IT IS SO ORDERED.

Dated: August 4, 2025

Tyson A. Crist
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re:	:	
	:	Case No. 25-30699
Dayton Development Partners, LLC,	:	Chapter 11
	:	Judge Crist
Debtors In Possession.	:	
	:	

ORDER APPROVING: (I) APPLICATION FOR ORDER AUTHORIZING THE EMPLOYMENT OF GOERING & GOERING, LLC AS ATTORNEYS FOR THE DEBTOR (DOC. 8); AND (II) AMENDED APPLICATION FOR ORDER AUTHORIZING THE EMPLOYMENT OF MICHAEL A. GALASSO AS ATTORNEY FOR THE DEBTOR (DOC. 16)

This matter is before the Court on Dayton Development Partners, LLC's (the "Debtor"): (I) *Application for Order Authorizing the Employment of Goering & Goering, LLC as Attorneys for the Debtor* (Doc. 8); (II) *Amended Application for Order Authorizing the Employment of Michael A. Galasso as Attorney for the Debtor* (Doc. 16) (together, the "Applications"), both of which were accompanied by proposed Debtor's counsel's affidavits in support pursuant to 11 U.S.C. §§ 329 and 504[1], and Federal Rules of Bankruptcy Procedure 2014(a) and 2016(b); and (III) The Surgery Center of Southwest Ohio, LLC's ("The Surgery Center") *Limited Objections and Reservation of Rights with Respect to the Debtor's Employment Applications* (Doc. 21)

[1] Unless otherwise specified in this Order, all sections referenced herein are sections of Title 11 of the United States Code (the "Bankruptcy Code").

("Limited Objection") (collectively, the "Contested Matters"). This case was transferred on June 3, 2025 and these Contested Matters were then scheduled for a status conference on June 24, 2025. Doc. 27. In attendance were counsel for The Middlefield Bank Company, Jonathan Hawkins, proposed counsel for the Debtor, Eric Goering, counsel for The Surgery Center, which included Robert B. Berner, Matthew T. Shaeffer, Scott A. Liberman, and Steven J. Miller, and, by telephone, counsel for the United States Trustee, Nathan A. Wheatley.

This Court has subject matter jurisdiction pursuant to the Amended General Order No. 05-02 of the District Court for the Southern District of Ohio (Amended Standing Order of Reference), and that jurisdiction is exclusive over these Applications because they "that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327." 28 U.S.C. § 1334(e)(2).

For the reasons set forth below, the Court will grant the Applications on the bases and terms set forth in this Order.

Background

I. Application to Employ Goering & Goering LLC

On April 18, 2025, Debtor filed its Application (Doc. 8) to employ Goering & Goering, LLC, pursuant to § 327(a) and (d), as their attorneys (hereinafter, "chapter 11 counsel"). Therein, Debtor explained that it is a real estate holding company "in connection with an office building in Moraine, OH, Montgomery County." App. at 1, ¶ 2. And the "Debtor has no employees." *Id.* Although not mentioned in the Application, the Debtor owns "single asset real estate," as that term is defined in § 101(51B). *See* Voluntary Petition at 2, item 7 (Doc. 1). Mr. Goering asserts that his firm "is both well qualified and uniquely able to represent the Debtor in this Chapter 11 case in a most efficient and timely manner." App. at 2, ¶ 4. The services Debtor proposes Mr. Goering's firm will handle include those required to conduct this chapter 11 case. *See* App. at 2, ¶ 5(a)-(d). And Debtor states "[i]t is contemplated that this case will not be lengthy and that a single fee application will be made at the end of the case." App. at 3, ¶ 8. Mr. Goering's current hourly rate is $600 and Ms. Mize's hourly rate is $400, while paralegals will be charged at $175 an hour. App. at 3, ¶ 10.

In the Affidavit of Mr. Goering in support of the Application, he declares that his firm, which employs two attorneys, has no conflicts, but if it later discovers a conflict "a supplement to this [Affidavit] will be filed with this Court." Aff. in Support at 1-2, ¶ 5. Further, Mr. Goering declares that his firm does not have a relationship with any entities, attorneys, or accountants that would be adverse to "the Debtor, its affiliates or the Estate[.]" *Id.* at 2, ¶ 6. In short, Mr. Goering believes his firm "is a 'disinterested person' as defined in section 101(14), as modified by section 1107(b), and that his firm "holds no interest adverse to the Debtor and their estate as to the matters with respect to which it is to be employed."[2] *Id.* at 2, ¶ 10.

II. Application to Employ Mr. Galasso (Robbins, Kelly, Patterson & Tucker, LPA)

Mr. Galasso's Amended Application[3] provides that he is to be retained as litigation counsel to "litigate the lease termination issues" with The Surgery Center, "in state court or in an adversary proceeding." *Am. App.* at 1; 2, ¶¶ 7-8; 3, ¶ 10. Authorization is sought under §§ 327(e) and 328(a). The terms of compensation are set forth in the letter agreement attached as Exhibit B to the Amended Application, which, as explained therein, will be "based upon the amount of time spent by attorneys and support staff." Ex. A to *Am. App.* (Doc. 16-1) at 4. Mr. Galasso's current (as of April 10, 2025) hourly rate is $450. *Id.* Law clerks and paralegals at his firm are charged at hourly rates of $100 to $195. *Id.* Notably, the letter agreement states that it is Mr. Galasso's "firm's policy to request a retainer in connection with litigation matters" and his firm requested "a retainer of $7,000." *Id.* at 5. There was no mention (no disclosure) of whether Mr. Galasso or his firm received any such retainer or, resultantly, from whom or which entity it may have been or was supposed to be paid. Section 329(a) requires that an attorney representing a debtor file a statement with the Court of the compensation paid, if such payment was made within one year before the petition date, and the source of such compensation. So, presumably, Mr. Galasso was not paid anything prior to this bankruptcy. But it appears that Mr. Galasso has been representing the Debtor to file an eviction action in state court against The Surgery Center, which The Surgery Center has removed to this court (and will be addressed separately).

[2] As an aside, this language does not appear in § 327(a).

[3] The original Application to employ Mr. Galasso (Doc. 15) appears to have been amended to seek to employ him under § 327(e) rather than § 327(a).

III. Limited Objection by The Surgery Center

The Surgery Center, in its Limited Objection filed on May 9, 2025, asserted that additional disclosures were needed regarding the employment Applications. This was prior to the amendment and supplementations of the Applications. The Surgery Center noted that Debtor has no cash, no bank account, no revenue, and has not sought approval of any DIP financing. *See Limited Obj.* at 5, ¶¶ 14-15; 6, ¶ 17. The Surgery Center also cited the late Bankruptcy Judge Speer's opinion in *In re Metropolitan Environmental, Inc.*, 293 B.R. 871 (Bankr. N.D. Ohio 2003) for the proposition that when a third-party or insider guarantees the fees of a corporate debtor, "it is necessary to scrutinize the overall arrangement." *Limited Obj.* at 6, ¶ 16. And "[t]he factual and legal relationships between the third party, the debtor, their respective attorneys, and their agreement concerning fees must be fully disclosed to the Court from the outset of the debtor's bankruptcy." *Id.* Thus, The Surgery Center did not ask the Court to deny the Applications; rather, it limited its objection to "significant questions regarding the sources and payment of professional fees" and asserted that "[a]t a minimum, additional disclosures are required." *Id.* at 6, ¶ 17.

IV. Mr. Galasso's Supplement to Amended Application

Prior to the status hearing, Debtor submitted a *Supplement to Amended Application for Order Authorizing the Employment of Michael A. Galasso as Attorney for the Debtor* (Doc. 29) (the "Supplement"). Therein, Debtor disclosed "that Galasso has been paid an 'evergreen retainer' by a third party that is not seeking reimbursement from the Debtor." *Supplement* at 1. The Fee Agreement attached thereto, dated May 15, 2025, which post-dates the Amended Application, states that Surgery Development Partners, LLC ("SDP")[4] agreed to pay Mr. Galasso's law firm, Robbins, Kelly, Patterson & Tucker, LPA ("RKPT") an evergreen retainer of $15,000. This Supplement addresses some of the issues addressed in the *Kelton Motors* opinion, discussed later, such as SDP understanding that it "has no right to make decisions or otherwise be involved in the attorney-client relationship." Fee Agreement at 1 (Doc. 29-1). But the fact that this is not an arm's-length transaction, and that SDP is almost certainly an affiliated, commonly owned entity (as

[4] SDP is not listed on either Schedules D or E/F as a creditor; however, by all accounts it is almost certainly an affiliate of the Debtor and other creditors who have made loans to the Debtor.

indicated by Joshua Pardue's execution of the Agreement as Managing Member of SDP[5]) is exemplified by SDP's representation "that the funds paid under this Agreement are not a loan to [Debtor] and that [Debtor] has no obligation to repay the funds to SDP." *Id.*

V. July 24, 2025 Status Conference on the Applications and Limited Objection

At the status conference, Mr. Berner stated that the Surgery Center would not further pursue the Limited Objection if the United States Trustee and the Court were willing to approve the Applications. Mr. Wheatley, on behalf of the United States Trustee, after expressing some concern about the way in which Debtor's representative, Joshua Pardue, addressed questions at the § 341 meeting of creditors, stated that he had no objection at this time to approval of the engagements, with the caveat that future information and disclosures could have an impact upon debtor's and special counsel's retention and allowance of fees, presumably as may be raised in future objections. The Court, however, raised concerns about the adequacy of the disclosures of counsel and whether they addressed the issues relevant to assessing disinterestedness (or in the case of § 327(e), an adverse interest) when the payment of fees is by a third-party, and therefore required that Debtor's proposed chapter 11 counsel and special counsel file supplemental declarations. *See Order Fixing Date for Supplementation of Debtor's Applications to Employ (Doc. 8, 16)*, Doc. 37. In response, counsel filed the *Declaration of Attorney Michael Galasso as Supplement to Application for Order Authorizing the Employment as Attorney for the Debtor (Doc. 16)* (Doc. 40) and the *Declaration of Attorney Eric W. Goering as Supplement to Application for Order Authorizing the Employment of Eric W. Goering as Attorney for the Debtor (Doc. 8)* (Doc. 41) (each a "Supplemental Declaration"), which the Court has reviewed.

VI. Mr. Goering's Supplemental Declaration

Mr. Goering's Supplemental Declaration states that he was paid retainers of $10,000 and $40,000 – a total of $50,000 – on April 11 and 18, 2025, respectively, in conjunction with being retained by the Debtor on April 11, 2025. Doc. 41 at 1, ¶ 4. This chapter 11 case was filed on April 18, 2025, just seven days later. Doc. 1. Mr. Goering goes on to declare that he "was paid

[5] Review of the Florida Secretary of State's records reveals that SDP is a Florida limited liability company with an address of 101 S. 12th Street, Unit 102, Tampa, Florida 33602, and the registered agent is JPRE Dev. LLC, with Joshua Pardue signing on behalf of the registered agent on April 30, 2025. *See* https://search.sunbiz.org (Search by Entity Name, Surgery Development Partners, LLC) (last visited July 31, 2025).

$12,035.00 for my work prepetition and paid the Chapter 11 filing fee of $1,738.00[,]" but there is no explanation of whether this payment came from the retainers and to what invoices the funds were applied. *Id.* at 1, ¶ 7. Attached to his Supplemental Declaration are copies of a Legal Services Contract dated April 11, 2025, pursuant to which Mr. Goering was retained (¶ 3), which, at least as to the original retainer, indicates the money was paid in advance. *See* Legal Servs. Contract at 2, ¶ B.1(a) (Doc. 41-1). The Legal Services Contract also provides that the hourly rates agreed to are $600 for Mr. Goering, $400 for Alexis Mize, $350 for Abby Swartz, and $175 for paralegals. *Id.* at 2, ¶ B. Mr. Goering declares that, to the best of his knowledge, the retainers were paid to him by the Debtor from loans they received from JPRE Development Partners, LLC ("JPRE"). Supp. Decl. at 2, ¶ 5-6 (Doc. 41). In support, also attached to Mr. Goering's Supplemental Declaration are two Standard Promissory Notes (together, the "Notes") made by and between the Debtor, as the Borrower (as defined therein), and JPRE, as the Lender (as defined therein). *See* Exhibits 2 and 3 (Doc. 41-1 at 4-9, Exs. 2-3). The first Note is dated April 10, 2025, concerning the principal amount of $10,000, payable by April 10, 2027. There does not appear to be any interest payable. The second Note is dated April 16, 2025, concerning the principal amount of $40,000, payable by April 16, 2027, also without any apparent interest payable. Not charging any interest on a loan repayable in two years suggests that these are not arm's-length transactions. Notably, both Notes were signed by Joshua Pardue in both capacities, on behalf of the Lender and the Borrower. Mr. Goering goes on to declare that the Debtor is owned 60% by GNP Development Partners ("GNP") and 40% by Embree Net Lease Fund I, LLC, and that Mr. Pardue is the 99% owner of GNP, but there is no further disclosures of ownership beyond that (no mention of who or what entity owns the other 1% of GNP or Embree Net Lease Fund I, LLC). Doc. 41 at 2, ¶¶ 8-9.

VII. Mr. Galasso's Supplemental Declaration

Mr. Galasso's Supplemental Declaration states that his firm, RKPT, received $15,000 on June 18, 2025 from SDP, which, to the best of his knowledge, is owned by JPRE Development, LLC.[6] Further, Mr. Galasso states, "[t]o the best of his knowledge and pursuant to the Statement of Financial Affairs #28, the Debtor is owned 60% by GNP Development Partners and 40% by

[6] There is no mention of whether JPRE Development, LLC is a separate entity from JPRE Development Partners, LLC – if it is the same entity or different but very similarly named.

Embree Net Lease Fund I, LLC." Supp. Decl. at 2, ¶ 4 (Doc. 40). Mr. Galasso also declares that "[t]o the best of my knowledge, JPRE is owner 100% by Joshua Pardue." *Id.* at 2, ¶ 6.

Although not mentioned in either of the Applications, nor the Supplemental Declarations in support, the Debtor listed JPRE Commercial[7], located at 101 S. 12th Street #102, Tampa, FL 33602, as a creditor in Schedule E/F: Creditors Who Have Unsecured Claims, as holding a nonpriority unsecured claim of $124,219.06 for loans, which debt was incurred "2020-current." Schedule E/F (Doc. 1 at 16). This is one of six different entities at the same address in Tampa, Florida that have made unsecured loans to the Debtor, totaling $821,849.62, which are all described as loans made during the same time period.

VIII. Summary of Background

In sum, the Applications, affidavits in support, the Supplement, and the Supplemental Declarations submitted to date lead to the conclusion that the third party who loaned money to the Debtor to pay prepetition retainers to Mr. Goering – JPRE – and the third party who has or will pay an evergreen retainer to Mr. Galasso's firm – SDP – are affiliated entities owned or controlled by Mr. Pardue. But there is no suggestion, at this point in time, that Mr. Goering, Mr. Galasso, or their respective firms represent the affiliated entities or Mr. Pardue, such that they would have an actual conflict of interest. And it does not appear, at this time, that there is an adversity of interest that would rise to the level of precluding the employment of counsel.

Legal Analysis

With respect to the Application to employ Goering & Goering, LLC as attorneys for the Debtor – chapter 11 counsel – approval is governed by 11 U.S.C. § 327(a).[8] In contrast, with respect to the Application to employ Mr. Galasso as special counsel to the Debtor, said Application asserts that approval is governed by § 327(e).

As a big-picture matter, it is rare that a debtor-in-possession will "be deprived of the ability to select qualified counsel, for '[t]he relationship between attorney and client is highly confidential,

[7] There is no disclosure as to whether JPRE Commercial and JPRE Development Partners, LLC are the same or affiliated entities; however, it appears they must be commonly owned or controlled by Mr. Pardue.

[8] Debtor, in its Application, also asserts the approval Mr. Goering's firm's employment is based on § 327(d), but there is no explanation within the Application of how this sub-section applies or why it is referenced. And the case law interpreting this provision appears to limit its application to situations in which a trustee will also serve as an attorney or accountant; thus, the Court does not further address § 327(d) in this Order.

demanding personal faith and confidence in order that they may work together harmoniously.' " 3 *Collier on Bankruptcy* ¶ 327.04[1] at 327-29 (Richard Levin & Henry J. Sommer eds., 16th ed.) (citations omitted). In this case, however, the source of payment of Debtor's counsel's fees has given rise to The Surgery Center's Limited Objection as well as the Court's request for further disclosures, and ultimately an analysis of whether the employment of Debtor's proposed counsel can be approved.

For purposes of employment under § 327(a), as well as § 327(e), there is a requirement that the attorneys "do not hold or represent an interest adverse to the estate," as phrased within § 327(a), and "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," as phrased within § 327(e). In addition, under § 327(a) an attorney must also be "disinterested," which requires, in part, that they not have any interest that is "materially adverse to the interest of the estate or of any class of creditors . . . by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason[.]" 11 U.S.C. § 101(14)(C). There is some potential overlap in these criteria, however, the most analogous cases appear to analyze the third-party payment issue present in this case under the "adverse interest" prong in § 327(a) and (e), and not the catch-all provision of the disinterestedness prong (as defined in § 101(14)(C)). *See, e.g.* 3 *Collier on Bankruptcy* ¶ 327.04[2][b] at 327-41 & n.64 (citing *Waldron v. Adams & Reese LLC* (*In re Am. Int'l Refinery, Inc.*), 676 F.3d 455, 462 n.9 (5th Cir. 2012) (applying the totality of the circumstances test when the retainer had been paid by creditor of the debtor, but sanctioning counsel for failure to disclose the source of its retainer when applying to be retained); *In re Silva Dairy, LLC*, 552 B.R. 847, 852-54 (Bankr. D. Idaho 2016) (payment of the debtor's fees by a third party may prevent the attorney from being disinterested); *In re Champagne Servs., LLC*, 560 B.R. 196, 200-02 (Bankr. E.D. Va. 2016) (disinterestedness may be affected by a third party guarantee of the fees of debtor's counsel).

This case presents a dynamic in which there does not appear to be any issue with Debtor's chosen counsel's past representations, affiliations, or actions (apart from some delays in making full disclosure with respect to the sources of payment); rather, the issue giving rise to The Surgery Center's Limited Objection is that Debtor has no money, not even a bank account, such that proposed counsel will be paid from funds that are loaned or contributed by affiliated entities owned or controlled by the Debtor's principal, Mr. Pardue. Thus, it appears this dynamic would exist no matter which counsel had been proposed, such that denying the Applications could effectively

close the door to bankruptcy for this Debtor, or, at a minimum, require the Debtor and its affiliated entities to take a different approach.

In a somewhat similar, yet ultimately distinguishable context, Judge Speer nicely summarized the rules of the road for the employment of chapter 11 counsel under § 327(a). *Metro. Env't*, 293 B.R. at 882. Therein, he wrote:

> Section 327(a) was enacted to ensure impartiality in bankruptcy representation. *Electro-Wire Prods. v. Sirote & Permutt, P.C. (In re Prince)*, 40 F.3d 356, 360 (11th Cir. 1994). To effectuate this purpose, this provision provides, in relevant part:
>
> > Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, . . . 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.
>
> Thus, based upon the explicit language of § 327(a), two requirements must be met before an attorney may be employed by a debtor for legal representation: (1) the attorney may not hold or represent an interest adverse to the estate; and (2) the attorney must be disinterested. *In re Eagle-Picher Industries, Inc.*, 999 F.2d 969, 971 (6th Cir. 1993) An attorney who, at any time, fails to meet these requirements is subject to having both compensation for services and reimbursement of expenses denied pursuant to 11 U.S.C. § 328(c).

Id. at 882-83 (footnotes omitted). In comparison, § 327(e) provides that a debtor:

> with the court's approval, may employ, for a specified special purpose, other than to represent the [debtor-in-possession] 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.

Thus, "[s]uch attorney need not be 'disinterested,' as is otherwise required by section 327(a), provided that the attorney represents or holds no interest adverse to the debtor or to the estate in respect of the matter upon which the attorney is to be engaged." 3 *Collier on Bankruptcy* ¶ 327.04[9].

In situations in which proposed Debtor's counsel is being paid from an entity other than the Debtor, there is a heightened concern about the "adverse interest" and "disinterestedness" standards. As the Surgery Center raised in its Limited Objection, there is case law on this topic

and a test set forth in the *Kelton Motors* case. *See Metro. Env't*, 293 B.R. at 884 (citing *In re Kelton Motors*, 109 B.R. 641, 658 (Bankr. D. Vt. 1989)). The Court alerted Debtor's proposed chapter 11 counsel to this issue at the status conference, expressed concerns, and advised counsel there was more work to be done with regard to disclosure and addressing those issues [Statements of Judge Crist – 3:58:36 – 4:01:54 (Doc. 34, Attached Audio File)]. The Court also directed counsel to submit his retention agreement and the loan document(s) concerning the funds loaned to the Debtor to pay his retainers, given that Debtor's counsel explained for the first time at the status conference that the retainer funds were loaned to the Debtor.

During the status conference, Mr. Goering, in response to a question from the Court, indicated that the Debtor would obtain postpetition financing to support the administrative expenses accruing in this case; however, that has not yet happened. Thus, the Court and parties are left to wonder how Debtor's chapter 11 counsel and any other administrative expense claims, including but not limited to the U.S. Trustee fees, will be paid. The Legal Services Contract attached to Mr. Goering's Supplemental Declaration obligates the Debtor, as the "Client," to "compensate the Attorneys for all legal services rendered" at the hourly rates set forth therein. Doc. 41-1 (Ex. 1) at 2, ¶ B. Thus, unlike the arrangement for Mr. Galasso's employment, there is no indication that a third party is presently obligated to pay Mr. Goering's (or, technically, his firm's) attorney fees. The reality, however, as confirmed by the Notes also attached to Mr. Goering's Supplemental Declaration, is that an affiliated entity, likely under common ownership or control of Mr. Pardue, is the likely source of any such funding. Although Debtor asserts that it may recover on claims against the Surgery Center, as of now it has little in the way of assets beyond its "single asset real estate," the Surgery Center is not paying rent, and Debtor asserts the lease was terminated. *See* Schedule A/B: Assets – Real and Personal Property (Doc. 1 at 10) (scheduling the real estate at 2210 Arbor Boulevard, Dayton (Moraine), Ohio 45439 with Debtor's interest currently valued at $8,500,000); Amended Schedule A/B: Assets – Real and Personal Property (Doc. 31) (scheduling an escrow account with tenant deposits, in the amount of $107,875.82); Amended Schedule G: Executory Contracts and Unexpired Leases (Doc. 32) (listing the lease with The Surgery Center and stating "it is Debtor[']s position that the lease was terminated.").

This situation is distinguishable from the case that was before Judge Speer in *Metro Environmental*, which involved other "aggravating" circumstances concerning the way in which debtor's counsel had not disclosed that checks from the debtor-in-possession were returned on

account of insufficient funds, that counsel then obtain a payment guaranty from individuals with divergent interests, and that counsel likely knew the guaranty would be the source of payment of fees. *See Metro. Env't*, 293 B.R. at 885-86. And the Court is mindful of Judge Speer's observation that there is a "major weakness" in adopting a per se rule not permitting an insider to guaranty (or pay) fees because "it does not allow the Court to take into account the unique characteristics of each case." 293 B.R. at 884. He further explained as follows:

> Of special concern, is the reality that many small closely-held corporations facing the prospect of bankruptcy do not have the funds available to obtain legal counsel, and therefore must rely upon insiders to finance their legal representation. *See In re Lotus Props. LP*, 200 B.R. 388, 393 (Bankr. C.D. Cal. 1996). Thus, to adopt a per se rule against insiders providing a fee guaranty could effectively preclude a large class of debtors from seeking bankruptcy protection. As such, a per se prohibition against insiders providing guaranties clearly goes against the bankruptcy policy that, unless a provision specifically provides otherwise, the Bankruptcy Code should be based on an equitable approach as opposed to hard and fast rules which do not leave any room for crafting an appropriate remedy.
>
> Accordingly, contrary to the UST's position, this Court declines to rule that, as a matter of law, an insider(s) may not guarantee the fees of a corporate-debtor under the standard enumerated in § 327(a). However, given the great potential for conflict, the Court will carefully scrutinize the overall arrangement so as to insure that it was reasonable, that i[t] was negotiated in good faith, and that it was necessary as a means of insuring the engagement of competent counsel. In making this determination, the Court finds illustrative the factors set forth in *In re Kelton Motors Inc.*, 109 B.R. 641 (Bankr. D. Vt. 1989), which, like the instant case, involved the allowance of an insider's fee guaranty under § 327.

Id. In addition, the Court located an analogous case involving a single asset real estate debtor in which an insider's – the general partner's – payment of a prepetition retainer and ongoing fees to the debtor's proposed chapter 11 counsel was held to not constitute a *per se* impermissible conflict of interest. *See In re Lotus Props., LP*, 200 B.R. 388, 390-96 (Bankr. C.D. 1996) (referring to the *Kelton Motors* opinion as best embodying the "analytical approach" and disagreeing "with the creation of a *per se* rule without allowance for consideration of individual facts and balancing the equities and practicalities of each unique situation."). The Court also identified an analogous case in which special counsel, who was retained to oppose a motion for stay relief to proceed with a state-court eviction proceeding, was approved to be employed even though counsel had received compensation from a third-party insider. *See In re Lan Dan Enters., Inc.*, 221 B.R. 93, 95-96

(Bankr. S.D.N.Y. 1998) (permitting the employment of special counsel and distinguishing *Kelton Motors*).

In the absence of a proposed arrangement by which chapter 11 counsel's fees would be directly paid or guaranteed by an insider or creditor, the issue of divided loyalties does not yet appear to rise to the same level present in the *Metro Environmental* case, such that retention of the Debtor's chapter 11 counsel can be approved at this time based on the disclosures presently before the Court. Further, payment of a retainer or fees by a creditor or insider does not necessarily equate to the attorney representing that interest adverse to the debtor or its estate, particularly when there are agreements in place that make this clear. *In re Missouri Min., Inc.*, 186 B.R. 946, 949 (Bankr. W.D. Mo. 1995) (Federman, J.) (holding that counsel's acceptance of a $15,000 retainer by debtor's principal, who was also a creditor, without more, did not mean that counsel had a conflict of interest, represented an adverse interest, or was not disinterested); *see also In re Glenn Elec. Sales Corp.*, 89 B.R. 410, 415-16 (Bankr. D.N.J. 1988), *aff'd* 99 B.R. 596 (D.N.J. 1988) (finding that "in this case, the payment of the retainer by the 100% shareholder does not equate to representation of that shareholder. Indeed, payment to a lawyer by one person to represent a different person is not uncommon[,]" but also concluding that debtor's proposed counsel was not disinterested due to the existence of other issues),

There are, however, remaining concerns about what may come to light before this chapter 11 case concludes, and whether any such developments could lead to a different conclusion. The admonition that "[a]n attorney who, at any time, fails to meet [the two] requirements [of § 327(a)] is subject to having both compensation for services and reimbursement of expenses denied pursuant to [] § 328(c)" should be kept in mind, and any gamble in proceeding with the representation of the Debtor in this circumstance will ultimately fall upon Debtor's counsel. *Metro. Env't*, 293 B.R. 871, 883 (Bankr. N.D. Ohio 2003). *See also In re Sandpoint Cattle Co., LLC*, 556 B.R. 408, 420 (Bankr. D. Neb. 2016) (stating that disinterestedness is a continual issue throughout the administration of the case). But the Debtor is being represented by experienced counsel who can assess their own appetite for risk, without which the Debtor might struggle to navigate this case and fulfill its fiduciary duties. And The Surgery Center, the currently known and actively adverse party, has had an opportunity to make its own judgment about the employment of Debtor's proposed counsel.

Special counsel, Mr. Galasso and his firm, do not need to meet the bar of being "disinterested," as defined in § 101(14); however, it must still be shown that they do not represent an adverse interest as required by § 327(e).[9] But this analysis is narrowed to a "factual evaluation of actual or potential conflicts only as related to the particular matters for which representation is sought." *In re Statewide Pools, Inc.*, 79 B.R. 312, 314 (Bankr. S.D. Ohio 1987) (Sellers, J.) (quoted in 3 *Collier on Bankruptcy* ¶ 327.04[9][a] at 327-56).

With those observations and admonitions as backdrop, and as previewed above, the Court has considered analogous case law, such as *Kelton Motors* and *Metro Environmental*, based on the current record. Notably, the factors set forth in *Kelton Motors* have been viewed as providing "flexibility when equity so requires, while still ensuring that the 'adverse interest' and 'disinterested' requirements of § 327(a) are met." *Metro. Env't*, 293 B.R. at 885. Here, unlike in the *Metro Environmental* case, the fee arrangements, while not fully disclosed initially, have been disclosed as to the sources of payment prior to approval of employment. And, because the Debtor does not appear to have any funds (or even a bank account), presumably any postpetition funding will be brought before the Court for approval pursuant to § 364. Further, as of now there is no evidence that either of the proposed counsel sought or obtained guaranties or payment from insiders with different roles or "very divergent" interests, which would hamper their ability to perform their fiduciary duties to the Debtor's estate. *Id.* at 885. That said, in the event that further facts come to light, whether by disclosure or otherwise, this analysis could change and give the Court reason to revisit counsel's employment and, obviously, factor into any decision whether to approve fees and expenses. Moreover, Debtor's counsel have a continuing obligation to supplement their disclosures pursuant to Bankruptcy Rule 2014(a)(3) and LBR 2014-1(f), and all parties, as well as the Court, will retain the ability to review those matters and take appropriate action. *See, e.g.*, *Sandpoint Cattle*, 556 B.R. at 421 (quoting *Metro. Env't*, 293 B.R. at 887 ("Although no ongoing disclosure requirement is explicitly set forth in Rule 2014(a), as is the case with Bankruptcy [Rule] 2016(b), case law has uniformly held that under Rule 2014(a), (1) full

[9] There is a divergence of opinion on whether an attorney has to be engaged prepetition in order to be employed under § 327(e); however, nobody raised an objection to employment on this basis and, technically, it appears that Mr. Galasso and his firm were engaged by the Debtor a week prior to the petition date, according to the engagement letter dated April 10, 2025, which was signed on behalf of Dayton Development Partners, LLC on April 11, 2025, attached to the Amended Application. *See* 3 *Collier on Bankruptcy* ¶ 327.04[9][b] at 327-57-327-58.

disclosure is a continuing responsibility, and (2) an attorney is under a duty to promptly notify the court if any potential for conflict arises." (collecting cases)).

Ticking through the five factors of *Kelton Motors*, as recited in *Metro Environmental*, the first is that the fee arrangement must be fully disclosed to the "debtor/client and the third party payor-insider[.]" *Metro Env't*, 293 B.R. at 884. This appears to be satisfied for both of Debtor's proposed counsel, given the execution of the Legal Services Contract for Mr. Goering's firm by the Debtor, by Joshua Pardue (Ex. 1 to Doc. 41), and the execution of the letter agreement dated April 10, 2025, by the Debtor (Ex. B to Doc. 16-2), and the Fee Agreement dated May 15, 2025, by SDP (Ex. 1 to Doc. 29-1), for Mr. Galasso's firm. Further, Mr. Goering filed the two Notes between the Debtor and JPRE (Exs. 2 and 3 to Doc. 41-1), both of which have the same Tampa, Florida mailing address. Mr. Goering also disclosed in his affidavit that JPRE is 99% owned by Joshua Pardue, who, in turn, is the managing member of GNP Development Partners, LLC ("GNP"). Doc. 41 at 2, ¶¶ 8-9; Doc. 4. And GNP is the 60% owner of the Debtor. *Statement of Financial Affairs*, Doc. 1 at 26, Q. 28; Doc. 41 at 2, ¶ 8. As for Mr. Galasso, proposed special counsel, he is a partner of the law firm of Robbins, Kelly, Patterson, and Tucker, LPA ("RKPT"). Doc 40 at 1, ¶ 1. RKPT received a $15,000 retainer on June 18, 2025 from SDP. In turn, that entity is, to the best knowledge of RKPT, owned by JPRE. *Id.* at 1, ¶ 3. This affidavit varies slightly in that it states that JPRE is 100% owned by Mr. Pardue. *Id.* at 2, ¶ 6. The RKPT affidavit additionally states that GNP, the Debtor's majority owner, is 99% owned by Mr. Pardue. *Id.* at 2, ¶ 5. Construing all of this together, it appears that there has now been full disclosure, not only to the Debtor and payor-insiders, but to the parties and the Court, apart from the issue of which entity will make any debtor-in-possession financing available; however, that will need to be brought before the Court by separate motion.

The second factor of the Kelton Motors analysis is that "the debtor must give express consent to the arrangement." *Metro. Env't*, 293 B.R. at 884. The foregoing facts discussed in the context of the first factor appear to likewise satisfy this element with respect to the employment of special counsel.[10] The record shows that the Debtor, who is controlled by Mr. Pardue, has consented to these fee arrangements. Mr. Pardue signed the previously discussed loan documents on behalf of both the Borrower and Lender thereto. Doc. 41, Exs. 2, 3.

[10] There is no proposal at this time that chapter 11 counsel be paid directly by a third-party.

The third factor of the Kelton Motors analysis is that "the third party payor-insider must retain independent legal counsel and must understand that the attorney's duty of undivided loyalty is owed exclusively to the debtor/client." *Metro. Env't*, 293 B.R. at 884. Here, Mr. Galasso's firm addressed this element by incorporating language into the Fee Agreement which states that "RKPT has advised SDP that it has the right, and encourages SDP, to review this Agreement with its own legal counsel prior to execution," which was signed by SDP, by Joshua Pardue as its Managing Member. Doc. 29-1, Ex. 1 at 1-2. As to Mr. Goering's firm, because a third party is not currently obligated to pay his fees, this factor does not necessarily cut one way or the other.

The fourth factor of the Kelton Motors analysis is that "the factual and legal relationships between the third party payor-insider, the debtor, their respective attorneys, and their contractual arrangement concerning the fees must be fully disclosed to the Court at the outset of the debtor's bankruptcy representation[.]" *Metro. Env't*, 293 B.R. at 884. On this count Debtor's counsel could have done better and could have been more proactive to comply with their obligations to come forward with and make full disclosures of all factual and legal relationships before The Surgery Center filed its Limited Objection, and before the Court, as well as the U.S. Trustee, had to ask for the information. Thus, the Court finds that not all of the factual and legal relationships, and contractual arrangement concerning the fees were fully disclosed to the Court at the outset of representation of the Debtor. Moreover, the Fee Agreement with Mr. Galasso's firm was entered into postpetition.

The fifth factor of the Kelton Motors analysis is that "the debtor's attorney-applicant must demonstrate and represent to the Court's satisfaction the absence of facts that would otherwise create non-disinterestedness, actual conflict, or impermissible potential for a conflict of interest." *Id.* This one is a closer call. It appears that any money that will ultimately be available to pay the attorney fees to either of Debtor's counsel is going to come from Mr. Pardue or the entities which appear to be under his control. Thus, at some point there is the potential for a conflict of interest; however, at this point in time there does not appear to be one. The thornier question may be whether there is an "impermissible potential" for a conflict of interest. It is always difficult to know what one does not know. At least as of now, it does not appear to be impermissible. But that could change.

On balance, although Debtor's counsel did not satisfy the fourth element, and the fifth element is somewhat of a toss-up at the moment, keeping in mind the "flexibility when equity so requires" gloss, and for reasons further discussed below, the Court finds Mr. Goering and his law firm are disinterested, and Mr. Galasso and RKPT do not have a disqualifying conflict pursuant to § 327(e). Because both the objecting party, the Surgery Center, and the U.S. Trustee have advised that they are not further pursuing objections to the employment of Debtor's counsel, the Court will, with some reservations, approve the employment of both of Debtor's proposed counsel at this time, subject to later revisiting this issue based on further facts and disclosures that may be brought before the Court.

Therefore, based on upon the Court's independent review of the record, as well as the Court's colloquy with proposed counsel for the Debtor, counsel for the United States Trustee, and counsel for The Surgery Center[11] during the status conference on June 24, 2025, the Court

[11]Statement of Nathan A. Wheatley, Trial Attorney for the United States Trustee – 3:48:07 – 3:51:22 (Doc. 34, Attached Audio File):

"As to the motion to retain Mr. Goering, in the first instance, under. . . 327(a), Mr. Goering is eminently qualified to represent the Debtor in Chapter 11, his rates are market, and we see no objection there. He appears to be disinterested and free of conflict. I do agree with him that he likely needs to file, . . . before an order is entered, he needs to file, probably file, a supplement to his declaration and will need to put a copy of his retention agreement in the record, but beyond that, your honor, he appears to have received . . . his retainer prepetition from one of the Debtor's related entities, that is also . . . listed as a creditor. Although, you've heard there is a question as to whether this affiliate creditor, any of the affiliate creditors, actually have viable claims, that is however an issue for another day. The entity, per Mr. Pardue's testimony, who paid Mr. Goering's retention was JPRE Commercial. In contrast, the supplement that was filed at docket number 29, includes an attachment, the fee agreement at 29-1, reflects an entity known as Surgery Development Partners LLC, made a $15,000 retainer payment to proposed special counsel. At this time, we don't know who Surgery Development Partners LLC is. I have asked Debtor's counsel to provide some information regarding that entity to us. However, there are numerous representations that the retainer payment is a gift to the estate, is not going to be considered a loan, or providing Surgery Development Partners LLC with status as a creditor. If Surgery Development Partners LLC can confirm that, then there does not appear to be a conflict. Additionally, . . . proposed special counsel included the representation that they will not take direction from anyone other than the debtor and the debtor's authorized representative. Since this is a . . . proposed retention under 327(e), . . . there is not the same requirement, they simply have to show there is no conflict of interest, which there does not appear to be, and in fact, they could have been retained prepetition for that matter . . . . So, with the caveat that we need that additional information, both for Mr. Goering's retention, and we'll need some additional information and representations regarding Surgery Development Partners LLC, we don't see an issue currently, with the retention of special counsel. Of course, . . .if it turns out there is an issue going forward that'll impact the ability of any counsel in this case to receive compensation, . . . I guess that's also the risk that they take, proceeding forward and knowing they have got to satisfy 329 and 330."

Robert B. Berner (Counsel for the Surgery Center) – 3:20:41 – 3:20:59 (Doc. 34, Attached Audio File):

"We believe that the filings were inadequate, there have been some official disclosures, it is not the Surgery Center's desire to create unnecessary litigation and our position on that is if the court and the U.S. Trustee is satisfied based

approves the Application for employment of Michael Galasso as special counsel pursuant § 327(e), and the Application for employment of Goering & Goering as Debtor's chapter 11 counsel under 11 U.S.C. § 327(a). Based on the record available to the Court, the Court finds that Mr. Goering and his firm Goering & Goering LLC are disinterested. *See* 11 U.S.C. § 101(14) (defining disinterestedness). Additionally, the current record shows the Mr. Galasso and his firm "do not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which [he and his firm] is to be employed." § 327(e). And it appears that Debtor's employment of Mr. Galasso and his firm will be in the best interest of the estate.

Importantly, counsel should be cognizant that counsel's employment, as well as all professional compensation, is subject to further review, pursuant to §§ 327, 329, 330 and 331. The Debtor and special counsel have an ongoing obligation to promptly disclose any conflicts that become apparent during the pendency of this case and file a supplemental affidavit. *See* LBR 2014-1(f). Conflicts of interest not apparent from the current record may result in the court ultimately denying allowance of professional compensation. 11 U.S.C. § 328(c).

Finally, although Debtor's counsel represented at the status conference that the Debtor would obtain postpetition financing to fund the administrative expenses accruing in this case, as of yet no motion to approve postpetition financing has been filed. Thus, the Debtor currently does not appear to have any funds to pay the fees of counsel. Also, the *Motion of the Middlefield Banking Co. for Relief from the Automatic Stay* (Doc. 46) relating to Debtor's real estate is now pending.

Conclusion

Based upon the foregoing, the Court finds that employment of Debtor's counsel – both chapter 11 counsel and special counsel – should be approved at this time. Mr. Goering and his firm are found, at this time based on the disclosures made, to not hold or represent an interest adverse to the estate and to be disinterested persons, as defined under § 101(14), as modified by § 1107(b). Further, the Court finds that employment of Mr. Galasso and his firm by the Debtor would be in the best interest of estate, and that Mr. Galasso and his firm do not represent or hold any interest

upon the supplemental disclosures that have been made and then future disclosures that it sounds like are coming, we will defer to the court and the U.S. Trustee on their satisfaction of those questions."

adverse to the Debtor or to the estate with respect to the matter on which they are to be employed. Thus, in the absence of any remaining objection to the Debtor's employment of the proposed chapter 11 counsel and special counsel, **IT IS HEREBY ORDERED** that the Applications be, and hereby are, approved on the terms set forth in this Order; and

IT IS FURTHER HEREBY ORDERED that Debtor's employment of proposed chapter 11 counsel, Mr. Goering and his firm Goering & Goering LLC, is approved pursuant to § 327(a) on the terms set forth in the Application (Doc. 8), Supplemental Declaration of Mr. Goering (Doc. 41), and attachments thereto, except as may be modified by this Order; and

IT IS FURTHER HEREBY ORDERED that Debtor's employment of proposed special counsel, Mr. Galasso and his firm Robbins Kelly Patterson Tucker, LPA, is approved pursuant to § 327(e) on the terms set forth in the Amended Application (Doc. 16), the Supplement to Amended Application (Doc. 29), the Supplemental Declaration of Mr. Galasso (Doc. 40), and attachments thereto, except as may be modified by this Order; and

IT IS FURTHER HEREBY ORDERED that Debtor's chapter 11 counsel, Mr. Goering and his firm Goering & Goering LLC, shall hold the balance of the retainers received from the Debtor prepetition – the loaned funds – in the firm's trust (IOLTA) account pending further order of this Court to permit any application of funds from the retainer to payment of fees and reimbursement of expenses in conjunction with chapter 11 counsel's application(s) for approval of fees and expenses pursuant to §§ 330 and 331; and

IT IS FURTHER HEREBY ORDERED that Debtor's special counsel, Mr. Galasso and his firm Robbins Kelly Patterson Tucker, LPA, shall hold any retainer received from SDP postpetition in the firm's trust (IOLTA) account pending further order of this Court to permit any application of funds from the retainer to payment of fees and reimbursement of expenses in conjunction with special counsel's application(s) for approval of fees and expenses pursuant to §§ 330 and 331; and

IT IS FURTHER HEREBY ORDERED that Debtor's chapter 11 counsel, Mr. Goering and his firm Goering & Goering LLC, shall, not later than August 14, 2025, file a further supplement to its Application to provide a description of the services rendered for which chapter 11 counsel received payment on April 17, 2025 in the amount of $12,035, as disclosed in the Statement of Financial Affairs, Part 6 (Doc. 1 at 23), to affirmatively state from which funds this

was paid (presumably the prepetition retainers), and the remaining amount of the prepetition retainers, following said prepetition payment, which balance will be held in its trust (IOLTA) account pending further order of this Court; and

IT IS FURTHER HEREBY ORDERED that both Debtor's counsel – chapter 11 and special – shall comply with LBR 2014-1(f), which requires that "[u]pon learning of any new or additional information required to be disclosed under Rule 2014 or [LBR 2014-1] (including but not limited to potential or actual conflicts of interest), the professional employed shall promptly file and serve a supplemental affidavit setting forth the additional information."; and

IT IS FURTHER HEREBY ORDERED that, in the event any payment or agreement to pay not previously disclosed is made to or with either of Debtor's counsel, both chapter 11 counsel and special counsel, such counsel shall file and send to the United States Trustee the supplemental statements required by Bankruptcy Rule 2016(b)(2); and

IT IS FURTHER HEREBY ORDERED that both Debtor's chapter 11 counsel and special counsel – Mr. Goering, Mr. Galasso, and their respective firms – shall seek approval from the Court, pursuant to §§ 330 and 331, Bankruptcy Rule 2016, and Local Bankruptcy Rule 2016-1, for all compensation and reimbursement of expenses, and shall not accept any payment for services rendered or expenses incurred, or apply any funds held on retainer, unless and until the compensation and reimbursement of expenses are approved by the Court, notwithstanding the source of payment – regardless of whether the fees are paid by a third-party.

IT IS SO ORDERED.

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