

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF IOWA**

In re:)	Chapter 11
)	
MERCY HOSPITAL,)	
IOWA CITY, IOWA, <i>et al.</i> ,)	Case No. 23-00623C
)	
Debtors.)	Jointly Administered

**OBJECTION OF THE ACTING UNITED STATES TRUSTEE TO THE DEBTORS’
APPLICATION FOR ENTRY OF ORDER, PURSUANT TO SECTION 363 OF THE
BANKRUPTCY CODE, AUTHORIZING DEBTORS TO RETAIN TONEYKORF
PARTNERS, LLC AS INTERIM MANAGEMENT OF THE DEBTORS EFFECTIVE AS
OF THE PETITION DATE, AND GRANTING RELATED RELIEF**

JURISDICTION, VENUE, AND STATUTORY PREDICATE

1. The Court has jurisdiction over this Objection and the Sale Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (M) and (N). The statutory predicate for the relief sought herein is 11 U.S.C. §§ 105, 363, 365, as governed by Fed. R. Bankr. P. 2002, 6004, and 6006. The United States Trustee has standing to raise, appear and be heard on this Objection pursuant to 11 U.S.C. § 307; 28 U.S.C. § 581 *et seq.*

INTRODUCTION

2. The Acting UST reincorporates all factual and legal statements made in her Objection to the McDermott Application, filed at Docket Number 189.

3. The Debtors seek to employ ToneyKorf Partners, LLC (“ToneyKorf”) as interim management to the Debtors, including Mark Toney as Chief Restructuring Officer (“CRO”), James Porter as Chief Financing Officer (“CFO”), Christopher Karambelas as Chief Information Officer (“CIO”) and Chief Operating Officer (“COO”), among others.

4. The Application makes clear the primary skills of ToneyKorf is as a turnaround and reorganization specialist. Here, the Debtor proposed a sale of assets and Asset Purchase Agreement within the first week of filing. In other terms, the majority of the work to prepare for the sale has been done pre-petition, and should have been paid for pre-petition. The UST has concerns of the necessity of the many professionals proposed within this and similar Applications, especially considering the proposed stalking horse bid is a mere \$20 million for substantially all of the assets.

PROCEDURAL BACKGROUND

5. On August 7, 2023, Mercy Iowa City ACO, LLC, Mercy Hospital, Iowa City, Iowa, and Mercy Services Iowa City, Inc., (hereinafter “Mercy” or “Debtors”) filed three individual chapter 11 bankruptcy petitions jointly administered under case number 23-00623.

6. The Debtors continue to operate as debtors-in-possession under §§ 1107 and 1108 of the Bankruptcy Code.

7. The Debtors’ *Application for Entry of Order, Pursuant to Section 363 of the Bankruptcy Code, Authorizing Debtors to Retain ToneyKorf Partners, LLC as Interim Management of the Debtors, Effective As of the Petition Date, and Granting Related Relief* (“Application”) was filed on August 23, 2023. Doc. 149.

8. A Motion to Appoint Examiner was filed on August 14, 2023, by Computershare Trust Company, N.A., as Master Trustee, and Preston Hollow Community Capital, Inc., as Bondholder Representative (“Preston Hollow”). *See* Do. 96. A hearing on the Motion is currently scheduled for September 20, 2023.

ARGUMENT

I. Employment Pursuant to Section 363 is Inappropriate.

9. The Application seeks to employ multiple people to fill the management team of the Debtors. Also contemplated by the Application and attached Engagement Letters are retainers the Debtors were required to pay.

10. Employment under § 363(b) requires the proposed professionals have been involved with the Debtor prior to the bankruptcy filing and can be considered employed in the ordinary course of the Debtors' business. The original engagement letter is effective April 3, 2023. *See* Doc. 149-3, Engagement Letter, page 5 of 16. It lists duties and responsibilities of the proposed professionals, and also contemplates a potential bankruptcy filing. *See* Doc. 149-3, Engagement Letter, page 4 of 16. Employment for such a relatively short period of time does not meet the standard of an ordinary course professional. Additional information and facts are needed to determine if the proper protocols have been complied with.

11. Further, the Engagement Letter only specifically mentions the employment of Mark Toney as Chief Restructuring Officer. As CRO, ToneyKorf was charged with providing addition "Temporary Staff," including the Chief Financial Officer, Chief Information Officer and Chief Operating Officer, and a Finance Manager. The hiring and continued employment, as well as ongoing oversight of these professionals, was solely at the discretion of the CRO. Thus, these people were never actually employed or supervised by the Debtors and will need their own Applications to Employ pursuant to § 327.

12. The engagement letter contemplates a retainer of \$500,000. *See* Doc. 149-3, Engagement Letter, page 10 of 16. A retainer implies the professional should be employed pursuant to 11 U.S.C.

§ 327, and must comply with the requires of §§ 330 and 331, rather than employment under § 363, which suggest ongoing payment in the ordinary course of business.

13. Further, the retainer contemplated is treated as an evergreen retainer, which is objectionable. *See* Doc. 149-3, Engagement Letter, page 15 of 16.

14. Finally, the UST will often resolve objections to employment under § 363 by ensuring the proper *Jay Alix Protocol* is followed. These conditions are meant to protect the estate and guard against issues which might otherwise arise through the lack of complete disinterestedness but for the conditions imposed. Among other key terms, the Jay Alix Protocol requires the crisis manager to limit itself to a single function in the bankruptcy case. The crisis manager may not fully supplant the debtor's existing management, but must remain answerable to the debtor's independent board of directors. As it stands now, the present Application and Engagement Letters only allowed for the employment of Mark Toney as CRO. The additional personnel are not subject to Mercy board oversight, and cannot meet the requirements of the *Jay Alix* protocols and must be employed, after separate application, under § 327.

II. Payment of the Success Fee is Inappropriate.

15. The Application contemplates a "Success Fee" of \$250,000. Doc. 149, Paragraph 23. The fee is to be paid upon Court approval of a transaction and/or transition to new owners where Mercy, as a healthcare facility, continues serving the community. *Id.*

16. Payment of the Success Fee is in addition to the other benefits derived from ToneyKorf's work managing the Debtors, including hour rates ranging from \$160/hour to \$950/hour, expense reimbursement, and indemnification.

17. The Success Fee has few parameters and is unclear when or how it is earned. There is no temporal limitation, meaning the management team could theoretically stay in place and take

months to effectuate a sale, and there would be no consequence reflected in the Success Fee. The fee is to be paid without any further application or approval by the Court, allowing no oversight into its reasonableness.

18. Further, the amount of the Success Fee, taken in conjunction with the hourly rates to be expended throughout the life of this case, are not commensurate with the proposed bid price of only \$20 million. Additionally, payment of the Success Fee is not contingent upon the amount of the sale, resulting in an inability of any party-in-interest being able to accurately analyze the reasonableness of the fee. Finally, as made clear by the pace of the case, a majority of the work was done pre-petition. Pre-petition services rendered should not be paid post-petition with little to no oversight by the bankruptcy court.

III. Employment Retroactive to the Petition Date is Not Warranted.

19. Filed on August 23, 2023, the Application seeks employment retroactive 16 days to the date the petition was filed.

20. Typically, an application seeking retroactive employment must give reasons as to the delay. The application sets forth no such reasons.

21. Because of the delay in filing the Application, all parties are left to consider the propriety of the employment, while simultaneously working to effectuate a sale on the Debtors' truncated timeline. The delay has direct harm on all parties in interest and is not warranted.

22. The UST reserves all rights to amend and supplement or modify each portion of this objection.

WHEREFORE, the Acting United States Trustee requests that the Court deny Debtors' Application to Employ and that the Court grant such further relief as it deems just and proper.

Dated: September 6, 2023

Mary R. Jensen
Acting United States Trustee
Region 12

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served electronically on parties who receive electronic notice through CM/ECF as listed on CM/ECF's notice of electronic filing dated September 6, 2023

By:/s/ Claire R. Davison
Claire R. Davison
Trial Attorney
United States Trustee's Office