

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

<i>In re</i>	:	
	:	Chapter 11
BONUS STORES, INC.	:	
	:	Case Number 02-12284(MFW)
Debtor.	:	
	:	Hearing Date: 8/18/03 at 10:30 a.m.
	:	Objection Deadline: 8/11/03 at 4:00 p.m.
	:	Extended to 8/14/03 at 4:00 p.m.

**UNITED STATES TRUSTEE’S OBJECTION TO DEBTOR’S APPLICATION
FOR ORDER AUTHORIZING EMPLOYMENT AND RETENTION OF
ASSET DISPOSITION ADVISORS LLC AS ASSET DISPOSITION
ADVISORS AND CONSULTANTS (D.I. 17)**

In support of her Objection to the Debtor’s Application for an Order Authorizing the Employment and Retention of Asset Disposition Advisors LLC as Asset Disposition Advisors and Consultants (the “Application”), Roberta A. DeAngelis, the Acting United States Trustee for Region 3 (“UST”), by undersigned counsel, avers as follows:

1. This Court has jurisdiction to hear and determine the above-referenced Objection.
2. Pursuant to 28 U.S.C. § 586(a)(3)(H), the UST is charged with monitoring applications filed under section 327 of the Bankruptcy Code “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 UST’s overarching responsibility to enforce the bankruptcy 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. Pursuant to 11 U.S.C. § 307, the UST has standing to be heard with regard to the above-referenced Objection.

4. By its Application, the Debtor seeks authority to employ and retain Asset Disposition Advisors (“ADA”) as its asset disposition advisors and consultants pursuant to Section 327(a) of the Bankruptcy Code.

5. Employment under 11 U.S.C. § 327(a) requires that the professional person sought to be employed must “not hold or represent an interest adverse to the estate” and must further be a “disinterested person.” 11 U.S.C. § 101(14)(E) provides in pertinent part that a “disinterested person” is a person that “does not have an interest materially adverse to the interest of the estate ... by reason of any *direct or indirect* relationship to, connection with, or interest in, the debtor ... or for any other reason” (emphasis added).

6. In evaluating whether a professional “holds or represents an interest adverse to the interest of the estate,” it is clear that actual conflicts of interest are *per se* disqualifying. Additionally, while potential conflicts do not disqualify a professional *per se*, retention of a professional with potential conflicts is disfavored. *See In re Marvel Entertainment Group, Inc.*, 140 F.3d 463, 476 (3d Cir. 1998)(*quoting In re BH&P, Inc.*, 949 F.2d 1300, 1316-17 (3d Cir. 1991)).

7. ADA represents or has represented interests adverse to the estate and is not a disinterested person.

(a) The Application discloses that in addition to performing pre-petition services *for the Debtor* from and after July 11, 2003, ADA also performed services *for Fleet Retail Finance, Inc.* (“FRFI”), the Debtor’s secured lender, through and including

July 10, 2003; those services related specifically to the Debtor. In fact, the Affidavit of Barry Gold annexed to the Application (“Gold Affidavit”) discloses that FRFI employed

ADA:

in connection with the Debtor’s financial difficulties, and to assist FRFI, and the Debtor, in assessing matters affecting FRFI’s collateral, identifying underperforming locations, and in assisting said parties in formulating and implementing a down-sizing program geared towards generating maximum realizable asset values. In the period through and including July 10, 2003, ADA assisted FRFI and the Debtor in the formulation and implementation and inventory liquidation program affecting 214 locations (which store closing program is the subject of various “first day” motions filed by the Debtor).

Gold Affidavit, ¶ 6d.^{1/2}

(b) The Gold Affidavit further discloses that Paul Traub, a partner in the law firm of Traub, Bonacquist & Fox, LLP, is also a principal of ADA. TB&F is the Debtor’s proposed bankruptcy co-counsel; indeed, TB&F’s engagement letter with the Debtor indicates that Mr. Traub is the lead TB&F partner on the engagement.

(c) The engagement letter between the Debtor and TB&F (attached as an exhibit to the Debtor’s application to employ TB&F) is dated July 9, 2003 but recites that the engagement is “effective as of July 3, 2003.” Thus, while TB&F was performing services for the Debtor, ADA was simultaneously performing services for FRFI.

(d) FRFI’s interests are structurally and inherently adverse to those of the Debtor and the estate. This is axiomatic, even though FRFI and the Debtor may share some common goals and may not disagree openly on certain issues. FRFI’s interests are

^{1/2}Upon inquiry by counsel for the UST, Mr. Gold disclosed that “ADA and FRFI did not have a formal written engagement agreement in place covering ADA’s performance of services.” Thus, the precise terms and scope of ADA’s engagement by FRFI are unknown.

to protect its collateral, assert the broadest lien rights possible and recover its claims in full; FRFI is not burdened by duties to any other creditor. The Debtor, in contrast, has fiduciary obligations to multiple creditor constituencies; it has an interest, on behalf of the estate, in minimizing the reach of FRFI's control and in preserving the availability of assets for distribution to unsecured creditors. These interests remain adverse even if the Debtor has agreed to waive any direct challenges to FRFI's liens.

(e) Based on the information set forth in the Gold and Traub Affidavits, ADA cannot provide the impartial and independent advice necessary to assist the Debtor in performing its fiduciary duties to the estate; such advice includes, among other things, whether and how to implement the down-sizing program that ADA formulated while working for FRFI.

(f) Despite the July 10, 2003 conclusion of ADA's engagement by FRFI, continuing obligations to FRFI (*e.g.*, to maintain the confidentiality of information) may also prevent ADA from providing the impartial and independent advice to which the estate is entitled.

(g) ADA's lack of disinterestedness cannot be cured, nor can it be waived. *In re American Printers & Lithographers*, 148 B.R. 862, 867 (Bankr. N.D. Ill. 1992).

(h) Even granting ADA the benefit of every possible doubt and viewing the Application in the light most favorable toward permitting employment and retention of ADA, the Application demonstrates that ADA cannot meet the requirements of Section 327(a) that are a *sine qua non* of professional retention. Accordingly, the proposed

employment of ADA should be denied. *See generally In re Marvel Entertainment Group, Inc., supra.*

8. The UST reserves the right to further amend this Objection to assert such other grounds as may become apparent upon further investigation and/or discovery.

9. The UST leaves Debtors to their burdens of proof and reserves all discovery rights.

WHEREFORE the UST requests that this Court issue an order denying the Application and/or granting such other relief that this Court deems appropriate.

Respectfully submitted,

ROBERTA A. DeANGELIS
ACTING UNITED STATES TRUSTEE, REGION 3

Dated: August 13, 2003

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