

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

)	
In re:)	Case No. 02-43619
)	jointly administered
COLD METAL PRODUCTS, INC. et al)	
)	Chapter 11
)	
Debtors)	Chief Judge William T. Bodoh
)	

**OBJECTION OF THE UNITED STATES TRUSTEE TO
MOTION OF DEBTORS AND DEBTORS IN POSSESSION FOR
AN ORDER AUTHORIZING THE NUNC PRO TUNC RETENTION,
EMPLOYMENT AND PAYMENT OF AARQUE MANAGEMENT
AS A PROFESSIONAL IN THE ORDINARY COURSE OF BUSINESS**

Saul Eisen, United States Trustee for Region 9, respectfully offers the following objection regarding the Motion of Debtors and Debtors in Possession for an Order Authorizing the *Nunc Pro Tunc* Retention, Employment and Payment of Aarque Management as a Professional in the Ordinary Course of Business (Aarque Application). Through the Aarque Application, debtors seek Court approval for the retention of Aarque Management (Aarque) to provide tax services including preparing and filing all Federal, State, City and Canadian tax returns for the debtors and related non-debtor entities. The United States Trustee objects based on the following: (1) Aarque is a professional subject to retention under 11 U.S.C. § 327(a); (2) Aarque is the largest shareholder of Cold Metal Products and shares common management with the debtors rendering it not disinterested under the standards of 11U.S.C. § 101(14)(A), § 101(31)(B)(iii) and § 101(31)(E); and (3) debtors have not justified retention *nunc pro tunc* to the date of filing, August 16, 2002. In support of his objection, the United States Trustee offers the following:

Factual Background and Procedural History

1. On August 16, 2002, Cold Metal Products, Inc. and Alkar Steel Corporation (debtors) filed voluntary petitions for relief under chapter 11. Debtors are continuing in the possession of their property and operating their businesses as debtors in possession consistent with 11 U.S.C. §§ 1107 and 1108.

2. Debtors describe their business activity as involving the processing of flat-rolled steel and the operation of service centers. In addition to the two companies operating under the protection of chapter 11, debtors have an affiliate in Canada. This company is organized under Canadian law and is not a debtor subject to chapter 11 relief.

3. Immediately prior to filing for relief under chapter 11, debtors closed two of their three processing facilities in the United States. On August 15, 2002, debtors shut down processing facilities in Youngstown, Ohio and Indianapolis, Indiana. Debtors kept open operations in Ottawa, Ohio. Recently, debtors obtained Court authority to reopen the plant in Indianapolis, Indiana under an agreement reached with the United Steel Workers of America.

4. At the time of filing, debtors hoped to propose a viable, stand-alone plan of reorganization. For their first three months of operations, debtors report a net operating loss of \$2,284,719.00. Debtors now concede they must pursue either a sale of assets or capital raising transaction.

5. Debtors indicate their desire to retain Aarque to provide the following tax-related services:

- Preparation of Federal and State income tax returns;
- Addressing United States and Canadian cross-border tax issues;
- Review of Canadian tax returns for issues related to United States taxes;
- Managing and addressing the day-to-day details of the Cold Metal IRS audit for the 3/31/00 and 3/31/01 years involving both domestic and Canadian

issues;

- Property tax reviews and appeals;
- Coordinating sales tax filings;
- Handling IRS and general tax questions;
- Addressing payroll taxes and tax issues related to employee benefits and pensions.

Aarque Application, ¶ 2 at 2. Reviewing the list of services supplied by debtors, it is apparent they will rely on Aarque to address all tax-related questions and requirements. Debtors acknowledge Aarque performed these services prepetition both for the debtors and non-debtor entities. Aarque Application, ¶¶ 3-6 at 2-3. It is the understanding of the United States Trustee that Aarque exists as an insular entity performing managerial and tax functions solely for the group of Cold Metal Product companies operating in the United States and Canada. Debtors indicate that Aarque is the largest shareholder of Cold Metal Products. Aarque Application, ¶ 10 at 5. Further, Heidi Nauleau serves as a principal for both the debtors and Aarque.

6. Debtors seek to retain Aarque as an ordinary course professional, *nunc pro tunc*, to the date of filing, August 16, 2002.

7. The Court has jurisdiction to hear and decide concerns regarding the Aarque Application under 28 U.S.C. § 1334. The Aarque Application and any objections thereto constitute core proceedings as defined under 28 U.S.C. § 157(b).

Legal Standard For Retention:

8. Section 327(a) provides in part:

[T]he 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.

Under this section, the selection of a professional must be in the best interests of the estate. In re Doors and More, Inc., 126 B.R. 43, 45 (Bankr. E.D. Mich. 1991).

9. Section 328(a) of the Bankruptcy Code indicates retention of a professional person under 11 U.S.C. 327 may be on any reasonable terms and conditions of employment.

Aarque Is A Professional Person Subject To Retention Under 11 U.S.C. § 327(a)

10. Although the Bankruptcy Code does not expressly define who is a professional person, case law indicates that professionals subject to retention include individuals or entities whose duties centrally impact upon administration of the debtor's estate. In re Marion Carefree Limited Partnership, 171 B.R. 584, 588 (Bankr. N.D. Ohio 1994); In re United Color Press, Inc., 129 B.R. 143, 145 (Bankr. S.D. Ohio 1991)(professionals are those who play a "central and intimate role in the reorganization of the debtor's estate.") In determining who is a professional, courts examine the degree of autonomy such person or entity is given in performing the duties called for by the retention application. In re Riker Industries., Inc., 122 B.R. 964, 973 (Bankr. N.D. Ohio 1990) (stating that a person who plays a central role in the administration of the estate is a professional person). Courts have concluded that financial advisors fit this category and must be retained under 11 U.S.C. § 327(a). Stahl v. Bartley Lindsay Co. (In re Bartley Lindsay Co.), 137 B.R. 305, 309 (D. Minn. 1991) (financial advisor and workout consultant is considered a professional person subject to retention).

11. Debtors concede that Aarque will provide tax advice and be responsible for

preparing all tax forms. Services of Aarque will extend to the debtors and their Canadian affiliate. Aarque will navigate the debtors through the requirements of the Internal Revenue Service and all Cities and States in which the companies conduct business. The services of Aarque will extend beyond domestic tax issues. Debtors will rely on Aarque to address the impact and requirements of Canadian law. As a requisite of employment, Aarque will be called upon to assess and allocate tax liabilities and benefits between the various companies operating under the ownership of Cold Metal Products, Inc. and Cold Metal Products, Ltd. Determinations made by Aarque concerning income, expenses, depreciation and allocation will impact the bankruptcy estates of both Cold Metal Products and Alkar Steel. The breadth, detail, import and centrality of the services rendered by Aarque meet the definition of professional person. Accordingly, debtors must seek to retain Aarque not as an ordinary course professional, but one subject to the standards of 11 U.S.C. § 327(a).

Aarque Is Not Disinterested

12. Section 327(a) of the Bankruptcy Code provides that the trustee, or debtor in possession, may employ an attorney who does not hold an interest adverse to the estate and is disinterested. Courts have applied a literal and strict interpretation of the standards for retention outlined in 11 U.S.C. § 327(a). To the extent an applicant fails to be disinterested or possesses an adverse interest, retention must be denied. Michel v. Federated Dept. Stores, Inc. (In re Federated Dept. Stores, Inc.), 44 F.3d 1310 (6th Cir. 1995); In re Eagle-Picher Industries, Inc., 999 F.2d 969 (6th Cir. 1993).

13. Section 101(14)(A) of the Bankruptcy Code indicates that “disinterested person” means a person who “is not a creditor, an equity security holder, or an insider” of the debtors. Debtors acknowledge that Aarque is the largest shareholder of Cold Metal Products. Aarque Application, ¶ 10 at 5. As an equity security holder, Aarque fails to be a disinterested person and cannot be retained

under the standards of 11 U.S.C. § 327(a).

14. Section 327(a) also prohibits the retention of insiders. See 11 U.S.C. § 101(14)(A). The Bankruptcy Code defines insider to include either a person in control of the debtor or an affiliate of the debtor. 11 U.S.C. §§ 101(31)(B)(iii) and 101(31)(E). As largest shareholder of Cold Metal Products, Aarque meets the definition of insider, being both an entity in control and an affiliate of the debtors. See 11 U.S.C. § 101(2)(defining affiliate). In addition, Aarque shares common management with the debtors. Heidi Nauleau is a principal both of Aarque and the debtors.

15. Based on the literal language of the Bankruptcy Code, Aarque fails to be disinterested and cannot be retained under 11 U.S.C. § 327(a).

Retention Nunc Pro Tunc

16. Debtors ask the Court to authorize the retention of Aarque *nunc pro tunc* as of the petition date. In the Aarque Application, debtors fail to articulate any reason for this request.

17. Retroactive, or *nunc pro tunc*, approval of retention should be granted only under extraordinary circumstances. In re Jarvis, 53 F.3d 416, 421 (1st Cir. 1995); In re Marion Carefree Limited Partnership, 171 B.R. 584 (Bankr. N.D. Ohio 1994); In re Platinum Power Co., 105 B.R. 381 (Bankr. N.D. Ohio 1989). Extraordinary circumstances warranting retroactive appointment do not include “the mere neglect of the professional who was in a position to file a timely application.” In re Platinum Power, 105 B.R. at 384 (citing In re Arkansas Company, Inc., 798 F.2d 645, 650 (3d Cir. 1986)).

18. The Application fails to identify any compelling circumstances warranting the approval of retention as of the date of filing of these chapter 11 cases.

19. Debtors have had ample opportunity to comply with the substantive and procedural

requirements of the Bankruptcy Code at the outset and of these chapter 11 cases. Within ten days of the petition date, debtors filed applications to retain three professionals. No compelling reason is apparent why debtors could not have sought the retention of Aarque at the outset of this case along with other professionals.

WHEREFORE, the United States Trustee requests that the Court deny the Aarque Application and grant such further relief as may be just and proper.

Respectfully submitted,

**Saul Eisen
United States Trustee, Region 9**

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Certificate of Service

I, Andrew R. Vara, hereby certify that a copy of the foregoing Objection was served by regular U.S. Mail, postage prepaid, upon the following parties on this 30th day of December, 2002:

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