

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE:	§	
	§	
COUNTRY FRESH HOLDING COMPANY, INC., et. al.¹	§	Case No.: 21-30574
	§	
Debtors.	§	
	§	Jointly Administered

**TRUSTEE’S MOTION FOR AUTHORITY TO
(i) EMPLOY SPECIAL ERISA COUNSEL, (ii) TERMINATE PLAN AND (iii)
APPROVE ATTORNEY’S FEES**

THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 21 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

TO THE HONORABLE MARVIN ISGUR, UNITED STATES BANKRUPTCY JUDGE:

COMES NOW, Janet S. Northrup, the Chapter 7 Trustee (the “Trustee”) of the bankruptcy

¹ The Debtors in these Chapter 7 cases and the last four digits of each Debtors’ taxpayer identification number are as follows: Country Fresh Holding Company Inc. (7822); Country Fresh Midco Corp. (0702); Country Fresh Acquisition Corp. (5936); Country Fresh Holdings, LLC (7551); Country Fresh LLC (1258); Country Fresh Dallas, LLC (7237); Country Fresh Carolina, LLC (8026); Country Fresh Midwest, LLC (0065); Country Fresh Orlando, LLC (7876); Country Fresh Transportation LLC (8244) CF Products, LLC (8404) Country Fresh Manufacturing, LLC (7839); Champlain Valley Specialty of New York, Inc. (9030); Country Fresh Pennsylvania, LLC (7969); Sun Rich Fresh Foods (NV) Inc. (5526); Sun Rich Fresh Foods (USA) Inc. (0429); and Sun Rich Fresh Foods (PA) Inc. (4661). The Debtors’ principal place of business is 3200 Research Forest Drive, Suite A5, The Woodlands, TX, 77381.

estate of Country Fresh Holding Company, Inc *et. al.* (“**Country Fresh**” or “**Debtors**”), Debtors in the above-styled Chapter 7 case and files this *Trustee’s Motion For Authority To (i) Employ Special ERISA Counsel, (ii) Terminate Plan And (iii) Approve Attorney’s Fees*, seeking authority (i) to retain Matthew J. Borrer (“**Borrer**”) pursuant to 11 U.S.C. §327(a), §330 and Rule 2014 of the Federal Rules of Bankruptcy Procedures, (ii) to terminate a qualified plan for which the Debtors served as administrators on the Petition Date (as defined herein) and (iii) to compensate Borrer for his services; and respectfully represents as follows:

PRELIMINARY STATEMENT

1. Trustee seeks authority to employ Matthew J. Borrer as special ERISA counsel, terminate a qualified plan, and to compensate Borrer for his services up to \$20,000.00 upon fifteen (15) days’ notice filed with the Court without further fee application as requested by the Ad Hoc Group of Secured Lenders to reduce administrative costs to the estate.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

3. This Court has constitutional authority to enter a final order with respect to this Motion. The employment of professionals of the estate has no equivalent in state law, thereby rendering the Supreme Court’s opinion in *Stern v. Marshall* inapplicable. *See In re Carlew*, 469 B.R. 666, 672 (Bankr. S.D. Tex. 2012) (discussing *Stern v. Marshall*, — U.S.—, 131 S.Ct. 2594,

180 L.Ed.2d 475 (2011)). In the alternative, the employment of professionals for the estate is an essential bankruptcy matter which triggers the “public rights” exception. *See id.*

BACKGROUND

4. On February 15, 2021 (the “**Petition Date**”), the Debtors filed a Voluntary Petition for Relief under Chapter 11 of the Bankruptcy Code (the “**Case**”).²

5. The Debtors operated as a debtor-in-possession from February 15, 2021 until June 21, 2021, when the Court entered its order of conversion to Chapter 7—*Order (I) Authorizing and approving the Conversion of the Chapter 11 Cases, (II) Extending the Designation Rights Period, and (III) Granting Related Relief* [Docket No. 719] (the “**Conversion Order**”). Thereafter, Janet S. Northrup was appointed as the Chapter 7 Trustee.

6. On the Petition Date, the Debtors were the administrators and sponsors of one ERISA-governed plan known as the “Country Fresh, LLC 401(k) Plan” (the “**401(k) Plan**”) and another known as the “Country Fresh, LLC Welfare Benefit Plan” (the “**Welfare Plan**”). The Bankruptcy Code provides that the Trustee shall “continue to perform the obligations required of the administrator”. 11 U.S.C. § 704(a)(11).

7. The Trustee wishes to obtain Court approval to employ Borrer as Special ERISA Counsel for the Trustee effective as of June 24, 2021 for the purpose of terminating both the 401(k) Plan and the Welfare Plan. Further, the Trustee wishes to obtain Court approval to pay Borrer for his services up to \$20,000.00 without fee application or further Court order.

RELIEF REQUESTED – EMPLOYMENT OF SPECIAL ERISA COUNSEL

8. Section 327(a) of the Bankruptcy Code authorizes a Trustee to retain professionals as necessary to represent or assist the Trustee in carrying out her duties:

² Additional information about the Debtors and their business can be found in the *Declaration of Stephen Marotta in Support of First-Day Motions* filed at Docket No. 18 in this Case.

the Trustee, with the court's approval, may employ, one or more attorneys, accountants, appraisers, auctioneers, or other professional persons . . . to represent or assist the Trustee in carrying out the Trustee's duties under this title.

See 11 U.S.C. § 327(a).

9. Pursuant to this provision of the Bankruptcy Code, the Trustee seeks to retain Borrer, effective as of June 24, 2021, as special counsel for matters relating to compliance with the applicable federal statutes, including the Internal Revenue Code, regarding the Plan or other employee benefit matters which may be necessary in this bankruptcy proceeding. It is necessary for the Trustee to employ legal counsel knowledgeable about ERISA law because her general bankruptcy counsel lacks specialized knowledge and expertise in this area to assist the Trustee in performing her duties under 11 U.S.C. §704(a)(11). Typically, those duties include inviting 401(k) plan participants to make benefit elections. Here, it appears that distributions to participants have commenced but several mandatory federal filings have yet to be submitted. Additionally, the 2019 Form 5500 for the 401(k) Plan discloses that \$80,000 of participant deferrals was not timely transmitted to the financial custodian but does not describe a resolution. Borrer is a skilled professional with years of experience in dealing with the winding up of retirement plans, such as the 401(k) Plan, in the bankruptcy context. Borrer has represented bankruptcy Trustees nationally, and in this district, to assist in winding down ERISA-governed plans sponsored by debtors. Borrer currently represents the Trustee in two other cases. A copy of Borrer's resume is attached hereto as **Exhibit "A"**.

10. The professional services that Borrer will render to the Trustee are limited to representation related to the ERISA-governed plans sponsored by the Debtors and he will be retained as special counsel for that purpose.

11. To the best of the Trustee's knowledge and other than as set forth herein, Borrer does

not have any connection with or any interest adverse to the Debtors, the Trustee, any creditors, or any other party in interest, or their respective attorneys or accountants, the United States trustee, or any person employed in the office of the United States trustee and is a “disinterested person” within the definition of Section 101(14) of the Bankruptcy Code on the matters for which he is to be engaged, except that the Borrer has represented the Trustee in other cases in which she serves as Chapter 7 Trustee. See Declaration of Matthew J. Borrer attached hereto as “**Exhibit B**”.

12. To the best of the Trustee’s knowledge Borrer does not have an agreement to share fees earned from his services to the estate as prohibited by the Bankruptcy Code. The Declaration of Matthew J. Borrer pursuant to Federal Rule of Bankruptcy Procedure 2014(a) is attached hereto as **Exhibit “B”**.

13. The Trustee submits that Borrer’s rate of \$400.00 per hour is reasonable and should be approved by the Court at this time.

14. The Trustee proposes to retain Borrer to assist the Trustee in dealing with all matters relating to the termination of the 401(k) Plan and Welfare Plan to ensure compliance with all retirement plan related federal statutes including the Internal Revenue Code. Based upon the foregoing, the Trustee believes that retention of Borrer is necessary and in the best interest of this estate, its creditors, and parties in interest.

RELIEF REQUESTED – TERMINATION OF PLAN

15. In order to terminate the ERISA-governed plans, it will be necessary for the Trustee to, among other actions, execute or direct the execution of documents, provide notice to the plan participants, and file required forms with the DOL or the IRS. The Trustee requests authority to execute and file all documents required to wind down and/or terminate those plans, using her business judgment and based on the advice and assistance of Borrer. Further, to the extent it

facilitates termination of the plans, the Trustee requests that she be authorized to allow and direct any custodian of funds to execute and file documents related to the Plan pursuant to the Trustee's directions and instructions.

**RELIEF REQUESTED – APPROVAL OF BORROR'S FEES UP TO \$20,000.00
WITHOUT FURTHER FEE APPLICATION**

16. As requested by the Ad Hod Group of Secured Lenders, the Trustee seeks the Court's approval of Borrer's fees up to \$20,000.00 upon fifteen (15) days' notice to be filed with the Court without separate fee application to reduce administrative costs to the estate. Bankruptcy Code § 330 permits professional persons to apply to the Court for compensation and reimbursement of expenses. In this case, Borrer is providing discrete, specialized services to the Trustee necessary for the Trustee to perform her duties as plan administrator under 11 U.S.C. § 704(a)(11).

The First Colonial Factors

17. The Fifth Circuit in *In re First Colonial Corp. of America*, 544 F.2d 1291 (5th Cir.), *cert. denied*, 97 S. Ct. 1696 (1977), described certain factors which should be considered in compensating attorneys in Chapter 7 cases. Those factors are discussed in the following paragraphs.

18. Time and labor required and novelty and difficulty of the questions involved. Borrer expects his fees in this case to be less than \$20,000.00. Employment of Borrer is necessary in this case for matters relating to compliance with the applicable federal statutes, including the Internal Revenue Code, regarding the Plan or other employee benefit matters which may be necessary in this bankruptcy proceeding. It is necessary for the Trustee to employ legal counsel knowledgeable about ERISA law because her general bankruptcy counsel lacks specialized knowledge and expertise in this area to assist the Trustee in performing her duties under 11 U.S.C.

§704(a)(11).

19. Reputation of Borrer. Borrer regularly represents the Trustee and other Chapter 7 Trustees in the Southern District and across the country and is well qualified to represent the Trustee in this case.

20. Skill required. The preceding paragraphs reflect the skill required by this case. A higher than ordinary degree of skill has been and will be required and employed by Borrer in the representation of the Trustee for the reasons indicated.

21. Preclusion of other employment. Borrer will be precluded from engaging in other employment as is necessary to perform the legal services described.

22. Undesirability of the case. A Chapter 7 case is only undesirable to the extent that Borrer's compensation is always contingent upon the availability of sufficient assets with which to reimburse Borrer for his fees and expenses incurred.

23. Results obtained. Borrer expects the 401(k) plan to be wound down as efficiently as practical.

24. Time limitations imposed by the case. Borrer has been and will be available at all times to meet the Trustee's needs as they arise. Borrer will attend to matters with due regard for the Trustee's desire to quickly administer the assets, terminate the Plan, and thereafter close the bankruptcy case.

25. Customary charges for the services rendered. Borrer's hourly rate is \$400.00. The rate charged is commensurate with the abilities of the Borrer and equal to those customarily charged by Borrer for equivalent work to non-trustee clients.

26. Contingent nature of the fee. Fees to be paid to Borrer in any Chapter 7 case are dependent on the availability of assets and/or recovery of voidable transfers. Borrer was not hired on a percentage contingency agreement, but at the hourly rate noted herein.

27. Nature and length of professional relationship with client. Borrer regularly assists the Trustee in the wind down of debtor retirement plans.

28. Borrer believes the compensation and reimbursement of expenses sought herein are reasonable and represent work that will be necessary to wind down the Plan, and thus allow proper administration of the estate.

29. Borrer, in compliance with Rule 2016 of the Bankruptcy Code, hereby states that: (i) no compensation previously received has been shared with any other entity; and (ii) no agreement or understanding exists between Borrer and any other entity for the sharing of compensation received or to be received for services rendered in connection with this case. Borrer did not receive any pre- or post-employment retainer in this matter and is holding no funds belonging to the Trustee or the Debtor.

PRAYER

WHEREFORE, the Trustee prays that the Court enter an order authorizing the Trustee to (i) employ Borrer, effective June 24, 2021, on the terms set forth herein, (ii) terminate the 401(k), (iii) pay Borrer for his services up to \$20,000.00 upon 15 days' notice with the Court without fee application or further Court order, and (iv) such other and further relief as is just and proper.

Dated: July 9, 2021.

Respectfully submitted,

/s/ Heather Heath McIntyre

Wayne Kitchens TBN 11541110

wkitchens@hwa.com

Heather McIntyre TBN 24041076

hmcintyre@hwa.com

HUGHESWATTERSASKANASE, LLP

Total Plaza

1201 Louisiana, 28th Floor

Houston, Texas 77002

Telephone: (713) 759-0818

Facsimile: (713) 759-6834

**PROPOSED ATTORNEYS FOR CHAPTER 7
TRUSTEE, JANET S. NORTHRUP**

Respectfully submitted,

/s/ Matthew J. Borrer

Matthew J. Borrer

Law Office of Matthew J. Borrer

1205 McBain Avenue

Campbell, CA 95008

Tel: 408.206.8873

Fax: 888.788.4345

**PROPOSED SPECIAL ERISA COUNSEL FOR
CHAPTER 7 TRUSTEE, JANET S. NORTHRUP**

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that she conferred with Steve Statham with the U.S Trustee Office via telephone and email starting on July 9, 2021 and that the U.S. Trustee does not oppose the relief sought herein.

The undersigned further certifies that she corresponded with John Weber, attorney for the Ad Hoc Group of Lenders, beginning on July 6, 2021 and that the Ad Hoc Group of Lenders does not oppose the relief sought herein.

/s/ Heather Heath McIntyre

Heather Heath McIntyre

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the *Trustee's Motion For Authority To (i) Employ Special ERISA Counsel, (ii) Terminate Plan And (iii) Approve Attorney's Fees* was served on (i) all parties receiving ECF notice in the case, and (ii) all parties listed on the attached "Master Service List" by electronic transmission or U.S. mail, first class, postage prepaid on July 9, 2021.

/s/ Heather Heath McIntyre

Heather Heath McIntyre