

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

In re
ENVIVA, INC., *et al.*,¹
Debtors.

Case No. 24-10453 (BFK)
Chapter 11

(Jointly Administered)

**U.S. TRUSTEE’S OBJECTION TO APPLICATION TO EMPLOY
VINSON & ELKINS LLP AS DEBTORS’ COUNSEL**

Gerard R. Vetter, Acting United States Trustee for Region Four (“U.S. Trustee”), by counsel, objects to the Debtors’ Application to Employ Vinson & Elkins LLP (“Vinson”) as counsel. *See* ECF No. 183. In support of his objection, the U.S. Trustee states:

JURISDICTION AND VENUE

1. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(b) and 157(a) and the Order of Reference of the U.S. District Court for the Eastern District of Virginia dated August 15, 1984. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2). Venue of this proceeding is proper under 28 U.S.C. §§ 1408 and 1409.

FACTUAL BACKGROUND

2. The Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code commencing the above-captioned cases on March 12, 2024, and March 13, 2024. *See* ECF No. 1.

¹ A complete list of the Debtors in these jointly administered chapter 11 cases and the last four digits of their federal tax identification numbers is available on the website of the Debtors’ claims and noticing agent at www.kcellc.net/enviva. The location of the Debtors’ corporate headquarters is: 7272 Wisconsin Avenue, Suite 1800, Bethesda, MD 20814.

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3. The Debtors continue to operate their businesses as debtors-in-possession pursuant to 11 U.S.C. §§ 1107(a) and 1108 (“Bankruptcy Code”).
4. No trustee or examiner has been appointed in these cases.
5. The U.S. Trustee appointed an official committee of unsecured creditors (“Committee”) on March 25, 2024. *See* ECF No. 173.
6. The Debtors filed an application to employ Vinson as counsel on March 27, 2024 (“Employment Application”). *See* ECF No. 183.
7. Vinson filed a Declaration of David S. Meyer (“Meyer Declaration”) and a copy of a January 23, 2024 retainer agreement (“Retainer Agreement”) in support of its Employment Application. *Id.*
8. Vinson disclosed that it “has represented the Debtors on a variety of corporate, securities, transactional, and litigation matters since 2015.” *See* Meyer Dec. ¶ 3.
9. Vinson disclosed that it “currently represents, and in the past has represented, Riverstone Investment Group LLC and its affiliates (“Riverstone”) in a variety of other matters[.]” *See Id.* at ¶ 20.
10. Vinson’s representation of Riverstone “accounted for 0.8% of V&E’s billings and 1.4% of V&E’s collections for V&E’s fiscal year ended December 31, 2023.” *Id.*
11. Meyer and Jessica C. Peet (“Peet”) are Vinson partners currently working on these Chapter 11 cases. Both Meyer and Peet have previously represented Riverstone and its affiliates in several matters. *See* <https://www.velaw.com/people/david-s-meyer/> ; *see also* <https://www.velaw.com/people/jessica-c-peet/>
12. Vinson also disclosed that it “currently represents Debtor Enviva Inc. and certain of its current and former directors and officers in two putative class action securities lawsuits”

(“Securities Cases”) pending in the United States District Court for the District of Maryland. *See* Meyer Dec. ¶ 21.

13. The Debtors paid Vinson “for its services representing Enviva Inc. and its current and former directors and officers in the Securities Cases” prior to the Petition Date. *Id.*

14. Vinson “intends to continue representing such current and former directors and officers in the Securities Cases to the extent such claims are not stayed” and any compensation for “continued representation would be through insurance policies maintained by the Debtors and would be subject to further order of this Court authorizing such payments.” *Id.*

15. Vinson further disclosed that it “currently represents Enviva Inc., as nominal defendant, along with current or former Enviva Inc. directors and officers, Ralph Alexander, John C. Bumgarner, Jr., Janet S. Wong, Eva T. Zlotnicka, Martin N. Davidson, Jim H. Derryberry, John K. Keppler, Gerrit L. Lansing Jr., Pierre F. Lapeyre, Jr., David M. Leuschen, Thomas Meth, Jeffrey W. Ubben, Gary L. Whitlock, Shai S. Even, and Michael A. Johnson” in a derivative action pending in the United States District Court for the District of Maryland (“Derivative Action”). *Id.* at ¶ 22.

16. The Debtors paid Vinson “for its services representing Enviva Inc. and its current and former directors and officers in the” Derivative Action. *Id.*

17. Vinson represented that the parties to the Derivative Action stipulated to “stay all proceedings and deadlines” pending resolution of the Securities Cases. *Id.*

18. The U.S. Trustee submitted informal comments and inquiries to Vinson regarding its Employment Application on April 2, 2024 and April 9, 2024.

19. The U.S. Trustee requested Vinson provide additional information regarding the following:

(a) Whether Vinson rendered services that were not yet billed or paid prior to the Petition Date. If so, a request for the amounts owed for services rendered prepetition but not billed or paid prior to the Petition Date.

(b) A breakdown of fees paid prepetition including invoice dates and Pillowtex analysis chart.

(c) Whether Vinson previously represented Riverstone or its affiliates in connection with any matter involving the Debtors, its non-debtor affiliates, or joint ventures.

(d) Whether Meyer or Peet, Vinson professionals working on these Chapter 11 Cases, are currently working on matters on behalf of Riverstone.

(e) Additional information regarding the last date Meyer or Peet provided services to Riverstone or its affiliates. Requested a description of the nature of Meyer's and Peet's prior representation(s) of Riverstone and any of its affiliates within the previous two years.

(f) Information regarding whether there is any overlap of employees working on these Chapter 11 cases with those working on matters related to Riverstone or its affiliates. If so, the identification of any employee overlap and description of the Riverstone or affiliate matters.

(g) Whether Vinson has separate engagement letters with the individual defendants in the Securities Cases and Derivative Action.

(h) Whether Vinson received separate retainers in connection with the Securities Cases and Derivative Action. The date and retainer amounts received from the Debtors and current retainer balances if applicable.

(i) Clarification regarding the source of compensation for Vinson's representation of the individual defendants in the Securities Cases and Derivative Action.

(j) Whether a claim has been made for insurance coverage for fees and expenses incurred in relations to the Securities Cases and Derivative Action. Identification of policy limits for any coverage and explanation about the source of compensation for any fees and expenses not covered by an insurance policy.

(k) Whether Vinson rendered services related to the Securities Cases and Derivative Action that were not billed or paid prior to the Petition Date. Information regarding the amounts owed for services rendered prepetition but not yet billed or paid prior to the Petition Date if applicable.

(l) Whether Vinson render services in connection with other non-bankruptcy matters that were not yet billed or paid prior to the Petition Date. If so, a request to

provide the amounts owed for non-bankruptcy services rendered prepetition but not yet billed or paid prior to the Petition Date.

(m) Whether Vinson rendered services in connection with any non-bankruptcy matter since the Petition Date. If so, a request for information regarding any payments received by Vinson from the Debtors for all post-petition non-bankruptcy work.

(n) An explanation regarding how Vinson will address any conflicts that arise between its representation of the individual defendants in the Securities Cases and Derivative Action and any potential claims the Debtors may have against these individuals.

(o) Whether Vinson represented the Debtors or any individuals in connection with the Q4 Transactions.

(p) Additional information regarding whether Vinson's investment partnership as disclosed in Meyer's Declaration holds any investments in the Debtors, its non-debtor affiliates, or joint ventures.

(q) Whether Vinson canvassed its employees to ascertain whether any individual holds investments in the Debtors or its non-debtor affiliates and the results if so.

(r) Whether Vinson can be adverse to Barclays (litigation counterparty), BMO (litigation counterparty), and JP Morgan Chase (litigation counterparty).

(s) Clarification of whether Vinson's representation of the parties on Schedule 3 are ongoing or concluded.

(t) Disclose additional connections referenced in prior Vinson retention applications including: Unifirst Corp., Duke Energy, AT&T Co., FedEx Freight Inc., Starr Indemnity, and Lazard. *See In re Strategic Materials, Inc.*, No. 23-90907, ECF No. 135, pp 47-53 (Bankr. S.D.Tex. 2023); *see also In re Rockwall Energy Holdings, Inc.*, No. 22-90000, ECF No. 144, pp 63-65 (Bankr. N.D.Tex. 2022).

(u) Additional information regarding all non-bankruptcy related services rendered by Vinson on behalf of the Debtors including payments received within the ninety days preceding the Petition Date.

(v) Identification of all non-bankruptcy matters Vinson rendered services on behalf of the Debtors within the two years preceding the Petition Date.

(w) Clarification regarding the purported discount referenced in Meyer Dec. ¶ 16(a) since discount is not disclosed in the Engagement Letter.

20. The U.S. Trustee also requested certain changes to the proposed order including the following:

(a) Order ¶ 2: “The Debtors are authorized to retain and employ V&E as their counsel as of the Petition Date in accordance with ~~(a)~~ the terms and conditions set forth in the Engagement Letter attached to the Application as Schedule 1 to Exhibit B-1 ~~and (b)~~, **as modified by** this Order.”

Requested the portions crossed out be stricken and the highlighted portion be added to this paragraph.

(b) Order 3: “V&E will make a reasonable effort to comply with the U.S. Trustee’s requests for information and additional disclosures as set forth in the *Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases Effective as of November 1, 2013* (the “**Revised UST Guidelines**”) in connection with the interim and final fee applications to be filed by V&E in these chapter 11 cases and V&E shall use its reasonable efforts to avoid any duplication of services provided by any of the Debtors’ other professionals.”

Requested the following language be added to the end of this paragraph.

(c) “Notwithstanding anything to the contrary in the Application, the Engagement Letter, or the Declarations attached to the Application, the reimbursement provisions allowing the reimbursement of fees and expenses incurred in connection with participating in, preparing for, or responding to any action, claim, suit, or proceeding brought by or against any party that relates to the legal services provided under the Engagement Letter and fees for defending any objection to V&E’s fee applications under the Bankruptcy Code are not approved pending further order of the Court.”

Requested the following provision be added to the proposed order.

(d) “To the extent that there may be any inconsistency between the terms of the Application, the Engagement Letter, the Meyer Declaration, and this Order, the terms of this Order shall govern.”

Requested the following provision be added to the proposed order.

21. Vinson agreed to all changes requested by the U.S. Trustee to the proposed order.

22. Vinson provided the U.S. Trustee with some additional information on April 5, 2024 and continues to cooperate with the U.S. Trustee.

23. The U.S. Trustee will continue to work with Vinson in obtaining and reviewing information to resolve his concerns and narrow any remaining issues.

24. The Court entered an order continuing the hearing on the Employment Application from April 11, 2024 to May 9, 2024 due to possible issues concerning Vinson's disinterestedness and established a briefing schedule on April 3, 2024. *See Order Continuing Hearing*, ECF No. 224.

25. The objection deadline to the Employment Application is April 10, 2024.

26. This objection is timely².

LEGAL ARGUMENT

27. Vinson has failed to provide sufficient information to adequately evaluate certain connections, and absent additional disclosures the Employment Application should be denied.

28. A debtor, "with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons...." 11 U.S.C. § 327(a); *see also Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 124 (2015). Employment under section 327(a) is limited to professionals that do not "hold or represent an interest adverse to the estate and are disinterested." *In re Congoleum Cop.*, 426 F.3d 675, 688-89 (3d Cir. 2005) (citing 11 U.S.C. § 327(a)); *see also Harold & Williams Development Company v. U.S. Trustee*, 977 F.2d 906, 909 (4th Cir. 1992).

29. Vinson bears the burden to establish that it is "both disinterested and [does] not represent an interest adverse to the estate." *In re Big Mac Marine, Inc.*, 326 B.R. 150, 154 (8th BAP Cir. 2005) (citing *Interwest Bus. Equip., Inc. v. United States Trustee (In re Interwest Bus.*

² The U.S. Trustee reserves the right to file a supplemental brief in accordance with the Order Continuing Hearing.

Equip., Inc.), 23 F.3d 311, 318 (10th Cir. 1994); *In re Huntco Inc.*, 288 B.R. 229, 232 (Bankr. E.D.Mo. 2002)).

a. Disclosures

30. As the applicant, Vinson is obligated to provide clear and candid disclosures regarding all connections to the debtor, creditors, and parties in interest in a verified statement and adequately disclose its compensation arrangement with the Debtors. *See* Fed. R. Bankr. P. 2014(a); *see also In re Park-Helena Corp.*, 63 F.3d 877, 881 (9th Cir. 1995); *In re Alpha Natural Resources, Inc.*, No. 15-33896, 2016 Bankr. LEXIS 4374, at *31 n. 7 (Bankr. E.D.Va. Dec. 20, 2016); *In re Roberts*, 618 B.R. 213, 219 (Bankr. S.D.Ohio 2020). Vinson’s duty to disclose under Rule 2014(a) is a continuous one. *See In re Final Analysis, Inc.*, 640 B.R. 633, 641-42 (Bankr. D.Md. 2022); *see also In re Sandpoint Cattle Company, LLC*, 556 B.R. 408, 421 (Bankr. D.Neb. 2016) (citations omitted)

31. Compliance with Rule 2014(a)’s verified statement and disclosure requirements is mandatory. *In re Blue Ridge Limousine and Tour Service, Inc.*, No. 12-17551, 2014 WL 4101595, at * 4 (Bankr. E.D.Va. Aug. 20, 2014); *see also In re Rowe*, 750 F.3d 392, 397 (4th Cir. 2014) (“[T]he term ‘shall’ customarily connotes a command...”)(citations omitted).

32. Courts, creditors, and the U.S. Trustee rely upon a professional’s disclosures to evaluate whether retention is appropriate. *In re eToys, Inc.*, 331 B.R. 176, 189 (Bankr. D.Del. 2005). An applicant’s failure to provide clear and candid disclosures inhibits the ability to conduct a meaningful evaluation of disqualifying connections. *See In re Champagne Services, LLC*, 560 B.R. 196, 201 (Bankr. E.D.Va. 2016); *see also In re LSS Supply Inc.*, 247 B.R. 280, 282-83 (Bankr. D.Ariz. 2000) (citations omitted). Accordingly, “[i]t is not ... the obligation of the bankruptcy court to search the record for possible conflicts of interest. That obligation belongs to the party who seeks employment by the estate.” *In re BH & P, Inc.*, 949 F.2d 1300,

1317 (3d Cir. 1991). Moreover, it is not within the province of a professional to “usurp the court's function by choosing, *ipse dixit*, which connections impact disinterestedness and which do not. The existence of an arguable conflict must be disclosed if only to be explained away.” *In re Midway Industry Contractors, Inc.*, 272 B.R. 651, 662 (Bankr. N.D.Ill. 2001) (citations omitted); *see also In re Vascular Access Centers, L.P.*, 613 B.R. 613, 625 (Bankr. E.D.Pa. 2020) (citations omitted).

33. The U.S. Trustee’s request for additional information noted above highlights Vinson’s disclosure deficiencies. Vinson’s incomplete disclosures fall short of its mandatory obligation to provide “full, candid, and complete disclosures.” *In re Kings River Resorts, Inc.*, 342 B.R. 76, 85 (Bankr. E.D.Cal. 2006) (citations omitted). Vinson must provide additional disclosures regarding its connections to parties in interest and its compensation agreement³ with the Debtors. *See In re Dickson Properties, LLC*, No. 11-18617, 2012 WL 2026760, at *8 (Bankr. E.D.Va. June 5, 2012).

34. Vinson’s lack of full disclosures regardless of any prejudice to the estate is a sufficient basis, by itself, to warrant denial of its employment. *See In re Lewis Road, LLC*, No. 09-37672, 2011 WL 6140747, at *9 (Bankr. E.D.Va. Dec. 9, 2011) (citations omitted); *see also In re Biddle*, No. 12-05171, 2012 WL 6093926, at *4 (Bankr. D.S.C. Dec. 6, 2012) (same).

³ Any payment received or compensation agreement made within the one year preceding the Petition Date “in connection with the bankruptcy case” must be disclosed in accordance with Section 329(a) and Rule 2016(b). *See* 11 U.S.C. § 329(a); Fed. R. Bankr. P. 2016(b); *see also In re Gorski*, 519 B.R. 67, 71 (Bankr. S.D.N.Y. 2014) (“The term “in connection with the case” in § 329(a) is construed broadly...”); *In re Hargis*, 148 B.R. 19, 21-22 (Bankr. N.D.Tex. 1991).

b. Conflict of interest

35. Vinson's prior and current representation of Riverstone and insiders may create a conflict to merit denial of its Employment Application.

36. Section 327(a) imposes "a per se disqualification...of any attorney who has an actual conflict of interest." *In re Marvel Entertainment Group, Inc.*, 140 F.3d 463, 476 (3d Cir. 1998). Additionally, potential conflicts of interest may be sufficiently egregious to warrant disqualification. *See Congoleum Cop.*, 426 F.3d at 692.

37. Vinson has not provided sufficient information regarding its prior and ongoing representations of Riverstone, its affiliates, and insiders. Nor did Vinson provide any information regarding internal controls to combat potential conflicts as noted by the Court. *See* Order Continuing Hearing, ECF No. 224. Vinson also did not highlight Meyer's and Peet's prior representations of Riverstone or its affiliates.

38. The U.S. Trustee and Court need additional information from Vinson regarding its connections with Riverstone and current and former directors to evaluate whether a conflict of interest arises to warrant denial of its Employment Application

39. Additionally, Vinson has not provided sufficient information upon which a determination may be made whether Vinson is a creditor of the Debtors, and if so, whether Vinson received preferential payments from the Debtors. *Staiano v. Pillowtex, Inc. (In re Pillowtex, Inc.)*, 304 F.3d 246 (3d Cir. 2002); *see also In re BF Chinatown, LLC*, No. 22-11143, 2022 WL 17861775, at*2 (Bankr. E.D.Va. Dec. 22, 2022).

40. Vinson's informal disclosures to the U.S. Trustee in no way supplants or alleviates its duty to disclose under Rule 2014(a). *See In re Swansea Consol. Resources, Inc.*,

155 B.R. 28, 35 n.9 (Bankr. D.R.I. 1993) (citations omitted); *see also In re Granite Sheet Metal Works, Inc.*, 159 B.R. 840, 847 (Bankr. S.D.Ill. 1993).

41. The Employment Application in its current form lacks necessary and adequate information and must be denied.

CONCLUSION

WHEREFORE, the U.S. Trustee respectfully requests that the Debtors' Application to Employ Vinson & Elkins LLP be denied. Additionally, the U.S. Trustee seeks such other and further relief as the Court may find appropriate and just.

Respectfully submitted,

Gerard R. Vetter, Acting United States
Trustee for Region Four

By: /s/ Nicholas S. Herron

Kenneth N. Whitehurst, III
Assistant United States Trustee

Nicholas S. Herron
Trial Attorney

CERTIFICATE OF SERVICE

I certify that on **April 10, 2024** service on all attorney Users in this case was accomplished through the Notice of Electronic Filing, pursuant to CM/ECF Policy 9 of the United States Bankruptcy Court for the Eastern District of Virginia, Case Management/Electronic Case Files (CM/ECF) Policy Statement, Version 05/02/2023. A copy of this Objection was mailed on the same date by First Class U.S. Mail, postage prepaid addressed as follows: Enviva Inc., 7272 Wisconsin Avenue, Suite 1800, Bethesda, MD 20814 (Debtor); David S. Meyer and Jessica C. Peet, Vinson & Elkins LLP, The Grace Building, 1114 Avenue of the Americas, 32nd Floor, New York, NY 10036-7708 (Proposed Debtors' Counsel); Matthew J. Pyeatt and Trevor G. Spears, Vinson & Elkins LLP, 2001 Ross Avenue, 39th Floor, Dallas, TX 75201 (Proposed Debtors' Counsel); Michael A. Condyles, Peter J. Barrett and Jeremy S. Williams, Kutak Rock LLP, 901 East Byrd Street, Suite 1000, Richmond, VA 23219-4071 (Proposed Debtors' Co-Counsel); Ira S. Dizengoff, Abid Qureshi and Jason P. Rubin, Akin Gump Strauss Hauer & Feld LLP, One Bryant Park, New York, NY 10036 (Proposed Counsel for Unsecured Creditor Committee); Scott L. Alberino and Alexander F. Antypas, Akin Gump Strauss Hauer & Feld LLP, 2001 K Street, N.W., Washington, DC 20006 (Proposed Counsel for Unsecured Creditor Committee).

/s/ Nicholas S. Herron