

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	:	Chapter 11
	:	
	:	Case No. 24-10972 (JTD)
ProSomnus, Inc., <i>et al.</i> , <sup>1</sup>	:	
	:	(Jointly Administered)
	:	
Debtors.	:	<b>Hearing Date: June 12, 2024, at 10:00 a.m.</b>
	:	<b>Obj. Deadline: June 6, 2024 at 4:00 p.m. (extended</b>
	:	<b>for U.S. Trustee)</b>
	:	
	:	<b>D.I. 11 and 76</b>
	:	

**OBJECTION OF THE UNITED STATES TRUSTEE IN CONNECTION WITH (I) THE DEBTORS’ MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS TO RETAIN AND COMPENSATE PROFESSIONALS UTILIZED IN THE ORDINARY COURSE OF BUSINESS AND (II) THE MOTION OF DEBTORS FOR ENTRY OF INTERIM AND FINAL ORDERS AUTHORIZING PAYMENT OF PREPETITION OBLIGATIONS TO CRITICAL VENDORS**

In support of the objection of the United States Trustee in connection with the *Debtors’ Motion For Entry of an Order Authorizing the Debtors to Retain and Compensate Professionals Utilized in the Ordinary Course of Business* (D.I. 76) (the “OCP Motion”) and the *Motion of Debtors for Entry of Interim and Final Orders Authorizing Payment of Prepetition Obligations of Critical Vendors* [D.I. 11] (“Critical Vendor Motion,” and collectively with the OCP Motion, the “Motions”). Andrew R. Vara, the United States Trustee for Regions 3 and 9 (the “U.S. Trustee”), by and through his undersigned counsel, states:

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number are: ProSomnus, Inc. (8216), ProSomnus Holdings, Inc. (3855), and ProSomnus Sleep Technologies, Inc. (0766). The location of the Debtors’ principal place of business and the Debtors’ mailing address is 5675 Gibraltar Dr., Pleasanton, California 94588.



### **JURISDICTION AND STANDING**

1. This Court has jurisdiction to hear and consider the above-referenced objection.
2. Pursuant to 28 U.S.C. § 586, the U.S. Trustee is charged with, *inter alia*, the oversight of the administration of chapter 11 cases.
3. Pursuant to 11 U.S.C. § 307, the U. S. Trustee has standing to be heard regarding the above-referenced objection.

### **BACKGROUND AND RELEVANT FACTS**

4. On May 7, 2024 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.
5. The U. S. Trustee has not appointed a statutory committee of unsecured creditors in these cases.
6. The first meeting of creditors pursuant to 11 U.S.C. § 341 has been scheduled for June 10, 2024, at 2:00 p.m.
7. On May 29, 2024, the Debtors filed the OCP Motion.
8. On May 7, 2024, the Debtors filed the Critical Vendor Motion.
9. In the OCP Motion, the Debtors originally sought to retain and pay three professionals as Ordinary Course Professionals ("OCPs"). Since filing the Motions, as stated in the declaration of Brian Dow, the Debtors' chief financial officer, in support of the Debtors' "second day" relief (D.I. 110) ("Dow Declaration"), the Debtors have deleted two accounting firms -- Marcum LLP ("Marcum") and Moss Adams LLP ("Moss Adams," and, collectively with Marcum, the "Accountants") -- from the list of proposed OCPs to be retained by the Debtors that was attached to the OCP Motion. Marcum is a prepetition creditor of the Debtors in the approximate amount of \$200,000. (D.I. 1, p. 9). Moss Adams is a prepetition creditor of the

Debtors in the approximate amount of \$90,000. (D.I. 1, p. 9). Section 327(a) of the Bankruptcy Code requires that accountants not have a disqualifying conflict of interest with the Debtors' estates and be "disinterested persons," which means, inter alia, that the accountants can't be "creditors." The Dow Declaration indicates that the Debtors have a simple plan to cure the Accountants' lack of disinterestedness: pay them post-petition for their pre-petition services by designating them as critical vendors. While there is certainly precedent for proposed estate professionals holding prepetition claims to "cure" their lack of disinterestedness by waiving the claim (and thereby bearing the cost of bringing themselves into compliance with the Code's dictates), the Debtors' efforts to pay the Accountants' prepetition claims and, by extension, forcing the estates' creditors to bear the cost of the Accountants' lack of disinterestedness is an improper end-run around section 327's dictates.

10. The Debtors request that the Court approve the Accountants as critical vendors who have made clear that they will not "continue to support the Debtors through the Chapter 11 cases in the absence of being made whole on their outstanding prepetition balances." Dow Declaration ¶ 11. Debtors also underscore that the failure to retain the Accountants as critical vendors would result in Debtors' officers and directors being subject to penalties, "including a complete bar against ever serving as an officer or director of a public company." *Id.* ¶ 10. Rather than follow the requirements of the Bankruptcy Code, the Debtors are permitting their professionals to dictate the terms of their employment to protect the interests of insiders. Section 327(a) and established precedent prohibit this result. Accordingly, to the extent the Debtors are seeking this Court's assistance with manufacturing disinterestedness to evade Bankruptcy Code requirements, the Motions should be denied.

## LAW, ANALYSIS AND ARGUMENT

11. Section 327(a) of the Bankruptcy Code provides:

Except as otherwise provided in this section, the Trustee, with the Court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, ***that do not hold or represent an interest adverse to the estate***, and that are ***disinterested persons***, to represent or assist the Trustee in carrying out the Trustee's duties under this title.

11 U.S.C. § 327(a) (emphasis added).

12. A “disinterested person” is defined, in relevant part, as a person who “is not a creditor, an equity security holder, or an insider. 11 U.S.C. § 101(14)(A).

13. Section 327(a) only allows the debtor in possession to employ professional persons that “do not hold or represent an interest adverse to the estate”, and that are “disinterested persons.” One court has described Section 327(a) as “a prophylactic provision designed to insure that the undivided loyalty and exclusive allegiance required of a fiduciary to an estate in bankruptcy is not compromised or eroded.” *In re Prudent Holding Corp.*, 153 B.R. 629, 631 (Bankr. E.D.N.Y. 1993).

14. The Third Circuit has stated that a professional person has an interest adverse to the estate “when counsel has a competing economic interest tending to diminish estate values or create a potential or actual dispute in which the estate is a rival claimant.” *See United States Trustee v. First Jersey Securities, Inc.*, 180 F.3d 504, 509 (3d Cir. 1999) (internal quotations omitted).

15. Any professional person that does not meet both the “no adverse interest” and “disinterested person” tests is disqualified from employment under Section 327(a). *See In re BH&P Inc.*, 949 F.2d 1300, 1314 (3d Cir. 1991) (Section 327(a) “creates a two-part requirement for retention of counsel”). Thus, a professional who holds or represents an adverse interest is *per*

se disqualified, and a professional who does not hold or represent an adverse interest is nevertheless disqualified unless he or she falls within the definition of “disinterested person” set forth in 11 U.S.C. § 101(14) (“Section 101(14)”). *See, e.g., U.S. Trustee v. Price Waterhouse*, 19 F.3d 138, 141 (3d Cir. 1994) (disqualified because not disinterested); *Michel v. Eagle-Picher Indus., Inc. (In re Eagle-Picher Indus., Inc.)*, 999 F.2d 969, 972 (6<sup>th</sup> Cir. 1993) (can lack disinterestedness without having adverse interest).

16. In these cases, if the Debtors properly sought to employ the non-attorney Accountants under section 327(a), they could not be retained unless they waived their claims. *See Price Waterhouse*, 19 F.3d at 141 (“These provisions [ Sections 101(14); 101(10)(A); 301; and 327], taken together, unambiguously forbid a debtor in possession from retaining a prepetition creditor to assist it in the execution of its Title 11 duties.”).

17. The U.S. Trustee objects to the Motions because “accountants” are specifically required to be retained pursuant to Code section 327(a) and, by extension, must be “disinterested persons” at the time of their proposed employment. A “disinterested person” must not be a creditor of the Debtors. As is clear from Debtors’ own admissions, Marcum is creditor with a claim of almost \$200,000 and Moss Adams has a claim of approximately \$90,000. As a result, neither Marcum nor Moss Adams qualify for appointment under section 327(a). As Debtors also admit, neither will waive their respective claims against the Debtors.

18. Moreover, equity does not permit the Debtors to do what the law prohibits. The Debtors argue that retention of the Accountants is necessary because “no firm, other than the existing service provider, has the historical and financial knowledge of the Debtors necessary to competently perform this work efficiently and timely.” Dow Declaration ¶ 12. This argument has been rejected when firms have attempted to skirt the requirement of “disinterestedness.” In

*Price Waterhouse*, 19 F.3d at 142, the applicant argued that the professional was most familiar with the debtor's accounting systems and operations, the debtor may be incapable of engaging a satisfactory replacement, the debtor was operating under tight time constraints, there was considerable expense connected with retaining a substitute professional, and there would be delay in waiting for a substitute professional to become familiar with the debtors' needs. *See Price Waterhouse*, 19 F.3d at 140. The Third Circuit roundly rejected the idea that equitable concerns permitted it to ignore the dictates of Code section 327(a). *See Price Waterhouse*, 19 F.3d at 142 (observing that "'bankruptcy courts cannot use equitable principles to disregard unambiguous statutory language;'" internal citation omitted); *In re Federated Dep't Stores*, 44 F.3d 1310, 1318-19 (6th Cir. 1995) (reversing the Bankruptcy Court's approval of Lehman Brothers retention as financial advisor to the debtor, notwithstanding the firm's familiarity with the Debtors' business operations/special expertise, and holding Section 327 "prevents individual Bankruptcy Courts from having to make [equitable] determinations as to the best interest of the Debtors in these situations."). The interests of expedience cannot be allowed to outweigh the critical interest of having truly disinterested professionals serving the Debtors' estate. By extension, the Debtors' proposal to designate the Accountants as critical vendors and to pay their prepetition claims should be rejected.

19. Accordingly, the U.S. Trustee reserves any and all of his rights, duties and obligation found at law, equity or otherwise. The U.S. Trustee reserves any and all rights, remedies, duties, and obligations to, *inter alia*, complement, supplement, augment, alter and/or modify this Objection, file an appropriate motion and conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become apparent and to take whatever other actions are deemed necessary and appropriate.

WHEREFORE the United States Trustee requests that this Court grant relief consistent with this Objection and/or grant such other relief that this Court may deem appropriate and just.

**ANDREW R. VARA**  
**UNITED STATES TRUSTEE**  
**REGIONS 3 & 9**

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Dated: June 6, 2024

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on June 6, 2024, a copy of the **Objection of the United States Trustee in Connection with the Debtors’ Motion for Entry of an Order Authorizing the Debtors to Retain and Compensate Professionals Utilized in the Ordinary Course of Business and Motion of Debtors for Entry of Interim and Final Orders Authorizing Payment of Prepetition Obligations to Critical Vendors** was served via e-mail to the persons indicated below:

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/s/ Jonathan W. Lipshie  
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