



**SO ORDERED,**

A handwritten signature in blue ink that reads "Neil P. Olack".

**Judge Neil P. Olack  
United States Bankruptcy Judge  
Date Signed: April 6, 2015**

**The Order of the Court is set forth below. The docket reflects the date entered.**

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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF MISSISSIPPI**

**IN RE:**

**STACY HOWARD AND  
STEPHANIE HOWARD,**

**CASE NO. 00-51897-NPO**

**DEBTORS.**

**CHAPTER 13**

**ORDER DENYING APPLICATION TO EMPLOY**

This matter came before the Court<sup>1</sup> for hearing (the “Hearing”) on April 1, 2015 on, *inter alia*, the Trustee’s Application for Employment of Special Counsel (the “Application to Employ”) (Bankr. Dkt. 99)<sup>2</sup> filed by Sean S. Cassidy (“Cassidy”) of the law firm, Smith Stag, L.L.C. (“Smith Stag”), purportedly on behalf of J.C. Bell, the standing chapter 13 trustee (the “Trustee”); the Trustee’s Response to Application to Employ Special Counsel (the “Trustee’s Response”) (Bankr. Dkt. 105) filed by the Trustee; the Reynolds Plaintiffs’ Response to the

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<sup>1</sup> The above-styled bankruptcy case (the “Bankruptcy Case”) and Adversary Proceeding No. 14-05009-NPO (the “Adversary”) were transferred from the Honorable Katharine M. Samson, United States Bankruptcy Judge, Southern District of Mississippi to the Honorable Neil P. Olack, United States Bankruptcy Judge, Southern District of Mississippi on June 11, 2014.

<sup>2</sup> Citations to the record are as follows: (1) citations to docket entries in the Bankruptcy Case are cited as “(Bankr. Dkt. \_\_\_)”;

and (2) citations to docket entries in the Adversary are cited as “(Adv. Dkt. \_\_\_)”.

Debtor's Lawyers' (Not the Trustee's) Application for Employment of Special Counsel (the "Reynolds Plaintiffs Response") (Bankr. Dkt. 107) filed by Fina Oil and Chemical Company; Murphy Oil U.S.A. Inc.; Vintage Petroleum, Inc. (now Vintage Petroleum, LLC following merger); Champlin Petroleum Company; Exxon Corporation; Kerr-McGee Oil & Gas Corporation n/k/a Anadarko US Offshore Corporation, a former affiliate of Oryx Energy Corporation; TXO Production; Oxy USA Inc., Placid Oil Company; Amoco Production Company; Union Oil Company of California; ConocoPhillips Company (formerly known as Phillips Petroleum Company and successor in interest by merger to Conoco, Inc.); Bass Enterprises Production Company; ARCO Oil and Gas Company; Mobil Oil Exploration & Producing Southeast, Inc.; and Inexco Oil Company (collectively, the "Reynolds Plaintiffs"); the Joinder of Chevron U.S.A. Inc., Chevron Corporation, Texaco Inc., Four Star Oil & Gas Company, and Shell Western E&P, Inc. in the Reynolds Plaintiffs' Response to the Debtor's Lawyers' (Not the Trustee's) Application for Employment of Special Counsel (Bankr. Dkt. 108) filed by Chevron U.S.A. Inc., Chevron Corporation, Texaco Inc., Four Star Oil & Gas Company, and Shell Western E&P, Inc. (collectively, "Chevron/Shell"); and the Joinder of Moon-Hines-Tigrett Operating Company, Inc. in Reynolds Plaintiffs' Response to the Debtor's Lawyers' (Not the Trustee's) Application for Employment of Special Counsel (Bankr. Dkt. 118) filed by Moon-Hines-Tigrett Operating Company, Inc. ("Moon-Hines-Tigrett") in the Bankruptcy Case. At the Hearing, Cassidy argued on behalf of Smith Stag, Jeffery P. Reynolds argued on behalf of the Reynolds Plaintiffs, and Samuel J. Duncan argued on behalf of the Trustee. The Court, being fully advised in the premises, ruled from the bench at the Hearing and denied the Application to Employ. This Order memorializes and supplements the Court's bench ruling.

In the Application to Employ, Cassidy requests the Court to authorize the Trustee's retention of Smith Stag in pursuing claims against the Reynolds Plaintiffs, Chevron/Shell, and Moon-Hines-Tigrett in three proceedings (collectively referred to as the "Related Proceedings") currently pending before the Circuit Court of Wayne County, Mississippi; the United States District Court for the Southern District of Mississippi; and the Mississippi Commission on Environmental Quality, respectively. Cassidy and Smith Stag currently represent Stacy Howard (the "Debtor")<sup>3</sup> in the Bankruptcy Case.

In the Trustee's Response, the Trustee requests that the Court stay the disposition of the Application to Employ because the Trustee is in the process of resolving the underlying issues of the Related Proceedings with the Reynolds Plaintiffs. According to the Trustee, the resolution of the Related Proceedings could potentially moot the Application to Employ.

In the Reynolds Plaintiffs Response, the Reynolds Plaintiffs argue that the Application to Employ should be denied because: (1) the Trustee does not wish to employ the Debtor's lawyers and has instead entered into a settlement agreement with the Reynolds Plaintiffs; (2) Smith Stag's representation of the Trustee in the Related Proceedings would create a conflict of interest; and (3) the Application to Employ is procedurally defective. As for the conflict of interest argument, the Reynolds Plaintiffs specifically claim that Smith Stag's representation of the Trustee in pursuing the Related Proceedings on behalf of the Debtor's estate would create a conflict of interest because Smith Stag currently is representing the Debtor in appealing this Court's Memorandum Opinion and Order Denying: (1) Debtor's Motion to Alter or Amend Judgment or for New Trial; (2) Motion to Stay Judgment Pending Motion to Alter or Amend

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<sup>3</sup> The Bankruptcy Case was commenced on May 5, 2000 by joint debtors, Stephanie Howard and Stacy Howard, but the Court refers only to Stephanie Howard as the "Debtor" because Stacy Howard is now deceased.

Judgment or for New Trial or, in the Alternative, Motion to Stay Pending Appeal; and (3) Debtor's Motion to Extend Deadlines to File Amended Schedules (the "Court's Opinion Denying the Motion to Alter or Amend") (Adv. Dkt. 117) that was entered in the Adversary.

At the Hearing, the Trustee stated that he is unsure if there is a settlement currently in place, but that he is working with counsel for the Reynolds Plaintiffs to resolve the Related Proceedings. As a result of a potential settlement, the Trustee requested that the Court reset the hearing on the Application to Employ, the Trustee's Response, and the Reynolds Plaintiffs Response to a later date. Regarding the issue of a potential conflict, if the Court granted the Application to Employ, the Trustee stated that there would seem to be a potential conflict if Smith Stag simultaneously represented the Trustee in the Related Proceedings and the Debtor in her appeal of the Opinion Denying the Motion to Alter or Amend in the Adversary.

Turning to the merits of the Application to Employ, the Court finds that the Application to Employ should be denied because Smith Stag's representation of the Debtor in appealing the Court's Opinion Denying the Motion to Alter or Amend Trustee gives Smith Stag an interest adverse to the Debtor's bankruptcy estate. In the Court's Opinion Denying the Motion to Alter or Amend, the Court denied the Debtor's request to alter or amend the Memorandum Opinion and Order: (1) Granting the Plaintiffs' Summary Judgment Motion and (2) Denying the Debtor's Summary Judgment Motion (the "Summary Judgment Opinion") (Adv. Dkt. 81). In the Summary Judgment Opinion, the Court held that the Debtor is judicially estopped from pursuing her claims in the Related Proceedings. The Court, however, found that judicial estoppel does not apply to the Trustee should he wish to pursue the Debtor's claims in the Related Proceedings on behalf of the Debtor's bankruptcy estate. The Court further found that in the event the Trustee does pursue the Debtor's claims in the Related Proceedings and obtain a recovery, any funds that

remain after the distribution to creditors and the payment of the Trustee's statutory fees should be refunded to the respective parties who were responsible for paying such funds. The Debtor, represented by Smith Stag, filed the Notice of Appeal (Adv. Dkt. 121) on February 19, 2015 and, accordingly, is currently pursuing the appeal of the Court's Opinion Denying the Motion to Alter or Amend in the United States District Court for the Southern District of Mississippi.

Under 11 U.S.C. § 327(e), a trustee may employ an attorney who has represented the debtor, but the employment must be for a special purpose other than representing the trustee in conducting the bankruptcy case. 11 U.S.C. § 327(e). Further, an attorney may be employed as special counsel under § 327(e) only if he or she "does not represent or hold any interest adverse to the debtor or to the estate with the respect to the matter on which such attorney is to be employed" and the employment is "in the best interest of the estate." 11 U.S.C. § 327(e); *In re Daigle*, No. 09-50144, 2011 WL 182892, at \*1 (Bankr. W.D. La. Jan. 19, 2011). 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 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.

*Waldron v. Adams & Reese, L.L.P. (In re Am. Int'l Refinery, Inc.)*, 676 F.3d 455, 461 (5th Cir. 2012); *In re Winterville Marine Servs., Inc.*, No. 05-13815-NPO, 2008 WL 4279962, at \*3 (Bankr. N.D. Miss. Apr. 16, 2008). The Fifth Circuit Court of Appeals has stated that while this definition is helpful, the determination of whether an "adverse interest" exists must be made "with an eye to the specific facts of each case." *I.G. Petroleum, L.L.C. v. Fenasci (In re West Delta Oil Co.)*, 432 F.3d 347, 356 (5th Cir. 2005). The standard for determining whether a party has an "adverse interest" is "strict" and attorneys who are employed "should be free of the slightest personal interest which might be reflected in their decisions concerning matters of the

debtor's estate or which might impair the high degree of impartiality and detached judgment expected of them during the course of administration." *In re Am. Int'l Refinery, Inc.*, 676 F.3d at 462 (citing *In re West Delta Oil Co.*, 432 F.3d at 355).

Here, Smith Stag requests to represent the Trustee in pursuing the Related Proceedings on behalf of the Debtor's bankruptcy estate while simultaneously representing the Debtor in her appeal of the Court's Opinion Denying the Motion to Alter or Amend. The Court finds that this simultaneous representation creates an adverse interest for Smith Stag. As the Trustee stated at the Hearing, his primary goal in the Related Proceedings is to recover enough money to pay the Debtor's unsecured creditors in full.<sup>4</sup> The Debtor, on the other hand, is attempting to appeal the Court's Opinion Denying the Motion to Alter or Amend so that she can pursue the claims in the Related Proceedings and obtain the largest possible recovery for the Debtor's personal benefit. Thus, Smith Stag's personal interest in representing the Debtor on appeal could impact or impair the "high degree of impartiality and detached judgment" expected of Smith Stag if it represented the Debtor's estate in the Related Proceedings. *Id.* An example of a scenario in which Smith Stag's judgment or impartiality could be impacted or impaired is currently on display in the Adversary where the Debtor has objected to two different motions to approve settlements<sup>5</sup> of the Related Proceedings that would purportedly result in the Trustee recovering more than enough

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<sup>4</sup> According to the Debtor's confirmed Chapter 13 Plan (Bankr. Dkt. 21), the Debtor has approximately \$8,483.03 in unsecured debt.

<sup>5</sup> Specifically, the Debtor filed the Response of Debtor to Motions to Settle and Compromise Claims (Adv. Dkt. 126) objecting to the Corrected Motion to Settle and Compromise Disputed Claim Pursuant to Rule 9019 of the Bankruptcy Rules of Procedure (Adv. Dkt. 112) filed by the Reynolds Plaintiffs and the Motion to Approve Compromise and Settlement (Adv. Dkt. 119) filed by Conquest Exploration Company ("Conquest"). Conquest is a defendant in the Related Proceedings and is a plaintiff in the Adversary. However, for reasons unknown to the Court, the Application to Employ did not list the Debtor's bankruptcy estate's potential claims against Conquest. Conquest was represented by counsel at the Hearing.

funds to pay the Debtor's unsecured creditors in full. As these circumstances show, if the Court approved the Application to Employ, Smith Stag's representation of the Debtor on appeal could impact its decisions concerning the Debtor's bankruptcy estate in the Related Proceedings, including whether to enter into settlements with the Reynolds Plaintiffs, Chevron/Shell, Moon-Hines-Tigrett, and/or Conquest.

Moreover, it is not necessary for the Court to find the presence of an actual bias or impairment of representation because “[t]he purpose of [the adverse interest provision] is to preclude the employment of a professional ‘who in the slightest degree *might* have some relationship that would color the independent and impartial attitude required by the Code.’” *In re Fish & Fisher, Inc.*, No. 09-2747-EE, 2010 WL 5256992, at \*4 (Bankr. S.D. Miss. Dec. 17, 2010) (emphasis added) (citing *Pierson & Gaylen v. Creel & Atwood (In re Consolidated Bancshares, Inc.)*, 785 F.2d 1249, 1256 (5th Cir. 1986)); *see also In re Daigle*, 2011 WL 182892, at \*1 (“A lawyer possesses or represents an interest adverse to the estate, ‘if it is *plausible* that the representation of another interest may cause the debtor’s attorneys to act any differently than they would without that other representation.’”) (quoting another source). Here, the Trustee’s and the Debtor’s litigation strategies are inapposite, and, thus, Smith Stag’s representation of the Debtor on appeal gives Smith Stag an interest adverse to the Debtor’s bankruptcy estate in the Related Proceedings.

For these reasons, the Court finds that based on these facts and circumstances, Smith Stag is not “free of the slightest personal interest which might be reflected in their decisions concerning matters of the debtor’s estate or which might impair the high degree of impartiality and detached judgment expected of [the firm] during the course of administration.” *In re Am. Int’l Refinery, Inc.*, 676 F.3d at 462 (citing *In re West Delta Oil Co.*, 432 F.3d at 356). Instead,

Smith Stag, by virtue of its representation of the Debtor in appealing the Court's Opinion Denying the Motion to Alter or Amend, holds an interest adverse to the Debtor's bankruptcy estate with respect to the Related Proceedings. Therefore, the Court finds that Smith Stag's employment is not in the best interest of the Debtor's bankruptcy estate and that the Application to Employ should be denied. As a result of the Court's finding that the Application to Employ should be denied, it is unnecessary for the Court to (1) reset the hearing on the Application to Employ, the Trustee's Response, and the Reynolds Plaintiffs Response to a later date because of a potential settlement of the Related Proceedings or (2) determine whether the Application to Employ is procedurally proper.

IT IS, THEREFORE, ORDERED that the Application to Employ hereby is denied.

##END OF ORDER##