

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

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Re: U.S. Office Products, Inc., et al.
Case No. 01-646 (PJW)

Dear Counsel:

This is the Court's ruling with respect to the Debtors' application to retain PricewaterhouseCoopers LLP ("PwC") as independent accountants. (Doc. # 27). For the reasons briefly

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discussed below, I will grant the application subject to certain limitations.

The petition of U.S. Office Products Company, et al. ("USOP") was filed on March 5, 2001 and the retention application was filed on March 7, 2001. The United States Trustee ("U.S. Trustee") objects to the retention application on the grounds that PwC is not a "disinterested" person as contemplated by § 327(a). PwC has served as the independent accountants for USOP since 1994. The alleged lack of disinterestedness arises out of the fact that PwC has performed similar services for Corporate Express, Inc. ("Corporate Express") for some number of years and shortly before the petition date USOP and Corporate Express executed an Asset Purchase Agreement whereby USOP agreed to sell to Corporate Express its office supplies business. PwC performed services for Corporate Express in connection with that Agreement. On April 24, 2001 the Court approved the Asset Purchase Agreement and the transaction closed on May 14, 2001. On April 24, 2001 the Court held an evidentiary hearing on the retention application. Thereafter the parties submitted post-hearing memoranda in support of their respective positions.

USOP takes the position that PwC's services for Corporate Express does not present a disqualifying conflict because (1) the PwC services rendered in connection with the Asset Purchase Agreement did not constitute a "representation" of Corporate

Express's interests and (2) the services were concluded as of March 23, 2001. In obvious recognition of the problem involved here, USOP, Corporate Express and PwC entered into a letter agreement dated April 24, 2001 (the "April 24 letter") which addresses how PwC would function for both seller and buyer in resolving certain remaining accounting/financial issues related to the consummated transaction. PwC has not begun that work and USOP advises that PwC will not proceed with that work in accordance with the guidelines set forth in the April 24 letter unless that arrangement is approved by this Court.

With respect to USOP's assertion that PwC did not and does not represent the interest of Corporate Express in the asset purchase transaction, USOP argues that as "independent auditors" PwC has a role of independence and does not assume a role of representation or advocacy for Corporate Express's interests. In its post-hearing memorandum USOP states this position as follows:

The record shows that PwC did not, in fact, "represent" Corporate Express or its interests. Both USOP and Corporate Express were represented by investment bankers and counsel in the transaction. PwC's role was merely to gather, synthesize and present facts for Corporate Express to evaluate as part of its due diligence. [p. 2] [Emphasis added.]

At the hearing one of the PwC witnesses repeatedly spoke in terms of PwC's role as simply being "fact gatherers".

In response, the U.S. Trustee points out that neither § 327(a) nor § 101 (14)(E) speaks in terms of "representation". Furthermore, the U.S. Trustee points to several places in PwC's

affidavit attached to the retention application where PwC speaks in terms of its "representation" of Corporate Express.

I do not buy USOP's argument that PwC was merely acting in some ministerial role of fact gathering in connection with the activities leading up to the execution of the Asset Purchase Agreement. PwC's role on behalf of Corporate Express is appropriately described in paragraph 11 (d) of PwC's affidavit as follows:

Prior to the Debtor's bankruptcy filing, parties that were evaluating making a proposal to purchase some or all of the Debtor's business units retained PwC's Transaction Support group to provide financial due diligence. Affiant respectfully submits that the services performed, or to be performed, by the PwC Transaction Support team on behalf of potential purchasers of business units of USOP do not diminish, compromise or affect PwC's ability to continue to provide financial consulting services to the Debtors during these proceedings. During their involvement, the PwC Transaction Support team had only limited discussions with the PwC Audit team, related to the interpretation of accounting workpapers and had no interaction with the Business Recovery Services team. [Emphasis added.]

This statement clearly shows that PwC was engaged in a due diligence effort on behalf of Corporate Express. Indeed, in the April 24 letter PwC describes its role as having "provided certain due diligence services to [Corporate Express] in connection with its initial consideration of that purchase."

While admittedly, in connection with an asset purchase transaction a CPA firm acting on behalf of a purchaser would not be expected to take the kind of adversarial/negotiator role as that of the purchaser's investment banker and/or its counsel, it seems

clear that the CPA firm's role is not simply one of acting as a clerk performing ministerial functions. In performing the due diligence services for Corporate Express, I believe the conclusion is inescapable that PwC brought to bear its vast experience and knowledge regarding such matters and exercised judgment and discretion in assessing the proposed transaction and in advising Corporate Express with the intent of maximizing Corporate Express's benefit in the transaction. It seems clear that PwC was an active, indeed essential, representative of Corporate Express in seeking the consummation of a transaction which Corporate Express deemed in its best interest. In that context, PwC represented an interest adverse to that of USOP. However, it does appear that since the Asset Purchase Agreement was executed and binding on the parties on the petition date, subject to subsequent court approval, the conflicting interests essentially occurred pre-petition and in any event ceased on March 23, 2001.

A denial of the retention application would cause substantial delay and expense in concluding this liquidating case. It seems to me that a more limited response to the problem is appropriate. From the March 5, 2001 petition date up to March 23, 2001, to the extent PwC performed services for USOP in connection with the consummation of the asset purchase transaction, PwC should be disqualified from being compensated by the estate. Consequently, I will deny PwC any compensation otherwise payable by

USOP for work performed for USOP related to the consummation of the transaction.

With respect to the additional work needed to conclude the open accounting/financial issues pursuant to the procedures set forth in the April 24 letter, the U.S. Trustee appropriately points out that USOP in its post-hearing memorandum effectively acknowledges that in performing services going forward in concluding the transaction, PwC will be serving two different clients--one on the buyer side and one on the seller side. Specifically at page 19 of its post-hearing memorandum, USOP states:

Any contact between USOP's PwC team and Corporate Express's PwC team will be on an arms-length basis as if the teams were from different firms. ...The interaction between the two groups of PwC professionals will be conducted as if they worked for different firms.

I agree with the U.S. Trustee that the fundamental problem here is that the two groups of PwC professionals are not from "different firms". They are from the same firm. Whatever AICPA rules of conduct may authorize for this type of dual representation, I do not believe it is consonant with the disinterestedness requirement of the Bankruptcy Code. Therefore, PwC shall not provide services to USOP in concluding the asset sale transaction. This will result in additional expense to the estate since it will have to retain accounting assistance from another source in concluding the transaction. This solution is similar to those not uncommon

situations where a debtor's lead bankruptcy counsel is conflicted out of a certain matter or transaction and the debtor must retain special counsel to represent the debtor's interest in that matter or transaction.

In conclusion, I will authorize the retention of PwC, provided that (a) PwC shall not be entitled to compensation from USOP for any services performed on behalf of USOP related to the consummation of the asset purchase transaction from the date of March 5, 2001 through March 23, 2001 and (b) PwC is not authorized to perform services on behalf of USOP in completing the work related to the asset purchase transaction pursuant to the April 24 letter or otherwise.

Counsel for USOP should submit an order on notice.

Very truly yours,

Peter J. Walsh

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