UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Joseph G. Rosania, Jr.

In re:	)	
	)	
Ajubeo LLC	)	Bankruptcy Case No. 17-17924 -JGR
EIN: 45-2467444	)	
	)	Chapter 11
	)	
	)	
Debtor.	)	

MEMORANDUM OPINION

Ajubeo, LLC ("Debtor") filed a chapter 11 case in this district on August 25, 2017 and filed a motion to approve the retention of BGA Management, LLC, d/b/a Alliance Management ("Alliance") to act as a Chief Restructuring Officer ("CRO") under 11 U.S.C. §§ 105 and 363(b) (the "Motion") on August 29, 2017. The United States Trustee ("UST") objected and an evidentiary hearing was held on September 21, 2017. No creditors or other parties in interest objected to the Motion.

Because time was of the essence, the Court granted the Motion in an oral ruling on September 27, 2017 and appropriate orders have been entered. This *ex post facto* Memorandum Opinion details the reasoning behind the Court's ruling,[1] in order to aid practitioners in the district.

Ajubeo, LLC ("Debtor") filed a chapter 11 case in this district on August 25, 2017 and filed a motion to approve the retention of BGA Management, LLC, d/b/a Alliance Management ("Alliance") to act as a Chief Restructuring Officer ("CRO") under 11 U.S.C. §§ 105 and 363(b) (the "Motion"). The United States Trustee ("UST") objected and an evidentiary hearing was held on September 21, 2017. No creditors or other parties in interest objected to the Motion.

The Court has jurisdiction over the subject matter under 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (M) since it involves the administration of the estate and use of property of the estate.

The Debtor is a Colorado limited liability company, founded in 2011 located in Boulder, Colorado. It is a provider of cloud infrastructure services and leases servers from several equipment lessors. It has approximately forty customers who rely on Debtor for secure data storage and its business requires a high level of confidentiality. It engaged an investment banker prior to filing to market its business for sale. The investment banker professionally marketed the business and found a stalking horse buyer, Green House Data, Inc. ("Green House"). Green

[1] *See In re Sunland, Inc.*, 2014 WL 7011747 (Bankr. D. N.M. 2014) at *1 (citing, *inter alia*, *In re Dow Corning Corp.*, 198 B.R. 214, 218-19 (Bankr. E.D. Mich. 1996).

House signed a letter of intent as a stalking horse bidder to purchase substantially all of Debtor's assets on January 31, 2017. Unfortunately, Debtor's business deteriorated, it lost employees and the parties terminated the letter of intent in March 2017. Thereafter, Debtor made certain changes to its business, which resulted in the execution of a second letter of intent with Green House in August 2017 for a purchase price of approximately $1.9 million.

The Debtor was forced to file a chapter 11 case on an emergency basis on August 25, 2017, to obtain the stay and preserve the value of the business and confidentiality of its customers, after one of the equipment lessors filed suit in state court to seize the server it leased to the Debtor. The Debtor filed the bankruptcy case to proceed with the proposed sale of substantially all of its assets to Green House as a stalking horse bidder.

Alliance is a national financial consulting firm specializing in corporate turnaround work. Alex Smith ("Smith") is the principal of Alliance assigned to this case. Smith has had prior experience acting as a financial advisor in chapter 11 cases. Neither Alliance nor Smith had any connection with Debtor prior to the chapter 11 case. They were not creditors, shareholders or officers of Debtor. The CRO employment agreement and an affidavit from Smith were attached to the Motion. Alliance tailors its fee to each case and seeks to be paid at its standard hourly rates plus a success fee in this case. The success fee is 2% for a sales price up to $1,545,000 and 5% for a sale price over $1,545,000. The agreement also called for a $20,000 retainer.

Smith testified he was appointed an officer of the Debtor after the bankruptcy case was filed because in Colorado, a limited liability company is required to have at least one officer (Colo. Rev. Stat. §§ 7-80-402 and 403 state the management of a limited liability company vests with a manager or officer). He familiarized himself with all aspects of the Debtor's business and bankruptcy case, has acted as a general manager interfacing with and "mollifying" customers (if the customers lose confidence in either Alliance or the bankruptcy process, there is no business to sell), handled banking, prepared the bankruptcy schedules and statement of financial affairs and attended the meeting of creditors. He and counsel negotiated the cash collateral and post-petition financing agreements, and notably, a revised asset purchase agreement with Green House. Smith stated there was no letter of intent or stalking horse bidder on day one of the bankruptcy case.

Debtor filed several first day expedited motions, including the Motion, and Smith "jumped" into the case after the filing to serve as CRO without payment or a retainer. Debtor also filed an expedited motion to use cash collateral and for approval of post-petition financing, which have been granted. It also filed a motion to approve certain bid procedures in connection with the proposed sale to Green House, which was granted. Finally, the Court set an evidentiary hearing on the Debtor's motion to sell for October 31, 2017.

As of the date of filing, the Debtor had no officers and one director. It was out of cash, and in danger of losing employees, customers and vendors. By obtaining the interim orders authorizing the use of cash collateral and for post-petition financing, Debtor has been able to fund its operations, provide goods and services to its customers, retain employees and work with the stalking horse bidder and others to advance the sale. Smith has been integral to this process

and has been the face of Debtor in customer, vendor and employee relations. He also re-negotiated the terms of the pre-petition asset purchase agreement, which resulted in a 50% increase in the sale price and elimination of conditions thereunder.

As of the date of the hearing on the retention of Alliance, Smith reported its business operations, finances, customers, employees and equipment leases were stable, the DIP loan was drawn within the budget and the company was even working on obtaining new customers. The sale process was underway, the Debtor was diligently seeking competing bids and had set up a data room for potentially interested purchasers to review financial records and conduct due diligence. As of the date of the evidentiary hearing, Smith had not been compensated.

Alliance argues its services are essential to the success of the case, it had no legal or financial connection with Debtor prior to the case, and it was holding the company together to get to closing of the sale for the benefit of the estate. Smith is making decisions on the sale process and day-to-day operations of the business.

Debtor is seeking to employ Alliance as a CRO under Bankruptcy Code §§105(a) and 363(b) and argues that many bankruptcy courts around the country have approved employment of a CRO under 11 U.S.C. §§ 105(a) and 363(b). The UST contends that since Smith is a professional person due to his qualifications and role as an officer of the Debtor in this case, the employment of Alliance is governed by 11 U.S.C. § 327(a) and its disinterested standard, and any compensation is governed by 11 U.S.C. § 330 for reasonableness.

11 U.S.C § 327, the classical approach, requires a professional to be disinterested and not hold an interest adverse to the estate. It also requires fee applications be made under 11 U.S.C § 330 to be reviewed and evaluated by the court on a reasonableness standard. Thus, the twin goals of 11 U.S.C § 327 are impartiality of the professional and professional fees subject to court review for reasonableness.

The role of a CRO is often critical to success in bankruptcy. The CRO is responsible for leading the company through the bankruptcy process with the help of debtor's counsel. The reason the CRO issue continually arises in chapter 11 cases is because the role of CRO is critical and necessary in many chapter 11 cases where previous management has been released or has deserted.[2]

The UST states that Smith's skills and role in the case make him a professional person and therefore he must be employed under 11 U.S.C. § 327(a). However, since he is also an officer of the Debtor, he is not disinterested as an officer and insider of the Debtor under 11 U.S.C § 101(14). Therefore, Alliance cannot be employed under 11 U.S.C. § 327(a) since that section requires the professional to be disinterested and not hold an interest adverse to the estate. Thus, the UST states, Alliance is not eligible to be employed as CRO in this case.

Debtor argues the emerging trend in practice in chapter 11 cases has evolved with the use of the CRO, and the Court can employ Alliance under 11 U.S.C. § 363(b) in the Debtor's

[2] Mark Stingley, Craig Schuenemann, Bryan Cave, Too Many Chiefs Make for a CROwded Reorganization, 080416 ABI-CLE 165 (August 4, 2016).

exercise of its business judgment, in unique circumstances as an extraordinary remedy, and with any fees reviewed under 11 U.S.C. § 328. It argues that a majority of bankruptcy courts have approved the retention of a CRO under 11 U.S.C. § 363(b), including in Delaware and the Southern District of New York citing *In re TSA WD Holdings, Inc., et al.,* No. 16-10527-MFW (Bankr. D. Del., August 10, 2016) and *In re RadioShack Corporation, et al.,* No. 15-10197-KJC (Bankr. D. Del., February 6, 2015).[3] The benefits of using 11 U.S.C. § 363(b) are that the CRO does not have to be disinterested, the CRO is not required to file fee applications for review under 11 U.S.C. § 330 and the CRO can be covered by the existing directors' and officers' liability insurance or otherwise be indemnified.

Alliance modified the employment agreement by agreeing to file detailed monthly compensation reports and a final fee application at the conclusion of the employment at the hearing. It agreed its hourly compensation would be reviewed under 11 U.S.C. § 330 for reasonableness and its success fee would be reviewed under 11 U.S.C. § 328. The standard of review under 11 U.S.C. § 328 is whether the terms and conditions of the success fee prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of the terms and conditions of the success fee.

The analysis of the use of 11 U.S.C. §§ 363(b) and 105(a) to justify retention of a CRO must be made on a case by case basis. Here, there are unique circumstances justifying the retention of Alliance. Alliance is well-qualified and had no dealings with Debtor prior to the bankruptcy case. No creditors have objected. The Debtor was a moribund company losing customers and employees and facing a repossession of one of its servers, which contained confidential information. Since its retention, Alliance has retained customers and employees and renegotiated the asset purchase agreement to the benefit of the estate. It has provided valuable services and resuscitated the Debtor in a very short period of time, which is exactly what a CRO does.

I am satisfied the safeguards and twin goals of impartiality and court review of fees are present here. Smith is impartial with no actual conflict of interest as CRO. However, since Colorado law requires a manager, Smith was appointed an officer and therefore no longer was statutorily disinterested. Thus, while Alliance may not be employed under the more rigorous standard of 11 U.S.C. § 327, it can be retained under 11 U.S.C. § 363(b), in the exercise of the Debtor's business judgment.

Alliance has agreed its hourly fees and success fee are subject to final fee applications, with the hourly services reviewable under 11 U.S.C. § 330 and the success fee reviewable under 11 U.S.C. § 328. Thus, the Court retains the final word on any fees paid to Alliance.

This conclusion is supported by the case law, including *In re Copenhaver*, 506 BR 757 (Bank. C. D. Ill. 2014). In *Copenhaver*, the Debtor sought to employ a CRO under 11 U.S.C. §§ 105(a) and 363(b) for a liquidation under chapter 11. The proposed CRO, a former employee

[3] The court refused to employ a CRO under 11 U.S.C. § 363(b) in *In re Blue Stone Real Estate, Constr. & Dev. Corp.*, 392 B.R. 897 (Bankr. M.D. Fla. 2008), and *In re B.R. Festivals, LLC*, No. 14-10175 (Bankr. N.D. Cal. Feb. 18, 2014).

of debtor, had an actual conflict of interest because he was also employed by an unsecured creditor of the debtor. He asserted his compensation would not be subject to court oversight but agreed to maintain time records and file fee statements for notice purposes with the UST.

The court analyzed the use of 11 U.S.C. §§ 105(a) and 363(b) for approval of the retention of the CRO. Although it found the CRO had an actual conflict of interest and could not be employed under 11 U.S.C. § 327, it found that the debtor's business judgment supported the retention of the CRO. The court also noted the unique and compelling circumstances in the case and debtor's valid business justification supported retention under 11 U.S.C. §§ 105(a) and 363(b). Ultimately, the court denied the motion because the CRO would not subject his fees to court oversight. But, that is not the end of the story, because the CRO filed an amended motion agreeing he would file a final fee application and his fees would be subject to court approval, and the court approved the retention.

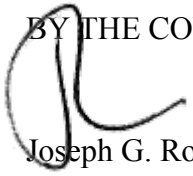
The UST urges this Court to strictly enforce the Code. The Court believes it is enforcing the Code and recognizes that chapter 11 is a flexible statute. Under the unique and compelling circumstances of this case, the outstanding job performed by Alliance thus far, and the satisfaction of the twin goals of impartiality and court review of fees, the Motion is granted *nunc pro tunc* to the petition date.

The CRO agreement attached to the Motion is approved, subject to the following terms and conditions. Alliance is required to file detailed monthly compensation statements of its hourly time and serve a copy of such statements on the UST and all creditors and other interested parties, Alliance is required to file a final fee application under 11 U.S.C. § 330 for its hourly services and a final fee application under 11 U.S.C. § 328 for the success fee.

The Court waives the fourteen day stay under Bankruptcy Rule 6004(h).

DATED: September 27, 2017

BY THE COURT:



Joseph G. Rosania, Jr.
United States Bankruptcy Judge