

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: : Chapter 11
: :
ADVANTA CORP., *et al.* : Case No. 09-13931 (KJC)
: :
Debtors. : Jointly Administered
: :
: **Hearing Date: June 8, 2010 @ 10:00 a.m.**
: **Objections Due: June 1, 2010 @ 4:00 p.m.**
: **(extended for the UST until June 4, 2010 @ 11:00)**
: :
: **Re: Docket No. 529**

**ACTING UNITED STATES TRUSTEE’S OBJECTION TO THE MOTION
PURSUANT TO SECTIONS 105(A) AND 363 OF THE BANKRUPTCY
CODE AUTHORIZING THE EMPLOYMENT OF VARA GLOBAL
FINE ARTS LLC AS ART CONSULTANT**

In support of her Objection to the Motion of Debtor Advanta Shared Services Corp. (“ASSC”), pursuant to sections 105(a) and 363 of the Bankruptcy Code, for authorization to employ Vara Global Fine Arts LLC as art consultant (the “Motion”), Roberta A. DeAngelis, Acting United States Trustee for Region 3 (“U.S. Trustee”), by and through her undersigned counsel, states as follows:

Introduction

1. This Court has jurisdiction to hear and determine this Objection.
2. Pursuant to 28 U.S.C. § 586(a)(3), the U.S. Trustee is charged with administrative oversight of the bankruptcy system in this District. Such oversight is part of the U.S. Trustee’s overarching responsibility to enforce the laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, 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. Under 11 U.S.C. § 307, the U.S. Trustee has standing to be heard on the issues raised by this Objection.

Background

4. On November 9, 2010 (the “Petition Date”), the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtors continue to operate their business and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

5. On November 19, 2009, the U.S. Trustee appointed the Official Committee of Unsecured Creditors (the “Committee”).

6. By the Motion, ASSC seeks authority to retain and employ Vara Global Fine Arts LLC (“VGFA”) pursuant to an engagement agreement dated May 18, 2010. According to the Motion, VGFA will provide exclusive consulting advice and logistical coordination services with respect to the disposition of the Debtors’ corporate art collections and works of lesser value at retail galleries and/or auction houses. According to the Debtors, VGFA will also perform appraisals on certain of the Debtors’ more valuable artwork. ASSC seeks the retention of VGFA under section 363, rather than as a professional under section 327, because it believes the retention of VGFA is within the ordinary course of its business.

Grounds/Basis for Relief

7. Section 327(a) of the Bankruptcy Code provides:

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.

11 U.S.C. § 327 (a).

8. The U.S. Trustee objections to the Motion because VGFA is a professional and should be retained under section 327(a) of the Bankruptcy Code. Because VGFA has not filed an affidavit of disinterestedness, it cannot be determined at this point whether this firm is qualified to serve as a professional of this estate.

9. By the very terms of section 327(a), VGFA is a professional. VGFA will be performing appraisals of certain of the Debtors' artwork and acting similar to an auctioneer with respect to the sale of such artwork. Appraisers and auctioneers are expressly set out in section 327(a) as professionals to be retained by the estate. Therefore, by the terms of section 327(a), VGFA should be retained by the estate.

10. Also, when comparing the scope of services to be performed by VGFA to Judge Farnan's analysis of what constitutes a professional in *In re First Merchants Acceptance Corporation*, 1997 WL 873551 (D. Del.), it is clear that VGFA should be retained under section 327(a).

11. In *First Merchants*, Judge Farnan examined the case law on the subject and adopted a totality of circumstances approach, identifying factors for the court to consider when determining whether or not someone is a professional. The factors include the following:

“(1) whether the employee controls, manages, administers, invests, purchases or sells assets that are significant to the debtor's reorganization,(2) whether the employee is involved in negotiating the terms of a Plan of Reorganization, (3) whether the employment is directly related to the type of work carried out by the debtor or to the

routine maintenance of the debtor's business operations; (4) whether the employee is given discretion or autonomy to exercise his or her own professional judgment in some part of the administration of the debtor's estate, i.e. the qualitative approach, (5) the extent of the employee's involvement in the administration of the debtor's estate, i.e. the quantitative approach; and (6) whether the employee's services involve some degree of special knowledge or skill, such that the employee can be considered a 'professional' within the ordinary meaning of the term." [footnotes omitted]. 1997 WL 873551 at page 3.

12. Applying the factors to the proposed retention in that case, Judge Farnan found the firm to be a professional requiring retention under Bankruptcy Code Section 327(a). In reaching this conclusion, he found that the firm would be intimately involved in the management of the debtor's receivables, its primary asset: "...and in accomplishing tasks that are within the fiduciary duties undertaken by a debtor-in-possession." (1997 WL 873551 at page 3).

13. In this case, the Debtors cannot credibly argue that the retention of VGFA is in the ordinary course of business. The Debtors were in the banking and credit card business. The Debtors were not in the business of appraising and selling artwork. It is true, however, that VGFA is playing an integral role in the liquidation of assets that are significant to the Debtors' bankruptcy proceeding. Similar to what Judge Farnan found in *First Merchants*, VGFA will be intimately involved in the administration of significant assets of this estate and in accomplishing tasks that are within the fiduciary duties of a debtor-in-possession.

14. When comparing some of the other factors set out in *First Merchants*, it is clear that VGFA is a professional. VGFA has discretion in both negotiating with the art houses and galleries and performing appraisals of artwork. VGFA will be the direct point of contact in these negotiations. Also, as noted, VGFA is intimately involved in the administration of the Debtors' estate, which is the liquidation of assets. VGFA does not perform services that are directly related to the type of work carried out by the Debtors. Finally, VGFA certainly has a specialized skill in the art business

and can be classified as a professional within the ordinary meaning of that term. For all of these reasons, VGFA should be retained as a professional under section 327(a) of the Bankruptcy Code.

15. The U.S. Trustee reserves and any all rights, remedies and obligations to, *inter alia*, complement, supplement, augment, alter, substitute and/or modify this Objection and to take any further action as may be required or to conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become apparent.

_____ WHEREFORE, the Acting United States Trustee respectfully requests this Court to issue a ruling denying the Motion, and award such other relief as this Court deems appropriate under the circumstances.

Respectfully submitted,

ROBERTA A. DEANGELIS
Acting United States Trustee

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Dated: June 4, 2010

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CERTIFICATE OF SERVICE

IT IS CERTIFIED that on the 4th day of June, 2010, the Acting United States Trustee's Objection to the Motion Pursuant to Sections 105(a) and 363 of the Bankruptcy Code, Authorizing the Employment of Vara Global Fine Arts LLC as Art Consultant, was caused to be served electronically and/or by placing copies thereof in the United States Mail, postage prepaid, addressed as follows:

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