

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF RHODE ISLAND

IN RE

UTGR, INC. d/b/a TWIN RIVER, et al,
Debtor.

CASE NO: 09-12418

Chapter 7

OBJECTION OF THE UNITED STATES TRUSTEE TO DEBTORS'
MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE
RETENTION AND COMPENSATION OF PROFESSIONALS
UTILIZED IN THE ORDINARY COURSE OF BUSINESS

Pursuant to 28 U.S.C. § 586(a)(3)(H) and 11 U.S.C. §§ 307, 327 and, 330, the United States Trustee objects to the Debtors' motion for entry of an order authorizing the retention and compensation of professionals utilized in the ordinary course of business (Doc. #93) ("Motion").

In support thereof the United States Trustee says:

1. UTGR, Inc. d/b/a Twin River, et al ("Debtors") filed voluntary petitions on June 23, 2009.
2. The Motion seeks authority to employ seven separate sets of professionals including law firms and accounting firms without the necessity of complying with 11 U.S.C. §§327(a) or 330. The Debtors assert in the Motion that it would be "impracticable and inefficient for the Debtors and their legal advisors to prepare and submit individual applications and proposed retention orders for each OCP." Motion at page 4.
3. The relief requested would allow the Debtors to pay the lesser of \$35,000 per month or \$300,000 in aggregate to each professional covered by the Motion. The Motion states that some of the professionals may hold unsecured claims against the Debtors.

4. A trustee or debtor in possession must seek prior Court approval before employing professionals. “Prior approval is to be preferred because it permits the bankruptcy court to supervise the administration of the estate more closely, and minimizes the chance that the court will be confronted with a *fait accompli*.” In re Jarvis, 53 F.3d 416, 420 (1st Cir. 1995).

5. A debtor in possession assumes the rights and powers of a trustee per 11 U.S.C. §§323(a)¹ and 1107(a)² and, therefore, is a fiduciary of “the estate and its constituents,” including creditors. In re DN Associates, 144 B.R. 195, 198 199 (Bankr. D. Me. 1992), *aff’d*, 3 F.3d 512, 514 - 515 (1st Cir. 1993); *see* Commodity Futures Trading Com’n v. Weintraub, 473 U.S. 343, 354 (1985); Rome v. Braunstein, 19 F.3d 54, 58 (1st Cir. 1994). Section 327(a) of the bankruptcy code authorizes a debtor in possession, subject to court approval,³ to retain one or more professional persons to assist it in fulfilling its fiduciary duties, provided that the person: 1) does not represent an interest adverse to the estate; and 2) is disinterested. Rome v. Braunstein,

¹Section 323(a) provides:

The trustee in a case under this title is the representative of the estate.

²Section 1107(a) provides:

a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and the powers, and shall perform all the functions and duties . . . of a trustee serving in a case under this chapter . . .

³ The Code accords professionals priority in payment for fees and expenses ahead of the claims of unsecured creditors as an administrative expense. *See* 11 U.S.C. §§ 330(a) and 503(b); In re DN Associates, 144 B.R. at 198. Accordingly, bankruptcy courts control the professional employment process in order to manage costs. *See* In re Peoples Sav. Corp., 114 B.R. 151, 155 (Bankr. N.D. Ill. 1990); In re Rusty Jones, Inc., 134 B.R. 321, 333 (Bankr. N.D. Ill. 1991) (“every dollar spent on [professional] fees results in a dollar less that is available to the estate and its creditors.”) “Only those professionals whose employment is authorized by the court under Section 327 or 1103 may be compensated under Section 330.” Grabill Corp. v. Pelliccioni, 135 B.R. 835, 839 (N.D. Ill. 1991).

19 F.3d at 57 -58.⁴

6. Section 327(b) does contain an exception for debtors who regularly employ professional persons on salary. As the Debtors' motion makes clear however, the professionals that are the subject of the Motion are not on salary. Canons of statutory construction require that "when statutory language is clear and unambiguous it must ordinarily be followed." United State Trustee v. Price Waterhouse, 19 F.3d 138, 141 (3d Cir. 1994), *citing* Rake v. Wade, 508 U.S. 464 (1993). The Court "must presume that a legislature says in a statute what it means and means what it says there." Connecticut Nat'l. Bank v. Germain, 503 U.S. 249, 253 - 254 (1992). "The plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application will produce a result demonstrably at odds with the intentions of its drafters." United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 243 (1989); *accord*, In re Columbia Gas Systems, Inc., 33 F.3d 294, 300 (3d Cir. 1994). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" Connecticut Nat'l. Bank v. Germain, 503 U.S. at 254 (citations omitted).

⁴ "[P]rofessionals performing duties for the estate are held to high fiduciary standards, and act as officers of the court . . ." In re EWC, Inc., 138 B.R. 276, 279 (Bankr. W.D. Okla. 1992).

WHEREFORE, the United States Trustee prays that the Court enter an order denying the Motion, and granting such other relief as justice demands.

Respectfully submitted,

PHOEBE MORSE
United States Trustee

Dated: July 7, 2009

By: /s/ Gary L. Donahue

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CERTIFICATION OF SERVICE

I hereby certify that on July 9, 2009, I electronically filed the above Objection with the Clerk of the Bankruptcy Court for the District of Rhode Island using the CM/ECF System. The following participant has received notice electronically.

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