

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

*In re* : Chapter 11  
FORWARD FOODS LLC, :  
Debtor. : Case Number 09-10545 (KJC)  
:

Hearing Date: March 18, 2009 at 2:00 P.M.

**OBJECTION OF THE UNITED STATES TRUSTEE TO THE  
DEBTOR'S APPLICATION PURSUANT TO SECTION 327(a) OF THE BANKRUPTCY  
CODE AND BANKRUPTCY RULE 2014 FOR AN ORDER AUTHORIZING THE  
RETENTION AND EMPLOYMENT OF BENESCH, FRIEDLANDER, COPLAN &  
ARONOFF LLP AS ATTORNEYS FOR DEBTOR AND DEBTOR IN POSSESSION  
(DOCKET ENTRY # 17)**

In support of her objection to the Debtor's application pursuant to section 327(a) of the Bankruptcy Code and Bankruptcy Rule 2014 for an order authorizing the retention and employment of Benesch, Friedlander, Coplan & Aronoff LLP ("Benesch") as attorneys for the Debtor and Debtor in possession (the "Application"), Roberta A. DeAngelis, Acting 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.

2. Under 28 U.S.C. § 586(a)(3)(I), the U.S. Trustee 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." The

U.S. Trustee has a corresponding duty to review applications filed under 11 U.S.C. § 1103. *See, e.g., In re Calabrese*, 173 B.R. 61 (Bankr. D. Conn. 1994). 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 U.S. Trustee 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 U.S. Trustee as a "watchdog").

3. Under 11 U.S.C. § 307, the U.S. Trustee has standing to be heard on the Application.

#### **GROUND/BASIS FOR RELIEF**

4. In paragraph 12 of the declaration of Bradford J. Sandler in support of the Application (the "Sandler Declaration"), Sandler states:

During the 90 days prior to the commencement of this case, BFC&A was paid approximately \$48,694.40 for current legal services provided to the Debtor, representing (1) \$10,997.50 in the review and evaluation of a composition agreement as an alternative to the bankruptcy filing and (2) \$37,696.90 in negotiating the settlement with [Next Proteins, Inc.]. *These amounts do not include amounts incurred in the preparation of the necessary first-day documents and pleadings.* Such amount does not include a security retainer in the amount of \$75,000, \$25,000 of which was received on February 12, 2009, and \$50,000 of which is to be received upon entry of an interim order approving the DIP Facility. The source of such payments presently held by BFC&A was the usual operating revenues of the Debtor. (Emphasis added).

5. In paragraph 6 of the Sandler Declaration, Sandler states that “[e]xcept as otherwise set forth herein, to the best of my knowledge the partners, of counsels, and associates of [Benesch] . . . are ‘disinterested persons,’ as that term is defined in section 101(14) of the Bankruptcy Code, as modified by section 1107(b) of the Bankruptcy Code . . . .” (Emphasis added).

6. Upon information and belief, Benesch has a pre-petition claim for services provided in the approximate amount of \$95,000 and a pre-petition claim for expenses in the approximate amount of \$3,200.

7. 11 U.S.C. § 327(a) provides:

Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

8. The term "disinterested person" is defined in part as a person who "is not a creditor . . . ." 11 U.S.C. § 327(a).

9. An "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor" is a "creditor." 11 U.S.C. § 101(10)(A).

10. As defined in the Bankruptcy Code, the term "claim" means:

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5). In drafting section 101(5) of the Code, Congress "intended . . . to adopt the broadest available definition of 'claim.'" *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991) (citations omitted); see *United States Trustee v. First Jersey Sec., Inc. (In re First Jersey Sec., Inc.)*, 180 F.3d 504, 509 (3d Cir. 1999) ("[u]nder th[e] broad definition of claim [in section 105(a) of the Code], 'all legal obligations of the debtor, no matter how remote or contingent, will be able to be

dealt with in the bankruptcy case.”) (quoting Senate Report at 22, 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5808). The term “claim” is “construed broadly to permit debtors to meet all of their legal obligations in bankruptcy and to enable holders of claims to participate in bankruptcy proceedings.” *Air Line Pilots Ass’n v. Continental Airlines (In re Continental Airlines)*, 125 F.3d 120, 132 (3d Cir. 1997) (citations omitted).

11. Upon information and belief, the Debtor seeks an order of this Court permitting the Debtor to employ Benesch and, at the same time, permitting the firm to seek payment for its pre-petition claim *after* the employment order is entered. Apparently, the Debtor and/or Benesch believe(s) that the fact that the services which are the subject of the pre-petition claim were “bankruptcy preparation” services gives the firm a right to be paid for the services. The plain language of the Bankruptcy Code does not permit the Debtor to employ Benesch if it wants to seek payment of its pre-petition claim. Specifically, the statutory definitions of “creditor” and “claim” do not except pre-petition claims for bankruptcy preparation services from the “disinterestedness” requirement – Benesch must not be asserting *any* pre-petition claims in order to be eligible for employment by the chapter 11 estate. *See United States Trustee v. Price Waterhouse*, 19 F.3d 138, 142 (3d Cir. 1994) (“If it is thought that Section 327(a) should allow trustees and debtors in possession under some circumstances to employ professionals who are not ‘disinterested,’ an amendment of that provision should be sought from Congress.”).

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**CONCLUSION**

WHEREFORE the U.S. Trustee requests that this Court issue an order denying the Application.

Respectfully submitted,

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

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Date: March 16, 2009