

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

*In re* : Chapter 11  
:   
FLEMING COMPANIES, INC., *et al.*, :   
:   
Debtors. : Case Number 03-10945 (MFW)  
: Jointly Administered

**OBJECTIONS OF THE ACTING UNITED STATES TRUSTEE  
TO SEVERAL OF THE DEBTORS' APPLICATION(S)/MOTION(S)  
TO EMPLOY VARIOUS PROFESSIONALS  
(RELATED TO DOCKET ENTRY #s 643, 661, 662, 663)**

In support of her objections to several of the Debtors' application(s)/motion(s) to employ various professionals, Roberta A. DeAngelis, Acting United States Trustee for Region 3 ("UST"), by and through her counsel, avers:

**INTRODUCTION**

1. This Court has jurisdiction to hear and determine this objection.
2. Under 28 U.S.C. § 586(a)(3)(H), the UST is charged with monitoring applications filed under section 327 of the Bankruptcy Code "and, whenever the United States trustee deems it to be appropriate, filing with the court comments with respect to the approval of such applications." 28 U.S.C. § 586(a)(3)(H). This duty is part of the UST's overarching responsibility to enforce the laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that UST has "public interest standing" under 11 U.S.C. § 307 which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6<sup>th</sup> Cir. 1990) (describing the UST as a "watchdog").

3. Under 11 U.S.C. § 307, the UST has standing to be heard on the issues raised in this objection.

**GROUND/BASIS FOR RELIEF**

4. The UST objects to various professional employment application(s)/motion(s) filed by the Debtors on the grounds detailed below.

*Application Under 11 U.S.C. § 327(e) and 328(a) and Fed. R. Bankr. P. 2014(a) Authorizing the Employment and Retention of Rider Bennett, LLP as Special Labor Relations and Business Litigation Counsel for the Debtors and Debtors in Possession (Docket Entry # 643)*

5. The UST objects to the Debtors' application to employ Rider Bennett, LLP on the following ground: Paragraph 4 of the application details the scope of services to be provided by Rider Bennett. In paragraph 4(g), the Debtors propose that Rider Bennett "continue to advise the Debtors in connection with general business litigation." Given that the Debtors have sought authority to retain McAfee & Taft as special corporate counsel (Docket Entry # 82) and Baker Botts LLP as special corporate and securities counsel (Docket Entry # 84), the lines dividing the services to be provided by these firms have to be clearly drawn. Paragraph 4(g) is not a clear dividing line.

*Motion for Order Authorizing Debtors to Employ and Compensate Certain Professionals Utilized in the Ordinary Course of Debtors' Businesses (Docket Entry # 661)*

6. The UST objects to the Debtors' motion to employ ordinary course professionals on the following grounds:

- (a.) A review of the proposed ordinary course professionals listed on Exhibit A to the motion suggests that a \$50,000 cap/month is excessive. The cap should be reduced to \$30,000/month. The monthly "global" cap should be reduced accordingly.
- (b.) Further, to the extent that the ordinary course professional exceeds the cap in any

given month, it should be required to file a retention application under 11 U.S.C. § 327(a) and seek compensation in a manner consistent with 11 U.S.C. § 330, the administrative order in these cases, and this Court's local rules.

- (c.) The proposed form of order should provide that the ordinary course affidavit must detail the following information: (a) a description of the effort(s) that were taken to search for connections with parties in interest; (b) a description of the proposed scope of services to be provided by the ordinary course professional; (c) the rate(s) proposed to be charged for the services; and (d) all information otherwise required to be disclosed pursuant to Federal Rule of Bankruptcy Procedure 2014.
- (d.) Parties in interest should have 20 days from the date the ordinary course affidavit is served to object to the retention of an ordinary course professional. No payments should be made to any ordinary course professional until (a) the objection period has expired or (b) the bankruptcy court has entered an order ruling on an objection to the professional's affidavit. whichever date is later.
- (e.) The Debtors' filing of a list of ordinary course professionals should be for informational purposes only and should not affect the retention/compensation of the ordinary course professional. To the extent that an ordinary course professional was not providing services as of April 1, 2003, the list should indicate when the professional began providing services.
- (f.) The proposed form of order should expressly provide that any monies requested by, or paid to, an ordinary course professional are subject to disallowance and/or disgorgement pursuant to 11 U.S.C. §§ 328 and 330.

- (g.) Latham & Watkins, KPMG, and WCM Investment Company should be removed from the ordinary course professional list and retained separately.

*Debtors' Motion for (I) an Interim Order Authorizing the Employment of AP Services LLC as Crisis Managers to the Debtors and Thereby to Designate Rebecca A. Roof as Interim Chief Financial Officer and Michael Scott as Interim Treasurer of the Debtors Nunc Pro Tunc to April 9, 2003 and Scheduling Final Hearing on Proposed Employment Agreement, and (II) a Final Order Authorizing Same (Docket Entry # 662)*

7. The UST objects to the Debtors' motion for interim/final orders authorizing the employment of AP Services LLC as crisis managers to the Debtors on the following grounds:

- (a.) On May 9, 2003, at the meeting of creditors, Ted Stenger of AP Services LLC appeared on the Debtors' behalf and testified. Mr. Stenger represented that the board of directors authorized his appointment to the position of Chief Restructuring Officer on May 5, 2003. The motion does not disclose Mr. Stenger's role, nor does it disclose Mr. Stenger's hourly rate. AP Services LLC is required to disclose this information under the "Jay Alix Protocol," which is attached to the motion as Exhibit C (paragraph I(C), pg. 1).
- (b.) The Debtors seek approval to provide AP Services, LLC with an "evergreen" retainer (see pg. 4 of engagement letter). The "evergreen" retainer provision is an unreasonable employment term and should not be approved.
- (c.) The Debtors seek approval to pay AP Services, LLC with a \$1 million termination fee (see pg. 6 of engagement letter). The termination fee is an unreasonable employment term and should not be approved.
- (d.) Exhibit A to the motion lists a number of proposed AP Services, LLC temporary employees whose services are "to be determined." The Debtors should be required

to disclose the roles of the AP Services temporary personnel to enable the UST and other parties in interest to evaluate AP Services' staffing of the engagement.

- (e.) In paragraph 7 of the Roof affidavit in support of the motion, Roof identifies connections between Kmart and AP Services. Fleming is a significant creditor of the Kmart estate(s). Based on the limited disclosure that was made, the UST is unable to determine whether AP Services has a disqualifying conflict of interest. Roof should supplement her affidavit to describe (1) the nature and amount of Fleming's claims in the Kmart case(s), (2) whether any of those claims are currently disputed, and (3) whether AP Services personnel were involved on Kmart's behalf in the decision to assume or reject Fleming's executory contract.
  
- (f.) In paragraph 7 of the Roof affidavit in support of the motion, Roof identifies a connection between AlixPartners (an affiliate of AP Services) and a "Confidential Client" of AlixPartners in the same industry as the Debtors. Based on the limited disclosure that was made, the UST is unable to determine whether AP Services has a disqualifying conflict of interest. First, Roof should supplement her affidavit to disclose whether the Confidential Client has any connection(s) with Questor Management Company and/or the funds under its management. Second, Roof should supplement her affidavit to disclose, for the time period spanning a year prior to the filing of the petitions which initiated the above-captioned cases to the present, (a) whether the Debtors or their professionals have contacted the Confidential Client in connection with any potential transaction involving the Debtors' estates or (b) whether Confidential Client has contacted the Debtors and expressed an interest in

pursuing a transaction involving the Debtors' estates. Further, to the extent that AP Services, LLC has any guideline(s) or other document(s) which it provides to its employees regarding maintenance of an ethical wall or screen, the UST requests a copy of the guideline(s)/document(s). Finally, the UST requests that AP Services, LLC disclose whether Confidential Client is currently a creditor, major customer and/or equity security holder of the Debtors.

- (g.) The proposed form of order (see paragraph 2(d), page 2) expands the terms on which AP Services, LLC may obtain a success or back-end fee beyond that which is permissible under the Jay Alix Protocol (see paragraph II(D), page 3). The order should be revised to bring its terms in line with the Protocol.

*Application of the Debtors for Order Pursuant to 11 U.S.C. §§ 327(a) and 328 and Fed. R. Bankr. P. 2014(a), 2016 and 5002 Authorizing the Employment and Retention of Kekst and Company as Public Relations and Corporate Communications Consultant to the Debtors and Debtors in Possession (Docket Entry # 663)*

8. The UST objects to the Debtors' application to employ Kekst and Company on the following grounds:

- (a.) Based upon the description of proposed services to be provided by Kekst in paragraph 7 of the application, it is unclear precisely what value Kekst is bringing to what is essentially a wholesale business operation that is in the process of selling non-core retail holdings. The recitation of proposed services is nothing more than a recitation of vagaries (“(i) communicating reliably, accurately and effectively; (ii) speaking with a unified, authoritative voice; (iii) presenting a coherent, consistent message; (iv) managing the Debtors' disclosure of information; (v) correcting,

counteracting and controlling damage in regard to the rumors and misinformation that inevitably will arise; (vi) deterring and dissuading irrational, uninformed, panicked or other behavior deleterious to the estates and the reorganization; and (vii) otherwise protecting the goodwill of the Debtors”). The Debtors have already retained several experienced counsel and financial advisors to assist with their reorganization efforts and who are quite capable of doing all of the things that the Debtors propose to have Kekst do. To the extent that Kekst is going to be providing specific services (i.e., assisting the company in drafting press releases), the scope of services should be clearly defined.

- (b.) Paragraph 4 of the May 24, 2001 engagement letter (attached to the application as Exhibit B) provides for a minimum non-refundable fee on each anniversary of the contract. The minimum non-refundable fee is an unreasonable employment term and should not be approved.
- (c.) The Debtors propose to indemnify Kekst for claims arising from Kekst’s *pre-petition* performance of services under the May 24, 2001 engagement letter (see page 2 of proposed order, subparagraph (a)). Kekst has a pre-petition, unliquidated claim based on the indemnity provision. *See In re Pinnacle Brands, Inc.*, 259 B.R. 46, 50 (Bankr. D. Del. 2001) (Walrath, J.). Contrary to the Debtors’ request to indemnify Kekst for pre-petition conduct in the retention order (which, effectively, would elevate Kekst’s pre-petition, unsecured claim to administrative status), Kekst should be required to waive its pre-petition indemnity claim or risk being disqualified. *See* 11 U.S.C. § 101(14) (definition of “disinterested person”).

**CONCLUSION**

WHEREFORE the UST respectfully requests that this Court issue orders denying the application(s)/motion(s) or granting other relief consistent with these objections.

Respectfully submitted,

**ROBERTA A. DeANGELIS  
ACTING UNITED STATES TRUSTEE**

**BY:** /s/ Joseph J. McMahon, Jr.

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