IT IS ORDERED as set forth below:

Date: March 17, 2008

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 08-63990
Russell Smith,	
	CHAPTER 11
Debtor.	JUDGE MASSEY

ORDER GRANTING U.S. TRUSTEE'S MOTION TO RECONSIDER ORDER APPROVING APPLICATION BY DEBTOR TO EMPLOY BANKRUPTCY COUNSEL, VACATING MARCH 4, 2008 ORDER, AND GRANTING DEBTOR'S MOTION TO EXTEND TIME TO FILE STATEMENT OF FINANCIAL AFFAIRS AND SCHEDULES AND NOTICE OF TENTATIVE HEARING

Section 327(a) of the Bankruptcy Code provides in relevant part that "the trustee, with the court's approval, may employ one or more attorneys . . . that do not represent an interest adverse to the estate, and that are disinterested, to represent or assist the trustee in carrying out the trustee's duties under this title." In a chapter 11 case, the debtor in possession ("DIP") performs most of the duties of a trustee. 11 U.S.C. § 1107.

Debtor Russell Smith filed this Chapter 11 case on March 3, 2008 but did not file schedules and a statement of financial affairs with the petition. On the same day he filed an application as DIP to employ the firm of Danowitz & Associates, P.C. as his counsel, stating that he desires to employ the firm to provide legal services "which may be necessary in the administration of this case," including "preparation or amendment of schedules, representation in contested matters and adversary proceedings, preparation of a plan of reorganization and disclosure statement, and other matters which may arise during the administration of this case." The application does not specifically allege that failure to approve the application would cause immediate and irreparable harm.

The Court entered an Order on March 4 granting the application subject to objection of the U.S. Trustee filed within twenty days.

On December 1, 2007, Bankruptcy Rule 6003 became effective. It provides:

> Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 20 days after the filing of the petition, grant relief regarding the following:
>
> > (a) an application under Rule 2014;
> >
> > (b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001; and
> >
> > (c) a motion to assume or assign an executory contract or unexpired lease in accordance with § 365.

Bankruptcy Rule 6003 is designed to provide some time for parties in interest in a case to vet the need for and qualifications of professionals that a trustee or DIP seeks to employ, or as the Advisory Committee Note states: "This rule is intended to alleviate some of the time pressures

present at the start of a case so that full and close consideration can be given to matters that may have a fundamental impact on the case."

The U.S. Trustee moves for reconsideration of the March 4 Order on the ground that its entry was error in that the application failed to allege "immediate and irreparable harm." That motion spooked Debtor's counsel, who on behalf of Debtor, filed a motion to extend the time for filing a statement of financial affairs and schedules and to extend a meeting between Debtor and the "U.S. Trustee Analyst" (financial not psychological) because "the status of legal representation has been placed into question." Debtor also filed an amended application asserting that he would suffer irreparable hard unless his application is granted because without legal representation he is unable to file his schedules or statement of financial affairs or to deal with creditors or the U.S. Trustee.

These motions raise a few questions. The first one is whether section 327(a) and Bankruptcy Rule 6003 mean that in the absence of Court approval, an attorney for a trustee or DIP not yet approved by the Court is disabled from appearing in court, giving legal advice or otherwise representing the estate until after the Court enters an order authorizing the employment. A related question is whether a court may retroactively bless the choice of counsel. The short answers are "no" to the first question and "yes" to the second question. A third question is what to do about the Order entered on March 4. The short answer to that question is to vacate it, even though it will not likely make the slightest bit of difference in this case to Debtor or to his counsel or to any creditor or the U.S. Trustee.

It is not unusual in bankruptcy cases pending under Chapters 7 and 11 for an attorney for a trustee to render services that include preparing and filing motions, appearing in court and giving

advice about what a trustee should and should not do before the bankruptcy judge enters an order granting the motion of the trustee to employ the attorney. This Court has not been able to find a single case that states that even though the trustee filed a timely application to employ, such work undertaken prior to the entry of the order granting the application is without legal effect or otherwise improper or may not be compensated. Rather, it has been generally accepted for many years that bankruptcy courts have the authority to retroactively authorize employment of professionals. *See, e.g., Matter of Arkansas Co., Inc.*, 798 F.2d 645, 648 (3rd Cir. 1986) ("bankruptcy courts have the power to authorize retroactive employment of counsel and other professionals under their broad equity power."). Thus, a delay in entering an order granting such an application should not concern either the trustee or DIP or counsel, so long as services rendered in the interim "were reasonably necessary for the due performance of the trustee's duties, that the professional is licensed or otherwise qualified to render such services, and that the disinterestedness requirements of section 327(a) are not at risk." *In re Jarvis,* 53 F.3d 416, 420 (1st Cir. 1995). *See also In re Singson*, 41 F.3d 316, 319 (7th Cir. 1994) (affirming lower court rulings that denied compensation to a law firm approved as special counsel for the trustee but which acted as primary counsel without approval or excuse for not seeking approval, noting that while "[p]rior approval is strongly preferred . . . [n]othing in the statute forbids or even reproves belated authorization.").

Although Bankruptcy Rule 6003 applies to all cases, its promulgation was prompted by the practice in many courts, particularly those routinely handling very large Chapter 11 cases, to approve the employment of professionals at a time when creditors and other parties in interest, including the U.S. Trustee, were unable to respond because of the time constraints caused by the

sheer volume of first day motions in a case. As a result where there might be a legitimate basis for objecting to the employment of a particular professional, the objecting party may feel or be at a disadvantage in having to seek to undo the order of approval.

The truth is that either way, with early approval or with approval 20 days later, a professional must still meet the minimum requirements of being disinterested and having no other conflict. In other words, the entry of an order granting an application to employ would likely not protect a professional firm for work done thereafter if the firm is in fact not disinterested or otherwise has a conflict. It is also true that in Chapter 11 cases of any size, particularly those involving an operating business, there is much to be done in the first 20 days of a case from a legal standpoint. To say that an order approving an application to employ must be signed before the professional can begin work would be unworkable in almost all Chapter 11 cases. Achieving Rule 6003's purpose of giving creditors time to vet a firm's qualification under section 327(a) does not require a ban on rendering legal services to the estate until approval is obtained. Although there will always be some risk that approval will not be forthcoming with unpleasant consequences for the firm, that risk and its consequences exist whether the Court considers the matter on day one or on day twenty-one. Superficial consideration on day one is no bar to a sifting analysis at a later date.

Rule 6003 has a safety valve of sorts in providing that the court may approve employment earlier than the 21st day after filing where the estate would likely suffer immediate and irreparable harm if the application were not immediately approved. This provision is more suited to professionals other than the trustee's or DIP's primary bankruptcy counsel. It may lead, however, to the routine inclusion of an allegation that failure to approve a motion to employ counsel

promptly will result in irreparable harm and already has in this case. As stated above, however, fear that the lack of immediate approval leaves the trustee or DIP without legal representation or the law firm without compensation is unfounded. If the firm knows of no basis to challenge a contention that it is disinterested, a delay in the entry of the order is a non-event. Hence, the fear that the U.S. Trustee's motion for reconsideration in this case is intended to cast doubt on whether the motion to employ should ever be granted is almost certainly unfounded.

It has been common practice for many years in this district for orders granting motions of trustees or debtors in possession to employ attorneys to contain language that making such orders subject to the objection of the U.S. Trustee filed within 20 days, which as noted above is what the order here states. Based on the above analysis, there would appear to be no practical difference between permitting Danowitz and Associates, P.C. to represent Mr. Smith subject to objection and waiting 20 days to approve the motion to employ but permitting Mr. Danowitz to represent him in the interim, other than perhaps a perceived impediment for an entity opposing the application to have to ask the Court to undo what it has been done. Here, there is no suggestion at all in the documents that have been filed in this case that Mr. Danowitz should not be approved. If there is information that would lead to a different result, the Court would have no stake in the status quo. Nonetheless, Rule 6003 says what it says. The assertion in the amended application that Debtor will suffer irreparable harm if the application is not approved is based on the erroneous assumptions that the DIP is responsible for filing schedules, which is discussed below, that Mr. Danowitz cannot be paid for that work even if the application to employ were to be denied, and that Mr. Danowitz cannot represent Mr. Smith as DIP until the application is granted.

Accordingly, the U.S. Trustee's motion for reconsideration is GRANTED and the March 4, 2008 Order is VACATED. On March 24, 2008, the Court will reconsider the motion

without the need for any further filing by Debtor unless by March 23 an objection to the motion to employ has been filed.

The suggestion in Debtor's motion that the U.S. Trustee's motion affects the ability of Debtor to file timely schedules and other documents is without merit. It is the responsibility of Mr. Smith as Debtor in the first instance, and not as DIP, to prepare the schedules and statement of financial affairs. 11 U.S.C. § 521(a). Debtor is free to hire Danowitz & Associates, P.C. or any other attorney for that purpose, but he may not pay his attorney with property of the bankruptcy estate, which includes any income he receives after the petition date. The filing of the motion to reconsider is not, therefore, an excuse for not filing those documents timely. Yet, Mr. Danowitz has an interest in the retainer paid that will enable him to be paid for the work done pre- and post-petition for Mr. Smith as Debtor.

Given the newness of Rule 6003, Debtor's motion to extend the time to file those documents is GRANTED, and the time for timely filing such documents is extended through March 26, 2008, without prejudice to a further extension for good cause shown. As to the postponement of the meeting with a representative of the U.S. Trustee scheduled by the U.S. Trustee, the Court has no power to reset that meeting.

PLEASE TAKE NOTICE that if there is an objection to the motion to employ, the Court will hold a hearing on the motion on March 28, 2008 at 2:00 p.m. in Courtroom 1404, U.S. Courthouse, 75 Spring Street, Atlanta, Georgia 30303. The Clerk is directed to serve a copy of this Order on Debtor, Debtor's counsel, the U.S. Trustee and all creditors in the list of creditors filed pursuant to Bankruptcy Rule 1007.

IT IS SO ORDERED.

END OF ORDER