

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

**OBJECTION OF THE ACTING UNITED STATES TRUSTEE TO THE DEBTORS’
DESIGNATION OF SONNENSCHN NATH & ROSENTHAL LLP
AS AN ORDINARY COURSE PROFESSIONAL AND PROVISIONAL OBJECTION
TO *NUNC PRO TUNC* APPROVAL OF EMPLOYMENT
OF ALL LISTED PROFESSIONALS
(RELATED TO DOCKET ENTRY # 3518)**

In support of her objection to the Debtors’ designation of Sonnenschein Nath & Rosenthal LLP as an ordinary course professional and provisional objection to the *nunc pro tunc* approval of the employment of all listed 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 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. Pursuant to the order approving the Debtors’ motion to employ ordinary course professionals in these cases (Docket Entry # 1029), the Debtors recently filed their third supplement to the ordinary course professionals list.

5. One of the professionals designated as an “ordinary course” professional was Sonnenschein Nath & Rosenthal LLP (“Sonnenschein”). Sonnenschein is listed as “counsel to the Audit Committee.”

6. Previously, this Court authorized the employment of Baker Botts LLP to serve as counsel to Fleming’s audit committee (Docket Entry # 1241). The Debtors filed a separate application to retain Baker Botts, and Baker Botts’ compensation is subject to the administrative order previously entered in these cases. The UST submits that the proposed retention of Sonnenschein raises “duplication of effort” issues in conjunction with the Baker Botts retention which are best addressed if the Debtors file a “full” fee application (with a supporting affidavit attached) seeking to employ Sonnenschein under 11 U.S.C. § 327 and Federal Rule of Bankruptcy Procedure 2014.

7. Further, given that the list is being filed more than five months into these cases, the UST objects to the retention of Sonnenschein and the other designated professionals that is sought to be made effective as of a date earlier than August 1, 2003 unless the Debtors are able to

demonstrate “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).

8. The UST reserves her right to supplement this objection after the affidavits supporting the professionals’ employment are filed. The UST further notes that this objection shall be deemed an objection to the retention of all listed professionals to the extent that the Debtors are seeking to retain the professionals effective as of a date prior to August 1, 2003.

CONCLUSION

WHEREFORE the UST requests that this Court grant relief consistent with this objection.

Respectfully submitted,

ROBERTA A. DeANGELIS
ACTING UNITED STATES TRUSTEE

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