

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

**OBJECTION OF THE ACTING UNITED STATES TRUSTEE TO
THE APPLICATION OF THE DEBTORS FOR ENTRY OF AN ORDER PURSUANT
TO 11 U.S.C. § 327(a), 330 AND 105(a) AND FED. R. BANKR. P. 2014(a), 2016 AND 5002
AUTHORIZING THE EMPLOYMENT AND RETENTION OF BAIN & COMPANY AS
TURNAROUND ADVISOR TO THE DEBTORS NUNC PRO TUNC TO APRIL 1, 2003
AND MOTION OF THE DEBTORS FOR AN ORDER APPROVING THE
TERMINATION AGREEMENT
(DOCKET ENTRY # 2818)**

In support of her objection to the application of the Debtors for entry of an order pursuant to 11 U.S.C. § 327(a), 330 and 105(a) and Fed. R. Bankr. P. 2014(a), 2016 and 5002 authorizing the employment and retention of Bain & Company (“Bain”) as turnaround advisor to the Debtors *nunc pro tunc* to April 1, 2003 and motion of the Debtors for an order approving the termination agreement, 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 11 U.S.C. § 327 “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 (6th 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 the application and motion on the following grounds:
- (a.) The Debtors seek to retain Bain *nunc pro tunc* to April 1, 2003 (more than 120 days prior to the filing of the application) without averring “extraordinary circumstances” which would justify such relief. *See In re F/S AirLease II, Inc.*, 844 F.2d 99 (3d Cir. 1988), *cert. denied*, 488 U.S. 852 (1988); *In re Arkansas Co.*, 798 F.2d 645 (3d Cir. 1986); *see also First Merchants Acceptance Corp. v. J.C. Bradford & Co.*, 198 F.3d 394, 399-400 (3d Cir. 1999) (emphasizing importance of prior court approval of professional retention and policy reasoning supporting prior approval requirement).
- (b.) In paragraph 12 of the Kovac affidavit in support of the application, Bain discloses that it received approximately \$4.3 million in compensation during the two years prior to the petition date. The information provided does not give this Court, the UST, and other parties in interest an opportunity to evaluate whether Bain has a disqualifying conflict of interest based upon receipt of (a) preferential transfer(s). *See In re Pillowtex, Inc.*, 304 F.3d 246 (3d Cir. 2002); *United States Trustee v. First Jersey Securities, Inc. (In re First Jersey Securities, Inc.)*, 180 F.3d 504 (3d Cir.

1999). Bain should supplement the Kovac Affidavit with a grid detailing payments received from the Debtors during the year prior to April 1, 2003 (the date the Debtors filed the petitions initiating the above-captioned cases). The grid should have the following columns: invoice date, invoice amount, date(s) of service covered by invoice, payment date, and payment amount. Retainer payments should be identified on the grid.

- (c.) Any request by Bain to be indemnified pursuant to the September 25, 2002 engagement letter should be subject to prior court notice and approval. Further, the limitation of liability provision should be struck from the engagement letter. *See In re United Cos. Fin. Corp.*, 241 B.R. 521 (Bankr.D.Del. 1999); *In re Dailey Int'l*, No. 99-1233 (Bankr. D. Del. July 1, 1999).

CONCLUSION/RESERVATION OF RIGHTS

5. The UST leaves the Debtors to their burden and reserves all discovery rights.
6. The UST reserves the right to amend and/or supplement this objection.

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WHEREFORE the UST requests that this Court issue an order (a) denying the application and motion or (b) granting other relief that this Court deems appropriate.

Respectfully submitted,

ROBERTA A. DeANGELIS
ACTING UNITED STATES TRUSTEE

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