UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:	)	
	)	**Case No. 16-47428-659**
DIRECTORY DISTRIBUTING	)	**Chapter 11**
ASSOCIATES, INC.,	)	**The Honorable Kathy Surratt-States**
	)	
Debtor.	)	**Original Hearing Date: October 24, 2016**
	)	**Hearing Time: 11:00 a.m.**
	)	**Adj. To Date: April 3, 2017**
	)	**Adj. To Time: 11:00 a.m.**
	)	**Hearing Location: Courtroom 7 North**

OBJECTION TO APPLICATION OF DEBTOR-IN-POSSESSION FOR THE ENTRY OF AN ORDER PURSUANT TO 11 U.S.C. § 327(A) AND FED. R. BANKR. P. 2014(A) AUTHORIZING THE EMPLOYMENT OF MCCARTHY LEONARD & KAEMMERER AS SPECIAL LABOR AND EMPLOYMENT AND CORPORATE COUNSEL FOR THE DEBTOR-IN-POSSESSION

COME NOW the represented Plaintiffs/Claimants (collectively, the "Wage and Hour Classes") in class actions pending in California and Missouri captioned *Krawczyk et al. v. Directory Distributing Assocs., Inc. et al.*, No. 3:16-cv-02531-VC, in the United States District Court for the Northern District of California (the "Krawczyk Action" in the "California District Court"), and *Walker et al. v. Directory Distributing Assocs., Inc., et al.*, No. 17-04020, in the United States Bankruptcy Court for the Eastern District of Missouri[1] (the "Walker Action")[2], and state as follows for their Objection to the Application of Debtor–in-Possession for the Entry of

[1] Prior to the Debtor's invocation of 28 U.S.C. § 1452 and request for removal in the Walker Action, that matter was pending as case number 2011-50578 in the 269th District Court (Harris County), Texas (the "Texas State Court"); after removal and before transfer of the Walker Action to the present counsel, that matter was pending as adversary proceeding number 17-03258 in the United States Bankruptcy Court for the Southern District of Texas (the "Texas Bankruptcy Court").

[2] The Walker Action remains subject to the Wage and Hour Class's Motion for Withdrawal of Reference. That Motion has yet to be docketed with the United States District Court for the Eastern District of Missouri (the "Missouri District Court") and remains pending as of the date of this Response.

an Order Pursuant to 11 U.S.C. § 327(a) and Fed. R. Bankr. P. 2014(a) Authorizing the Employment of Employment of McCarthy Leonard & Kaemmerer as Special Labor and Employment and Corporate Counsel for the Debtor in Possession (the "ML Application") [Dkt. No. 8] as now adopted, in part, by the Chapter 11 Trustee in this matter:

I. INTRODUCTION

The Wage and Hour Classes, which are creditors and parties in interest in the Debtor's Chapter 11 case, object to the proposed retroactive retention of the law firm of McCarthy Leonard & Kaemmerer ("ML") as special counsel to the Trustee. ML clearly does not qualify for engagement under the requirements of section 327(a) of Title 11 of the United States Code, 11 U.S.C. §§ 101-1550 (the "Bankruptcy Code") and repeatedly has failed to make the complete and forthcoming disclosures required under Rule 2014 of the Federal Rules of Bankruptcy Procedure ("the Bankruptcy Rules"). While the Wage and Hour Classes appreciate that the Trustee in this case now seeks to retain ML only under section 327(e) of the Bankruptcy Code for the limited purpose of acting as special counsel to the Trustee for transition purposes regarding the litigation involving the Classes and other miscellaneous matters as requested by the Trustee, the Trustee also now seeks approval of ML's employment effective as of the Petition Date, instead of as of the date of the Trustee's appointment.

ML represented, represents, held and holds interests adverse to the Debtor and to its estate with regard to the matters on which the Trustee seeks to employ ML in violation of section 327(e) of the Bankruptcy Code that dictates the requirements of the employment of special counsel. Despite multiple opportunities to comply with the Bankruptcy Code and the Bankruptcy Rules, ML repeatedly has failed to disclose the full extent of all of its connections with the Debtor, its principals, its insiders and affiliates, and other parties in interest in this case. Moreover, ML simultaneously represented the Debtor, its principals and insiders, and an affiliate

of the Debtor's with regard to pre-petition transfer transactions involving up to $10 million that may be avoidable by the Trustee for the benefit of the estate – and, depending upon the resolution of creditors' claims against the Debtors and the Trustee potential avoidance actions regarding those transfers, ML may be either a material witness or a defendant in those avoidance actions. As a result, any employment of ML should be strictly limited to what is essential and necessary to effectuate the transition to the Trustee's administration in these matters and should be prohibited and denied for periods prior to the Trustee's appointment in this matter on February 17, 2017.

II. BACKGROUND AND FACTS

A. The ML Application and the McGovern Affidavit

1. The Debtor filed its voluntary petition (the "Petition") under Chapter 11 of the Bankruptcy Code on October 14, 2016 (the "Petition Date"). [Dkt. No. 1].

2. Almost a week later, on October 20, 2016, the Debtor filed its Application of Debtor-in-Possession for the Entry of an Order Pursuant to 11 U.S.C. § 327(a) and Fed. R. Bankr. P. 2014(a) Authorizing the Employment of Desai Eggmann Mason LLC as Counsel. [Dkt. No. 7]. That application sought this Court's authorization to employ the law firm of Desai Eggmann Mason LLC as the Debtor's general bankruptcy counsel in this matter.

3. The Debtor filed the ML Application that same day. [Dkt. No. 8].

4. The ML Application sought to retain ML "to assist the Debtor in the negotiation and litigation of its pending labor and employment class action litigation matters" and "to continue to provide such services reasonably requested by Debtor as are generally within the duties and responsibility of the general counsel of a company such as Debtor". See ML Application at 3, ¶ 8.

5. The ML Application stated that Brian McGovern ("McGovern"), as well as Stephen J. Smith ("Smith") and Bryan M. Kaemmerer ("Kaemmerer"), and ML had served as counsel for the Debtor "in matters relating to labor and employment law and related litigation" and that ML had served as "general outside corporate counsel of the Debtor" pre-petition. See id. at 2, ¶ 4.

6. The ML Application was accompanied by the Affidavit of Brian E. McGovern Support [sic] of Application of Debtor-in-Possession for the Entry of an Order Pursuant to 11 U.S.C. § 327(a) and Rule 2014(a) of the Federal Rules of Bankruptcy Procedure Authorizing the Employment of McCarthy Leonard & Kaemmerer as Special Labor and Employment and Corporate Counsel (the "McGovern Affidavit"). See ML Application at 5-7 (same as McGovern Affidavit at 1-3).

7. The McGovern Affidavit was signed by Brian McGovern ("McGovern"), a partner in ML firm. See ML Application at 5-6/McGovern Affidavit at 1, ¶ 2 and at 2.

8. McGovern's signature on the McGovern Affidavit was notarized and stated that McGovern had signed the McGovern Affidavit "as his free act and deed". See ML Application at 6/McGovern Affidavit at 2.

9. The McGovern Affidavit stated that McGovern was "duly sworn", see ML Application at 5/McGovern Affidavit at 1, presumably indicating that the Affidavit purported to be true and correct.

10. Presumably relying on the McGovern Affidavit, the ML Application stated that neither ML, nor McGovern, Smith or Kaemmerer, had any connections with or financial interest in the Debtor or its insiders, other than as counsel to the Debtor. See ML Application at 2, ¶ 5.

11. The McGovern Affidavit stated that ML had acted as outside counsel for the Debtor "for the last eight (8) years". See ML Application at 5/McGovern Affidavit at 1, ¶ 2.

12. The McGovern Affidavit stated that neither ML nor McGovern had any connections with "the Debtor-in-Possession, its creditors, or any party in interest therein" except "that we are acting as special counsel to the Debtor in this proceeding". See ML Application at 5/McCarthy Affidavit at 1, ¶ 3.

13. The ML Application and the McGovern Affidavit both disclosed that ML was paid $42,331.19 by the Debtor in the ninety days pre-petition. See ML Application at 2, ¶ 5/ McCarthy Affidavit at 2, ¶ 6. Neither the ML Application nor the McGovern Affidavit disclosed whether the payment/s comprising that amount were for services to the Debtor or for services to any other person or entity.

14. The McGovern Affidavit stated that ML had not

> represented any creditors of Debtor, any other party in interest, their respective attorneys and accountants, . . . in connection with any matters adverse to Debtor, or in any capacity in which confidential knowledge of a creditor has been acquired that would bear on the proposed retention by the Debtor."

See ML Application at 6, ¶ 5/McCarthy Affidavit at 2, ¶ 5.

15. The McGovern Affidavit also stated that, to the best of McGovern's knowledge, neither he nor ML "represent any interest adverse to those of the Debtor-in-Possession". See ML Application at 6, ¶ 8/ McCarthy Affidavit at 2, ¶ 8.

16. The ML Application, again, presumably relying on the McGovern Affidavit, also claimed that ML was a disinterested person as defined in section 101(14) of the Bankruptcy Code.

17. On October 20, 2016, Counsel for the Debtor noticed out the ML Application, along with the application for its own retention, for an interim hearing on October 24, 2016. [Dkt. No. 9].

18. According to the Certificate of Service that the Debtor's Counsel filed with this Court on October 20, 2016 [Dkt. No. 11], the Notice of the interim hearing for the ML Application was transmitted "via electronic mail, facsimile, telephone, via Federal Express and/or Express Mail this 20th day of October 2016, to the United States Trustee, and all parties listed on the attached mailing matrix." See Dkt. No. 11 at 1. That Certificate of Service does not specify the means of transmittal to any party listed on the mailing matrix attached to that document. See id. at 1-5.

19. Notice of the interim hearing on the ML application was not transmitted in any fashion to the counsel for the Wage and House Classes in the Walker Action – who also are the primary counsel in the Krawcyzk Action -- let alone in any fashion that ensured its receipt before the October 24, 2016 interim hearing. In fact, that counsel was not included either on the mailing matrix filed by the Debtor on the Petition Date and verified under oath by Kristy Runk Bryan as "true, correct and complete", see Dkt. No. 1 at 8-13, on the Debtor's list of twenty largest creditors, see id. at 5-7, or even on the October 20, 2016 certificate of service regarding notice of the interim hearing on the ML Application, despite the fact that the Debtor's principal, Kristy Runk, and ML both fully were aware of the participation and contact information for those counsel.[3]

20. This Court held an interim hearing on the ML Application on October 24, 2016 and set a final hearing for the ML Application on November 21, 2016. [Dkt. Entry 10/24/2016.]

21. The Court's October 24, 2016 minute entry indicates that the ML Application was granted on an interim basis. [Dkt. Entry 10/24/2016.] However, the Court's docket does not show that any order ever was entered approving ML's retention on an interim basis in this case.

[3] The Debtor never amended the mailing matrix of record with this Court or its Schedules to add primary counsel for the Wage and Hour Classes during the period from the Petition Date until the Trustee's appointment.

22. The Court's docket does not show that Debtor served notice of the final hearing on the ML Application promptly after the October 24, 2016 hearing or before the November 21, 2016 setting on that Application.

23. On November 8, 2016, the Debtor filed an application seeking to retain its bankruptcy counsel at that counsel's new firm. [Dkt. No. 19].

B. The Debtor's Schedules and Statement of Financial Affairs

24. On November 14, 2016, the Debtor filed its Schedules and Statement of Financial Affairs. [Dkt. No. 23].

25. Kristy Runk Bryan ("Bryan") signed the Schedules and Statement of Financial Affairs under penalty of perjury, listing her capacity as "Attorney" to the Debtor. See Dkt. No. 23 at 1, 35

26. The Debtor's Schedule F lists a number of creditors who comprise insiders of the Debtor as defined under section 101(31) of the Bankruptcy Code and/or affiliates of the Debtor as defined under section 101(2) of the Bankruptcy Code, including:

a. Edradour Insurance Company (sometimes referenced as "Erdadour" (sic)), a non-priority unsecured creditor scheduled with a debt of $160,000 related to the Debtor's worker's compensation obligations. See Schedule F, Dkt. No. 23 at 11. It appears that Edradour was a Vermont corporation, now dissolved, owned by John Runk. See Transcript of 341 Meeting at 34:16-25 (attached as Exhibit B to this Objection). John W. Runk and Judith Runk, who also are directors of the Debtor, appear to be two of Edradour's three directors as demonstrated by the duplicates of the records of the Vermont Secretary of State that are attached hereto and included in Exhibit A. Edradour also is registered as a domestic Missouri insurance company owned by the Judith A.

Runk Irrevocable Inter Vivos Trust U/A 8/23/1999 that has both John and Judith Runk as directors as demonstrated by the duplicates of the records of the Missouri Secretary of State that are included in Exhibit A. Exhibit A contains records of the Missouri Secretary of State's Office that include Articles of Incorporation and Articles of Redomestication for Edradour that have a facsimile transmission headed listing ML as their transmitting party in 2011 and that list Smith as Edradour's current registered agent. See Exhibit A at 2-5, 17.

b. Glen Runk, a non-priority unsecured creditor scheduled with a debt of $0 described as "contractor – records management". See Schedule F, Dkt. No. 23 at 12. Glen Runk is the son of John and/or Judith Runk and sibling to Jack Runk, and Bryan, see Exhibit B at 37:15-18, and the Debtor's Statement of Financial Affairs lists the Glen J. Runk Irrevocable Gift Trust as a shareholder of the Debtor. See Dkt. No. 23 at 33, § 28.

c. Jack Runk, a non-priority unsecured creditor scheduled with a debt in an unknown amount described as "contractor – records management". See Schedule F, Dkt. No. 23 at 12. Jack Runk is the son of John and/or Judith Runk and sibling to Glen Runk, and Bryan, see Exhibit B at 40:23-24, and the Debtor's Statement of Financial Affairs lists the Jack W. Runk Irrevocable Gift Trust as a shareholder of the Debtor and Jack Runk as the former "VP – Supermedia/Independents" for the Debtor until the year before the Petition Date. See Dkt. No. 23 at 33, §§ 28 and 29.

d. John Runk, a non-priority unsecured creditor scheduled with a debt for $10,000 described as "Director". See Schedule F, Dkt. No. 23 at 13. John

Runk is the spouse of Judith Runk and the father of Glen and Jack Runk and Bryan, see Exhibit B at 29:8-11, 34:19-22, and the Debtor's Statement of Financial Affairs lists the Indenture Trust of John W. Runk as a shareholder of the Debtor and John Runk as the President of the Debtor. See Dkt. No. 23 at 13 and 33-34, §§ 28 and 29.

e. Judith Runk, a non-priority unsecured creditor scheduled with a debt for $10,000 described as "Director". See Schedule F, Dkt. No. 23 at 13. Judith Runk is the spouse of John Runk and the mother of Glen and Jack Runk and Bryan, see Exhibit B at 42:19-24, and the Debtor's Statement of Financial Affairs discloses Judith Runk as a Director of the Debtor and lists her as the former President of the company. See Dkt. No. 23 at 13 and 34, ¶ 29.

f. Kristy Runk Bryan, a non-priority unsecured creditor scheduled with a debt for $200,000 described as "Contractor – legal and administrative". See Schedule F, Dkt. No. 23 at 13. Bryan is the daughter of John and Judith Runk and sibling to Glen and Jack Runk, see Exhibit B at 37:15-18, 40:23-24, 42:19-24, and the Debtor's Statement of Financial Affairs lists the Kristy Runk Bryan Irrevocable Gift Trust shareholder of the Debtor, Bryan as the former General Counsel and Secretary of the Debtor, and lists her as the current Secretary of the company. See Dkt. No. 23 at 33-34, §§ 28-29.

27. The Debtor's Schedule G listed multiple insiders as contract counterparties and contract employees, including Glen Runk and Jack Runk. See Schedule G, Dkt. No. 23 at 19-20.

28. The Debtor's Statement of Financial Affairs listed total payments of $40, 228.33 to ML in the ninety days prior to the Petition Date. See Statement of Financial Affairs, Dkt. No. 23 at 25-26, § 3.

29. The Debtor's Statement of Financial Affairs listed no payments or other transfers of property made within the year pre-petition to or for the benefit of any insiders. See Statement of Financial Affairs, Dkt. No. 23 at 26, § 4.

30. The Debtor's Statement of Financial Affairs listed no transfers of money or other property by any means made by the Debtor or a person acting on its behalf in the two years pre-petition other than property transferred in the ordinary course. See Statement of Financial Affairs, Dkt. No. 23 at 28, § 13.

31. The Debtor's Statement of Financial Affairs listed no payments, distributions or withdrawals of any kind to insiders in the year pre-petition. See Statement of Financial Affairs, Dkt. No. 23 at 28, § 13.

C. The 341 Meeting

32. On November 15, 2016, Bryan, the Debtor's representative, appeared at the meeting of creditors conducted by the United States Trustee in this Chapter 11 case. A duplicate of the certified transcript from that meeting of creditors is attached hereto and designated as Exhibit B.

33. At that 341 meeting, Bryan disclosed numerous items at odds with the Debtor's Schedules and Statements of Financial Affairs, among other things:

a. As of the Petition Date, John Runk, an insider of the Debtor, owed money to the Debtor arising from his sale of certain pieces of the Debtor's physical property. See Exhibit B at 31:8-16, 80:9-81:5.

b. As of the Petition Date, Edradour, an insider and, potentially affiliate of, the Debtor due to its ownership by John Runk and/or Judith Runk or their trusts and to the status of John Runk and Judith Runk as its directors, owed

$350,000 to the Debtor, potentially subject to offset for monies allegedly owed to it by the Debtor. See id. at 33:1-34:15, 46:24-48-5.

c. Glen Runk, an insider of the Debtor, was paid $144,000 in 2016 pursuant to an agreement negotiated by ML on behalf of the Debtor. See id. at 38:4-8, 39:24-40:5.

d. Jack Runk, an insider of the Debtor, was paid similarly to Glen Runk in 2016 pursuant to an agreement with the Debtor. See id. at 41:19-24.

e. Kristy Runk, an insider of the Debtor, was paid at least six figures by the Debtor in 2016. See id. at 45:21-46:7.

f. Most notably, in 2014, the Debtor distributed $10 million to its shareholders' trusts as "a distribution of equity". See id. at 81:10-88:14. This included $6,437,500 to John Runk's trusts, see id. at 81:13-82:23, $1,187,500 to Jack Runk's trust, see id. at 82:24-83:6, $1,187,500 to Glen Runk's trust, see id. at 83:8-12, and $1,187,500 to Bryan's trust. See id. Bryan further confirmed that she and her brothers were the beneficiaries of their trusts. See id. at 83:10-14. These transfers were outside of the ordinary course of the Debtor's business. See id. at 84:5-25.

g. Moreover, Smith was involved in those transfers and their surrounding circumstances, including the determination of how much to distribute out to the shareholders' trusts. See id. at 102:17-103:5.

34. As a result of Bryan's testimony at the 341 meeting and research via publically available records following that meeting, counsel for the Wage and Hour Classes determined that the ML Application and the McGovern Affidavit did not comply with applicable law and rules regarding disclosures necessary for counsel's retention in a bankruptcy case, to wit:

a. The ML Application and McGovern Affidavit did not disclose ML's relationship with, and presumably representation, of Edradour, a creditor both to and of the Debtor.

b. The ML Application and McGovern Affidavit did not disclose that ML had represented both Bryan and her brother, Glen Runk, at various times pre-petition in personal matters.

c. The ML Application and McGovern Affidavit did not disclose Smith's historic representation of the Debtor or its insiders or affiliates, nor the extent and scope of those representations.

All of these items raised concerns that ML and its attorneys had far more expansive connections with the Debtor and its principals than as disclosed in the ML Application or the McGovern Affidavit.

35. On November 18, 2016, counsel for the Wage and Hour Classes contacted Thomas Riske, counsel for the Debtor, advised about these issues, and requested amendment or supplementation of the ML Affidavit and continuance of the November 21, 2016 hearing to a later date.

36. On November 21, 2016, counsel for the Wage and Hour Classes appeared at hearing in this matter and confirmed the continuance of the hearing on ML's retention to December 12, 2016. [Dkt. Entry 11/21/2016.]

37. ML did not file any amended or supplemental affidavit by December 12, 2016. On that date, this Court continued the hearing on ML's retention to January 9, 2017. [Dkt. Entry 12/12/2016.]

38. On December 16, 2016, Debtor's counsel noticed out the January 9, 2017 setting of the hearing on the ML Application. [Dkt. No. 38].

39. ML did not file any amended or supplemental affidavit before January 9, 2017. On that date, this Court continued the hearing on ML's retention to January 23, 2017. Dkt. Entry 1/9/2017.

D. The Smith Affidavit

40. On January 18, 2017, the Debtor filed the Affidavit of Stephen J. Smith in Support of Application of Debtor-in-Possession for the Entry of an Order Pursuant to 11 U.S.C. § 327(a) and Rule 2014(a) of the Federal Rules of Bankruptcy Procedure Authorizing the Employment of McCarthy Leonard & Kaemmerer as Special Labor and Employment and Corporate Counsel (the "Smith Affidavit") [Dkt. No. 66].

41. The Smith Affidavit was signed by Smith, a partner in ML. See Smith Affidavit at 1, ¶ 2 and at 2.

42. Smith's signature on the Smith Affidavit was notarized and stated that Smith had signed the Smith Affidavit "as his free act and deed". See Smith Affidavit at 3-4.

43. The Smith Affidavit stated that Smith was "duly sworn", see Smith Affidavit at 1, presumably indicating that his Affidavit purported to be true and correct.

44. The Smith Affidavit made substantial disclosures that should have been in the McGovern Affidavit, to wit:

a. That the Debtor had been represented by Husch Blackwell as outside counsel since 1995 and that Smith had been a partner there. See Smith Affidavit at 1, ¶ 2.

b. That ML had represented members of the Runk family and the Debtor's affiliates "in separate unrelated matters" including:

- Representing John Runk and Judy Runk in estate and succession planning;

- Representing John and Judy Runk in "non-Debtor related business and real estate transactions";
- Representing Glen Runk in "non-Debtor related" financial issues;
- Representing undisclosed "Runk family members" in estate and succession planning;
- Representing Bryan in domestic matters;
- Representing Jack and Karen Runk in "civil litigation"; and
- Representing the Debtor in various legal matters as required by Debtor's management.

See id. at 1-2, ¶3.

c. That ML had "worked in connection with" other professionals related to "corporate and shareholder succession planning" relating to "bank loans, shareholder loans and distributions" – and, notably, on this point, without specifying on whose behalf ML had worked. See id. at 2, ¶ 4.

45. The Smith Affidavit stated that neither ML nor Smith had any connections with "the Debtor-in-Possession, its creditors, or any party in interest therein" except "that we are acting as special counsel to the Debtor-in-Possession in this proceeding with respect to the Debtor's ongoing Texas and California litigation matters". See id. at 2, ¶ 5.

46. The Smith Affidavit disclosed that ML was paid $42,331.19 by the Debtor in the ninety days pre-petition. See Smith Affidavit at 3, ¶ 8. The Smith Affidavit did not disclose whether the payment/s comprising that amount were for services to the Debtor or for services to any other person or entity.

47. The Smith Affidavit stated that ML had not

> represented any creditors of Debtor, any other party in interest, their respective attorneys and accountants, . . . in connection with any matters adverse to Debtor, or in any capacity in which confidential knowledge of a creditor has been acquired that would bear on the proposed retention by the Debtor."

See id. at 3, ¶ 7.

48. The Smith Affidavit also stated that, to the best of Smith's knowledge, neither he nor ML "represent any interest adverse to those of the Debtor-in-Possession". See id. at 3, ¶ 9.

49. The Smith Affidavit disclosed some connections with insiders and affiliates of the Debtor that were not contained in the McGovern Affidavit. However, the Smith Affidavit did not disclose all of Smith's or ML's connections with insiders and affiliates of the Debtor. For example, the Smith Affidavit did not disclose ML's relationship with, and presumably representation, of Edradour, a creditor both to and of the Debtor. The Smith Affidavit did not disclose ML's post-petition representation of Edradour or ML's post-petition representation of the Runk family, including Bryan.

50. The Smith Affidavit did not disclose or clarify Smith's or ML's role in the 2014 transfers of $10,000,000 to the trusts of DDA's shareholders.

51. On January 20, 2017, upon the request of the parties, this Court continued the hearing on ML's retention, among other matters, to February 6, 2017. [Dkt. Entry 1/20/2017.]

52. On January 20, 2017, counsel for the Wage and Hour Classes contacted Smith via e-mail and requested his available dates for deposition "in order to obtain information about the scope and extent [sic] your firm's representation of the Debtor's owners, affiliates, and other insiders" prior to the scheduled February 6, 2017 hearing. A duplicate of the e-mail thread (with attachment) containing that transmittal is attached hereto and designated as Exhibit C.

53. On January 23, 2017, Smith responded to that request for dates by responding that "we have sufficiently outlined this Firm's past representations as relates to Directory Distributing

Associates, Inc. to the extent that we can do so without invading the attorney client privilege". See Exhibit C. Understandably, Smith's response created issues about whether the attorney client privilege referenced was that of the Debtor or that pertaining to the insiders and affiliates, i.e. the Debtor's creditors and certain other parties in interest in this Chapter 11 case.

54. At that point, Robert Eggmann, then the Debtor's bankruptcy counsel, indicated that the Debtor would be filing an amended Application to retain ML that would narrow and clarify the scope of ML's proposed retention. See Exhibit C, Attachment. However, that proposed amended Application never was filed with the Court in this matter.

55. Because of the pending grant of the United States Trustee's Motion to Appoint Trustee, and because the amended Application had not been filed, among other reasons, this Court continued the February 6, 2017 hearing on ML's retention to March 6, 2017. [Dkt. Entry 2/6/2017.]

56. On February 8, 2017, this Court entered its Order Granting Motion to Appoint Trustee [Dkt. No. 87] and, after consultation with parties in interest, the United States Trustee filed its Motion to Appoint Trustee in this matter. [Dkt. No. 93].

57. John P. Vaclavek was appointed as Trustee in this matter on February 15, 2017 [Dkt. No. 94], and the Trustee accepted his appointment on February 17, 2017. [Dkt. No. 95].

58. On March 6, 2017, this Court continued the hearing on the ML Application to April 3, 2017. [Dkt. Entry 3/6/2017.]

59. The Trustee had his counsel communicate to parties in the case that he has determined that he wishes to employ ML "to (a) assist on the wage and hour claims, and (b) assist on general corporate matters." A duplicate of the e-mail transmittal dated March 20, 2017 containing that communication (without attachments) is attached hereto and designated as Exhibit D.

60. After discussions with the Trustee's counsel about these matters, on March 22, 2017, the Trustee, through counsel, then circulated a proposed order clarifying the Trustee's intent and advising that the Trustee wanted to retain ML as special counsel under 11 U.S.C. § 327(e) "for the purposes of the FLSA litigation transition and ad hoc matters in which it has knowledge.". A duplicate of the March 22, 2017 e-mail comprising that communication (with one attachment) is attached hereto and designated as Exhibit E. That proposed order also clarified that the Trustee wished to have ML's employment be effective as of the Petition Date.

61. Counsel for the Wage and Hour Classes had multiple discussions with the Trustee's counsel about ML's retention at that point and raised additional concerns regarding items not disclosed, or not fully disclosed, in the McGovern Affidavit or the Smith Affidavit.

E. THE AMENDED SMITH AFFIDAVIT

62. On March 28, 2017, the Trustee filed the Amended Affidavit of Stephen J. Smith in Support of Application of Debtor-in-Possession for the Entry of an Order Pursuant to 11 U.S.C. § 327(a) and Rule 2014(a) of the Federal Rules of Bankruptcy Procedure Authorizing the Employment of McCarthy Leonard & Kaemmerer as Special Labor and Employment and Corporate Counsel (the "Amended Smith Affidavit") [Dkt. No. 123].

63. The Amended Smith Affidavit was signed by Smith, a partner in ML. See Amended Smith Affidavit at 1, ¶ 1 and at 7.

64. Smith's signature on the Amended Smith Affidavit was notarized and stated that Smith had signed the Amended Smith Affidavit "as his free act and deed". See Amended Smith Affidavit at 7.

65. The Amended Smith Affidavit stated that Smith was "duly sworn", see Amended Smith Affidavit at 1, presumably indicating that his Amended Affidavit purported to be true and correct.

66. The Amended Smith Affidavit averred that Smith had ML review the potential categories of parties listed on Exhibit 1 to that Affidavit for "potential connections and relationships". See id. at 1-2, ¶ 3; at 8-9. That Exhibit did not include a number of entities owned or controlled by members of the Runk family that Smith, his prior law firm, and/or ML represented or may have represented including, without limitation Ste. Genevieve Farms, L.C., Ste. Genevieve Farms I, L.C., R&S Ste. Genevieve Farms, L.C., or trusts created for or for the benefit of the Runk family, including those that own the Debtor. See id. at 8-9.

67. The Amended Smith Affidavit made substantial disclosures that should have been in the McGovern Affidavit and the Smith Affidavit, to wit:

a. That ML had represented the Debtor with regard to the cumulative $10 million transfer in 2014, that the Debtor's shareholders did not have separate representation in that transaction, and that ML subsequently had performed services to evaluate the "legal implications" of that transfer and certain "shareholder loans". See Amended Smith Affidavit at 2-3, ¶ 8.

b. That ML had represented both Logistech, Inc. ("Logistech"), an entity owned "by the Runk Family", and the Debtor in multiple borrowing and lending transactions both before and after the 2014 transfers. See id. at 3, ¶ 9.

c. That ML had represented both John Runk and the Debtor in multiple borrowing and lending transactions both before and after the 2014 transfers. See id. at 3, ¶ 10.

d. That ML had represented both Edradour and the Debtor with regard to a potentially executory contract between them regarding "insurance benefits". See id. at 3, ¶ 11. Notably, the Amended Smith Affidavit says that, if retained, ML "will not represent either the Debtor, the Trustee, or Edradour in

any matters pertaining to the [Edradour] Agreement or their relationship, except to provide information to the Trustee about the Agreement and the historic business relationship between the Debtor and Edradour". See id. at 3-4, ¶ 11.

e. That ML had "[f]rom time to time" invoiced the Debtor for services rendered on behalf of the Runk family and the Debtor's affiliates and that DDA "may have" paid some of those invoices, see id. at 4-5, ¶ 14, and that ML had billed the Runk family and the Debtor's affiliates $8,843.85 in the year pre-petition. See id. at 5, ¶ 17. Notably, the Amended Smith Affidavit still did not identify the entity or person/s who paid those invoices.

f. That ML has continued to represent Edradour, Bryan, and other members of the Runk family post-petition. See id. at 5, ¶ 18.

68. The Amended Smith Affidavit included ML's post-petition fee invoices to the Debtor. See id., Exhibit B, at 10-40. Those invoices previously had not been provided or circulated to parties in interest in the case as has been required for professionals to be paid prior to fee application hearings in this matter.

69. ML was paid $808.50 on its invoice 1088806 and $1,203.50 on its invoice 1088807 post-petition, despite the fact that ML had not circulated its fee statements to parties in interest in the case. See id., Exhibit B, at 11-14.

70. ML's post-petition invoices state "By Acceptance Of These Legal Services, You Agree To Pay 9% Interest Per Annum On Any Fees Unpaid For 60 Days From the Invoice Date". See id., Exhibit B, at 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 37, 39. This term relating to ML's retention was not disclosed in the ML Application or any of the Affidavits filed by or on behalf of ML in this matter.

ARGUMENT

A. SECTION 327

71. ML did not qualify for retention by the Debtor under any part of section 327 of the Bankruptcy Code; appointment of the Trustee does not change that situation. In that light, the Wage and Hour Classes oppose ML's retention in this matter for any purpose whatsoever.

72. Purely as an accommodation to the Trustee, and without conceding the propriety of that retention, the Wage and Hour Classes do not oppose the Trustee's request to retain ML on a limited basis as special counsel as per the Trustee's communications because the Classes appreciate the need for this matter to proceed economically and to effectuate transition of the administration of this case from the Debtor to the Trustee.

73. However, any retention of ML should be denied to the extent that it seeks ML's retention retroactive to the Petition Date in this matter.

74. Section 327(e) of the Bankruptcy Code, which addresses the employment of special counsel in cases where the attorney has previously represented a debtor, expressly provides:

> The trustee, with the court's approval, may employ, for a specific special purpose, other than to represent the trustee 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.

See 11 U.S.C. § 327(e).

75. This section makes it abundantly clear that an adverse interest or actual conflict will preclude an attorney from serving as special counsel in the case on behalf of a trustee. Case law bolsters and enhances this mandate. For example, in the case of In re Polaroid Corp., 424 B.R. 446, 454 (Bankr. D. Minn. 2010), the Court indicated that section 327(e) disqualifies an

attorney from serving as special counsel when the attorney has a conflict related to the matter upon which the attorney is to be employed. Such a conflict exists here because ML represented, and potentially represents, both the Debtor and its principals, each of which ultimately may have significant liability with regard to the debts owed to the Debtor's creditors as a result of the 2014 transfers and the subsequent borrowing and lending transactions between Logistech and the Debtor – at least one of which involved millions of dollars repaid in the year prior to the Petition Date. Recoveries from avoidance of those transfers and transactions comprise the single largest potential asset of this bankruptcy estate and the Wage and Hour Classes comprise the largest creditor of the estate. As a result, any legal services provided by ML in or with regard to the Walker Action and the Krawczyk action are tainted by the impact that litigation will have not only on the Debtor, but also on the Debtor's principals and insiders.

76. That conflict is compounded when ML has represented not only the Debtor, but also its shareholders, their settlors and beneficiaries, and their affiliates on both sides of transfers and transactions and repeatedly has failed to disclose those multiple representations in sworn affidavits. The invoices attached to the Amended Smith Affidavit evidence that ML provided post-petition services to the Debtor on a variety of matters, including substantive issues related to the Walker Action and the Krawczyk Action and issues related to the conduct of this Chapter 11 case while the Amended Smith Affidavit discloses post-petition representations of Edradour, Bryan, and other Runk family members, all at a time when ML knew that its disclosures in this matter were under scrutiny and that there were multiple intertwined and connection relationships that it had with the Debtor and its insider creditors, affiliates, and principals. Notably, none of the Affidavits filed by or on behalf of ML affirmatively state that ML has terminated all representations of the Debtor's insiders and affiliates at any point.

77. Both In re Southern Kitchens, Inc., 216 B.R. 819 (Bankr. D. Minn. 1998) and In re Hoffman, 53 B.R. 564 (Bankr. W.D. Ark. 1985), make clear that courts frown upon simultaneous representation of a corporate Debtor and its principal and suggest that the prior representation of those insiders violates section 327(e) of the Bankruptcy Code because all of a debtor's professionals must provide undivided loyalty and untainted advice in connection with the fulfillment of their fiduciary duties. See Southern Kitchens, 216 B.R. at 827. Indeed, the Court in Southern Kitchens also recognized that potential conflicts equally are as disqualifying as actual conflicts. Id. at 827.

78. In this case, ML's conflicts reflect an active competition between competing interests that only can be served at each other's expense. See In re American Energy Trading, Inc., 291 B.R. 154, 157 (Bankr. W.D. Mo. 2003). These competing interests include the anticipated competition between the estate and the Debtor's principals and insiders over funds to repay creditors with regard to actual or potential avoidance of the 2014 transfers, the borrowing and lending transactions between the Debtor and its insiders and affiliates, preferential or similar payments made to or for the benefit of the Debtor's principals and insiders pre-petition, unauthorized payments made to or for the benefit of the Debtor's principals and insiders post-petition, and recovery of funds owed by or to Edradour. In fact, the information that has come to light about ML's multiple representations has drawn into question numerous issues, arguments, and disclosures made in the Walker Action and the Krawczyk Action, particularly in terms of disclosures about the Debtor's financial condition.

79. ML does assert that it will not represent Edradour in matters pertaining to its relationship or agreements with the Debtor going forward, see Amended Smith Affidavit, Dkt. No. 123 at 3-4, ¶ 11, and that it has concluded certain post-petition representations of Bryan. See id. at 5, ¶ 18. However, this does not sanitize the conflicts that are so intertwined and ingrained

in this matter, particularly when the Amended Smith Affidavit discloses that ML is performing "limited estate planning work" – potentially with regard to the trusts that are the Debtor's insiders or the disposition of the funds transferred or repaid to them by or for the benefit of the debtor. See Southern Kitchens, 216 B.R. at 827 (finding that the fact that certain connections are past and completed do not matter and do not change the outcome on conflicts analysis).

80. Moreover, even if there are some common interests that the estate and the Debtor's principals and insiders share, the interests of the estate and the Debtor's principals and insiders are not the same, still giving rise to a conflict that precludes representation. See In re Mican Homes, Inc., 179 B.R. 886, 888–89 (Bankr. E.D. Mo. 1995).

81. Likewise, Courts are clear that in dual representation or loyalty situations, the conflict of interest for purposes of section 327 cannot be waived. See American Energy Trading, 291 B.R. at 157.

82. As a parenthetical to the argument with regard to section 327(e), there is also section 327(c), which provides that a creditor's objection to the employment of counsel, who has represented a creditor of the Debtor, precludes that employment by the estate if there is an actual conflict. The facts here indicate such an actual conflict that would disqualify ML. Consequently, section 327(c) and the law supporting its interpretation further suggest and support the denial of the ML Application.

B. BANKRUPTCY RULE 2014

83. Bankruptcy Rule 2014(a) states the requirements that must be contained in an application seeking employment of counsel and the supporting affidavit of the proposed attorney:

> The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors,

> any other party in interest, their respective attorneys and accounts, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

See Fed. R. Bankr. P. 2014(a).

84. In this case, the McGovern Affidavit and the Smith Affidavit substantially were deficient; both the Smith Affidavit and the Amended Smith Affidavit only were created and filed because of the Wage and Hour Classes' and the United States Trustee's insistence on full disclosure in this matter.

85. In bankruptcy case, professionals must make mandatory disclosures of actual and potential conflicts, as well as detailed descriptions and identification of all conceivable connections. See Southern Kitchens, 216 B.R. at 829. Disclosure gives the Court and all interested parties the opportunity to evaluate any conceivable conflicts and disqualifying events or factors, see id.; failure to provide detailed disclosures constitutes independent grounds for disqualification of a professional. See id. at 830.

86. Here, the ML Application and the McGovern Affidavit contained only a bland recitation of no adverse interests, other than ML's claim and payments for fees and a vanilla statement that it had represented the Debtor. While a slight improvement, the Smith Affidavit -- even coming almost two months after its deficiencies were pointed out -- still failed to disclose all of or give sufficient descriptions of ML's multiple representations. And again, the Amended Smith Affidavit – the product of an additional two months and, presumably, additional guidance and instruction from the Trustee's counsel – still does not rise to a sufficient level. All of this militates against any retention of ML: a Debtor's professionals should not need or take five

months to make multiple attempts accurately to disclose their relationships and conflicts with a Debtor.

87. Good and complete disclosure comprises a cornerstone of the bankruptcy process. In view of the overwhelming connections and entanglement of ML with the Debtor, its principals, insiders, and affiliates, its continuing representation of some of those parties post-petition, and ML's lackadaisical attitude towards its responsibilities to make full disclose in this matter, ML employment should be denied.

C. EFFECTIVE DATE OF RETENTION

88. Under Eighth Circuit law, absent extraordinary circumstances or fundamental unfairness, a professional that desires payment from the assets of a bankruptcy estate must seek retention prior or at the time it commences providing services in order to receive compensation from that estate. See Lavender v. Wood Law Firm, 785 F.2d 247, 248-49 (8th Cir. 1986).

89. While the ML Application initially was filed timely in this matter, the Debtor and ML failed to give the Wage and Hour Classes prompt and timely notice of that filing or any interim hearing on it. Cf. In re Carr, 224 B.R. 785, 786 (Bankr. D. Idaho 1998) (denying proposed retention of professional in absence of service and notice to necessary parties in case).

90. As discussed above, ML failed promptly to make sufficient disclosure to facilitate review and analysis of its potential retention by the Debtor, and now by the Trustee, in this matter.

91. Retroactive retention of a professional is not warranted where there has not been full disclosure and, in fact, courts regularly remove professionals and deny compensation for failing to make sufficient disclosures. See Southern Products, 216 B.R. at 829; accord In re Black Hills Greyhound Racing Ass'n, 154 B.R. 285, 296 (Bankr. D.S.D. 1993) (finding fee award inappropriate due to professional's "lack of candor at the inception of the case about its

prior representation" of the debtor's shareholder, particularly in light of the professional's "disregard" for disclosure); In re Marine Outlet, Inc., 135 B.R. 154, 156 (Bankr. M.D. Fla. 1991) (removing special counsel in a Chapter 11 case despite the lack of initial objection to that professional's employment on grounds that the counsel had failed to disclose its conflict of interest). Moreover, where, as here, parties did not receive initial service or notice of the proposed retention, any application for retention should be denied

WHEREFORE the Wage and Hour Classes respectfully request that the ML Application be denied in part, or otherwise limited, such that any retention of ML by the Trustee is limited only to retention under section 327(e) of the Bankruptcy Code from and after February 17, 2017, and for the limited purpose of acting as special counsel to the Trustee for transition purposes regarding the litigation involving the Classes and other non-substantive matters as requested by the Trustee that are unrelated to the Debtor's insiders and affiliates, and that this Court grant such other and further relief with regard to the ML Application as this Court deems just and proper.

Respectfully Submitted,

Date: March 30, 2017 By: /s/ Bonnie L. Clair

BONNIE L. CLAIR (#41696MO)
SUMMERS COMPTON WELLS LLC
8909 Ladue Road
St. Louis, MO 63124
(314) 991-4999/(314) 991-2413 Fax
blcattymo@summerscomptonwells.com
(ECF filings only)
bclair@summerscomptonwells.com
(Correspondence)

with

Richard Mithoff
Janie L. Jordan
Mithoff Law
One Allen Center-Penthouse

500 Dallas Street
Houston, TX 77002
(713) 654-1122/(713) 739-8085 Fax
RMithoff@mithofflaw.com
JJordan@mithofflaw.com

Judith Sadler
Holmes Diggs Eames & Sadler
5300 Memorial Drive, Suite 900
Houston, TX 77007
(713) 802-1777/(713) 802-1779 Fax
JSadler@holmesdiggs.com

Russell S. Post
Beck Redden, LLP
1221 McKinney, Suite 4500
Houston, TX 77010
(713) 951-3700/(713) 951-3720
rpost@beckredden.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on March 30, 2017 via electronic filing in the CM/ECF system of the United States Bankruptcy Court for the Eastern District of Missouri to the parties requesting service by electronic filing. I hereby also certify that a copy of the foregoing was served on March 30, 2017 via United States Mail, first class postage prepaid, on the date of the electronic filing of this document to those individuals and entities not requesting service by electronic filing. The individuals and entities being served electronically or by mail are:

United States Department of Justice
U.S. Trustee's Office
111 S. 10th Street, Ste. 6353
St. Louis, MO 63102

Robert E. Eggmann
Thomas H. Riske
Christopher J. Lawhorn
Carmody MacDonald P.C.
120 South Central Avenue, Ste. 1800
Clayton, MO 63105

E. Rebecca Case
Stone Leyton & Gershman
7733 Forsyth Blvd, Suite 500
St. Louis, MO 63105

John P. Vaclavek
Williams-Keepers LLC
2005 West Broadway
Suite 100
Columbia, MO 65203

David L. Going
Armstrong Teasdale LLP
7700 Forsyth Blvd, Suite 1800
St. Louis, MO 63105

David A. Warfield
Thompson Coburn
One US Bank Plaza
St. Louis, Missouri 63101

/s/ Bonnie L. Clair

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:	**)**	
	)	**Case No. 16-47428-659**
DIRECTORY DISTRIBUTING	**)**	**Chapter 11**
ASSOCIATES, INC.,	**)**	**The Honorable Kathy Surratt-States**
	)	
Debtor.	**)**	

SUMMARY OF EXHIBITS

The following exhibits to the Objection to Application to Employ McCarthy Leonard & Kaemmerer filed by the Wage and Hour Classes on this date are identified as follows:

Exhibit A – Duplicates of records of the Vermont Secretary of State and the Missouri Secretary of State regarding Edradour Insurance Company.

Exhibit B – Duplicate of Certified Transcript of November 15, 2016 Meeting of Creditors.

Exhibit C – Duplicate of e-mail thread ending January 25, 2017 (in reverse chronological order), with attachment.

Exhibit D – Duplicate of e-mail dated March 20, 2017 (without attachments).

Exhibit E – Duplicate of e-mail dated March 22, 2017 (with one attachment).

Respectfully Submitted,

Date: March 30, 2017

By: _/s/ Bonnie L. Clair_____

BONNIE L. CLAIR (#41696MO)
SUMMERS COMPTON WELLS LLC
8909 Ladue Road
St. Louis, MO 63124
(314) 991-4999/(314) 991-2413 Fax
blcattymo@summerscomptonwells.com
(ECF filings only)
bclair@summerscomptonwells.com
(Correspondence)