

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:) Chapter 11
)
NIPPON ELECTRIC GLASS) Case No. 04-63851
OHIO, INC.,)
)
Debtor.) Judge John E. Hoffman, Jr.

**MOTION FOR AN ORDER AUTHORIZING THE DEBTOR TO EMPLOY
AND COMPENSATE ACCOUNTING FIRMS FOR SERVICES IN THE ORDINARY
COURSE OF THE DEBTOR'S BUSINESS**

Nippon Electric Glass Ohio, the debtor and debtor in possession (the "Debtor"), hereby submits this motion (the "Motion") for an order, attached hereto as Exhibit A, authorizing the debtor to employ and compensate two accounting firms, (1) Deloitte Tax LLP, and (2) Galaz, Yamazaki, Ruiz Urquiza, S.C. to provide services in the ordinary course of the Debtor's business. A memorandum in support of this Motion is provided below.

/s/ Lisa M. Diem

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MEMORANDUM IN SUPPORT

Jurisdiction

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

2. Venue of this proceeding and the Motion is proper in this District under 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein are 11 U.S.C. §§ 105(a), 363(c), 1107(a) and 1108.

Background

4. The Debtor is in the business of manufacturing glass parts for cathode ray tubes used in television sets.

5. On September 1, 2004, the Debtor commenced the above-captioned bankruptcy case by filing its voluntary petition for relief under Chapter 11 of the Code.

6. The Debtor has continued to operate its business and manage its assets as a debtor-in-possession pursuant to Code sections 1107 and 1108.

Relief Requested

7. By this Motion, the Debtor seeks approval to employ and retain two accounting firms, Deloitte Tax LLP (“Deloitte Tax”), whose offices are located in San Diego, California, and Galaz, Yamazaki, Ruiz Urquiza, S.C. (“Galaz”), whose offices are located in Tijuana, Mexico, to continue to provide accounting services in the ordinary course of the Debtor’s business.¹ Deloitte Tax prepares the Debtor’s federal income tax returns, and Galaz audits the Debtor’s financial statements semi-annually. Neither Deloitte Tax nor Galaz are engaged in, or

¹ The Debtor understands that Deloitte Tax is a subsidiary of a member firm of Deloitte Touche Tohmatsu, a Swiss Verein (association of professional service firms), of which the Galaz is the Mexican member firm.

will be engaged in, providing financial advice or reorganization services in connection with the Debtor's Chapter 11 case.

8. The Debtor seeks permission to continue to employ Deloitte Tax and Galaz postpetition in the ordinary course of business, and to pay for their services upon submission of invoices in the ordinary course of business, without the necessity of filing motions for compensation pursuant to sections 327, 328, 329 and 330 of the Bankruptcy Code.

9. The Debtor requests that it be permitted to employ and retain Deloitte Tax and Galaz, effective *nunc pro tunc* to the Petition Date, on terms similar to the terms under which they were employed prior to the Petition Date, subject to the terms described herein. The Debtor represents that (a) Deloitte Tax will be employed to assist with preparation of tax returns and other accounting functions in the ordinary course of the Debtor's business, that (b) Galaz will be employed to perform services with respect to audited financial statements and other accounting functions in the ordinary course of the Debtor's business, (c) that Deloitte Tax and Galaz will only be paid by the Debtor for reasonable fees and expenses, and (d) that Deloitte Tax and Galaz will not perform services relating to bankruptcy and reorganization matters without seeking appropriate approval from this Court.

10. Due to the nature of Deloitte Tax and Galaz's respective services to the Debtor, the services are not necessarily performed on a monthly basis. Accordingly, budgeting on a monthly basis, as may be common for other ordinary course professionals, is not an accurate measure for Deloitte Tax and Galaz. Deloitte Tax and Galaz have provided the Debtor with an estimate of their fees for a six month period. Deloitte Tax estimates that its fees for a six month period will total approximately \$25,000. Galaz estimates that its fees for a six month period will

total \$60,000 for the period during which the year end audit is performed, and a substantially lower amount for the period during which the mid-year audit is performed.

Law and Argument

11. The Debtor submits that the continued employment and compensation of Deloitte Tax and Galaz is in the best interests of the Debtor's estate, creditors and other parties in interest. Deloitte Tax has extensive qualifications, experience in this area and familiarity with respect to the Debtor's federal tax returns, and has provided services to the Debtor with respect to income tax preparation since the Debtor's incorporation. Galaz has extensive qualifications, experience and knowledge with respect to the Debtor's audited financial statements, and has provided audit services to the Debtor since 2002.

12. If the expertise and background knowledge of Deloitte Tax and Galaz are lost, the Debtor will undoubtedly incur additional and unnecessary expenses as replacements without their background and expertise are retained. Therefore, it is in the best interest of all parties and the creditors to avoid any disruption in the professional services rendered by Deloitte Tax and Galaz.

13. Bankruptcy Code section 330 requires that prior to payment of reasonable compensation and reimbursement of actual expenses of a professional person retained under Bankruptcy Code section 327, there must be notice and a hearing. Deloitte Tax and Galaz will not be involved in the administration of this Chapter 11 case but, rather, will provide services in connection with the Debtor's routine business operations -- services which the Debtor would require regardless of its Chapter 11 status. As a result, the Debtor does not believe that Deloitte Tax and Galaz are "professionals," as that term is used in Section 327, whose employment and compensation must be approved by the Court. *See, e.g., In re Riker Indus., Inc.*, 122 B.R. 964,

973 (Bankr. N.D. Ohio 1990) (no need for Section 327 approval of a management and consulting firm that performed only “routine administrative functions” and whose “services were not central to [the] bankruptcy case”); *In re Babcock Dairy Co.*, 70 B.R. 691, 692 (Bankr. N.D. Ohio 1987) (holding that an expert witness was not a “professional person” under Section 327 because his testimony did not measurably affect the administration of the estate); *see also, In re That’s Entertainment Mkt’g Group, Inc.*, 168 B.R. 226, 230 (N.D. Cal. 1994) (only the retention of professional whose duties are central to the administration of the estate require prior approval under Section 327); *In re D’Lites of Am., Inc.*, 108 B.R. 352, 353 (Bankr. N.D. Ga. 1989) (Section 327 approval is not necessary for “one who provides services to debtor that are necessary regardless of whether the petition was filed”); *In re Fretheim*, 102 B.R. 298, 299 (Bankr. D. Conn. 1989) (only those professionals involved in the actual reorganization effort, rather than debtor’s ongoing business, require approval under Section 327); *In re Johns-Manville Corp.*, 60 B.R. 612, 619 (Bankr. S.D.N.Y. 1989) (only those professionals involved in the actual reorganization effort, rather than debtor’s ongoing business, require approval under Section 327).

14. Thus, in determining whether a person is a “professional person” for purposes of Section 327, the focus is on the person’s duties in regards to the estate and not his status as a professional. *See, e.g., That’s Entertainment*, 168 B.R. at 230; *In re Leslie Oil & Gas Co.*, 98 B.R. 774, 775 (Bankr. S.D. Ohio 1989) (“It is not the usual onlooker’s perception that a person’s occupation is a ‘profession’ that governs, but rather the substance of the person’s role in a debtor’s operations.”) For example, in *That’s Entertainment*, the court held that retention of an accounting firm as expert witness in collateral litigation did not require prior court approval because, given its duties in regards to the debtor, the accounting firm was not a “professional person” under Section 327. 168 B.R. 230.

15. Moreover, based on the foregoing, the standards that professionals hired by the estate must be “disinterested” and must not hold or represent an interest adverse to the estate, do not apply to Deloitte Tax and Galaz in light of the fact that they are being retained under Sections 1107 and 1108 rather than Section 327. Nevertheless, out of an abundance of caution, the Debtor seeks the relief requested in this Motion to avoid any subsequent controversy as to the Debtor’s employment and payment of Deloitte Tax and Galaz during the pendency of this Chapter 11 case.

16. The relief requested in this Motion has been granted routinely by this and other Districts. *See, e.g., In re Ormet Corp.*, Case No. 04-51255 (Bankr. S.D. Ohio, Jan. 30, 2004); *In re National Century Financial Enterprises, Inc.*, Case No. 02-65235 (Bankr. S.D. Ohio, Nov. 18, 2002); *In re Chiquita Brands Int’l Inc.*, Case No. 01-18812 (Bankr. S.D. Ohio, Nov. 28, 2001); *In re Cooker Restaurant Corp.*, Case No. 01-56156 (Bankr. S.D. Ohio, July 31, 2001).

17. Although Deloitte Tax and Galaz are owed modest amounts for prepetition services rendered to the Debtor, such prepetition claims do not preclude the Debtor from retaining them under Section 1108 in the ordinary course of business, as they are not employed under Section 327 and “disinterestedness” is not a requirement. *In re Sieling Assocs. Ltd. P’Ship*, 128 B.R. 721, 723 (Bankr. E.D. Va. 1991).

18. Although Deloitte Tax and Galaz are not being employed under Section 327, the Debtor has requested that Deloitte Tax and Galaz submit disclosure affidavits or declarations with respect to their respective retentions, which submissions are attached hereto as Exhibit B (Deloitte Tax) and Exhibit C (Galaz). Based on these submissions, the Debtor believes that Deloitte Tax and Galaz do not hold or represent any interests adverse to the Debtor or its estate.

Conclusion

Based on the foregoing, the Debtor respectfully requests that this Court enter an order, substantially in the form attached hereto as Exhibit A, authorizing the Debtor to employ and compensate Deloitte Tax and Galaz in the ordinary course of business without any further filings and granting such other and further relief as the Court deems appropriate.

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NOTICE AND CERTIFICATE OF SERVICE

Please take notice that any objection or memorandum contra to the *Motion for an Order Authorizing the Debtor to Employ and Compensate Accounting Firms for Services in the Ordinary Course of the Debtor's Business* shall be filed and served no later than twenty (20) days after service of the Motion. If such an objection or memorandum contra is filed and served, the matter shall be heard at the next omnibus hearing at 11:00 a.m. (prevailing Eastern time) on January 6, 2005, at the United States Bankruptcy Court, 170 North High Street, Columbus, Ohio 43215.

Please take further notice that the Debtor may present a proposed order to the Court granting the relief sought without further notice unless an objection or memorandum contra is timely filed.

The undersigned hereby certifies that a copy of the forgoing Motion and Notice was served to those persons listed on the attached Service List, by regular U.S. Mail, postage prepaid, this 15th day of December, 2004.

/s/ Lisa M. Diem

Lisa M. Diem

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EXHIBIT A

Form of Proposed Order

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re:)	Chapter 11
)	
NIPPON ELECTRIC GLASS)	Case No. 04-63851
OHIO, INC.,)	
)	
Debtor.)	Judge John E. Hoffman, Jr.

**ORDER AUTHORIZING THE DEBTOR TO EMPLOY
AND COMPENSATE ACCOUNTING FIRMS FOR SERVICES IN THE ORDINARY
COURSE OF THE DEBTOR’S BUSINESS**

Upon the Motion of Nippon Electric Glass Ohio, Inc., the debtor and debtor in possession in the above-captioned Chapter 11 case (the “Debtor”) for an order authorizing the Debtor to employ and compensate Deloitte Tax LLP (“Deloitte Tax”) and Galaz, Yamazaki, Ruiz Urquiza, S.C. (“Galaz”) in the ordinary course of the Debtor’s business [Docket ____]; and it appearing that the relief requested is essential to the continued operation of the Debtor’s business and is in the best interest of the Debtor’s estate and creditors; and it appearing that this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that this

Motion is a core proceeding pursuant to 28 U.S.C. § 157; and adequate notice of the Motion having been given; and it appearing that no other notice need be given; and after due deliberation and sufficient cause appearing therefore, it is hereby ORDERED that:

1. The Motion is GRANTED.
2. The Debtor is authorized, in the reasonable and ordinary conduct of its business, to retain, employ and pay each of Deloitte Tax and Galaz for the performance of accounting services related to the Debtor's ordinary operations and course of business, as described in the Motion, without filing individual retention applications for each and without further order of the Court.
3. Deloitte Tax and Galaz will not be utilized by the Debtor to handle matters in connection with the bankruptcy proceedings or plan of reorganization, except to the extent that their services may be used to support the activities of professionals retained by the Debtor pursuant to Sections 327 and 328 of the Bankruptcy Code.
4. The Debtor is authorized to make payments of compensation and reimbursement of expense to Deloitte Tax and Galaz in the manner customarily made by the Debtor, in the full amount billed by the firms upon receipt therefrom of reasonably detailed invoices indicating the nature of the services rendered and calculated in accordance with the firms' standard billing practices (without prejudice to the Debtor's normal right to dispute such invoices).
5. The fees and reimbursement of expenses paid by the Debtor to Deloitte Tax and Galaz shall be separately itemized in the monthly operating reports filed by the Debtor in the Chapter 11 case.

6. Notwithstanding the possible applicability of Bankruptcy Rules 6004(g), 7062, 9014, or otherwise, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

7. All time periods set forth in this Order shall be calculated in accordance with Bankruptcy Rule 9006(a).

IT IS SO ORDERED.

Copies to: See Attached Service List

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