

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re : Chapter 11
: :
THE SCO GROUP, INC., *et al.*, : :
: :
Debtors. : Case Number 07-11337 (KG)
: (Jointly Administered)

Hearing Date: November 6, 2007 at 11:00 A.M.

**OBJECTION OF THE UNITED STATES TRUSTEE TO THE DEBTORS’
APPLICATION, PURSUANT TO 11 U.S.C. §§ 327(e), 328 AND 330, FOR APPROVAL
OF EMPLOYMENT OF BOIES, SCHILLER & FLEXNER LLP AS SPECIAL
LITIGATION COUNSEL TO THE DEBTORS
NUNC PRO TUNC TO THE PETITION DATE
(DOCKET ENTRY # 115)**

In support of her objection to the Debtors’ application, pursuant to 11 U.S.C. § 327(e), 328 and 330, for approval of the employment of Boies, Schiller & Flexner LLP (“BSF”) as special litigation counsel to the Debtors nunc pro tunc to the Petition Date (the “Application”), Kelly Beaudin Stapleton, United States Trustee for Region 3 (“U.S. Trustee”), by and through her counsel, avers:

INTRODUCTION

1. Under (i) 28 U.S.C. § 1334, (ii) (an) applicable order(s) of the United States District Court for the District of Delaware issued pursuant to 28 U.S.C. § 157(a), and (iii) 28 U.S.C. § 157(b)(2), this Court has jurisdiction to hear and determine the Application and this objection.

2. Under 28 U.S.C. § 586(a)(3)(I), 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.” This duty is part

of the U.S. Trustee's 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 U.S. Trustee has standing to be heard on the Application and the issues raised in this objection.

GROUND/BASES FOR RELIEF

4. The U.S. Trustee objects to the Application on the grounds identified below.

Scope of Employment Needs to Be Limited

5. 11 U.S.C. § 327(e) ("Section 327(e)") of the Bankruptcy Code states that a chapter 11 debtor in possession¹ may employ,

with the court's approval, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed. (Emphasis added).

6. Section 327(e) prohibits special counsel from representing the Debtors in conducting their cases. See In re Neuman, 138 B.R. 683, 686 (S.D.N.Y. 1992) ("[I]t is clear both from the language of § 327(e) and from the framework of § 327 more generally that, even if there is a special purpose, it is crucial that the appointment not be part of the trustee's general duty of conducting the

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Although Section 327(e) refers to the "trustee," pursuant to 11 U.S.C. § 1107 most of the rights, powers, and duties of a trustee in a chapter 11 case are conferred upon the debtor in possession. This includes the trustee's power to employ professional persons under 11 U.S.C. § 327. See United States Trustee v. Price Waterhouse, 19 F.3d 138, 141 (3d Cir. 1994); see also Fed. R. Bankr. P. 9001(10) ("Trustee" includes a debtor in possession in a Chapter 11 case.).

case.”). Accordingly, BSF’s proposed scope of employment (described in paragraph 9 of the Application) should be narrowed to reflect that the firm will not be addressing bankruptcy issues before this Court or be otherwise involved in conducting these cases.

Rule 2014(a) Disclosures Need to Be Made

7. In paragraph 10 of his declaration in support of the Application, Stuart H. Singer, Esquire did not disclose BSF’s “connections” as required by Federal Rule of Bankruptcy Procedure 2014(a). This Court should not rule on the Application until those disclosures are made. The U.S. Trustee reserves the right to amend or supplement this objection at or prior to the hearing in light of subsequent disclosures by BSF under Rule 2014(a).

Amount of Monies Held by BSF and Status Thereof Needs to Be Clarified

8. The Application suggests that BSF is holding monies previously paid to the firm by the Debtors pursuant to paragraphs a, b, and/or c (pages 1-2) of the October 31, 2004 engagement letter (appended as Exhibit A to the Application). The amount of those monies needs to be disclosed, as well as the Debtors’/BSF’s position as to whether those funds are retainer funds which are property of the Debtors’ estates.

Fees Need to Be Subject to Review Under Standard Employed in 11 U.S.C. § 330(a)

9. The fees payable to BSF (including fees payable pursuant to a Litigation Recovery or a Transaction Recovery) need to be subject to review by this Court under the standard set forth in 11 U.S.C. § 330. More specifically, the compensation terms of the October 31, 2004 engagement letter should not be “pre-approved” under the standard identified in 11 U.S.C. § 328(a).

Retention, Compensation-Sharing Provisions of Engagement Letter

10. The engagement letter provides for BSF's employment of counsel to assist it with the litigation matters and the sharing of monies received from the Debtors with other firms, including certain professionals that have been (or are proposed to be) retained by the Debtors' estates. The U.S. Trustee is reviewing how those provisions intersect with the Bankruptcy Code's provisions governing employment of professionals and prohibiting fee sharing (see 11 U.S.C. §§ 327, 504) and will report to the Court regarding her position on these provisions at or before the hearing.

Disputes Related to Employment Subject to Bankruptcy Court Jurisdiction

11. On page 5 of the engagement letter, there is a provision for submission of disputes between the parties to arbitration. Consistent with this Court's prior guidance, in the event that the Application is approved, disputes relating to BSF's employment by the Debtors must be submitted to the jurisdiction of this Court in the first instance. See In re United Cos. Fin. Corp., 241 B.R. 521 (Bankr. D. Del. 1999).

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CONCLUSION

WHEREFORE the U.S. Trustee requests that this Court issue an order denying the Application or granting other relief consistent with this objection.

Respectfully submitted,

**KELLY BEAUDIN STAPLETON
UNITED STATES TRUSTEE**

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Date: November 2, 2007