SO ORDERED.

SIGNED this 5th day of May, 2021.

Dale L. Somers
Dale L. Somers
United States Chief Bankruptcy Judge

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:	
Leslie M. Landau,	Case No. 20-21114-11
Debtor.	

Order Provisionally Granting Application to Employ, Subject to Entry of Final Order

Debtor Leslie M. Landau has filed an application to "retain and employ" David Christian Attorneys LLC under 11 U.S.C. §§ 327, 328, and 329.[1] Over the objection of the United States Trustee ("UST"), the Court

[1] All future references to "Bankruptcy Code," "Code," or "§," refer to Title 11 of the United States Code. In addition, the Court will refer to employment of the firm "David Christian Attorneys LLC" as employment of Mr. Christian, simply for ease of reference and readability.

provisionally grants the motion, and will enter a final order on the application once additional information is filed in this case.

I. Factual and Procedural Background

On August 10, 2020, Debtor filed his subchapter V Chapter 11 bankruptcy petition. Debtor's petition was a "quick-file;" it contained only the petition and his list of creditors. Debtor's petition was signed by his attorney Mr. Christian,[2] but no additional information about Mr. Christian's representation was given. Two weeks after filing, on August 24, 2020, Debtor filed the application to employ Mr. Christian that is the subject of this Order.[3]

In that application to employ, Debtor revealed that he worked as a surgeon but also was engaged in other enterprises, one of which was a fifty percent ownership interest in EHL, LLC. On July 23, 2018, about two years prepetition, one of the creditors of EHL—Bank of Kirksville—filed a state court suit against EHL and its guarantors. Both Debtor and the Leslie M. Landau Revocable Trust were named as guarantors on the debt. In August 2018, Mr. Christian was retained to represent Debtor and the Trust. Then, about a year later (but about a year prior to his petition), on September 13,

[2] Doc. 1 p. 7.
[3] Doc. 30.

2019, the Bank of Kirksville obtained a judgment against all defendants in its suit.

Debtor's application to employ Mr. Christian stated that as a result of the judgment against him, Debtor then asked Mr. Christian to "expand [his] engagement to include a potential workout of the Debtor's obligations to [Bank of Kirksville] and prebankruptcy planning."[4] Since that expanded engagement, Debtor reported that Mr. Christian had been negotiating with creditors and consulting on his bankruptcy options. Debtor requested that the Court approve the retention of Mr. Christian "under a general retainer," to perform legal services required during his bankruptcy proceeding.[5] Debtor's application to employ stated that Mr. Christian held a credit balance of $126,978.84 on his behalf, which he characterized as a "fee advance."[6] The application also disclosed Mr. Christian had received "prepayments for legal services" in the year prior to commencement of the bankruptcy case, but none within the ninety days prior to the petition date.[7]

Mr. Christian's attached declaration in support of the application to employ stated that he is disinterested and not a creditor. It then stated Mr. Christian received $75,000 in "prepayments for legal services" in the year

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[4] Doc. 30 p. 2.
[5] *Id.* p. 3.
[6] *Id.* p. 5.
[7] *Id.* p. 4-5.

prior to Debtor's bankruptcy, and then again said he is holding $126,978.84 that he characterized as a "remaining credit balance."[8] The declaration also indicated Mr. Christian intended to charge Debtor for his services rendered in the Chapter 11 case at his hourly rate: $835 for Mr. Christian, $400 for "of counsel" attorneys, $225 to $250 for associates, and $50 for case assistants.

A few days after filing the application to employ counsel, Debtor filed his bankruptcy Schedules, Summary of Assets, and Statement of Financial Affairs. Debtor's Statement of Financial Affairs revealed for the first time that that on October 15, 2019, Debtor made a "deposit of insurance proceeds" of $210,000 to Mr. Christian.[9] As a result, the Court is left to surmise that Debtor "deposited" $210,000 with Mr. Christian in October 2019, that between October 2019 and early May 2020 (i.e., approximately ninety days prior to Debtor's bankruptcy filing, wherein Mr. Christian states he has received no payments from Debtor) Debtor "paid" Mr. Christian $75,000 in attorneys' fees via draw down from that $210,000 "deposit," and that about $127,000 of the original $210,000 "deposit" remained. The approximately $8000 difference (i.e., $210,000 minus $75,000 equals $135,000, not the $127,000 that remained) was not explained at that point.

[8] Doc. 30-1 p. 2-3.
[9] Doc. 50 p. 5.

The Unites States Trustee (UST) objected to Debtor's application to employ Mr. Christian. In that objection, the UST indicated it had learned that some of the $210,000 had been used to service debt held by Debtor's creditors, and some had been used to pay Mr. Christian's legal fees. The UST argued that the application to employ and Mr. Christian's declaration failed to adequately describe the circumstances surrounding the $210,000 payment, the use of any of those funds, and the pre and post-petition financial arrangements between Debtor and Mr. Christian.

Just prior to the hearing on this matter, Mr. Christian filed a supplemental declaration in support of the application to employ. The supplemental declaration includes as an attachment the engagement letter dated August 28, 2018 between Debtor and Mr. Christian. The engagement letter indicates Mr. Christian was retained "in connection with workout and bankruptcy advice associated with" the Bank of Kirkville loan, but specifically excludes "filing or appearing as your counsel of record in any bankruptcy case that might be filed."[10] Mr. Christian agreed to accept fees of $20,000 in connection with this engagement letter. Mr. Christian's supplemental declaration also included additional details about what he called his "expanded engagement" after the judgment entered by the state

[10] Doc. 130-1 p. 1.

court in September, 2019; no additional written contract was entered between Debtor and Mr. Christian, despite the $210,000 "deposit" of funds in October 2019. Of that money, $75,000 was used as "a retainer that would be drawn down" as Mr. Christian completed work, and $8021.16 was used to make monthly payments on Debtor's debt to Bank of Kirksville in October through December 2019. The $126,978.84 that remains is being held in Mr. Christian's trust account. It is not clear, but it appears the $75,000 retainer was drawn down in late 2019 and early 2020, and now Mr. Christian seeks to keep the approximately $127,000 remaining as an additional retainer for the Chapter 11 bankruptcy, for work he estimates will require about $100,000 in professional fees.

The UST confirmed during oral argument that the supplemental declaration satisfied the concerns it had as to Mr. Christian's disclosure and conflict issues. The UST, however, argues that the balance of the funds in Mr. Christian's trust account—the approximately $127,000—do not constitute a true retainer and are instead estate assets that should be held in a debtor-in-possession account.

Finally, the Court notes there are two related adversary proceedings to Debtor's bankruptcy case: one between Debtor and the Bank of Kirksville,[11] and one between Debtor and his co-partner in EHL, LLC.[12]

II. Analysis

Matters concerning the "administration of the estate" and "the use or lease of property" are core proceedings under 28 U.S.C. § 157(b)(2)(A) and (M), over which this Court may exercise subject matter jurisdiction.[13]

A small business debtor that has elected to be treated under subchapter V of Chapter 11 may employ an attorney to represent or assist the debtor in possession in performing its duties during the Chapter 11 case, subject to court approval thereof.[14] Under § 327(a), the attorney must be disinterested, and must not hold or represent an interest adverse to the

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[11] Adv. No. 20-6026.

[12] Adv. No. 20-6027.

[13] This Court has jurisdiction pursuant to 28 U.S.C. § 157(a) and §§ 1334(a) and (b) and the Amended Standing Order of the United States District Court for the District of Kansas that exercised authority conferred by § 157(a) to refer to the District's Bankruptcy Judges all matters under the Bankruptcy Code and all proceedings arising under the Code or arising in or related to a case under the Code, effective June 24, 2013. D. Kan. Standing Order 13-1 *printed in* D. Kan. Rules of Practice and Procedure (March 2018).

[14] 11 U.S.C. § 327(a) ("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"); § 1184 (stating that a subchapter V "debtor in possession shall have all the rights . . . and powers, and shall perform all functions and duties . . . of a trustee serving in a case under this chapter").

estate. Federal Rule of Bankruptcy Procedure 2014 then implements this statutory requirement, and mandates that the application be accompanied by a verified statement of, among other things, any proposed arrangement for compensation and "all of the person's connections with the debtor, creditors, [or] any other party in interest."[15]

The UST at first complained that Mr. Christian's disclosures were inadequate. After Mr. Christian, on the eve of hearing, supplemented those disclosures, the UST was satisfied that enough information had been provided to meet the standards for employment under § 327 and Rule 2014. As a result, the Court need not analyze whether Mr. Christian is a disinterested person, as defined by § 101(14).[16] The UST's objection has now shifted, challenging the terms and conditions of Mr. Christian's employment.

Under § 329, an attorney representing a debtor in a bankruptcy case must "file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in

[15] All future references to the Federal Rules of Bankruptcy Procedure will be to Rule number only.

[16] Under § 101(14), a disinterested person is a person that "(A) is not a creditor, an equity security holder, or an insider; (B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and (C) 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.

contemplation of or in connection with the case by such attorney, and the source of such compensation." Rule 2016 then implements § 329 and requires the filing and transmission to the UST of the statement required by § 329, including any particulars about any agreement to share compensation with any entity.[17]

According to Mr. Christian's own declarations, the last engagement agreement signed by Debtor was from August 2018. In October 2019, Debtor deposited additional funds with Mr. Christian, and throughout the fall of 2019 and the first quarter of 2020, $75,000 of those funds were drawn down. At some point—time frame entirely unknown, but presumably between the end of March 2020, and the petition date in August 2020—Debtor decided to file a subchapter V bankruptcy petition and use the remaining funds on deposit with Mr. Christian for that purpose. Apparently, Debtor and Mr. Christian had some kind of understanding, i.e., a loose agreement about an expanded engagement. But there is nothing in writing. In addition, there is nothing at all in writing concerning the deposit of the $210,000, the draw down by Mr. Christian for the $75,000 of work in late 2019 and early 2020, or the ultimate representation of Debtor in this bankruptcy case. Mr. Christian has not yet filed a Rule 2016 statement and has not yet complied with § 329.

[17] Bankruptcy Form B 2030 then provides a form to be used for the Rule 2016 statement.

The UST opposes the employment terms proposed by Mr. Christian, namely that Mr. Christian keep the approximately $127,000 in his trust account and thereafter apply for compensation under § 330 at his hourly rate. It is Mr. Christian's duty to perform his obligations under the Code with respect to compensation, and to show that the proposed terms and conditions of employment are reasonable.[18] The Court cannot make a determination based on what has been filed to date.

Mr. Christian points out the $210,000 deposit was disclosed on Debtor's Statement of Financial Affairs, Debtor's petition was filed urgently in response to a foreclosure of real property, and there have been no allegations of bad faith. But the Tenth Circuit BAP has expressly addressed all of these arguments and rejected them, and this Court does as well. In *In re Smitty's Truck Stop, Inc.*, the debtor, like herein, filed an emergency bankruptcy petition and when the Statement of Financial Affairs was later filed, it disclosed a $5000 retainer.[19] The BAP foreclosed the arguments made by Mr. Christian here: it does not matter that a bankruptcy petition is filed on an emergency basis, that a failure to disclose was not done in bad faith, or that

[18] *Jensen v. United States Trustee (In re Smitty's Truck Stop, Inc.)*, 210 B.R. 844, 850 (10th Cir. BAP 1997).
[19] *Id.* at 846.

the Statement of Financial Affairs disclosed the payment.[20] Bankruptcy courts in the Tenth Circuit are directed to strictly apply the Code's requirements relating to attorney's fees and the Code's disclosure requirements.[21]

Because there is no actual agreement with respect to the deposit of the $210,000, at least not a written one, the Court cannot at this point characterize it as a true retainer to be approved under § 328. It appears that Mr. Christian intends the remaining balance of that $210,000 deposit (the approximately $127,000) to be a "security" retainer. A security retainer secures payment of fees for future services that the attorney is expected to render—it is not a present payment for future services, but is property of the

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[20] *Id.* at 849 ("Appellant attempts to excuse himself by arguing that the Chapter 11 was filed on an emergency basis, implying that this omission was simply an oversight. However, this does not excuse his failure to file a supplemental statement to correct the error. Appellant further asserts that his failure to disclose the retainer to the court was not done in bad faith or in an effort to conceal. The court did not specifically find bad faith or an effort to conceal, but those findings are not necessary to hold Appellant in violation of § 329 and Rule 2016(b). Even a negligent or inadvertent failure to disclose the retainer is sufficient to deny fees. Appellant also argues that the retainer was disclosed in [the debtor's] statement of affairs. If we accepted this argument, we would nullify the § 329 and Rule 2016(b) disclosure requirements, which are designed to enable courts to oversee the fee arrangement between debtor and its counsel. More importantly, it is not the court's job to search through the record to find all relevant facts relating to an attorney's employment. It is counsel's duty to provide the court with the information necessary to determine whether to appoint counsel.").

[21] *See, e.g.*, *SE Prop. Holdings, LLC v. Stewart (In re Stewart)*, 970 F.3d 1255, 1267 (10th Cir. 2020) (holding that full disgorgement should be the "default sanction" for a failure to disclose under § 329).

bankruptcy estate that will be earned in the future.[22] The attorney may apply for compensation for services rendered against the retainer, and any unearned portion of the retainer is returned to the estate.[23]

The Court wants Debtor to have competent legal counsel and wants Mr. Christian to be paid reasonable compensation for his services. But at this point, there is no way to determine whether the compensation arrangement is reasonable, because there is no formal engagement, no contract between Debtor and attorney with respect to fees or scope of the legal work. The Court cannot judge the reasonableness of an understanding between two parties. If Mr. Christian wants to be able to apply for compensation later, he must give the Court the right details now. The Court requires the following: (1) a detailed contract between Debtor and Mr. Christian should be executed outlining the terms of Mr. Christian's representation in this bankruptcy proceeding, and (2) a Rule 2016 statement must be filed, detailing the terms of that agreement. These two requirements must be met within fourteen days of the date of this Order.

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[22] *Collier on Bankruptcy* ¶ 328.02[3][b][i] (Richard Levin & Henry J. Sommer eds., 16th ed.) ("A "security retainer" is defined as one held by attorneys to secure payment of fees for future services that the attorneys are expected to render. The funds do not constitute a present payment for future services, but rather remain property of the bankruptcy estate until the attorney applies charges for services rendered against the retainer. Any unearned portion of the retainer must be returned to the estate." (internal quotation omitted)).

[23] *Id.*

Regarding the UST's request that the funds be placed in Debtor's debtor in possession account, the Court defers ruling on that request. The UST argues the funds are an estate asset, but the funds are an estate asset regardless of whether they are in the trust account or the debtor in possession account. Mr. Christian should keep those funds in his trust account, undisturbed, unless express approval or direction is first received by this Court. The Court has been advised that the two adversaries related to this bankruptcy have been successfully mediated, and the Court suspects that the disposition of funds in Mr. Christian's trust account was one of the subjects of the mediation. The Court will therefore defer ruling on the UST's request that the money be transferred to Debtor's debtor in possession account until after the Court and the UST have had an opportunity to examine the impact of the mediation on these funds.

Once the above is filed, and the Court can assess the impact of the mediation on the funds, the Court will then enter an Order granting final approval for Mr. Christian's employment and disposition of the funds in the trust account.

Finally, Mr. Christian should file an application for compensation for his fees incurred to date. The application for compensation should be filed within fourteen days of entry of the final Order approving his employment. If

any creditor or the UST opposes that compensation, then the Court will take up any objections as they arise.

III. Conclusion

As indicated herein, Debtor's application to employ Mr. Christian is provisionally granted. The UST's objections to that motion concerning disclosure and conflict issues have been resolved, and the Court is comfortable with the approximate $127,000 estate asset remaining in Mr. Christian's trust account until further order of this Court. That said, the Court will not enter a final order on the application for employment until, within fourteen days of the date of this Order, both (1) a contract between Debtor and Mr. Christian is executed outlining the terms of Mr. Christian's representation in this bankruptcy proceeding, and (2) a Rule 2016 statement is filed, detailing the terms of that agreement. Mr. Christian should then file an application for compensation for his fees incurred to date, within fourteen days of entry of the final Order approving his employment.

Mr. Christian has exhibited an extremely cavalier attitude towards his "retention and employment" as Debtor's attorney, despite holding himself out as an experienced bankruptcy lawyer and requesting $835 an hour to represent Debtor. This attitude is troubling, and the Court expects Mr. Christian to closely adhere to the law and rules governing the award of attorney fees in his future handling of this case.

It is so Ordered.

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