

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

<i>In re</i>	:	Chapter 11
	:	
BUILDING MATERIALS	:	
HOLDING CORPORATION, <i>et al.</i> ,	:	Case Number 09-12074 (KJC)
	:	(Jointly Administered)
Debtors.	:	
		<b>Hearing Date: July 16, 2009 at 11:00 A.M.</b>

**OBJECTION OF THE UNITED STATES TRUSTEE TO THE  
DEBTORS' MOTION FOR A FINAL ORDER PURSUANT TO SECTIONS 105(a), 363,  
AND 554 OF THE BANKRUPTCY CODE APPROVING (A) PROCEDURES FOR THE  
SALE OF CERTAIN DE MINIMIS ASSETS FREE AND CLEAR OF LIENS, CLAIMS,  
AND ENCUMBRANCES WITHOUT FURTHER COURT APPROVAL, (B) PAYMENT  
OF MARKET RATE BROKERS' AND AUCTIONEERS' COMMISSIONS IN  
CONNECTION WITH THE SALES, AND (C) ABANDONMENT OR DONATION OF  
CERTAIN PROPERTY  
(DOCKET ENTRY # 17)**

In support of the United States Trustee's objection to the Debtors' motion for a final order pursuant to sections 105(a), 363, and 554 of the Bankruptcy Code approving (a) procedures for the sale of certain de minimis assets free and clear of liens, claims, and encumbrances without further court approval, (b) payment of market rate brokers' and auctioneers' commissions in connection with the sales, and (c) abandonment or donation of certain property (the "Motion"), 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)(A), this Court has jurisdiction to hear and determine the Motion.

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). These duties are 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 Motion and the issues raised in this objection.

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

4. 11 U.S.C. § 327(a) states:

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.* (Emphasis added).

5. Through the Motion, the Debtors seek authority to "engage brokers and auctioneers and to pay market rate brokers' and auctioneers' commissions to facilitate the sale of [] real and personal property" that the Debtors have determined to be of de minimis value. Mot. ¶ 12.

6. The word "auctioneer" appears in the text of 11 U.S.C. § 327(a). Notwithstanding the fact that auctioneers and other "professional persons," including property brokers, have to be

employed consistent with 11 U.S.C. § 327(a), the Debtors argued at the “first day” hearing in the above-captioned cases that the prepositional clause at the end of 11 U.S.C. § 327(a) – “to represent or assist the trustee in carrying out the trustee’s duties under this title” – exempts the Debtors from compliance with the statute. Per the Debtors, that prepositional clause authorizes the Debtors to employ and pay, without prior court approval, professional persons whose role is allegedly not central to the cases.

7. “It is axiomatic that statutory interpretation begins with the language of the statute itself.” *Government of Virgin Islands v. Knight*, 989 F.2d 619, 633 (3d Cir. 1993). A statutory language analysis must precede any resort to legislative history or case law as “[t]here is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.” *United States v. Amer. Trucking Ass’n, Inc.*, 310 U.S. 534, 543 (1930). Here, the preposition “to” plainly means “for the purpose of,” and the words following “to” – “represent” and “assist” – are descriptive of the services which the identified professionals may provide to the trustee. Therefore, the prepositional clause which the Debtors rely on is descriptive in nature and does not exempt any “professional persons” from the requirements of 11 U.S.C. § 327(a).

8. Further, it is axiomatic that statutory construction should not lead to absurd results. The Debtors’ proffered construction would eliminate an undefined class of professional persons from having to comply with 11 U.S.C. § 327(a) prior to being employed by the Debtors, thereby undercutting the protective function of the Bankruptcy Code’s professional employment regime.

9. The brokers and auctioneers proposed to be employed by the Debtors are

“professional persons” within the meaning of 11 U.S.C. § 327(a). Accordingly, given that the Motion is facially deficient, *see* Fed. R. Bank. P. 2014(a), the Motion should be denied.

**CONCLUSION**

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

Respectfully submitted,

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

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