UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

GEORGE V. KOULOURIS TERESA P. KOULOURIS	CASE NO. 95-64417
Debtors	Chapter 11

IN RE:

WASHINGTON-MONTGOMERY STREET CORPORATION	CASE NO. 95-64416
Debtor	Chapter 11

APPEARANCES:

POUSHTER, MARSHALL & LEBERMAN Former Attorneys for Debtors 500 South Salina Street Syracuse, New York 13202	WILLIAM LEBERMAN, ESQ. Of Counsel
WHITELAW & FANGIO, ESQS. Attorneys for Debtors 247-259 W. Fayette Street Syracuse, New York 13202	MARY LANNON FANGIO, ESQ. Of Counsel
HANCOCK & ESTABROOK, LLP Attorneys for Skaneateles Bank 1500 Mony Tower I P.O. Box 4976 Syracuse, New York 13202	R. JOHN CLARK, ESQ. Of Counsel
MICHAEL COLLINS, ESQ. Assistant U.S. Trustee 10 Broad Street Utica, New York 13501	

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,

CONCLUSIONS OF LAW AND ORDER

Poushter, Marshall and Leberman ("PM&L") has filed an Application For Final Allowance of Attorney's Fees And Expenses ("Final Applications") in each of these cases. The Final Applications appeared on the calendar of this Court at Syracuse, New York, on August 20, 1996. Opposition to the Final Applications was filed by the United States Trustee ("UST") and the Debtors. Following oral argument, the Court gave all parties until September 20, 1996 to submit memoranda of law.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a) and (b)(1) and (b)(2)(B).

FACTS

On December 7, 1995, George P. and Teresa V. Koulouris ("Koulouris'"), as well as Washington-Montgomery Street Corporation ("Washington") (collectively the "Debtors"), filed voluntary petitions pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"). The Koulouris' were officers and stockholders of Washington, which formerly operated a restaurant in downtown Syracuse.

PM&L represented the Debtors in connection with the Chapter 11 case filings and initially sought appointment as counsel to the Debtors pursuant to Code § 327(a) by way of an

Application and *ex parte* order. By letter, dated December 21, 1995, the UST opposed PM&L's *ex parte* appointment citing *inter alia* the potential conflict of interest arising out of PM&L's simultaneous representation of the corporate debtor and its insiders.

Thereafter, PM&L filed a motion on notice to creditors seeking appointment as counsel to the Debtors. That motion was scheduled for argument on March 19, 1996. On the return date of the motion, PM&L withdrew the motion, after indicating to the Court that they could no longer represent the Debtors and that the Debtors were seeking the appointment of new counsel for both Chapter 11 cases.[1] On April 26, 1996, the Court granted an Order permitting PM&L to withdraw as Debtors' counsel.

The Final Application in the Koulouris' case seeks a fee of $6,247.50, plus disbursements of $288.34 and covers the period 12/18/95 through 4/29/96, while the Final Application in Washington seeks a fee of $4,001 plus disbursements of $171 and covers the period 12/18/95 through 4/15/96.[2]

ARGUMENTS

The UST objects to the Final Applications on the grounds that PM&L was never actually appointed pursuant to Code § 327 and is not entitled to seek compensation pursuant to Code § 330. The UST contends that PM&L must turn over any retainers that it has received. The UST

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[1]PM&L contends that they withdrew the motion for appointment at the request of the Court and without prejudice to filing a later fee application.

[2]The Final Applications indicate that PM&L received a pre-petition retainer in the Koulouris' case of $900 and $925.44 in the Washington case.

also opines that PM&L's withdrawal from the cases caused detriment to the Debtors that far outweighs any benefit conferred.

The Debtor George Koulouris ("G. Koulouris") opposes the Final Applications and contends that PM&L should be made to account for and disgorge the additional sum of $5,330.06 paid to it on the day of filing in connection with representation of the Koulouris' and $2,669.94 paid to it on the day of filing in connection with representation of Washington. G. Koulouris alleges that he was never advised by PM&L that it might have a conflict of interest in representing the Debtors and, in fact, PM&L insisted on representing both the Koulouris' and Washington.

G. Koulouris also opposes *nunc pro tunc* appointment of PM&L, citing the potential conflict of interest and further asserting that PM&L actually put the Debtors at risk by failing to interpose opposition to a motion to dismiss the cases filed by a secured creditor.

PM&L responds that the payments made to it by both Debtors on the eve of bankruptcy compensated it for extensive services rendered pre-petition and the Debtors were advised that payment of those fees was a condition to PM&L's representation in connection with the Chapter 11 cases. PM&L says it also required retainers for both bankruptcies.

PM&L acknowledges that it did not actually receive the requested Chapter 11 retainers but, in fact, utilized a portion of the payments for pre-petition services as retainers, $900 and $925.44 respectively. It also denies that it did not advise the Debtors of a potential conflict of interest and asserts that following the appropriate disclosure the Debtors consented to representation by PM&L.

DISCUSSION

It is clear that PM&L was not appointed as Debtors' counsel pursuant to Code § 327(a), however, lack of appointment is not fatal under the facts here. PM&L, as indicated, moved for their appointment in March 1996. However, in light of their announced intention to withdraw as the Debtors' counsel, the Court suggested that they withdraw the pending appointment motion without prejudice to the filing of a fee application. Thus, the issue it seems is not lack of appointment but rather, whether PM&L's motion seeking appointment *nunc pro tunc* would have been granted.

Code § 327(a) authorizes appointment of a professional only where the professional does not hold an interest adverse to the debtor's estate and the professional is otherwise disinterested. A professional who holds a pre-petition claim against the debtor has been held not to be disinterested and, therefore, barred from appointment. *See U.S. Trustee v. Price Waterhouse*, 19 F.3d 138 (3rd Cir. 1994); *In re Eastern Charter Tours Inc.*, 167 B.R. 995 (Bankr. M.D.Ga. 1994). Here PM&L was clearly a creditor of at least Washington pre-petition. It appears, however, that much of what was owed to PM&L was paid off on the date of the filing of the Debtors' petitions.[3] PM&L also asserts that there were additional unpaid fees due to it for other services rendered pre-petition.

Thus, on the date of filing Chapter 11's, PM&L received between $5000 and $8000 from

[3]There appears to be some dispute as to the amount paid to PM&L on the date of filing. PM&L acknowledges receipt of $5,000, only one half of which was allocated to services rendered to Washington. However, G. Koulouris contends that PM&L was paid a total of $8,000 on the date of filing, $5,330.06 allocated to services rendered to Koulouris' pre-petition and $2,669.94 for services rendered to Washington.

the Debtors in payment of past due legal services which, arguably at least, constituted preferential transfers (Code § 547) and, since there were additional fees which admittedly remained unpaid, PM&L was not disinterested within the meaning of Code § 101(14) on the date of filing. Presented with these facts, on the date of PM&L's motion for appointment, it is unlikely that the Court would have granted the motion absent some adjustment for the actual sums received by PM&L on the date of filing and a waiver of any and all sums then claimed to be due by PM&L for pre-petition services. *See U. S. Trustee v. Price Waterhouse,* 19 F.3d at 141.

Turning to the alleged conflict of interest, it is generally recognized that dual representation of a corporation and its principals is inherently a conflict of interest. *See In re Lee*, 94 B.R. 172, 177 (Bankr. C.D.Cal. 1988). While such dual representation does not *per se* disqualify the professional seeking appointment, courts generally scrutinize the potential for conflict very carefully. Some courts find no basis for a denial of appointment absent an actual conflict of interest, choosing to rely on the plain language of Code § 327(c). *See In re O'Connor*, 52 B.R. 892, 897 (Bankr. W.D.Okla. 1985).

Here the Court has little factual background upon which to consider the impact of the potential conflict of interest. Clearly, PM&L disclosed the dual representation of the Debtors from the outset and that has never been a factor. Conversely, it is equally clear given the early withdrawal of PM&L from both Chapter 11 cases, that conflicts did arise though it is not clear that such conflicts resulted from PM&L's dual representation of the Debtors.

Viewing these contested matters generally, the Court is of the opinion that PM&L would not have been appointed as counsel to **both** the Koulouris' and Washington. Without any real

basis for a distinction between Debtors, the Court will deny PM&L's application for compensation in connection with services rendered to Washington since it concludes that no appointment of PM&L pursuant to Code § 327(a) would have been made in that case. The case has since been converted from Chapter 11 to Chapter 7 and is presently being administered by a Chapter 7 trustee.[4]

Turning to the Koulouris' case, the Court will, for purposes of passing upon the instant application, treat PM&L as having been appointed effective February 13, 1996, the date on which it filed the motion seeking appointment. Such appointment would have been conditioned upon PM&L's waiver of any pre-petition fees owed to it. (The Court finds no reason to date PM&L's appointment any earlier since they offer no explanation for the delay in filing the motion following the UST's letter of December 21, 1995.) Considering the effective date of appointment as February 13, 1996, the Final Application in the Koulouris' case is reduced to $1,979.50 and is approved in that amount.[5]

PM&L acknowledges receipt of a $900 retainer in this case, which amount was allegedly the unallocated balance of the $5,330.06 payment made to PM&L on December 7, 1995, the date the Chapter 11 case was filed, and which must be credited against the fee award.. (*See* Ledger

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[4]The Court makes no finding herein with regard to the nature of the payments made to PM&L on the date of filing, but as previously indicated they are arguably preferential in nature. It is also noted that any Chapter 11 administrative claims will be subordinated to Chapter 7 administrative claims pursuant to Code § 726(b).

[5]It is noted that the contemporaneous time records attached to the Final Application are billed to "1110 Montgomery Street Partnership" which is not a debtor herein.

History attached to Affidavit of William J. Leberman filed 8/19/96).[6]

The Court leaves unresolved the appropriate disposition of the disputed non-retainer amounts paid to PM&L on the date of filing, most of which PM&L applied as payment of its services rendered prior to filing. As previously observed, to treat these amounts other than as a retainer, raises a serious question of preferential payment.

Turning to PM&L's request for disbursements, the Court will approve only those disbursements incurred in the Koulouris' Chapter 11 and then only for the period post appointment, in the sum of $44.19.

IT IS SO ORDERED.

Dated at Utica, New York

this 10th day of January 1997

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

[6]As indicated, G. Koulouris contends that on the date of filing he provided PM&L with a check in the sum of $8,000 of which $5,330.06 was allocated to the "individual case." (*See* Affidavit of George Koulouris sworn to August 12, 1996).