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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re:	:	
	:	Chapter 11
TCI 2 Holdings, LLC., *et al.*	:	Case No. 08-13654 (JHW)
	:	
Debtor(s)	:	Hearing Date: May 1, 2009 at 4:00 p.m.

OBJECTION OF THE ACTING UNITED STATES TRUSTEE TO THE DEBTORS' APPLICATION FOR AN ORDER TO RETAIN, EMPLOY AND COMPENSATE WEIL, GOTSHAL & MANGES LLP AS CO-COUNSEL, FOR THE DEBTORS, NUNC PRO TUNC TO THE PETITION DATE

The Acting United States Trustee, by and through counsel, in furtherance of her duties and responsibilities under 28 U.S.C. § 586(a)(3) and (5), hereby respectfully submits this Objection to the Application (the "Application")[1] To Retain, Employ and Compensate Weil, Gotshal & Manges, LLP ("Weil Gotshal"), as Co-Counsel for the Debtors (the "Objection") and in support of the Objection, respectfully states as follows:

[1]Capitalized terms used herein as defined terms and not otherwise defined shall have those meanings ascribed to them in the Application.

BACKGROUND

1. On February 17, 2009 (the "Petition Date"), TCI 2 Holdings, LLC and its debtor affiliates[2] (collectively, the "Debtors") filed separate voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code" or "Code"). The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

2. As of the date of the Objection, the UST has not appointed an official committee of unsecured creditors.

3. On the Petition Date, the Debtors filed the Application (Docket Entry 25). In addition, the Debtors filed an Affidavit of Michael F. Walsh in support of the Application (the "Walsh Affidavit").

4. The Walsh Affidavit sets forth that during the Debtors' previous chapter 11 cases, Weil Gotshal represented an informal committee of holders of notes secured by the Taj Majal and Plaza casinos (the "TAC Notes Committee") in the negotiations with the Debtors' predecessor companies (collectively "THCR") and Donald Trump, ultimately leading to the filing of a negotiated 2004 chapter 11 case. *See* Walsh Affidavit, p. 4.

5. Pursuant to the plan of reorganization in that case, the TAC Notes Committee on behalf of all TAC Note holders, received new second lien notes and a controlling equity interest in the Debtors. *See id.* The new second lien notes were issued pursuant to that certain indenture dated May 20, 2005 by and between certain of the Debtors and U.S. Bank National Association in respect of the $1.25 billion in aggregate principal amount of 8.5 % Senior Secured Notes due 2015 (the "Secured Notes"). *See* Emergency Motion of Debtors For Entry of Interim Order (I)

[2]The definition of debtor affiliates shall have the meaning ascribed to it in the Application.

Authorizing Use of Cash Collateral Pursuant to Section 363 of the Bankruptcy Code, (II) Providing Adequate Protection to Prepetition Secured Parties Pursuant to Sections 361, 362, 363 and 364 of the Bankruptcy Code and (III) Scheduling a Final Hearing, pp. 5 and 6. U.S. Bank National Association and the bondholders are creditors in this case and hold a junior lien against the Debtors' property. *See id.*

6. Subsequent to Weil Gotshal's representation of the TAC Notes Committee, the Debtors retained Weil Gotshal to provide corporate and other legal advice. *See* Walsh Affidavit, p. 4. Weil Gotshal has acted as general outside corporate counsel to the Debtors since June 2005. *See id.*

7. Commencing in October 2008, Weil Gotshal began advising the Debtors in connection with their current financial restructuring including pre-petition negotiations with the Debtors' current secured creditors including Beal Bank and Beal Bank Nevada and an ad hoc committee on behalf of the Secured Notes. *See id.* As a result, it appears that certain holders of the TAC Notes, who were represented by Weil Gotshal in the prior case, received the Secured Notes and may be adverse to the Debtors in this case. As set forth in the Declaration of John P. Burke in Support of First Day Motions (the "Burke Declaration"), "[t]he bankruptcy proceeding will provide a forum for the prompt and efficient restructuring of the Debtors' Senior Notes." *See* Burke Declaration, p. 15. The Senior Notes referenced in the Burke Declaration are the same as the Secured Notes set forth above.

8. In addition, the Walsh Affidavit discloses that Weil Gotshal currently represents approximately 100 clients in matters purportedly wholly unrelated to the Debtors. *See* Walsh Affidavit, pp. 6-13. Further, the Walsh Affidavit discloses that Weil Gotshal represents approximately 35 entities that are related to a current or former client of Weil Gotshal. *See id.*,

pp. 13-16. Moreover, the Walsh Affidavit discloses that no potential parties-in-interest were former clients of Weil Gotshal during the past two years. *See id.*, p13.

9. On March 12, 2009, the Debtors filed a Supplemental Affidavit of Michael F. Walsh Regarding Disinterestedness in Further Support of Debtors' Application to Retain, Employ and Compensate Weil, Gotshal & Manges LLP as Co-Counsel for the debtors, *Nunc Pro Tunc* to the Petition Date (the " Supplemental Walsh Affidavit") (Docket Entry 130). The Supplemental Walsh Affidavit sets forth that the Trump Organization is a former client, not a current client of Weil Gotshal. The Supplemental Walsh Affidavit further sets forth that Weil Gotshal "has not represented and will not represent the Trump Organization in any matters adverse to the Debtors." *See* Supplemental Walsh Affidavit, p. 3.

LEGAL ARGUMENT

10. As a Chapter 11 debtor in possession, the Debtor owes the same fiduciary duty to the creditors of this estate as would a Chapter 11 trustee. *See, e.g., Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985) (debtor-in-possession bears "essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession."); *In re Marvel Entertainment Group, Inc.*, 140 F.3d 463, 474 (3d Cir. 1998) ("When the chapter 11 petition was filed in this case, the debtor-in-possession assumed the same fiduciary duties as would an appointed trustee. . . . [including] the duty to protect and conserve property in its possession for the benefit of creditors.") (internal quotation omitted).

11. Under the clear language of Section 327(a) of the Bankruptcy Code, any professional employed by a debtor in possession must be "disinterested" and neither hold nor represent an interest adverse to the estate.

12. Code Section 101(14)(C), in turn, defines "disinterested person" as a person 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, or interest in, the debtor... or for any other reason." *Collier* explains the rationale underlying this standard:

> The Code requires the same degree of disinterestedness on the part of an attorney or other professional person employed by the trustee that is required of the trustee in a reorganization case. This is, of course, quite logical, for it would be anomalous to require a trustee to be aloof from all connection with the debtor or its management, yet permit the trustee's attorney who necessarily would be active in furthering the trustee's duties of investigation, management, prosecution, development of plans and the like, to have a close relationship with the debtor, its management or associates.

2 Lawrence P. King, *Collier on Bankruptcy* ¶ 327.03 at 327-36 (15th ed. 1994).

13. Professionals for a bankruptcy estate must be committed to protecting the estate's interests and be free of the "interests of any other person" so that their "basic judgment and responsibility to the estate" is not affected. *In re Philadelphia Athletic Club, Inc.*, 20 B.R. 328, 337 (E.D. Pa. 1982). A professional "should not place himself in a position where he may be required to choose between conflicting interests or duties." *Id.*; See, e.g., *In re 765 Assocs.*, 14 B.R. 449, 451 (Bankr. D. Hawaii 1981) ("An attorney should not place himself in a position where he may be required to choose between conflicting duties.").

14. Code Section 101(14)(C), referred to as the "catch-all clause," has been characterized as "broad enough to include anyone who in the slightest degree might have some interest or relationship that would distract from the independent and impartial attitude which is required by the [Bankruptcy] Code." *In re Glenn Elec. Sales Corp.*, 89 B.R. 410, 413 (Bankr.

D.N.J.), *aff'd*, 99 B.R. 596 (D.N.J. 1988); See also, *In re Black Hills Greyhound Racing Ass'n*, 154 B.R. 285, 292 (Bankr. D.S.D. 1993).

15. Although not defined in the Bankruptcy Code, "adverse interest" has been interpreted in this District to mean:

> (1) to possess or assert any economic interest that would tend to lessen the value of the bankrupt 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 Glenn Elec. Sales Corp., 89 B.R. at 413 (quoting *In re Star Broadcasting, Inc.*, 81 B.R. 835, 838 (Bankr. D.N.J. 1988)).

16. 11 U.S.C. § 327(c) provides that proposed counsel must be disqualified following an objection to a proposed retention and the finding of an actual conflict:

> In a case under chapter 7, 12, or 11 of this title, a person in not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court **shall** disapprove such employment if there is an actual conflict of interest (emphasis added).

11 U.S.C. § 327(c).

17. The Third Circuit in *Marvel* determined that the District Court applied the wrong legal standard in disqualifying trustee's counsel under Sections 327(a) and 101(14)(E). In clarifying its prior decision in *BH&P* Inc., 949 F2d 1300 (3rd Cir. 1991), the Third Circuit held that,

> (1) Section 327(a), as well as Section 327(c), imposes a per se disqualification as trustee's counsel of any attorney who has an actual conflict of interest; (2) the district court may within its discretion — pursuant to Section 327(a) and consistent with Section 327(c) — disqualify an attorney who has a potential

> conflict of interest, and (3) the district court may not disqualify an attorney on the appearance of conflict alone.

140 F.3d at 476.

18. Any professional person that does not meet both the "no adverse interest" and "disinterested person" tests is disqualified from employment under Section 327(a). *See In re BH&P Inc*., 949 F.2d 1300, 1314 (3d Cir. 1991) (Section 327(a) "creates a two-part requirement for retention of counsel"). Thus, a professional who holds or represents an adverse interest is *per se* disqualified, and a professional who does not hold or represent an adverse interest is nevertheless disqualified unless he or she falls within the definition of "disinterested person" set forth in 11 U.S.C. § 101(14) ("Section 101(14)"). *See, e.g., United States Trustee v. Price Waterhouse*, 19 F.3d 138, 141 (3d Cir. 1994) (disqualified because not disinterested).

19. The court in *Marvel* further stated that a professional with a potential conflict should be disqualified, with certain possible exceptions: if the case is so large that every competent professional is already employed by a creditor or party in interest; or the possibility that the potential conflict will become actual is remote and the reason for hiring the professional is compelling. *Id.* at 476. The actual or potential conflict here arises from the ongoing multiple representation of persons or entities connected with the case, whose dealings are now or may in the future come under close scrutiny.

20. Multiple representations that may be allowed in commercial settings, especially with the informed consent of the clients, may not be acceptable in bankruptcy. The Bankruptcy Code provisions dealing with conflicts of interest are generally much stricter that the comparable rules of professional conduct. *See, Hansen, Jones & Leta, P.C. v. Segal*, 220 B.R. 434 (D.Utah 1998) citing *In re Amanda Corp*., 121 B.R. 862,866 (Bankr. D. Colo. 1990).

A. Actual Conflict

21. The UST objects to the retention of Weil Gotshal because it appears that Weil Gotshal has an actual conflict of interest (or at least a potential conflict that is likely to become actual) based on the fact that certain holders of the Secured Notes were formerly represented by Weil Gotshal in the previous bankruptcy case and that certain holders of the Secured Notes may be current and former clients of Weil Gotshal.

22. If an actual conflict exists, Weil Gotshal is *per se* disqualified, which can not be cured by waiver. *See*, *In re Congoleum Corp.*, 426 F.3d 675, 692 (3rd. Cir 2005)("... waivers under § 327(a) are ordinarily not effective"), and *In re Envirodyne Industries, Inc.*, 150 B.R. 1008,1016 (N.D. Ill. 1993)(the requirements of Code § 327 can not be excused by waiver).

23. As disclosed in the Application and the Walsh Affidavit, Weil Gotshal formerly represented certain bondholders in the Debtors' prior chapter 11 case. Now, Weil Gotshal seeks to be retained by the Debtors to represent the Debtors concerning another restructuring that involves certain of the prior bondholders formerly represented as a committee by Weil Gotshal, who are now holders of the Secured Notes and equity.

24. On its face, it would appear that Weil Gotshal, on behalf of the bondholders in the prior case, participated in the negotiation of certain documents including the Secured Notes, the senior bank debt and the corporate organization and structure of the Debtors.

25. As a result, it appears that Weil Gotshal has an actual conflict. However, at the very least, Weil Gotshal should be required to provide further disclosure concerning its representation of certain bondholders in the prior bankruptcy case.

B. New Jersey Rules of Professional Conduct

26. Even if the Court determines that Weil Gotshal does not have an actual conflict, the New Jersey Rules of Professional Responsibility 1.7 and 1.9 require waivers in order to be retained.

27. RPC 1.7 governs a conflict of interest when an attorney concurrently represents clients with adverse interests. RPC 1.7 provides:

> a. Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
> 1. the representation of one client will be directly adverse to another client; or
> 2. there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.
>
> b. Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
> 1. each affected client gives informed consent, confirmed in writing, after full disclosure and consultation;…
> 2. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> 3. the representation is not prohibited by law; and
> 4. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

28. RPC 1.7 requires informed consent and a written waiver in order to allow a law firm to represent a client that will be directly adverse to another client. *See* RPC 1.7.

29. Here, as set forth in the Walsh Affidavit, the Debtors have rendered services during the two years prior to the Petition Date to current clients of Weil Gotshal purportedly in matters unrelated to the Debtors. In addition, the Walsh Affidavit discloses that Weil Gotshal has approximately 100 current clients including various entities with board member affiliations,

creditors of the Debtors including bondholders, equity holders, certain professionals, certain secured lenders, certain underwriting investment banks, certain vendors and certain utilities.

30. Here, certain bondholders, equity holders and creditors may be directly adverse to the Debtors. As a result, in order to represent the Debtors, Weil Gotshal would have to obtain waivers from the Debtors and each current client that is directly adverse to the Debtors. Here, Weil Gotshal has not obtained all of the written waivers from the former bondholders, equity holders and creditors. As a result, Weil Gotshal can not represent the Debtors pursuant to RPC 1.7.

31. Prior to the Court's hearing concerning the retention of McCarter & English in this case, the Office of the United States Trustee requested waivers from certain clients of Weil Gotshal including holders of the Secured Notes, secured lenders and U.S. Bank National Association. In addition, based on Your Honor's prior ruling concerning the retention of McCarter & English, it would seem that Weil Gotshal must obtain waivers of current clients including bondholders, equity holders and creditors. The Office of the United States Trustee notes that Weil Gotshal has obtained several waivers from current and former clients but may not have obtained waivers from all of its current and former clients.

32. In addition, the Walsh Affidavit discloses that Lehman Brothers, Inc., and Citigroup, Inc. each represent more than one percent of Weil Gotshal's annual revenues over the twelve months prior to the Petition Date. Further disclosure is necessary to determine whether Weil Gotshal's representation of the Debtors is free from the interest of any other persons or entities.

33. RPC 1.9 prevents an attorney from representing one party and then becoming an adverse party on a substantially similar matter without the former client's consent in writing:

> a. A lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially

> related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing.

RPC 1.9(a). RPC 1.9 was enacted to promote attorney loyalty, client confidence and public respect for the integrity of the bar. *See In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 162 (3d Cir. 1984); *Kaselaan & D'Angelo Assocs. Inc. v. D'Angelo*, 144 F.R.D. 235, 239 (D.N.J. 1992).

34. To determine whether a conflict exists under RPC 1.9, Courts employ the "substantial relationship test" under which each of the following three prongs must be satisfied before the Court shall disqualify an attorney: (1) the existence of a past attorney client relationship involving the attorney sought to be disqualified; (2) that the current representation involves the same or a matter substantially related to the former representation; and (3) that the interests of the attorney's current client are materially adverse to the interests of the former client. *See Home Care Indus., Inc. v. Murray*, 154 F.Supp.2d 861, 866 (D.N.J. 2001); *Host Marriott Corp. v. Fast Food Operators, Inc.*, 891 F.Supp 1002, 1007 (D.N.J. 1995). *See also FMC Corp. v. Guthery*, 2009 WL 485280, *4 (D.N.J. Feb. 25, 2009); *Delso v. Trustees For Retirement Plan For Hourly Employees of Merck & Co., Inc.*, 2007 WL 766349, *6 (D.N.J. Mar. 6, 2007). However, if the former client is provided with informed consent and provides a written waiver, a law firm may represent the new client.

35. A "substantial relationship between matters will exist where the 'adversity between the interests of the attorney's former and present clients has created a climate for disclosure of relevant confidential information.'" *Kaselaan*, 144 F.R.D. at 239 (quoting Reardon v. Marlayne, Inc., 83 N.J. 460, 472 (N.J. 1980). In *Kaselaan*, there was "a substantial relationship between the present matter and the prior matters handled by [the attorney] since the adversity between the

interests of [the parties] has created a climate for the disclosure of relevant confidential information and the issues between the former and present matters are practically the same." *Id.* at 243-244; *see also Ciba-Geigy Corp. v. Alza Corp.*, 795 F.Supp. 711, 716, 718 (D.N.J. 1992) (denying motion to disqualify in part because the "factual contexts of the lawsuits" were not "strikingly similar," no substantial relationship existed between the successive representations, and the attorney had not represented the client over a substantial number of years); Reardon, 83 N.J. at 475 (disqualifying attorney because the legal and factual relationship between the prior and present representations were "strikingly similar").

36. Here, the prior bankruptcy cases and these cases appear to be substantially related. Weil Gotshal's representation of the prior bondholders was an integral part of the prior restructuring. In fact, the former bondholders received equity and the Secured Notes. Now, Weil Gotshal seeks to represent the other side, the Debtors, in a new restructuring, which will involve the restructuring of the Secured Notes.

37. In addition, Weil Gotshal has not obtained written waivers from the former bondholders. However, it is the Office of the United States Trustee's understanding that Weil Gotshal has obtained two waivers from former bondholders and expects to receive a waiver from a third former bondholder. Without waivers from Weil Gotshal's former clients, Weil Gotshal can not represent the Debtors pursuant to RPC 1.9.

WHEREFORE, in light of the foregoing the Acting United States Trustee respectfully requests that the Application not be approved at this time, and that this Court grant such further relief as is just.

Respectfully submitted,
ROBERTA A. DeANGELIS
UNITED STATES TRUSTEE

By: /s/ Jeffrey M. Sponder
Jeffrey M. Sponder
Trial Attorney

Dated: April 30, 2009