United States Department of Justice
Office of the United States Trustee
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Lisa L. Lambert,
for the United States Trustee

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**FORT WORTH DIVISION**

| | | |
|---|---|---|
| **IN RE:** | **§** | **Chapter 11** |
| | **§** | |
| **TEXAS RANGERS BASEBALL PARTNERS,** | **§** | **Case No. 10-43400-dml11** |
| | **§** | |
| **Debtor.** | **§** | **Hearing Date: 06/17/2010** |
| | **§** | **Hearing Time: 1:30 p.m** |

**UNITED STATES TRUSTEE'S OBJECTION TO APPLICATION PURSUANT TO SECTIONS 327(a) and 328(a) OF THE BANKRUPTCY CODE AND BANKRUPTCY RULES 2014(a) and 2016 FOR AUTHORIZATION TO EMPLOY AND RETAIN WEIL GOTSHAL & MANGES LLP AS ATTORNEYS FOR THE DEBTOR NUNC PRO TUNC TO THE COMMENCEMENT DATE**

TO THE HONORABLE D.M. LYNN,
UNITED STATES BANKRUPTCY JUDGE:

The United States Trustee for Region 6 objects to the Application Pursuant to Sections 327(a) and 328(a) of the Bankruptcy Code and Bankruptcy Rules 2014(a) and 2016 for Authorization to Employ and Retain Weil Gotshal & Manges, LLP as Attorneys for the Debtor Nunc Pro Tunc to the Commencement Date ("WG&M" and "WG&M Application") and respectfully states:

**Overview**

Historically, WG&M has represented Thomas Hicks and corporations controlled by him. Currently, WG& M represents HSG Sports Group and the Dallas Stars in connection with

marketing a sale of the Stars. Regarding the Texas Rangers specifically, WG& M represented HSG Sports Group for a year before bankruptcy; negotiated HSG Sports Group's January sale; and provided legal advice in connection with eve of bankruptcy transfers into the Debtor as well as transactions that arguably worsened the Debtor's economic position and penalized an unwinding of the sale. WG&M's attorneys may need to testify about factual disputes involved in the January sale. These issues cannot be carved out for conflicts counsel because they form the nucleus of this case. Cumulatively, these facts establish that WG&M lacks "disinterest" and that it has a materially adverse interest. Retention should be denied.

**Factual Statement**

*WG&M Discloses Prior and Ongoing Representation of Hicks-Related-Entities:*

1. The WG&M Application discloses that Thomas O. Hicks indirectly owns and controls the Texas Rangers Baseball Partners (the "Debtor"). *WG&M Application Declaration*, ¶7. WG&M has represented or does represent the following:

*HSG Sports Group and Texas Rangers Baseball Related-Representations:*

a. Baseball Real Estate LP in its acquisition and financing of the land adjoining the Texas Rangers' baseball park;

b. An unnamed Hicks-controlled entity in connection with the acquisition of the Texas Rangers;

c. HSG Sports Group and the Debtor since at least May of 2009 up until the bankruptcy filing in connection with:

   i. The Voluntary Support Agreement;

   ii. Prepetition efforts to sell the Texas Rangers;

iii. HSG Sports Group's restructuring arising from the Texas Rangers and the Dallas Stars;

d. On an ongoing basis, HSG Sports Group and the Dallas Stars in connection with the sale of the Dallas Stars;

e. On an ongoing basis, HSG Sports Group in connection with interests in the American Airlines Center;

*Other Hicks-Related-Entity Representations:*

f. Hicks Muse Tate & Furst, Mr. Hicks's private equity firm in "multiple leveraged buyout transactions;"

g. An unnamed Hicks-controlled-entity in connection with financing and development of the American Airlines Center;

h. Kop Investments in the acquisition of Liverpool Football Club.

*WG&M Application Declaration, ¶7.*

## *Eve of Bankruptcy Transfers, Contractual Modifications, and Intercompany Claims:*

2. The Disclosure Statement references intercompany claims, but the details of those claims are unknown because the schedules and statement of financial affairs have not yet been filed and because the intercompany names and amounts are undisclosed. *Disclosure Statement, pp.19, 27.*

3. WG&M's current client HSG Sports Group, WG&M's former client Ballpark Real Estate, and the Debtor engaged in a number of transactions on the eve of bankruptcy. *Disclosure Statement, pp. 10-11.*

4. As of May 14, 2010 at noon Central Time, no counsel has entered an appearance in this bankruptcy case on behalf of HSG Sports Group, Hicks, or the Hicks-Related Entities.

*The Ad Hoc Lenders Challenge the Eve of Bankruptcy Transactions as Ultra Vires and Improper; They Raise Questions About WG&M Communications During the Sales Process:*

5. In their Joint Brief, the Lenders Group highlights ten aspects of the Eve of Bankruptcy Transfers that they contend harmed the Debtor while improving the position of the Hicks-Related-Entities and Greenburg. *Lenders Group Brief, pp. 12-14.* They allege that TRBP agreed to pay fees and to indemnify parties in the Baseball Real Estate sale when it had not been a party to the transaction, agreed to pay the financial advisor's fee when the work had essentially been completed under the Debtor's view; agreed to an above-market lease for a charter aircraft in which Hicks has an interest.

6. The Lenders Group also challenges the events leading to the January sale to Greenburg. The recapitulation relies almost exclusively on communications from a WG&M attorney. *Lenders Group Brief, pp. 4-6.*

7. On June 14, 2010, the Lender Group filed an adversary proceeding alleging that the transfer from Rangers Ballpark to the Debtor was a fraudulent transfer and seeking a constructive trust. Adv. No. 4098.

*WG&M Defends the Debtor's Actions:*

8. The Debtor filed a fifty page brief supporting its pre-petition and post-petition actions. The brief specifies that HSG Sports Group's actions, at a time when it was represented by WG&M, were proper when HSG Sports Group sold the Texas Rangers to the Greenburg Group. *Debtor's Brief, pp. 11-12.* They contend that the Lenders Group notified the Debtor of default

but did not exercise control and that the Lenders agreed to MLB's consent rights in the Pledge Agreements and Credit Agreements. *Debtor's Brief, pp. 8-11.*

*WG&M Will Supplement Disclosure and Proposes Conflicts Counsel:*

9. United States Trustee has requested disclosure supplementation. Based on discussions with WG&M, the Office of the United States Trustee anticipates additional disclosures.

10. WG&M proposes to resolve any conflicts that arise by allowing conflicts counsel to address the issues. *WG&M Application Declaration, ¶8.*

**Applicable Law and Argument**

11. Under 11 U.S.C. §327(a), the Debtor's attorney has the burden or proof to establish (a) the firm is "disinterested" and (b) does not represent an interest adverse to the estate. 11 U.S.C. §327(a); *e.g. In re Big Mac Marine, Inc.*, 326 B.R. 150,154 (B.A.P. 8th Cir. 2005) (citations omitted)(addressing burden of proof for employment under section 327(a)).

12. A "disinterested person" means a professional who "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reasons of any direct or indirect relationship to, connection with, or interest in, the debtor . . . or for any other reason." 11 U.S.C. §101(14).

13. The Fifth Circuit has defined an "adverse interest" as either:

a. Possess[ing] or assert[ing] an economic interest that . . . tend[s] to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or

b. Possess[ing] a predisposition under circumstances that render such a bias against the estate.

*In re West Delta Oil Co., Inc.*, 432 F.3d 347, 356 (5th Cir. 2005)(citation omitted). The United States Trustee has a statutory obligation to monitor employment eligibility, 28 U.S.C.

§586(a)(3)(I), and court-appointed counsel have a fiduciary duty to raise conflicts issues on behalf of the client and the bankruptcy estate. *Cf. Pierson & Gaylen v. Creel & Atwood (In re Consolidated Bancshares, Inc.)*, 785 F.2d 1249, 1255 & n. 5 (5th Cir..1986) (discussing need to raise conflicts in context of fee objection and also noting United States Trustee's role).

*Supreme Court Concerns Gird the Current Standards:*

14. Concerns about conflicting roles in bankruptcy cases are not new. In a series of cases between 1929 and 1941, the Supreme Court emphasized the importance of avoiding conflicts of interest in bankruptcy. "Experience has shown the wisdom . . . of separating the function and obligation of counsel by forbidding the employment in different interests of the same person." *Weil v. Neary*, 278 U.S. 160, 168 (1929).

15. For example, in *Pepper v. Litton*, 308 U.S. 295 (1939), Litton, a shareholder in Dixie Splint Coal Company, engaged in a series of transactions which the Supreme Court acknowledged as a scheme to increase his position in the bankruptcy and to avoid paying Pepper. *Pepper*, 308 U.S. at 298-99. Debtor Dixie Splint Coal's counsel also represented Litton, individually; and the bankruptcy trustee then retained him. While section 327(e) now might allow limited representation of confluent interests, section 327(e) would not support the representation in *Pepper* given Litton's questionable conduct. "The grave impropriety of these appointments became striking as administration of the estate was commenced." *Pepper*, 308 U.S. at 299-300 n. 4.

16. When evaluating these conflicts in the context of employment and fee contracts, the Supreme Court emphasized, "[w]hat is struck at in the refusal to enforce contracts of this kind is not only actual evil results but their tendency to do evil in other cases." *Weil,* 278 U.S. at 173.

No speculation regarding motive or means is necessary. *See In re American Airlines*, 972 F.2d 605, 620 (5th Cir. 1992)(noting, outside bankruptcy, inappropriateness of post hoc evaluation of whether attorney's involvement tainted proceedings.) "Where an actual conflict of interest exists, no more need be shown." *Woods v. City Nat'l Bank & Trust*, 312 U.S. 262, 268 (1941).

*Fifth Circuit Precedent Interpreting "Disinterested Person" and "Adverse Interests" Expands on Supreme Court's Foundation:*

17. Consistent with this Supreme Court precedent, the Fifth Circuit requires courts evaluating a conflict to conduct a "painstaking analysis of the facts and precise application of precedent." *Pierson & Gaylen v. Creel & Atwood (In re Consolidated Bancshares, Inc.)*, 785 F.2d 1249, 1256 (5th Cir. 1986) (citation omitted) (remanding for additional findings and possible re-opening of evidence regarding special counsel's dual representation of director and debtor); *see also Humble Place Joint Venture v. Fory (In re Humble Place Joint Venture)*, 936 F.2d 814, 819 (5th Cir. 1991) (referring to findings of fact). Attorneys employed under section 327(a) are officers of the court and fiduciaries. *Consolidated Bancshares*, 785 F2d 1249 n. 7. They can only serve one master. *Consolidated Bancshares*, 785 F2d 1249 n. 7 (citing *Woods v. City Nat'l Bank*, 312 U.S. at 269)). Accordingly, the standards for employment "are strict," and the slightest personal interest may disqualify a candidate because bankruptcy professionals need a "high degree of impartiality and detached judgment." *Consolidated Bancshares*, 785 F.2d 1249, 1256 n. 6 (citing *In re Cropper Co.*, 25 B.R. 625, 629 (Bankr. M.D. Ga. 1983) and quoting *In re Philadelphia Athletic Club, Inc.*, 20 B.R. 328, 334 (E.D. Pa. 1982) (quoting 1 *Collier on Bankruptcy Manual* §101.13 (1981)).

18. Section 327(a) and Federal Rule of Bankruptcy Procedure 2014 impose specific standards that may narrow the ethical standards imposed outside bankruptcy. *See In re Dresser*

*Indus., Inc.*, 972 F.2d 540, 543 n. 5 (5th Cir. 1992). But the Fifth Circuit recognizes that bankruptcy employment requires an assessment of conflicts. The Fifth Circuit has drawn from the conflicts standards in state law and in federal national standards. *See Consolidated Bancshares*, 785 F.2d at 1256 (citing *Brennan's v. Brennans Restaurant, Inc.*, 590 F.2d 168, 173-74 (5th Cir. 1979), a case involving the national ethical standards).

*Non-Bankruptcy Fifth Circuit Cases Interpreting Conflicts Under National Ethical Standards:*

19. Outside of bankruptcy, the Fifth Circuit has instructed lower courts evaluating conflict issues to consider:

a. Local rules,

b. The American Bar Association's Model Rules of Professional Conduct;

c. The American Bar Association's Model Code of Professional Responsibility;

d. State rules of conduct; and

e. Restatement (Third) of the Law Governing Lawyers.

*Horaist v. Doctor's Hospital*, 255 F.3d 261, 266 (5th Cir. 2001); *In re Dresser Indus.*, 972 F.2d 540, 544-545 (5th Cir. 1992).

20. In the Northern District of Texas, the Texas Disciplinary Rules of Professional Conduct govern "unethical behavior." LR 83.8(e). In the context of conflicts of interest arising from prior or current representations, the Texas Rules and other applicable standards have already been interpreted by the Fifth Circuit.

*Application of Standards to Facts and Argument:*

21. *Prior Representations:* WG&M discloses that HSG Sports Group and Baseball Real Estate were former clients of the Debtor. The dates when representation ceased are unclear, but WG&M represented the HSG Sports Group in connection with its sale of the Texas Rangers during the year before bankruptcy.

22. In the context of prior representations, the Fifth Circuit applies the substantial relationship test. The Court evaluates whether an attorney-client relationship existed and whether a substantial relationship exists links the prior representation and the current representation. *In re American Airlines, Inc.*, 972 F.2d 605, 614 (5th Cir. 1990).

23. Here, WG&M was retained by HSG Sports Group to assist with HSG Sports Group's sale of the Texas Rangers and continues to represent the Dallas Stars. The Texas Rangers' proposed sale did not materialize, disputes developed with the Lenders, agreements were entered with the Major League Baseball Association, and transfers occurred. The bankruptcy case focuses on the propriety of the transfers into the Debtor, the fairness of the prior sale, the fairness of the proposed bankruptcy sale through the plan. These representations are substantially related. Because the representations are substantially related, WG&M is barred from asserting it did not receive confidences. *American Airlines*, 972 F.2d at 628. A genuine threat exists that confidences will be used to the advantage of HSG Sports Group and to the detriment of the Lender Group or other creditors. *American Airlines,* 972 F.2d at 615 (construing Texas Rule 1.09 and ABA Rule1.9).

24. *American Airlines* noted that the Rules discontinue Canon 9's distinctions of "actual conflict" and "appearance of impropriety" but added a duty of loyalty. Enforcing the duty of loyalty safeguards the attorney-client relationship and public confidence in the system.

*American Airlines,* 972 F. 2d at 618 (issuing writ of mandamus requiring district court to disqualify law firm that had been retained by Northwest Airlines but previously represented American Airlines). Here, the issue is that WG&M may remain loyal to HSG Sports Group and that this loyalty undermines confidence in the system. Specifically, if the Lender Group pursues a tort theory to recover assets or damages, WG&M cannot be perceived as evaluating the settlement or the merits in a neutral manner. Creditors and the public may perceive the plan and the prepetition transfers as benefitting HSG Sports Group and Hicks rather than the creditors. WG&M's retention should be denied.

25. *Current Representation of HSG Sports Group in Connection with Dallas Stars:* It is unclear whether HSG Sports Group has claims against the Debtor. The Bank Lenders contend HSG Sports Group benefitted from a service agreement and other transactions made on the eve of bankruptcy. Creditors and the public may perceive that these transactions benefited both HSG Sports Group and the Dallas Stars by reducing their expenses while correspondingly increasing the Debtor's expenses. Under section 327(c) a firm is not disqualified "solely" because it represents a creditor, but the Court is required to evaluate other issues such as conflicts. *In re Envirodyne Indus.,* 150 B.R. 1008, 1015 (Bankr. N.D. Ill. 1993). "A lawyer may not represent one client whose interests are adverse to those of another current client . . . even if the two representations are unrelated [, and] . . . a specific adverse effect probably will not have to be shown." *In re Dresser Indus., Inc.,* 972 F.2d 540, 545 n. 9 (5th Cir. 1992) (issuing writ of mandamus requiring district court to enter order disqualifying counsel).

26. Here, Forshey & Prostok's declaration in support of its application to be employed as conflicts counsel supports disinterest and the absence of an adverse interest, so WG&M has not

shown that other lawyers are unable to address this bankruptcy case. WG&M's retention in this case serves its self-interests rather than a societal need or professional interest. *Dresser*, 972 F.2d at 540. WG&M's retention should be denied.

27. *WG&M Lawyers as Fact Witnesses:* The Lender Group contends that the Greenburg Group modified a proposal in December 2009, shortly before HSG Sports Group accepted the Greenburg Group offer. They further contend that the parties disputed the relative merits of competing offers. They cite emails from a WG&M attorney. It is unclear whether this attorney will need to testify or whether the information can be developed through another source. The Court should independently evaluate this issue. *Horairist v. Doctor's Hospital*, 255 F.3d 261, 267 (5th Cir. 1992). If the WG&M attorney's testimony is needed, then the Court should evaluate whether HSG Sports Group or the Debtor might have an interest in discrediting the attorney. *Horairist,* 255 F.3d at 267. Here, the quotes cited by the Lenders Group suggest that HSG Sports Group or the Debtor might want to discredit the WG&M attorney's representation that Greenburg made a modification, that the parties relied on the modification, or that the competing bid had a better economic outcome.

28. *The Cumulative Effect:* Of course, it is not the isolated events alone that establish a lack of disinterestedness or an adverse effect. The Court should evaluate all the facts in aggregate, including the prior lengthy history of representing Hicks-Related-Entities, the ongoing representation of Hicks-Related-Entities, the possibility that WG&M attorneys will need to testify, the plan and sales modifications that fostered a particular result -- the alleged poison pill, a ten million dollar breakup fee that was added on the even of bankruptcy, the new benefits to Hick-Related-Entities, and the new economic burdens to the Debtor.

29. Historically, courts evaluating disinterestedness and adverse interests have scrutinized relationships benefiting insiders such as Hicks and the Hicks-Related-Entities. *E.g. Pepper v. Litton,* 308 U.S. 238 (1939) (holding that attorney improperly represented insider, debtor, and trustee and that bankruptcy motivation was to harm a creditor while benefitting the insider-shareholder); *Humble Place Joint Venture v. Fory (In re Humble Place Joint Venture),* 936 F.2d 814, 819 (affirming denial of attorney employment and fees as a result of actual conflict when attorney had previously represented insider, indicated he was currently representing debtor only, but proposed plan that delayed creditors' recovery while insulating insider's guaranty liabilities); *Temp-Way Corp. v. Continental Bank (In re Temp-Way Corp.),* 95 B.R. 343 (Bankr. E.D. Pa. 1989)(denying employment based on lack of disinterest when attorney had represented former and current family-owners of debtor and now represented corporate debtor when creditors alleged family-owners received benefits such as fraudulent and preferential transfers). Because the facts of this case reflect the multi-tiered conflicts that courts have found disqualifying, WG&M's retention should be denied.

## *Conflicts Counsel Cannot Resolve the Issues Either as a Matter of Law or as a Question of Fact.*

30. WG&M acknowledges that its prior and current representation of Hick and Hicks-Related-Entities may result in conflicts. It suggests retaining Forshey & Prostok, as conflicts counsel, ameliorates the effects of these conflicts.

31. Under the facts, conflicts counsel cannot resolve the issue. Arguably, conflicts counsel deflates the expressly included exceptions to the disinterestedness standard. General bankruptcy counsel must be disinterested and without adverse interest in all respects, while special counsel may be debtor's counsel on a limited basis as long as counsel 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." *Compare* 11 U.S.C. §327(a) *with* 11 U.S.C. §327(e). Recognizing that large law firms capable of handling complex cases have large conflicts, courts developed conflicts counsel. Conflicts counsel, however, was designed to address discrete, peripheral issues such as litigation against a particular creditor. Here, the issues touching on HSG Sports Group, Hicks, and the Hicks-Related-Entities involve events before the bankruptcy, events on the even of bankruptcy, the sale of all the assets, the disclosure statement, and the plan. These issues are necessarily the nucleus of this case. Forshey & Prostok cannot handle the conflicts issues without handling the entire case. In the context of an insider being a law firm's substantial client, a 64% owner, and a creditor and the bankruptcy involving the unwinding of a leveraged buyout, one court explained that costs would only increase if the court deferred the disqualification decision until lack of neutrality was evidenced. *In re Envirodyne Indus., Inc.*, 150 B.R. 1008, 1020 (Bankr. N.D. Ill. 1993).

32. WG&M's defense of the disclosure statement and plan in a fifty page brief reflects that the issues cannot be isolated and passed to Forshey & Prostok.

**Conclusion**

Enforcing "disinterestedness" and absence of an adverse interest fosters the fairness and transparency that the creditors and the public, including the Texas Rangers fans, expect in bankruptcy. Accordingly, the United States Trustee requests that the Court deny the WG&M Application and that the Court grant further proper relief.

DATED: June 14, 2010

Respectfully submitted,

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**Certificate of Service**

I certify that on June 14, 2010, I served a true copy of this document either by electronic case filing or by email on the following parties and on those requesting notice by ECF.

*/s/ Lisa L. Lambert*
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