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Unsecured Creditors

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:	*	Case No.: 11-31376
HOWREY LLP,	*	Chapter 11
Debtor.	*	Date: February 9, 2012 Time: 1:30 p.m. PST
	*	Dept.: U.S. Bankruptcy Court 235 Pine Street
	*	San Francisco, CA
		Judge: Dennis J. Montali

* * * * * * *

MEMORANDUM OF LAW IN SUPPORT OF OMNIBUS MOTIONS FILED BY THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR REJECTION OF CLIENT ENGAGEMENT AGREEMENTS RELATING TO HISPANIC FARMERS LITIGATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules, Statutes and Other Authorities

TO THE HONORABLE DENNIS J. MONTALI:

The Official Committee of Unsecured Creditors of Howrey, LLP (the "Committee"), respectfully submits this Memorandum in support of the Omnibus Motions Filed by the Official Committee of Unsecured Creditors for Rejection of Client Engagement Agreements Relating to Hispanic Farmers Litigation (collectively, the "Omnibus Motions").[1] In support of the Omnibus Motions, the Committee respectfully represents as follows:

I

INTRODUCTION

Howrey, LLP (the "Debtor") has provided representation to over 700 Hispanic farmers with claims against the United States Department of Agriculture. Approximately 80 of these persons have been named as plaintiffs in a putative class action styled, *Garcia v. Vilsack*, Civ. A. No. 00-2445 (D.D.C.), pending in the U.S. District Court for the District of Columbia. A subset of those persons have been named as plaintiffs in a companion action, *Cantu v. United States of America*, Civ. A. No. 1:11CV00541 (D.D.C.), filed in the same court. The *Cantu* and *Garcia* actions, as well as the claims of the other clients not named as plaintiffs in either action, are collectively referred to herein as the "Hispanic Farmers Litigation." Both the *Garcia* and *Cantu* actions are putative class actions. In addition to the over 700 individuals who have signed engagement agreements with the Debtor, upon information and belief, more than 500 additional persons have been in contact with the Debtor through the past years regarding potential claims against the USDA.

[1] Pursuant to Federal Rule of Bankruptcy Procedure ("FRBP") 6006(e) and (f), the Committee filed 17 separate Omnibus Motions, each requesting the same relief. As required by FRBP 6006(f), the maximum number of engagement agreements that are the subject of each Omnibus Motion does not exceed 100 executory contracts.

The amount at issue in the Hispanic Farmers Litigation exceeds one billion dollars. The upside for counsel who succeeds in obtaining a favorable resolution or settlement of such litigation could be substantial. But the expense also has been – and could be – substantial; the Committee is informed that the Debtor has invested to date approximately $30 million in legal services and almost $2 million in out-of-pocket expenses in connection with the Hispanic Farmers Litigation.

Unfortunately, the Debtor no longer can provide any legal services to its clients. As of December 22, 2011, the Debtor has no attorneys in its employ. In addition, the Trustee has informed the Committee that he will imminently file motions to withdraw the Debtor as legal counsel of record from the *Garcia* and *Cantu* litigations, and the Trustee will imminently send letters to all the clients withdrawing from the representations. Simply put, the absence of any legal staff necessarily precludes the estate, pragmatically and legally, from continuing its legal representation of these (or any) clients.

II
BACKGROUND

A. The Debtor and the Bankruptcy Case.

1. The Debtor is a limited liability partnership organized under the laws of the District of Columbia.

2. The Debtor was founded in 1956. At its peak, more than 750 lawyers practiced at the Debtor, and the Debtor engaged more than 900 non-lawyer staff.

3. On March 9, 2011, the Debtor's partners voted to dissolve the Debtor effective March 15, 2011.

4. On April 11, 2011 (the "Petition Date"), an involuntary petition under Section 303 of the Bankruptcy Code was filed against the Debtor in the United States Bankruptcy Court for the Northern District of California (the "Bankruptcy Court").

5. On June 6, 2011, the Debtor filed its Conditional Consent to Entry of Order for Relief and Motion to Convert Debtor's Case to Chapter 11. *See* Clerk's docket no. 58.

6. On June 14, 2011, the United States Trustee appointed the Committee. *See* clerk's docket no. 93.

7. On September 15, 2011, Citibank, N.A. ("Citibank"), the Debtor's main secured creditor, filed its Motion For Entry of an Order Converting the Debtors Chapter 11 Case to a Case under Chapter 7 of the Bankruptcy Code, or, in the Alternative, Appointing a Chapter 11 Trustee. *See* Clerk's docket no. 315.

8. On September 22, 2011, the Court entered its Order Approving Citibank, N.A.'s Motion to Appoint a Chapter 11 Trustee. *See* Clerk's docket no. 335.

9. On October 7, 2011, the Office of the United States Trustee filed its Application for Order Approving the Appointment of Chapter 11 Trustee, seeking the Court to approve its appointment of Allan B. Diamond as Chapter 11 Trustee. *See* Clerk's docket no. 369.

10. On October 10, 2011, the Debtor's malpractice insurer, Attorneys' Liability Assurance Society, Inc. ("ALAS") filed a Notice of Nonrenewal of Malpractice Insurance Policy. *See* clerk's docket no. 372. In such notice, ALAS stated its position that the Debtor's malpractice insurance policy "will expire by its terms on, and will not be renewed beyond, January 1, 2012."[2]

11. On October 12, 2011, the Court entered its Order Approving Appointment of Chapter 11 Trustee, approving Mr. Diamond's appointment. *See* Clerk's docket no. 376.

[2] The Committee does not concede that the insurance policy cannot be renewed, or that ALAS's notice was proper or effective under applicable law. All rights are reserved.

Until December 22, 2011, the Debtor employed three attorneys. Those attorneys worked solely on the Hispanic Farmers Litigation. Due to the limited financial resources of the Estate, the Trustee advised these three attorneys shortly after his appointment in October, 2011, that their continued employment by the Estate would come to an end no later than December 31, 2011.

B. ***The Garcia Case.***

12. On October 13, 2000, a complaint (as amended, the "*Garcia* Complaint") was filed on behalf of certain named plaintiffs in the United States District Court for the District of Columbia (the "District Court") captioned *Garcia v. Glickman*, No. 00-02445 (the "*Garcia* Case").

13. In the *Garcia* Complaint, the plaintiffs alleged that the United States Department of Agriculture ("USDA") routinely discriminated against them in its farm benefit programs on the basis of ethnicity and gender, and failed to investigate the claims of farmers who filed discrimination complaints with the agency at its behest.

14. The *Garcia* case was one of four similar cases filed in the District Court that alleged claims of discrimination against the USDA based on race, ethnicity or gender in connection with farm benefit programs. The other cases were *Pigford v. Glickman*, Nos. 97-1978 & 98-1693 (black farmers); *Keepseagle v. Glickman*, No. 99-3119 (Native American farmers); and *Love v. Glickman*, No. 00-2502 (female farmers; *the "Love" case*).

15. On February 7, 2002, attorneys engaged by the Debtor filed a notice of appearance in the *Garcia* case as co-counsel for the plaintiffs.

16. The plaintiffs sought certification as a class of Hispanic farmers in the *Garcia* case. The District Court denied certification on three occasions. The first denial occurred in 2002, prior to discovery. *See* Memorandum filed December 2, 2002 (*Garcia* clerk's docket no. 76; **Exhibit**

A)[3]**;** Order filed December 2, 2002 (Garcia clerk's docket no. 77; **Exhibit B**). Following limited discovery, the District Court again denied class certification. *See* Memorandum and Order Denying Class Certification, filed September 10, 2004 (*Garcia* clerk's docket no. 132); 224 F.R.D. 8 (D.D.C. 2004). The United States Court of Appeals for the District of Columbia affirmed. *See Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006).

17. On September 27, 2010, the defendants in the *Garcia* case filed a status report indicating that they planned to announce a settlement with Hispanic and female farmers, and the establishment of a fund in the amount of $1.33 billion for that purpose. *See* Defendants' Status Report, filed September 27, 2010 (*Garcia* clerk's docket no. 181; **Exhibit C**).

18. Following the filing of the status report, on October 6, 2010, the *Garcia* plaintiffs filed Plaintiffs' Motion to Review Defendant's Proposed Notice and Terms of Class-Wide Settlement, and to Certify Settlement Class (the "Settlement Class Motion"). *See Garcia* clerk's docket no. 182 (**Exhibit D**). In the Settlement Class Motion, the *Garcia* plaintiffs argued, among other things, that the proposed settlement offered by the United States violated due process, discriminated against Hispanic farmers and created a changed circumstance that justified the certification of a class.

19. On October 20, 2010, the District Court denied the Settlement Class Motion. *See* Order entered October 20, 2010 (*Garci*a clerk's docket no. 187; **Exhibit E**).

20. On March 23, 2011, Alan M. Wiseman, one of the two partners in the Debtor who had been principally responsible for the Hispanic farmers representation, filed his Motion of Alan M. Wiseman to Withdraw as Counsel of Record. *See Garcia* clerk's docket no. 197 (**Exhibit F**). In such motion, Mr. Wiseman informed the court that he was no longer affiliated with the Debtor,

[3] Unless otherwise indicated, all references to exhibits in this memorandum refer to the separate exhibits filed with the Court on the docket.

and that Stephen M. Hill, who had served as lead counsel, would continue to serve as counsel of record.

21. At a status conference held on October 21, 2011, the District Court stayed proceedings in the *Garcia* case pending further order of the court. A status conference is scheduled for January 6, 2012. *See* Order entered October 21, 2011 (*Garcia* clerk's docket no. 211; **Exhibit G**).

C. The Cantu Case.

22. On March 15, 2011, Stephen S. Hill, a partner in the Debtor, filed a Class Action Complaint For Declaratory, Injunctive, and Other Relief (the "*Cantu* Complaint") in the United States District Court for the District of Columbia, case no. 11-00541 (the "*Cantu* case"). *See* **Exhibit H**. The named plaintiffs and proposed class representatives in the *Cantu* case a subgroup of the plaintiffs in the *Garcia* case.

23. The *Cantu* Complaint seeks a determination that the settlement proposed by the United States in connection with the *Garcia* and *Love* cases violated the due process and equal protection rights of Hispanic farmers by, among other things: allocating a smaller fund for the resolution of such claims for the resolution of the claims of African-American and Native American farmers (even though the Hispanic farmer class is larger than either of those classes); failing to provide for judicial supervision of the settlement process, as was included in the settlements with the African-American and Native American classes; and by capping at $50,000 the potential recoveries by each Hispanic farmer (even though settlement with African-American and Native American farmers was not limited by any cap if the farmer could meet the specified evidentiary burden).

24. The *Cantu* Complaint also seeks class certification for the Hispanic farmers.

25. On May 11, 2011, the United States filed its Defendants' Motion to Dismiss. *See Cantu* clerk's docket no. 12 (**Exhibit I**).

26. On June 10, 2011, the plaintiffs in the Cantu case filed their Plaintiffs' Motion for Class Certification. *See Cantu* clerk's docket no. 16 (**Exhibit J**).

27. On November 1, 2011, the District Court entered an order directing the parties to brief the questions relating to the ripeness of, and the applicable statute of limitations for, the claims raised in the *Cantu* Complaint. *See* Order entered on November 1, 2011 (Cantu clerk's docket no. 21; **Exhibit K**). Final briefing in response to such order was due on December 12, 2011.

28. On December 21, 2011, the District Court in the *Cantu* case denied without prejudice the Defendant's Motion to Dismiss and the Plaintiffs' Motion for Class Certification. The District Court ruled that the issues raised by these motions were not ripe on the grounds that the program the government had proposed for resolution of the claims of Hispanic farmers was not yet final. The District Court stayed the case indefinitely and administratively closed the case. The defendants were ordered to provide status reports every 30 days regarding the progress made toward finalizing the government's program. *See Cantu* clerk's docket no. 27; **Exhibit L**.

D. The Engagement Agreements.

29. The clients memorialized their agreements to the engagement of counsel by signing engagement agreements. The form of the engagement agreement changed over time, as the *Garcia* case progressed. According to the documents provided to the Committee by the Trustee, three separate forms of engagement agreement were used.

30. The form of the engagement agreement used initially was titled "Retainer Agreement – Garcia v. Glickman." *See* **Exhibit M**.[4] The agreement provided for the retention of Alexander J. Pires, Jr. and Phillip L. Fraas as lead counsel.

31. The second version of the engagement agreement used in the Hispanic farmers litigation was titled Garcia v. Veneman – The Hispanic Farmers and Ranchers Class Action Lawsuit." *See* **Exhibit N**. That form of agreement provided for the retention of Mr. Pires and Mr. Fraas, as well as Alan M. Wiseman, Kenneth C. Anderson and Robert L. Green of Howrey Simon Arnold & White, all as lead counsel, along with such other attorneys as they may bring into the case as Of Counsel.

32. The third form of engagement agreement used in the Hispanic farmers litigation was entitled, "Retainer Agreement." *See* **Exhibit O**. This form of engagement agreement provided for the retention of Howrey LLP. The scope of the engagement included pursuit of payment to the client from: "a settlement fund for the claims of Hispanic farmers and ranchers who have been discriminated against by the Agriculture Department as has been asserted in a lawsuit filed in the U.S. District Court for the District of Columbia (*Garcia v. Vilsack*, No. 00-2445) and as may be asserted in future related lawsuits."

33. In addition to the individuals and entities that signed written engagement agreements, the Debtor has been in communications with approximately 500 other persons as prospective clients regarding the Hispanic Farmers Litigation.

[4] The forms of the agreements submitted as exhibits have been redacted to remove personal information.

III

ARGUMENT

A. Standards For Rejection.

Section 365 of the Bankruptcy Code provides in relevant part:

> Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executor contract or unexpired lease of the debtor.

11 U.S.C. § 365(a).

The engagement agreements for the Hispanic Farmers Litigation are executory contracts:

> An executory contract is one "on which performance remains due to some extent on both sides." Bildisco, 465 U.S. 513 at 522 n.6, 79 L. Ed. 2d 482, 104 S. Ct. 1188. (quotation marks and citation omitted). More precisely, a contract is executory if "the obligations of both parties are so unperformed that the failure of either party to complete performance would constitute a material breach and thus excuse the performance of the other." *Griffel v. Murphy (In re Wegner)*, 839 F.2d 533, 536 (9th Cir. 1988).

Unsecured Creditors' Comm. v. Southmark Corp. (In re Robert L. Helms Constr. & Dev. Co.), 139 F.3d 702, 705 (9th Cir. 1998). A lawyer's contract to perform legal services is an executory contract. *In re Tonry*, 724 F.2d 467 (5th Cir. 1984).

Section 365(a) of the Bankruptcy Code authorizes the rejection of an executory contract upon obtaining the approval of the Bankruptcy Court. *In re Pomona Valley Medical Group, Inc.*, 476 F.3d 665 (9th Cir. 2007). The purpose of this authorization is to allow the Debtor's chapter 11 bankruptcy estate (the "Estate") to shed burdensome post-petition obligations that may prevent reorganization or liquidation. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984).

B. The Committee Has Standing To Seek Rejection of the Engagement Agreements.

Pursuant to Sections 1103(c)(5) and 1109(b) of the Bankruptcy Code, an official committee in a Chapter 11 case may be authorized to act derivatively if a trustee or debtor in possession fails to act. *See Official Unsecured Creditors' Comm. of Suffola, Inc. v. U.S. Nat'l Bank (In re Suffola, Inc.)*, 2 F.3d 977, 979 n. 1 (9th Cir. 1993) ("Although the Bankruptcy Code contains no explicit authorization for the initiation of an adversary proceeding by a creditors' committee, a qualified implied authorization exists under 11 U.S.C. § 1103(c)(5)"); *see also Avalanche Maritime, Ltd. v. Parekh (In re Parmetex, Inc.)*, 199 F.3d 1029, 1031 (9th Cir. 1999); *In re Perkins*, 902 F.2d 1254, 1258 (7th Cir. 1990) (committee may prosecute an action when the trustee unjustifiably refuses to pursue it, the creditor establishes colorable claim, and the creditor seeks leave from the court).[5] This standing extends to rejection of executory contracts. *See In re Parrot Packing Co.*, 42 B.R. 323 (Bankr. N.D. Ind. 1983) (committee was authorized under Section 1109 to reject a collective bargaining agreement); *see also Liu v. Gordon*, 1990 U.S. Dist.

[5] This holding has survived the Supreme Court's decision in *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). In *Hartford Underwriters*, the Supreme Court found that an administrative creditor did not have standing under section 506(c) of the Bankruptcy Code to surcharge a secured creditor because the statute stated that only a trustee had such standing. Courts in the wake of *Hartford Underwriters* have held that this does not undermine a creditor's committee's right to seek derivative standing. *See Comm. of Tort Litigants v. Catholic Diocese of Spokane (In re Catholic Bishop of Spokane)*, 329 B.R. 304, 313 (Bankr. E.D. Wash. 2005) (creditor's committee had standing to pursue action akin to turnover action); *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 330 F.3d 548, 566-67 (3d Cir. 2003) (committee could pursue fraudulent transfer action under § 544(b) when debtor-in-possession refused to do so and bankruptcy court authorized committee to proceed derivatively); *Hunt, Ortmann, Blasco, Palffy & Rossell, Inc. v. Jim L. Shetakis Distrib. Co. (In re Jim L. Shetakis Distrib. Co.)*, 415 B.R. 791, 798 (D. Nev. 2009) ("A bankruptcy court may authorize an individual creditor to bring an avoidance action on behalf of the estate upon a showing of extraordinary circumstances, such as where the trustee or debtor-in-possession itself has no incentive to bring the action, or when the action is otherwise in the best interest of the estate.").

LEXIS 17961 (N.D. Cal. June 17, 1990) ("In making that determination, the bankrupt's primary concern should be how execution of the contract would effect the estate's ability to satisfy the claims of unsecured creditors."). Given the urgency for rejection, the Committee's standing should be recognized. The Committee has urged the Trustee to reject the Hispanic Farmers' engagement agreements. The Committee understands that the Trustee does not oppose rejection of these contracts in concept, but he does object to seeking rejection at this time to the extent that such rejection might prejudice the Estate's rights in any recovery ultimately obtained in the Hispanic Farmers Litigation. Moreover, the Trustee has asserted that the Committee lacks standing to bring the rejection motion. However, notwithstanding the foregoing, the Trustee has further indicated that he would join in the rejection motion, thereby eliminating the standing issue, on the condition that the Court enter an order which provides that rejection of these contracts will not impact in any way the Estate's rights to assert an interest in any ultimate recovery in the Hispanic Farmers Litigation.[6] Absent such relief, the Trustee has indicated that he will object to the motion.

C. The Engagement Agreements Should Be Rejected.

(1) *The Estate Cannot Perform the Engagement Agreements*

The need to reject the Hispanic farmers engagement agreements is compelling. The Debtor no longer has the resources to perform the client agreements.

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[6] The finding requested by the Trustee is supported by ample case law. *See First Ave. West Bldg., LLC v. James (In re Onecast Media),* 439 F.3d 558, 563 (9th Cir. 2006) (debtor's right to repayment of security deposit survived rejection of lease); *Turner v. Avery*, 947 F.2d 772, 774 (5th Cir. 1991) (contingency fees earned under rejected contract remain property of the estate); *Thompson-Mendez v. St. Charles at Olde Court P'ship, LLC (In re Thompson-Mendez)*, 321 B.R. 814, 819 (Bankr. D. Md. 2005) (right to payment for partial performance of contract survives rejection of executory contract); *Labrum & Doak v. Ashdale (In Re Labrum & Doak)*, 227 B.R. 391, 405 (Bankr. E.D. Pa. 1998) (work in process for contingent and hourly fees is property of the estate).

Because the Debtor had insufficient funds to employ counsel to represent the clients beyond December, 2011, the Trustee has terminated the three remaining Howrey attorneys. Without attorneys, the Debtor, of course, has no ability to provide representation of any kind or to fulfill any obligations under the client agreements. Moreover, the Debtor does not have any available financial resources to retain attorneys to provide such representation.

In addition, even if the Debtor did have the funds to employ legal counsel to continue representing the clients, the Debtor's continued representation of any clients does not make any fiscal sense. The Debtor will never emerge from bankruptcy as an operational entity. Indubitably, the Debtor would at some point have to cease providing legal services, and stopping now is logical because the Debtor's malpractice liability insurance expires at the end of 2011. The insurance carrier — ALAS — has taken the position that the Debtor's malpractice insurance will not be renewed when it expires on January 1, 2012. But even if ALAS were willing (or compelled) to renew the malpractice policy, the estate could not pay the premium. The premium under the ALAS policy would be approximately $2.7 million per year.[7] The Estate has insufficient resources to pay such premiums.

Finally, in addition to hypothetically having to pay the salaries of attorneys to handle the Hispanic Farmers Litigation, and having to pay an exceedingly large malpractice insurance premium, the Debtor likely would have to fund continuing expenses related to experts and other litigation costs. The Estate simply lacks these funds.

[7] That estimated premium figure assumes no coverage whatsoever for "prior acts" (e.g, acts occurring prior to December 31, 2011). Upon information and belief, the Trustee has been unable to secure even a premium quote for ongoing errors and omissions coverage that would include any "prior acts."

(2) Rejection of the Engagement Agreements Does Not Impose an Undue Burden On the Clients.

The Committee recognizes that a debtor cannot shed its duties when doing so would violate law and create a risk to public health or safety. *Midlantic National Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494 (1986). *In Midlantic*, the Chapter 7 trustee sought to abandon environmentally contaminated property pursuant to section 554 of the Bankruptcy Code. Although it was undisputed that the property was "burdensome" and "of inconsequential value to the estate" within the meaning of section 554(a), the Supreme Court held that abandonment was impermissible under the circumstances because:

> The Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety. Accordingly, without reaching the question whether certain state laws imposing conditions on abandonment may be so onerous as to interfere with the bankruptcy adjudication itself, we hold that a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards.

Midlantic, 474 U.S. at 506-07 (footnote omitted).

The *Midlantic* ruling has been held to be applicable to rejection of contracts under Section 365 of the Bankruptcy Code. The rejection of a contract will not relieve a debtor of its duties under local laws and ordinances but will relieve a Debtor of contractual duties. *Saravia v. 1736 18th Street, N.W., Ltd. P'ship*, 844 F.2d 823, 825 (D.C. Cir. 1988) (residential landlord's rejection of leases with tenants did not relieve it of duty to provide utilities and other services under municipal law, but would relieve it of duty to provide contractual amenities which exceeded minimum required under law). The mere presence of a statute protecting a class does not subject a motion to reject to heightened scrutiny. *In re Caribbean Petroleum Corp.*, 444 B.R. 263, 269 (Bankr. D. Del. 2010) (statute protecting franchisees from arbitrary termination of contracts did

not create heightened standard for rejection); *see also In re Old Carco LLC*, 406 B.R. 180, 190 (Bankr. S.D.N.Y. 2009) (quoting *In re Pilgrim's Pride Corp.*, 403 B.R. 413, 424 (Bankr. N.D. Tex. 2009)) (court is "unwilling to hold that a higher standard for rejection must be met any time another federal law is implicated by the contract to be rejected."). "[T]he Midlantic exception to the abandonment power is narrow and "does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment…" *Dep't of Human Resources v. Witcosky (In re Allen Care Ctrs.)*, 96 F.3d 1328, 1331 (9th Cir. 1996).

The Committee's proposed rejection does not violate any statute, let alone a statute protecting public health and safety. The only "law" that comes close to governing the relationship between the Debtor and the clients in the Hispanic Farmer Litigation are the District of Columbia Rules of Professional Conduct.[8] Those rules do not constitute "a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards" as that standard is meant by the Supreme Court in *Midlantic*. *See e.g. N.M. Env't Dep't v. Foulston (In re L.F. Jennings Oil Co.)*, 4 F.3d 887, 890 (10th Cir. 1993) (environmental threat under *Midlantic* must be immediate and mere failure to file reports required under state law does not prohibit abandonment); *In re Pilz Compact Disc, Inc.*, 229 B.R. 630, 641 (Bankr. E.D. Pa. 1999) (copyright law did not prohibit abandonment of CD's which infringed third party's copyright under *Midlantic*).

But even if the Rules of Professional Conduct were within the ambit of *Midlantic*, those rules would actually require the Debtor to withdraw. Indeed, the Trustee has informed the Committee that he will imminently send letters to all the Hispanic farmer clients withdrawing

[8] Both the *Garcia* and the *Cantu* cases were filed in the United States District Court for the District of the District of Columbia, and thus the ethical obligations of the Debtor and its attorneys are governed by the District of Columbia Rules of Professional Conduct. *See* Rules of the United States District Court for the District of the District of Columbia, Local District Rule 83.15(a).

from the representation based on those rules. First, D.C. Rule of Professional Conduct 1.16(a)(2) requires an attorney to withdraw from a representation if "[t]he lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client".[9] Here, the Estate has no attorneys at all. Thus, the situation here is more akin to the death of an attorney rather than simply his/her physical or mental impairment. The physical and literal inability of the Debtor to proceed with any legal representation given the lack of any lawyers under its employ undoubtedly justifies its withdrawal under the Rules of Professional Conduct. There are other bases for the Debtor's withdrawal from representation that undoubtedly will be raised by the Trustee in his expected motion to withdraw to be filed with the D.C. District Court imminently, if not concurrently, with the filing of this motion. *See, e.g.,* District of Columbia Rules of Professional Conduct 1.16(b).

In addition to notifying the Hispanic farmer clients that the Trustee is withdrawing the Debtor from the representations, the Trustee will also file motions in the *Garcia* and *Cantu* actions requesting leave to withdraw the Debtor as counsel for the plaintiffs in those cases. Those motions will be filed imminently, if not concurrently, with this motion. The basis for those motions will be substantially the same as the basis set forth in the letters to the clients; the Debtor simply has no continuing ability to represent any clients.

The Hispanic Farmers Litigation has become an impossible financial burden on the Debtor. The Committee is not seeking to reject the contracts based on convenience, or a revised view of the value of the Hispanic Farmer Litigation. Rather, the Committee has taken a sober view of the Debtor's circumstances. The Debtor is defunct. Practically speaking, it is no different from the "impaired lawyer" in *Collier* or perhaps no different than a deceased lawyer where it is impossible to continue any representation by his probate estate.

[9] *See also, e.g., Collier v. Bohnet*, 966 So.2d 1033, 1035 (Fla. App. 4 Dist. 2007) (citing Rule 4-1.16(a)(2) of the Rules Regulating the Florida Bar, which are substantially identical to DC Rule of Professional Conduct 1.16).

D. Rejection Should Be Effective No Later Than December 31, 2011.

The Committee requests that the Court order that the Hispanic Farmer engagement agreements be rejected effective no later than December 31, 2011. This date is important inasmuch as the Debtor's malpractice insurance will expire at that time. As noted above, the Trustee is following the procedures required by D.C. law to withdraw from the representations, but out of an abundance of caution, the Committee wants to make sure all potential obligations of the Estate under the engagement agreements are terminated, especially as attorneys in the Debtor's employ will no longer have control over the litigation and the Trustee cannot ensure that the cases are handled appropriately.

"[R]ejection under section 365(a) does not take effect until judicial approval is secured, but the approving court has the equitable power, in suitable cases, to order a rejection to operate retroactively." *Pac. Shores Dev., LLC v. At Home Corp. (In re At Home Corp.)*, 392 F.3d 1064, 1069 (9th Cir. 2004), *aff'g Pac. Shores Dev., LLC v. At Home Corp. (In re At Home Corp.)*, 292 B.R. 195 (N.D. Cal. 2003) (*quoting Thinking Machs. Corp. v. Mellon Fin. Servs. Corp. (In re Thinking Machs. Corp.)*, 67 F.3d 1021, 1029 (1st Cir. 1995). The Bankruptcy Court has broad discretion to order the retroactive rejection of executory contracts. 392 F.3d at 1069.

In *At Home Corporation*, the debtor filed for bankruptcy and two days later filed an emergency motion to reject a lease of a property it did not occupy. *Id.* at 1065-66. The Bankruptcy Court held a hearing nine days after the motion and approved the rejection retroactive to the date of the petition. *Id.* at 1066. The Ninth Circuit found that the Bankruptcy Court did not abuse its discretion because (1) the debtor promptly filed and obtained a hearing on the emergency motion; (2) the vacancy of the premises showed that the debtor did not receive any benefit from the period between the motion and the hearing; and (3) the landlord's lack of effort to further

expedite the hearing demonstrated a lack of prejudice to the landlord from the small delay that did occur.

In this case, retroactive relief is well within the Bankruptcy Court's discretion under *At Home Corporation.* First, there has been no substantial delay. The Trustee was appointed on October 12, 2011, and promptly familiarized himself with the Debtor's bankruptcy, including the Hispanic Farmer Litigation. The Committee expeditiously obtained all of the information necessary to file and serve the Omnibus Motions. Second, the Debtor will not receive any benefit from representing the clients during the period between the date of this Motion and a hearing thereon.[10] Finally, the retroactive relief will not prejudice the clients. The Trustee has moved – or is contemporaneously moving – to withdraw and is simultaneously sending letters to the clients withdrawing from the representations.

IV

CONCLUSION

For the reasons set forth above, the Official Committee of Unsecured Creditors respectfully requests that the Court order the rejection of the engagement agreements identified in the Omnibus Motions, substantially in the form filed as **Exhibit P,** and grant such other and further relief as is just.

[10] This is not to say that the Debtor, acting by and through the Trustee, is waiving, consenting or otherwise impliedly conceding that it will not seek to enforce any and all rights it may have in an to all recoveries in the Hispanic Farmers Litigation and related matters based on its interests in the client contracts and those litigation matters as of the date of this motion. It is the Committee's understanding that the Trustee fully intends to prosecute, if necessary, his rights in and to any recoveries from the Hispanic Farmers Litigation matters.

Dated: December 29, 2011

Respectfully submitted,

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