were granted without objection, creditor 550 St. Clair Retail Associates, LLC ("550 St. Clair") vigorously contested the Postpetition Financing Motion. According to the Declaration, 550 St. Clair had obtained a prelitigation attachment of one of Debtor's accounts receivable, disrupting Debtor's cash flow and business operations. 550 St. Clair asserted a lien on certain of Debtor's assets and fought the Postpetition Financing Motion on the grounds that its putative lien was not adequately protected.

The budget attached to the proposed order on the Postpetition Financing Motion included a $70,000 payment to the Chapter 11 DIP Professionals during the week in which Debtor filed the petition, and another $100,000 payment during the week ending December 10, 2021. Although it actively opposed the Postpetition Financing Motion, 550 St. Clair did not dispute or object to the amount allocated to professional fees in the budget attached to it. Neither did the U.S. Trustee.

At the end of the November 1 hearings on the First Day Motions, the parties asked the court for a short continuance. Two days later, they had reached a temporary resolution and the court entered an interim order granting the Postpetition Financing Motion ("First Interim Financing Order"). The budget attached to the First Interim Financing Order included the same line items of $70,000 and $100,000 for professional fees as in the proposed order.

The court continued the Postpetition Financing Motion to November 24, 2021, the same day on which Debtor had noticed the SFGH Application for hearing. Meanwhile, on November 10, 2021, Debtor filed the Cozen Application. It, too, was noticed for November 24.

According to the Cozen Application, while SFGH had appeared thus far as Debtor's counsel, Debtor had chosen Robert Fishman, Peter Roberts and the Cozen firm to represent it as substitute counsel in place of SFGH. The engagement letter attached to the Cozen Application indicated that Debtor agreed to provide Cozen with an initial retainer of $75,000 as a security retainer to be held in escrow pending further order of this court. Like the $70,000 SFGH retainer, this would be paid postpetition.

About a week later, SFGH filed a motion to withdraw as counsel to the Debtor. It ceased substantially all substantive work on behalf of the Debtor as of November 9, other than activities required to facilitate a transition of representation from SFGH to Cozen.

The parties returned to court on November 24, 2021. Debtor presented a second interim order authorizing it to incur postpetition debt pending a final hearing. Again, the budget attached to this proposed order included $100,000 for professional fees during the week ending December 10, 2021. 550 St. Clair supported the entry of this second interim order, and the U.S. Trustee had no objection. The court entered the order ("Second Interim Financing Order") and continued the Postpetition Financing Motion to December 15, 2021, for final hearing.

The SFGH Application and Cozen Application also came before the court for hearing on November 24. The U.S. Trustee filed a notice of objection to each. Under the provisions of this court's Fourth Amended General Order No. 20-03, a notice of objection need provide no substantive grounds for objection. It can be – and in this case, it was – merely a request that the matter be called for hearing rather than granted in chambers. No other party filed a notice of objection to either application, and no party objected at the hearing to Debtor's retention of either law firm. This included 550 St. Clair as well as Neema Varghese, the subchapter V trustee.

LEGAL DISCUSSION

Debtor seeks leave to employ Cozen pursuant to 11 U.S.C. §§ 327(a), 328(a) and 1107.[1] Relevant to the discussion in this order is section 328(a), which states:

> (a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, *on any reasonable terms and conditions of employment, including on a retainer*, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

11 U.S.C. § 328(a) (emphasis added). In this case, the terms and conditions of employment include the provision of a retainer, which the Code anticipates. The twist here, and the basis for

[1] The Cozen Application opens with a request to approve the retention pursuant to 11 U.S.C. §§ 327(a), 328(a) and 1107. Sections 327(a) and 328(a) are applicable in a subchapter V case, but § 1107 is not. See 11 U.S.C. § 1181 ("Inapplicability of other sections."). Section 1184, however, provides nearly the same rights and powers to the subchapter V debtor in possession as § 1107 provides to the ordinary chapter 11 debtor.

None of the other Code sections cited in this order are excluded by § 1181. Although § 1195 modifies the disinterestedness requirement of section 327, allowing professionals to hold a claim of up to $10,000, that modification is not relevant for purposes of this discussion.

the U.S. Trustee's verbal objection, is that the Debtor seeks authority to provide a *postpetition* retainer.

Prior to the hearing on the Cozen Application, the U.S. Trustee had filed only a notice of objection which included no substantive grounds to support denial. At the hearing, the court offered the U.S. Trustee the opportunity to supplement his notice with a substantive, written objection. The U.S. Trustee declined this offer. The court also asked other parties to provide their views on the Debtor's application, if any. None did.

The U.S. Trustee argued at the hearing that to provide Cozen with a postpetition retainer would "better[] the position of counsel over every other administrative claimant in the case … which is both unfair, inappropriate, and provided for nowhere in the statute." He asserted that his argument was based on the Code, because "nowhere in the statute are attorneys entitled to a postpetition retainer from funds of the estate…. And, to do so, improperly prefers counsel, and any other party who comes in asking for a retainer…. [C]ertainly, there is no express provision of the Bankruptcy Code that allows retainers to be paid to professionals postpetition."

The U.S. Trustee's first argument, that a postpetition retainer is "provided for nowhere in the statute," ignores the plain language of the Bankruptcy Code. 11 U.S.C. § 328 authorizes the debtor in possession[2] to employ a professional "on any reasonable terms and conditions of employment, including on a retainer." The Supreme Court tells us to begin an inquiry with the language of the statute, and in § 328 those words are clear. "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute

[2] "[A] debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all functions and duties, except the duties specified in paragraphs (2), (3), and (4) of section 1106(a) of this title, of a trustee serving in a case under this chapter, including operating the business of the debtor." 11 U.S.C. § 1184.

what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Therefore, "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances." *Rubin v. United States*, 449 U.S. 424, 430 (1981) (quotation omitted). *See In re Concepts America, Inc.*, 625 B.R. 881, 885 (Bankr. N.D. Ill. 2021). Section 328 clearly states that a debtor in possession may employ a professional on any reasonable terms and conditions of employment, including a retainer. The statute does not modify the word "retainer" with the adjective "prepetition." Nothing in the Code prohibits a chapter 11 debtor from providing its chosen professional with a postpetition retainer; indeed, the Code supports it.

11 U.S.C. § 329 requires attorneys representing a debtor to "file with the court a statement of the compensation paid or agreed to be paid … for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation." This was done. In the Cozen Application and in the engagement letter attached to it, Debtor disclosed its agreement to pay Cozen a $75,000 retainer. The engagement letter provides that the retainer will be placed in escrow and held pending further order of this court.

Since Debtor is to pay the retainer postpetition, it will be paid from property of the estate. Payments made from property of the estate in the ordinary course of business do not require court approval. Retainers to bankruptcy counsel are not paid in the ordinary course of business, but the Code provides a method for obtaining court approval to use property of the estate outside of the ordinary course. "The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate…". 11 U.S.C. § 363(b). Therefore, section 363(b) can and should be the basis of a court's authorization to use property of the estate to pay a postpetition retainer to a debtor in possession's chosen professionals. *See also In re*

American Consol. Trans. Cos., No. 09 B 26062, 2010 WL 3655485 (Bankr. N.D. Ill. Sept. 10, 2010) (finding the secured creditor to be adequately protected so that cash collateral could be used to pay professional fees as well as new debtor's counsel who sought a $75,000 postpetition retainer); *In re Addison Properties Ltd. P'ship*, 185 B.R. 766 (Bankr. N.D. Ill. 1995) (determining whether a secured creditor's interest was adequately protected so that cash collateral could be used to pay a postpetition retainer to debtor's attorneys).

Postpetition retainers are not used routinely in bankruptcy cases, but this is not because the Code prohibits their use. As stated above, the Code authorizes the court to permit postpetition retainers.[3] Even the U.S. Trustee acknowledged at the court hearing that "if done properly, there might be a mechanism under § 363." He might not object to a future request, depending on the facts and circumstances. Indeed, it is the facts, rather than the law, that nearly always result in the use of prepetition retainers. Debtors' assets are usually subject to liens. After reviewing the collateral that is available to secure their postpetition financing, lenders generally prohibit debtors from using those funds, intended to support the administration of the chapter 11 case, for postpetition retainers.

Simply because postpetition retainers are not ordinarily part of the compensation arrangement, however, does not bar their use. In *Knudsen Corp.*, the Bankruptcy Appellate Panel of the Ninth Circuit considered whether the facts supported an atypical compensation procedure. *In re Knudsen Corp.*, 84 B.R. 668 (B.A.P. 9th Cir. 1988). Although the *Knudsen* court considered a monthly fee arrangement with interim payment prior to court approval rather

[3] *See Addison Properties*, 185 B.R. at 768, n.1 ("There is some question whether a court should ever allow a security retainer to be paid postpetition to a bankruptcy professional. At least one court has denied a request for a postpetition security retainer…. However, Section 328(a) expressly authorizes employment of professionals 'on any reasonable terms and conditions of employment, including on a retainer.' In a particular case, it may well be that the debtor can obtain better professional assistance, with less expense to the estate, if the professionals receive assurance of payment through a retainer. There should be no presumption against approving employment arrangements that include this explicitly authorized option.").

than postpetition retainers, the factors set forth in that case are helpful in determining whether circumstances exist here that justify a departure from the routine:

> 1. The case is an unusually large one in which an exceptionally large amount of fees accrue each month;
>
> 2. The court is convinced that waiting an extended period for payment would place an undue hardship on counsel;
>
> 3. The court is satisfied that counsel can respond to any reassessment in one or more of the ways listed above; and
>
> 4. The fee retainer procedure is, itself, the subject of a noticed hearing prior to any payment thereunder.

Id., 84 B.R. at 672–73.

The U.S. Trustee argued, without providing specifics, that the facts of this case do not support the use of § 363 to authorize a postpetition retainer. In fact, looking at the elements suggested by *Knudsen* for evaluating an out of the ordinary compensation procedure, Debtor did develop a basis to support this request. Although this is not an unusually large case, neither it is a small one. Debtor faces a contentious reorganization process in which a large amount of fees likely has already accrued. *See, e.g., In re Affinity Health Care Mgmt., Inc.*, No. 08-22175, 2009 WL 596825, at *3 (Bankr. D. Conn. Jan. 28, 2009) ("[T]his Court does not view the *mere* magnitude of a case or its professional fees as particularly germane to the question of the appropriateness of the Monthly Payment Procedure. What *is* potentially relevant to that question is the *relative* hardship that would be visited upon a *particular* professional in a *particular* case…."). Debtor's filing for relief under the Bankruptcy Code was prompted in part by a judgment creditor who availed itself of a creative prejudgment mechanism to freeze a significant asset. The First and Second Interim Financing Orders themselves anticipate future litigation over the validity, priority, or extent of 550 St. Clair's liens.

Cozen disclosed the postpetition retainer and conditioned employment on its provision, as section 328 permits. Counsel seeks to avoid being unreasonably exposed to risk, which would place an undue hardship on the attorneys. *See, e.g., Addison Properties*, 185 B.R. at 768 ("A&G is apparently seeking payment of a [postpetition] retainer in order to reduce the risk that it will not be paid for the services it is providing to the debtor."). The court can take judicial notice that Cozen O'Connor is a large law firm with more than 775 attorneys, and that proposed counsel Robert Fishman and Peter Roberts are practitioners of long standing in this district. FRE 201. Counsel can respond to any reassessment, if necessary.

The last *Knudsen* factor asks whether the question of authorizing a postpetition retainer was the subject of a noticed hearing, with sufficient opportunity for parties to object and be heard. It was. The Cozen Application was properly filed and served with 14 days' notice of the hearing. The Postpetition Financing Motion was heard on shorter notice, but all parties in interest had an opportunity to be heard before entry of the First Interim Financing Order, and certainly before entry of the Second. The lender who is providing postpetition financing allocated funds for professional fees in the budget submitted to and approved by the court. *See, e.g., In re ACT Mfg., Inc.*, 281 B.R. 468, 478 (Bankr. D. Mass. 2002) ("This Court agrees with the *Kaiser*, *Knudsen*, and *Mariner* courts; the establishment of compensation procedures permitting professionals to receive payment in advance of court review is appropriate in certain cases, especially those in which … the post-petition lender includes such a provision in the debtor-in-possession financing agreements."). The judgment creditor, 550 St. Clair, did not object. In fact, no party in interest, including the U.S. Trustee and the subchapter V trustee, objected to the professional fees or any other line item in the budget.

While the facts of this case meet the *Knudsen* criteria, the court's holding that postpetition retainers may be authorized under § 363(b) is not limited to cases that satisfy the four-part test. The *Knudsen* factors may be more or less important, and there may be other relevant factors, depending on the circumstances of the case. *See In re Mariner Post-Acute Network, Inc.*, 257 B.R. 723, 731 (Bankr. D. Del. 2000) (other factors could include whether debtors would prefer monthly rather than quarterly payments, the effect of the proposal on the court's ability to adequately review fee applications, the economic impact of the payment arrangement on the debtor, the debtor's ability to reorganize, and the reputation of proposed counsel). In this case, Debtor's decision to retain Cozen approximately two weeks after filing for relief under the Bankruptcy Code necessarily meant that it was impossible to provide a prepetition retainer. To hold today that providing a postpetition retainer as a condition of employment is not a permissible use of § 363(b) would chill a debtor's ability to employ counsel of its choosing. Counsel to prospective debtors would hold a new kind of leverage over their clients, knowing that only firms willing to undertake representation without a retainer could be chosen as substitute counsel.

The U.S. Trustee's second argument, that authorizing a postpetition retainer would unfairly prefer counsel over other administrative creditors, also finds no traction here. The U.S. Trustee offered no authority for this argument, or what facts would support allowance of a postpetition retainer but are missing in this case. "Undeveloped and unsupported arguments may be deemed waived." *United States v. Thornton*, 642 F.3d 599, 606 (7th Cir. 2011). *See Ludke v. United States*, No. 16-CR-175, 2021 WL 5449257, at *6 (E.D. Wis. Nov. 22, 2021) ("Underdeveloped arguments that fail to marshal facts of record in support are waived.").

In the end, the retainer remains property of the estate until the court authorizes Cozen to deduct allowed fees and expenses from it. Even after interim payments of compensation and reimbursement of expenses are distributed from the retainer, those remain subject to court review and approval until the court enters a final order. The U.S. Trustee's concern about preference over other administrative creditors is not well-founded since compensation is always subject to disgorgement until the case is concluded. It is a risk that bankruptcy counsel takes. To modify the risk that others will be paid first, and insufficient funds will remain to pay attorneys their pro rata share, counsel has requested a postpetition retainer. Having considered the law and the facts of this case, the court will grant that request.

For all of the reasons stated above, **IT IS HEREBY ORDERED THAT** the Cozen Application is **APPROVED**, including the term of employment providing for payment of a $75,000 postpetition retainer.

ENTERED:

Date: November 24, 2021

DAVID D. CLEARY
United States Bankruptcy Judge