IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
	:	
QUANTUM FOODS, LLC, *et al.*,	:	Case No. 14-10318 (KJC)
	:	
	:	Jointly Administered
Debtors.	:	
	:	**Hearing Date: December 9, 2015 at 1:30 p.m.**
	:	**Objections Due: October 21, 2015 by 4:00 p.m.**

ACTING UNITED STATES TRUSTEE'S OBJECTION TO THE APPLICATION TO EMPLOY FGMK, LLC AS EXPERT CONSULTANT AND WITNESS FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS *NUNC PRO TUNC* TO AUGUST 11, 2015 (D.I. 1258)

In support of his Objection to the Application to Employ FGMK, LLC as Expert Consultant and Witness for the Official Committee of Unsecured Creditors *Nunc Pro Tunc* to August 11, 2015 (D.I. 1258),[1] Andrew R. Vara, the Acting United States Trustee for Region 3 ("U.S. Trustee"), by and through his counsel, respectfully states as follows:

I. JURISDICTION

1. The Court has jurisdiction to hear this Objection.

2. Pursuant to Title 28 U.S.C. § 586, the U.S. Trustee is charged with overseeing the administration of Chapter 11 cases filed in this District. 11 U.S.C. § 586. Under Section 586 and Section 307 of the Bankruptcy Code, Congress charged the U.S. Trustee with broad responsibilities in Chapter 11 cases and the standing to rise and be heard on any issue in any case or proceeding. 11 U.S.C. § 307; *see also United States Trustee v. Columbia Gas Sys., Inc.* (*In re Columbia Gas Sys., Inc.*), 33 F.3d 294, 295-96 (3d Cir. 1994) (the U.S. Trustee has "public interest standing" under 11 U.S.C. § 307, which goes beyond mere pecuniary interest).

[1] Unless otherwise defined herein, capitalized terms shall have the same meaning and context as those capitalized terms included in the referenced or cited document or pleading.

3. Pursuant to 11 U.S.C. § 307, the U. S. Trustee has standing to be heard with regard to the above-referenced Objection.

II. BACKGROUND

4. On February 18, 2014, the Debtors commenced these voluntary Chapter 11 cases which were consolidated for joint administration by this Court. (D.I. 1 & 36.)

5. On February 27, 2014, the U.S. Trustee appointed the Official Committee of Unsecured Creditors (the "Committee") under § 1102.

6. On May 22, 2014, the Court entered an order approving an agreement between the Debtors, their senior secured lenders and the Committee regarding the prosecution of the estates' litigation claims. (D.I. 353.) That same order adjourned the U.S. Trustee's pending motion for dismissal or conversion of the case. (*Id.*)

7. On June 3, 2014, the Court entered an order approving a sale to liquidate substantially all of the Debtors' assets. (D.I. 396.)

8. On October 2, 2015, the Committee applied to employ FGMK, LLC ("FGMK"), a Chicago advisory and accounting firm, as an expert consultant and expert witness in adversary proceedings related to this case (the "Application"). (D.I. 1258.)

9. The Application seeks to employ FGMK *nunc pro tunc* to August 11, 2015.

III. BASIS FOR OBJECTION

A. This Employment Is Not Necessary and These Cases are Administratively Insolvent.

10. Bankruptcy Rule 2014(a) provides in relevant part that the application for employment under 1103(a) "shall state the specific facts showing the necessity for the employment." FED. R. BANKR. P. 2014(a).

11. "Neither section 1103(a) nor Rule 2014 provide any guidance as to the criteria to be applied in determining whether to approve such retention," but "[a]n estate that is administratively insolvent is an outcome that the court and all parties must seek to avoid." 7 COLLIER ON BANKRUPTCY ¶ 1103.03 (Alan N. Resnick & Henry J. Somner, eds., 2015).

12. The Application has failed to demonstrate the necessity to employ FGMK.

13. No plan has been filed in this case. This Court has approved a sale of substantially all the Debtors' assets. (D.I. 396.) The Committee has not shown the need for an expert consultant and expert witness in that context.

14. The Debtors' Monthly Operating Report (June 13, 2015 through July 10, 2015) lists $22.8 million in total assets. (D.I. 1226.) The DIP loan, subject to a superpriority lien, is $21.8 million. (*Id.*) The Debtors list approximately $5.33 million in post-petition professional fees and expenses and another $5.56 million accounts payable and $8.05 million accrued liabilities. (*Id.*)

15. The Debtors' Monthly Operating Report (July 11, 2015 through August 7, 2015) also lists $22.8 million in total assets (D.I. 1279) but the DIP loan, subject to a superpriority lien, is now $22.58 million. (*Id.*) The Debtors' post-petition professional fees and expenses have increased to approximately $5.9 million with an additional $5.51 million accounts payable and $7.71 million accrued liabilities not subject to compromise. (*Id.*) As these combined amounts exceed the Debtors' assets, the Debtors are administratively insolvent.

16. This retention is contemplative and therefore anticipates *possible* needs to benefit the estate rather than actual, *necessary* needs. The Application and Declaration of Seth Palatnik (the "Palatnik Declaration"), a principal of FGMK, both describe the services anticipated by FGMK as "[p]roviding expert reports, when necessary" and "[p]roviding expert witnesses, when

necessary." (D.I. 1258 & Ex. A.) There is no present need for consultancy and expert witnesses, neither is there an anticipated need. Instead, the Committee specifies FGMK's duties in the vaguest possible terms, and it does so while the Debtors are administratively insolvent which is when the most care must be made in the accrual of additional administrative expenses. Absent any necessity for the retention of FGMK, the Application should be denied.

B. There Is No Basis for Approving this Employment *Nunc Pro Tunc*.

17. In the Third Circuit, the bankruptcy courts derive their power to approve *nunc pro tunc* appointments through their equity powers. The law in this Circuit is clear:

> [T]he bankruptcy courts have the power to authorize retroactive employment of counsel and other professionals under their broad equity power. The bankruptcy courts have traditionally been governed by equitable principles rather than statutory technicalities. Where equitable concerns weigh in favor of granting retroactive approval to enable deserving professionals to recover compensation for work actually done, we see nothing in the statute that denies the bankruptcy court the power to grant such retroactive approval.

In re Arkansas Co., Inc., 798 F.2d 645, 648 (3d Cir. 1986) (citations omitted).

18. Hypothetical approval of a timely application for employment is not dispositive. "It does not follow that such retroactive approval should be forthcoming merely because the court would have given approval if timely requested. Such a lenient rule would subvert Congress' purpose in imposing a prior approval requirement." *Id.*; *see In re Hydrocarbon Chemicals, Inc.*, 411 F.2d 203, 205 (3d Cir. 1969) (explaining that prior approval of employment provides an opportunity for the court to "know the type of individual who is engaged in the proceeding, their integrity[,] their experience in connection with work of this type, as well as their competency concerning the same").

19. The test to determine whether *nunc pro tunc* approval is appropriate in the Third Circuit is:

> When considering an application, the bankruptcy court may grant retroactive approval only if it finds, after a hearing, that it would have granted prior approval, which entails a determination that the applicant satisfied the statutory requirements of 11 U.S.C. §§ 327(a) and 1103(a) that the applicant be disinterested and not have an adverse interest, and that the services performed were necessary under the circumstances. Thereafter, in exercising its discretion, the bankruptcy court must consider whether the particular circumstances in the case adequately excuse the failure to have sought prior approval. This will require consideration of factors such as whether the applicant or some other person bore responsibility for applying for approval; whether the applicant was under time pressure to begin service without approval; the amount of delay after the applicant learned that initial approval had not been granted; the extent to which compensation to the applicant will prejudice innocent third parties; and other relevant factors.

Arkansas, 798 F.2d at 651. In sum, "*nunc pro tunc* approval should be limited to cases where extraordinary circumstances are present." *Id.* at 649 ("If retroactive approval were freely granted, it would subvert the prophylactic purpose underlying the statutory requirement of prior approval.").

20. Here, there are no extraordinary circumstances that could warrant *nunc pro tunc* approval. While the Committee has supplied a declaration regarding disinterestedness, (D.I. 1258, Ex. A), it has failed to meet all remaining factors of the test.

21. The Committee's application is deficient in showing that this application would have been approved if timely filed. Neither the application nor the Palatnik Declaration provides an explanation why this retention could not have been made on a timely basis. (*See* D.I. 1258 & Ex. A.)

22. The retention seeks prospective services and not retrospective services, and therefore there is no need to seek approval *nunc pro tunc*. The application specifies the Committee's potential rather than actual need to hire FGMK: "the Committee ***contemplates*** that FGMK as its expert consultant and expert witness ***will*** provide the following special litigation

services to the Committee." (D.I. 1258 (emphasis added).) The use of the words "contemplates" and "will" explicitly anticipate a possible need not an actual need.

23. The section of the Palatnik Declaration which describes the services to be performed "when necessary" is entitled "**SERVICES TO BE RENDERED**." (D.I. 1258 (formatting in original).) Because Palatnik, a partner of the firm to be employed, explicitly describes services *to be* rendered rather than services *actually* rendered, there is no need to be approved *nunc pro tunc*.

24. For the aforementioned reasons, *supra* ¶¶ 17-18, there could not have been any time pressure to begin service without prior court approval.

25. Because the Committee has failed to establish a basis for employing FGMK *nunc pro tunc*, the application should be denied.

IV. CONCLUSION

26. Because these cases are administratively insolvent, the employment of FGMK is not a necessary service for the operation of the estate, and the Committee has not sufficiently shown a basis for seeking approval of the application *nunc pro tunc*, the U.S. Trustee objects to the application to employ FGMK.

27. The U. S. Trustee reserves and any all rights, remedies and obligations found at law, equity or otherwise to, *inter alia*, complement, supplement, augment, or modify this Objection, including orally at any hearing, 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 upon further factual discovery.

WHEREFORE, the U.S. Trustee respectfully requests that the Application be denied and for such other and further relief deemed fair, just and appropriate.

Respectfully submitted,

ANDREW R. VARA
ACTING UNITED STATES TRUSTEE

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