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Third Circuit Affirms Award of Attorney's Fees – No Conflict of Interest In Representing Both the Debtor Under Chapter 11 and Debtor's Sole Shareholder Under Chapter 13

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By Evan T. Miller

In *In re Jade Management Services*, No. 09-2800, 2010 WL 2712139 (3d Cir. July 9, 2010), the United States Court of Appeals for the Third Circuit affirmed an award of attorney's fees to Nancy D'Anna, Esq. ("D'Anna"), who for a time represented the appellant, Jade Management Services ("Jade"), as debtor's counsel, as well as Jade's sole shareholder, president, and CEO, Jeannie Benjamin ("Benjamin"), in her individual Chapter 13 petition. The fees were first awarded by order of the United States Bankruptcy Court for the District of the Virgin Islands, which was affirmed by the District Court of the Virgin Islands.

Jade filed for Chapter 11 protection on September 11, 2002, and Benjamin followed with her Chapter 13 petition the next day. Benjamin had personally guaranteed some or all of Jade's secured debts. D'Anna was retained as counsel for both debtors. Following the confirmation of Jade's plan, another entity, Ursula and The Eleven Thousand Virgins, LLC ("Ursula") took control of Jade via a stock purchase agreement, and filed an amended plan, which was thereafter confirmed on October 5, 2005. D'Anna filed her fee application in the Jade case for work performed from 2002 through 2005; Ursula objected, arguing that D'Anna had been improperly employed because she was not a disinterested person due to her simultaneous representation of Jade and Benjamin in the Chapter 11 and 13 cases respectively. Ursula also argued that the fee request was unreasonable.

The Third Circuit dismissed Ursula's argument that D'Anna was not disinterested under section 327(a) of the Bankruptcy Code, concluding that there was no material risk that she would have elevated Benjamin's personal interests over those of Jade's secured creditors. Bankruptcy Code Section 101(14) defines "disinterested person," which disqualifies, among others, a person who has an "interest materially adverse to the interest of the estate or of any class of creditors . . . by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason." Citing the principle that "simultaneous representation of a corporation and its sole stockholder is not in and of itself improper," the Court affirmed the fee award finding that: Jade's encumbered assets far exceeded the value of the secured claims that Benjamin had guaranteed; there was no significant risk that Benjamin would ever be called upon to satisfy her secured debt guarantees; and Ursula had failed to object to D'Anna's representation until after it had taken control of Jade. The Court concluded that any deficiency in D'Anna's Federal Rule of Bankruptcy Procedure 2014 statement resulting from her failure to list her connection to Benjamin, was immaterial since the same judge sat for both the Chapter 11 and 13 cases, and the dual representation was known to everyone involved.

In rejecting Ursula's contention that D'Anna's fees were unreasonable, the Court found that it was not an abuse of discretion to award D'Anna fees for work defending a personal injury matter that might result in a verdict exceeding Jade's insurance coverage, notwithstanding Ursula's claim that D'Anna's work exposed Jade to potentially greater liability. The Court also found that D'Anna's work to cure deficiencies resulting from Jade's failure to file annual reports and corporate franchise taxes was beneficial to the corporate debtor.

For the foregoing reasons, the Court affirmed the order of the District Court.

