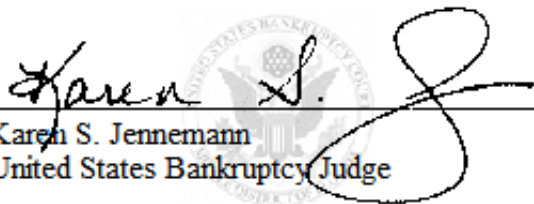


ORDERED.

Dated: March 23, 2021



Karen S. Jennemann
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re)	
)	
Greater Blessed Assurance Apostolic)	Case No. 6:20-bk-0148-KSJ
Temple, Inc.)	Chapter 11
Debtor.)	
)	

**ORDER SUSTAINING U.S. TRUSTEE'S
OBJECTION TO DAVID MARSHALL BROWN'S
AMENDED APPLICATION FOR COMPENSATION**

David Marshall Brown and the law firm of David Marshall Brown, P.A. (collectively "Brown") represented the Debtor, Greater Blessed Assurance Apostolic Temple, Inc., both before and after this Chapter 11 case was filed. Brown now seeks attorney's fees of \$92,050 and expenses of \$1,444.09 in this now dismissed Chapter 11 case.¹ The United States Trustee ("UST") objects,² arguing Brown's fees should be disallowed for his lack of disinterestedness, or alternately, be reduced as some fees

¹ Brown's Amended First Interim Application (the "Application.") Doc. No. 181.

² Doc. No. 203.

predate his retention application or are excessive. Brown in response,³ argues “if the issue came up, he would waive pre-retention fees” to cure his disinterestedness,⁴ he could not file a retention application earlier because he had not yet been admitted to practice before the Middle District of Florida, and his fees are reasonable for the services provided.

The Court sustains the UST’s objection. Because Brown failed to disclose his disinterested status, the *Debtor* has no obligation to pay his fees. And to the extent non-debtor parties must pay Brown for attorney fees in this case, the Court finds reasonable attorney fees total \$35,000 and will award reimbursement of Brown’s costs totaling \$1,444.09.

Debtor operates a church and school in Rockledge, Florida and filed this Chapter 11 case *pro se* on January 10, 2020.⁵ After the Court issued an Order to Show Cause Why this Case Should Not be Dismissed because the Debtor was not represented by counsel,⁶ the Debtor filed an Application to Employ Brown as general bankruptcy counsel (“Application to Employ”).⁷

In support of the Application to Employ, Brown signed an affidavit stating “[n]either I nor the firm represent any interest adverse to the debtor, or the estate, and we are disinterested persons as required by 11 U.S.C. § 327(a)” and “...my initial

³ Doc. No. 205.

⁴ Doc. No. 205, ¶ 1.

⁵ Doc. No. 1.

⁶ Local Rule 1074-1 provides corporations and other persons who are not individuals may appear and be heard only through counsel permitted to practice in this Court.

⁷ Doc. No. 30. Debtor filed the Application to Employ on March 25, 2020. Brown had to seek readmission to the Middle District of Florida before filing his Application to Employ. Doc. No. 24.

retainer is from a third-party source, to wit: Bishop Sylvester Jones, personally.” Brown also filed a Disclosure of Compensation of Attorney for Debtor,⁸ stating his \$10,000 retainer was paid from personal funds contributed by two officers of the Debtor—Bishop Sylvester Jones and Pastor Joyce Jones.⁹ Based on Brown’s representations, the Court entered an order approving the Application to Employ.¹⁰

Before Debtor’s unsuccessful second attempt to confirm a plan, Brown filed his Application seeking \$92,050.00 of attorney fees and \$1,444.09 of costs for services rendered from December 9, 2019 (*before the bankruptcy filing*) through November 23, 2020 (“Fee Application”).¹¹ The United States Trustee filed her Objection,¹² and, on December 14, 2020, I denied confirmation of Debtor’s amended plan,¹³ denied Debtor’s Notice of Election to Proceed under Subchapter V of Chapter 11,¹⁴ dismissed this case with a one-year injunction against refiling,¹⁵ and considered the Application.

No appeal was taken. So, this case is dismissed; the Debtor may not file another bankruptcy case for one year. The only unresolved issue is whether the Debtor owes Brown any monies for his fees and costs. I conclude they have no further payment obligation to him.

⁸ Doc. No. 37.

⁹ The Disclosure of Compensation also provides a balance due of \$0.00, and Brown further certifies that “the foregoing is a complete statement of any agreement or arrangement for payment to me for representation of the debtor(s) in this bankruptcy proceeding.” The Court is unsure and makes no finding whether Bishop or Pastor Jones have any on-going obligation to pay Brown for his legal services.

¹⁰ Doc. No. 127.

¹¹ Doc. No. 181. Brown filed the Amended Application on November 23, 2020.

¹² Doc. No. 203.

¹³ Doc. No. 214.

¹⁴ Doc. No. 213.

¹⁵ Doc. No. 210.

Brown is Not Entitled to Compensation from the Debtor

A court may deny compensation to professionals who are not disinterested persons.¹⁶ Section 328 of the Bankruptcy Code¹⁷ provides:

(c) Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 of this title, **such professional person is not a disinterested person**, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.¹⁸

Although not unlimited, the court has great discretion in deciding whether to deny compensation under Section 328.¹⁹ And even after the conclusion of the bankruptcy case, the bankruptcy court retains jurisdiction to award compensation.²⁰

Here, the Court finds Brown is not a disinterested person. The definition of a "disinterested person" includes a person that "is not a creditor."²¹ A creditor is an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor."²²

Brown is a creditor of the Debtor. He had represented the Debtor before they filed this bankruptcy case and has a pre-filing claim against the Debtor for legal fees

¹⁶ *Electro-Wire Products, Inc. v. Sirote & Permutt, P.C. (In re Prince)*, 40 F.3d 356, 359 (11th Cir. 1994). See also *Denison v. Shipyard (In re New River Dry Dock, Inc.)*, 497 Fed. Appx' 882, 886 (11th Cir. 2012).

¹⁷ All references to the Bankruptcy Code refer to 11 U.S.C. §101 *et. seq.*

¹⁸ 11 U.S.C. § 328 (c). Emphasis added.

¹⁹ *Prince*, 40 F.3d at 361.

²⁰ *New River*, 497 Fed. Appx' at 886.

²¹ 11 U.S.C. § 101 (14)(A).

²² 11 U.S.C. § 101 (10)(A).

for \$1,015. Because Brown is a creditor, he is not a “disinterested person.” And under §328 of the Bankruptcy Code, he should not have sought retention as the Debtor’s lawyer without disclosing this information or first waiving the claim.

Many lawyers face similar dilemmas when they represent debtors in bankruptcy cases. They must advise their clients before filing bankruptcy necessarily incurring fees. Most make sure that they have no pre-petition fees due when the case is filed. Then, they honestly can affirm they are “disinterested.” Alternatively, attorneys can disclose any amounts due on the bankruptcy filing but waive the right to payment.

Here, Brown failed to take either step. He was due monies from the Debtor when he sought to represent them. And he failed to disclose this debt in his papers. Under Bankruptcy Rule 2014, Brown must disclose all connections with the Debtor.²³ He “must disclose all facts that bear on his disinterestedness, and cannot usurp the court’s function by unilaterally choosing which connections impact on his disinterestedness and which do not.”²⁴ His duty to disclose all connections with the Debtor is continuing and does not end when employment is approved.²⁵ “[A] professional employed under 11 U.S.C. § 327(a) is under a continuing obligation to supplement its 2014 statement if circumstances change.”²⁶

Brown simply ignored his obligations. He never disclosed the amounts owed to him by the Debtor in the affidavit he signed in support of his retention or in his

²³ *In re Keller Financial Services of Florida, Inc.*, 243 B.R. 806, 812 (Bankr. M.D. Fla. 1999).

²⁴ *Keller Financial*, 243 B.R. at 812.

²⁵ *Id.* at 813.

²⁶ *Keller Financial*, 243 B.R. at 813 (quoting *In re Olsen Industries, Inc.*, 222 B.R. 49.59 (Bankr. D. Del. 1997)).

Disclosure of Compensation.²⁷ Brown now attempts to cure his disinterestedness by arguing “if the issue came up, he would waive pre-retention fees” and should this case convert to a Subchapter V under Chapter 11, he could not be disqualified solely for the prepetition fees.²⁸ Such argument, however, disregards his continuing obligations under § 327 and Bankruptcy Rule 2014.

Even after this Court determined the Debtor was not eligible for Subchapter V under Chapter 11, he still has not amended his affidavit.²⁹ And Brown certainly understands the strict disclosure rules imposed by § 327 of the Bankruptcy Code and Bankruptcy Rule 2014 given he clerked for two bankruptcy judges (for four years) and worked as an attorney (for two years) at the United States Trustee’s office in Miami.³⁰

Brown understood but ignored his obligation to disclose the pre-petition debt due to him by the Debtor. Although his pre-petition claim against the Debtor is small (\$1,015), courts expect and require full and complete disclosure from every attorney seeking retention without prodding or exception. There is no *de minimus* threshold excusing an attorney from failing to disclose his inability to meet the required “disinterestedness” status.

Because Brown is not disinterested and did not timely disclose his pre-petition claim against the Debtor as required by § 327 and Bankruptcy Rule 2014, he is not

²⁷ Doc. Nos. 30 and 37.

²⁸ 11 U.S.C. §1195 states “[n]otwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title, by a debtor solely because that person holds a claim of less than \$10,000 that arose prior to commencement of the case.”

²⁹ See *In re Jennings*, 199 Fed. Appx. 845, 848 (11th Cir. 2006)(bankruptcy courts are not obligated to peruse the entire record in search of the basic disclosures required by Rule 2014).

³⁰ Doc. No. 30, Affidavit of David Marshall Brown at ¶4.

allowed *any* compensation from the Debtor under §328 of the Bankruptcy Code. The United States Trustee's Objection is sustained.

Brown's Reasonable Attorney Fees and Costs

Although the *Debtor* does not have to pay Brown, third parties, such as Bishop Sylvester Jones and Pastor Joyce Jones, may have obligated themselves to pay Brown for legal services provided to the Debtor. I make no finding that any such payment obligation exists, but to the extent it does, I will determine Brown's reasonable attorney fees and costs for this bankruptcy case. Brown provided billing records³¹ which reflect he spent 263 hours for a total request of \$92,050 in attorney's fees, using an hourly billing rate of \$350. Brown also requests costs of \$1,444.09.

Brown's attorneys' fees are limited to reasonable fees and costs for work performed. The lodestar analysis helps courts sort reasonable from unreasonable fees by initially multiplying the attorney's reasonable hourly rate by the number of hours reasonably expended.³² A bankruptcy court can adjust and explain the lodestar calculation, upward or downward, after considering the twelve (12) factors laid out in *Johnson v. Georgia Highway Express, Inc.*³³ Although courts do not determine

³¹ Doc. No. 181, Exh. A.

³² *Grant v. George Schumann Tire & Battery Co.*, 908 F.2d 874, 879 (11th Cir. 1990).

³³ 488 F.2d 714 (5th Cir. 1974) (abrogated on other grounds by *Blanchard v. Bergeron*, 489 U.S. 87, 92, 109 S. Ct. 939, 944, 103 L. Ed. 2d 67 (1989)). The twelve factors are: (1) The time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

reasonableness of fees in hindsight,³⁴ the most important consideration to a fee increase or decrease is the results obtained.³⁵

Here, the Court finds the hourly billing rate of \$350 reasonable and consistent with the local hourly billing rate. The hours expended by Brown (263), however, need a downward adjustment. After considering the results obtained and examining other *Johnson* factors, such as complexity of this bankruptcy case, the Court finds 100 hours reasonable resulting in reasonable attorneys' fees of \$35,000.

Brown incurred almost half of his hours (103.2) representing the Debtor without proper authorization. Based on Brown's Itemized Time Entries,³⁶ he spent 2.9 hours representing the Debtor *before* this bankruptcy filing, 15.7 hours *before* filing his Application to Employ,³⁷ and 84.6 hours as state court litigation counsel when he never sought retention for this purpose. Debtor did not seek approval to retain Brown *nunc pro tunc* in this bankruptcy case or as special counsel for the pending state court litigation. This time expended was not reasonable and is excluded.

Of the remaining hours (159.8) requested by Brown, approximately 100 hours are reasonable considering the complexity of this case and the results obtained by Brown. This case is a relatively routine Chapter 11 case. It involved a two-party dispute between the Debtor and its secured creditor, Third World Missions, Inc. ("Third World"), who had obtained a foreclosure judgment against the Debtor. The primary

³⁴ *In re Blue Stone Real Estate*, 487 B.R. 573, 577 (Bankr. M.D. Fla. 2013).

³⁵ *In re Gencor Indus., Inc.*, 286 B.R. 170, 178 (Bankr. M.D. Fla. 2002).

³⁶ Doc. No. 181, Exh. A.

³⁷ This case was filed on January 10, 2020; however, Brown did not seek retention until March 25, 2020. Doc. No. 30. And his retention was not approved until August 12, 2021. Doc. No. 127.

contested matters were the Debtor's Objection to Claim filed by Third World,³⁸ and Third World's Objection to Confirmation.³⁹ Debtor ultimately could not confirm a plan, and I dismissed the case which had been pending less than a year.

Having reviewed Brown's Itemized Time Entries,⁴⁰ the time spent on this case is unreasonable given the circumstances. For example, Brown spent 29.3 hours on case administration and meeting of creditors,⁴¹ 16.4 hours on preparation and review of monthly operating reports,⁴² 36.9 hours on other bankruptcy contested matters,⁴³ and 41.7 hours for plan and confirmation matters.⁴⁴

After applying the loadstar analysis and considering the *Johnson* factors, the Court finds that 100 hours were reasonably spent by Brown from filing the Application to Employ (March 25, 2020) through November 23, 2020. Fees of \$35,000 (\$350 x 100 hours) are allowed. Brown is entitled to reasonable costs of \$1,444.09, which consists of bankruptcy court filing fees, attorney coverage fees, photocopies, postage and court call appearance fees.

Conclusion

Brown is not a disinterested person and has violated his disclosure obligations under §327 of the Bankruptcy Code and Bankruptcy Rule 2014. Under §328 of the Bankruptcy Code, the Application is denied. Debtor has no payment obligation to

³⁸ Doc. No. No. 51, Doc. No. 93.

³⁹ Doc. No. 145.

⁴⁰ Doc. No. 181, Exh. A.

⁴¹ Doc. No. 181, Exh. A, p. 6. 33.8 hours less 13.5 unauthorized pre-bankruptcy and pre-retention hours.

⁴² Doc. No. 181, Exh. A, p. 9. 18.6 hours less 2.2 unauthorized pre-retention hours.

⁴³ Doc. No. 181, Exh. A, p. 30. 37.9 hours less 1.0 unauthorized pre-retention hour.

⁴⁴ Doc. No. 181, Exh. A, p. 35.

Brown. If Bishop or Pastor Jones have any personal obligation to pay Brown, reasonable attorneys' fees total \$35,000. Brown's reasonable costs total \$1,444.09.

Accordingly, it is:

ORDERED:

1. United States Trustee's Objection to David Marshall Brown's Amended Application for Compensation and Reimbursement of Expenses as Counsel for Debtor (Doc. No. 203) is **SUSTAINED**.

2. David Marshall Brown's Amended Application for Compensation and Reimbursement of Expenses as Counsel for Debtor (Doc. No. 181) is **DENIED**. Brown may seek no compensation from the Debtor.

3. If Bishop or Pastor Jones (or any other third party) must pay Brown's attorneys' fees or costs, these fees and costs are deemed reasonable: attorneys' fees of \$35,000 and costs of \$1,444.09, incurred between March 25, 2020 and November 23, 2020.

###

Attorney David Marshall Brown will serve a copy of this order on interested parties who do not receive service by CM/ECF and file a proof of service within 3 days of entry of the order.