

Hearing Date:
April 22, 1999 at 10:00 a.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re :
BRADLEES STORES, INC., et al., : Chapter 11
 : Case Nos. 95 B 42777
 : through 95 B 42784 (BRL)
 Debtors. :
 : (Jointly Administered)
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**APPLICATION OF THE
UNOFFICIAL COMMITTEE OF TRADE CLAIM HOLDERS
FOR ALLOWANCE AND PAYMENT OF COMPENSATION AND
REIMBURSEMENT OF EXPENSES UNDER BANKRUPTCY CODE § 503(b)**

TO THE HONORABLE BURTON R. LIFLAND,
UNITED STATES BANKRUPTCY JUDGE:

The Unofficial Committee of Trade Claim Holders (the "Unofficial Committee"), by and through its attorneys, Milbank, Tweed, Hadley & McCloy LLP ("Milbank"), submits this application (the "Application") for allowance and payment of compensation and reimbursement of expenses under section 503(b) of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code"), and in support thereof respectfully represents as follows:

I. INTRODUCTION

1. By this Application, the Unofficial Committee requests an order of this Court under Bankruptcy Code §§ 503(b)(3)(D) and (b)(4) and Federal Rule of Bankruptcy Procedure ("Bankruptcy Rule") 2016 awarding (a) an allowance of reasonable compensation in the amount of \$804,248.75 for professional services rendered by Milbank on behalf of the Unofficial Committee during the period from December 19, 1995, through February 2, 1999 (the "Application Period"), and (b) reimbursement of actual, necessary expenses in the total amount of \$39,186.76 incurred by Milbank in rendering such services.

2. Milbank is seeking compensation for 2,074.20 hours of the attorney time, and 336.35 hours of the paraprofessional time expended on this matter during the Application Period. The total blended hourly rate (excluding paralegal or paraprofessional time) is \$373.16.

3. A summary schedule of the 2,410.55 hours of legal service for which compensation is sought is attached as Exhibit B. In the aggregate, partners accounted for 1,070.30 hours, or about 44% of the total amount of that time; associates accounted for 1,003.90 hours or about 42% of that time; and paraprofessionals accounted for 336.35 hours, or about 14% of that time.

4. An affidavit and certification of Wilbur F. Foster, Jr. (the "Foster Affidavit"), a member of Milbank, pursuant to Bankruptcy Rule 2016 and General Order M-151 of the Bankruptcy Court for the Southern District of New York,

establishing the "Amended Guidelines for Fees and Expenses for Professionals in Southern District of New York Cases" (the "Southern District Guidelines"), is attached as Exhibit A.¹ A summary of expenses incurred and posted by Milbank in its representation of the Unofficial Committee during the Application Period is attached as Exhibit C. Full compilations of contemporaneous time and expense records reflecting the compensation and reimbursement of expenses sought for the Application Period are attached as Exhibits D and E, respectively.

5. This Court has jurisdiction over this Application under (a) 28 S.C. U.S.C. §§ 157(a) and 1334(b), (b) the standing referral order of the United States District Court for the Southern District of New York, dated July 10, 1984 (Ward, Acting C.J.), and (c) section 12.01(d) of the "Second Amended Joint Plan of Reorganization of Bradlees Stores, Inc. and Affiliates under Chapter 11 of the Bankruptcy Code," which this Court confirmed by orders dated January 27, 1999 (the "Plan"). This is a core proceeding under 28 U.S.C. § 157(b)(2)(A)-(B), (O). Venue of this Application in this district is proper under 28 U.S.C. §§ 1408 and 1409(a).

¹ The Southern District Guidelines incorporate by reference guidelines promulgated by the Executive Office for United States Trustees on January 30, 1996 (the "UST Guidelines"). By their terms, the Southern District Guidelines and the UST Guidelines apply to applications for compensation and reimbursement under Bankruptcy Code §§ 330 and 331. Although the Application does not seek compensation and reimbursement under those sections of the Bankruptcy Code, but rather under sections 503(b)(3)(D) and (b)(4), it has been prepared in accordance with the Southern District Guidelines.

6. The relief sought in this Application is authorized under (a) Bankruptcy Code §§ 105(a), 503(b), and 1129(a)(4), as supplemented by Bankruptcy Rule 2016(a), and (b) Plan §§ 12.04 and 12.07(b).

II. SUMMARY OF SERVICES RENDERED

A. Background

7. On June 23, 1995 (the "Petition Date"), Bradlees Stores, Inc. ("Bradlees Stores"), New Horizons of Yonkers, Inc., Bradlees, Inc. ("Bradlees Inc."), Bradlees Administrative Co., Inc., Dostra Realty Co., Inc., Maximedia Services, Inc., New Horizons of Bruckner, Inc., and New Horizons of Westbury, Inc., debtors and debtors in possession (collectively, the "Debtors"), commenced these cases (the "Cases") by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code. By order of this Court dated June 23, 1995, the Cases were consolidated for procedural purposes only and were jointly administered under Bankruptcy Rule 1015.

8. On July 6, 1995, the Office of the United States Trustee for the Southern District of New York (the "U.S. Trustee's Office") formed, under Bankruptcy Code § 1102(a), a single Official Committee of Unsecured Creditors (the "Official Committee") in the Cases. The Official Committee included creditors holding claims against both Bradlees Inc. and Bradlees Stores.

B. The Intercompany Claim and Divergent Creditor Interests

9. October 6, 1995, the Debtors filed an operating statement in which, for the first time, they made a public disclosure (the "October 6th Disclosure") that Bradlees Inc. – the indirect parent of Bradlees Stores – held an intercompany claim against Bradlees Stores (the "Intercompany Claim") in the amount of about \$281.8 million. Before the October 6th Disclosure, the amount and composition of the Debtors' intercompany obligations was not generally known, because the Debtors had publicly filed only consolidated financial statements. In particular, before the October 6th Disclosure, the amount of the Intercompany Claim was generally believed to be about \$93.5 million, or only one-third of the amount stated in the October 6th Disclosure.

10. This disclosure of a sizable and, at the time, unexplained increase in the amount of the Intercompany Claim created a significant conflict between the interests of holders of (a) senior bank and subordinated bond claims against Bradlees Inc., on the one hand, and (b) unsecured trade claims against Bradlees Stores. In the wake of the October 6th Disclosure, ING Capital Corporation, CS First Boston Corporation, Quantum Partners LDC, and Stonington Management Corporation, each holders of a substantial amount of trade claims against Bradlees Stores, formed the

Unofficial Committee² and, on December 19, 1995, retained Milbank as attorneys for the Unofficial Committee.

11. As holders of about \$50 million of unsecured claims against Bradlees Stores, the Unofficial Committee was the largest constituency of creditors adversely affected by the October 6th Disclosure. The Unofficial Committee was understandably concerned about the sudden and unexpected disclosure that the amount of the Intercompany Claim was triple the previously known amount, making Bradlees Inc. the largest single creditor of Bradlees Stores. The October 6th Disclosure also highlighted that (a) the economic interests of creditors of Bradlees Stores diverged significantly from the economic interests of creditors of Bradlees Inc., and (b) as a consequence of this divergence, a single creditors' committee would be seriously hampered in any effort impartially to investigate and prosecute an action, or to compromise a dispute, relating to the amount of the Intercompany Claim.

C. Analysis of the October 6th Disclosure

12. Because of the economic importance and legal complexity of the issues raised by the October 6th Disclosure, the Unofficial Committee retained Milbank and Price Waterhouse to represent it in these Cases.

² Although Stonington Management Corporation remained a member of the Unofficial Committee, Anvil Investment Partners eventually replaced the other three members on the Committee. See Plan § 1.135.

13. Promptly after being retained, Milbank, with the assistance of Price Waterhouse, analyzed the circumstances that led to the October 6th Disclosure, and the various forms of relief that creditors of Bradlees Stores could pursue with respect to the matters raised by the October 6th Disclosure.

14. After completing this analysis, at the Unofficial Committee's direction Milbank initiated and held meetings with the attorneys for (a) the Debtors; (b) the Official Committee; (c) the Bank Group, as defined in Plan § 1.17 (the "Bank Group"); and (d) the holders of Bonds, as defined in Plan § 1.22 (the "Bondholders"), to share the results of Milbank's analysis and to discuss possible procedures and timing for the consensual adjustment of the Intercompany Claim.

15. Although those early meetings did not yield a global settlement of the dispute over the proper amount or characterization of the Intercompany Claim, they did (a) frame the issues that ultimately would be the subject of a broader investigation and report reflected in what has been commonly referred to in the Cases as the "Green Book," and (b) contribute to the formation of a working group of creditors (the "Working Group") comprising representatives of the Official Committee, the Unofficial Committee, the Bank Group, and the Bondholders.

D. Participation in Working Group Meetings and Initiatives

16. The Unofficial Committee and Milbank participated extensively in the meetings and the efforts of the Working Group. As this Court undoubtedly is

aware, these efforts provided a significant benefit in these Cases. By meeting periodically to develop a unified and considered position on strategic issues facing the Debtors, the creditor constituencies that made up the Working Group were able to work constructively with the Debtors and the Debtors' attorneys, and to influence the direction and orderly administration of the Cases.

17. For example, the cooperative spirit among the Working Group and the Debtors was instrumental in minimizing the disruption that occurred when the Debtors replaced the prior chief executive officer, Mark Cohen, with Peter Thorner. The Unofficial Committee and Milbank (a) participated in discussions among the Working Group and with members of the Debtors' board of directors that resulted in the removal of Mr. Cohen, and (b) participated extensively, along with the other members of the Working Group, in the negotiations that led to the reduction of the amount of severance that Mr. Cohen received from the Debtors. The Unofficial Committee's and Milbank's efforts in this matter contributed substantially to the Debtors' ability to avoid contentious litigation with Mr. Cohen that easily could have derailed the restructuring process.

E. Resolution of Intercompany Claim Dispute

18. The Working Group also facilitated the compromise of the Intercompany Claim dispute, which loomed as a formidable obstacle to the Debtors' successful emergence from chapter 11. Indeed, the Debtors have acknowledged that

the Unofficial Committee and the other members of the Working Group played a pivotal role in developing the framework for a consensual reorganization plan. As stated in the first amended disclosure statement for the Plan, dated October 2, 1998 (the "Disclosure Statement"): "During the course of the Debtors' Chapter 11 Cases, numerous discussions have been held between and among the Debtors, the Creditors' Committee, the Bank Group, and the Unofficial Committee with respect to the formulation of the Plan." Disclosure Statement at 63.

19. Although the intercreditor disputes were ultimately resolved on a consensual basis, this consensual resolution came only after a brief but necessary round of litigation resulting from the failure to resolve the Intercompany Claim dispute before the expiration of the Bankruptcy Code § 546(a) two-year statute of limitations for commencing avoidance actions. Soon after the Unofficial Committee commenced this litigation, the Debtors and the Working Group turned their attention in earnest to attempting to determine on a consensual basis the proper amount and characterization of the Intercompany Claim. As a result of these negotiations, the Unofficial Committee and the Bank Group, with the assistance of their respective attorneys, reached an agreement regarding (a) the relative distributions of the Debtors' assets between the Debtors' various estates and (b) other material terms for a reorganization plan for the Debtors. Milbank extensively participated in and contributed to these negotiations, and prepared various drafts of the term sheet setting forth the global

resolution that the Unofficial Committee and the Bank Group delivered to the Debtors in January 1998.

20. The Debtors have acknowledged that the Unofficial Committee played a key role in generating the compromise that served as the cornerstone of the Plan. See Disclosure Statement at 63 ("On or about January 11, 1998, the Bank Group and the Unofficial Committee provided a term sheet to the Debtors which formed the basis for the Plan. After delivery of the term sheet, various discussions were held among the parties in interest regarding, *inter alia*, the amount of total Claims, the terms and allocation of Cash and Reorganized Securities, tax issues and valuation of the Debtors.").

F. Negotiation and Preparation of Plan and Disclosure Statement

21. After the initial agreement was reached, the Unofficial Committee and Milbank participated extensively in, and contributed substantially to, the Debtors' efforts to promulgate a consensual plan. The Unofficial Committee and Milbank reviewed and commented on the many drafts of the Plan and Disclosure Statement that the Debtors' attorneys prepared and circulated. The Unofficial Committee and Milbank also played a substantial role in the negotiations leading to the Plan amendments that enabled all creditor constituencies to support the Plan. In fact, the Unofficial Committee provided the terms of the Plan that enabled the Bondholders, the last significant creditor constituency that was opposing the Plan, to support the Plan.

III. AUTHORITY FOR THE ALLOWANCE AND PAYMENT OF COMPENSATION AND REIMBURSEMENT OF EXPENSES

22. Bankruptcy Code § 503(b) authorizes the Court, after notice and a hearing, to allow as administrative expenses (a) "the actual, necessary expenses . . . incurred by" an unofficial committee "in making a substantial contribution in a case under" chapter 11 of the Bankruptcy Code, *id.* §503(b)(3)(D), and (b) "reasonable compensation for professional services rendered by an attorney . . . of an [unofficial committee] whose expense is allowable under [section 503(b)(3)(D)], based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under [the Bankruptcy Code], and reimbursement for actual, necessary expenses incurred by such attorney," *id.* §503(b)(4). A plan may provide for the payment of such amounts if the payment "has been approved by, or is subject to the approval of, the court as reasonable." *Id.* § 1129(a)(4).

23. Plan §§ 12.04 and 12.07(b) provide for the allowance of the amounts sought in this Application as administrative expenses of Bradlees Stores under Bankruptcy Code § 503(b), subject to the Court's approval of the reasonableness of those amounts. Section 12.04, titled "Fees and Expenses of Unofficial Committee," provides:

Subject to the approval of the Bankruptcy Court on appropriate application as set forth in Section 12.07(b) [of the Plan], the reasonable fees and expenses of the Unofficial Committee during the course of the

Chapter 11 Cases shall be allowed as administrative expenses of [Bradlees Stores], pursuant to 11 U.S.C. § 503(b).

Plan § 12.07(b), in turn, provides:

All professionals or other entities requesting compensation or reimbursement of expenses pursuant to section[] . . . 503(b) . . . of the Bankruptcy Code for services rendered before the Effective Date (including compensation requested by any Professional or other entity for making a substantial contribution in any Case) shall File an application for final allowance of compensation and reimbursement of expenses no later than 45 days after the Effective Date

24. Under section 503(b), an applicant must establish by a preponderance of the evidence that the services it rendered for which it seeks compensation provided a substantial benefit to the estate. In re U.S. Lines, Inc., 103 B.R. 427, 429 (Bankr. S.D.N.Y. 1989, aff'd, 1991 WL 67464 (S.D.N.Y. 1991); see In re McLean Industries, Inc., 88 B.R. 36, 38 Bankr. S.D.N.Y. 1988); In re Jack Winter Apparel, Inc., 119 B.R. 629, 622 (E.D.Wis. 1990); In re Hanson Industries, Inc., 90 B.R. 405, 409 (Bankr. D.Minn. 1988); In re D.W.G.K. Restaurants, Inc., 89 B.R. 684, 689 (Bankr. S.D.Cal. 1988).

25. Although the Bankruptcy Code does not define the term "substantial contribution," courts have found that an applicant satisfies the substantial contribution test when it has provided "actual and demonstrable benefit to the debtor's estate, its creditors, and to the extent relevant, the debtor's shareholders." U.S. Lines, 103 B.R. at 429; see In re Richton International Corp., 15 B.R. 854, 856 (Bankr.

S.D.N.Y. 1981) ("Services which substantially contribute to a case are those which foster and enhance, rather than retard or interrupt the progress of reorganization").

26. Factors that courts have considered in determining whether an applicant has made a substantial contribution in a chapter 11 case include whether the services (a) were provided to benefit the estate itself or all the parties in the bankruptcy case, (b) conferred a direct, significant, and demonstrably positive benefit upon the estate, and (c) were duplicative of services performed by others. See In re FRG, Inc., 124 B.R. 6553, 658 (Bankr. E.D. Pa. 1991); In re Buttes Gas & Oil Co., 112 B.R. 191, 194 (Bankr. S.D. Tex. 1989).

27. The extensive activities of the Unofficial Committee and Milbank that are detailed in above, and acknowledged in the Disclosure Statement, contributed substantially to the Debtors' orderly and successful restructuring and confirmation of the Plan. The record before this Court demonstrates that the Unofficial Committee and Milbank worked together with the Debtors and with other members of the Working Group to help the Debtors overcome numerous and complex obstacles to their emergence from chapter 11. In particular, the involvement of the Unofficial Committee and Milbank benefited the unsecured creditors of Bradlees Stores, who generally benefited from the successful conclusion of these Cases, and specifically benefited from the efforts of their principal de facto advocates, the Unofficial Committee and Milbank.

28. Other parties in the Cases have also effectively acknowledged the Unofficial Committee's and Milbank's substantial contribution to the Cases. As noted above, Plan § 12.04 expressly provides for the allowance of the reasonable fees and expenses of the Unofficial Committee as administrative expenses of Bradlees Stores under Bankruptcy Code § 503(b). The Debtors proposed the Plan and urged creditors to vote in favor of it. See Disclosure Statement at 16. The other members of the Working Group, the Official Committee, and the Bondholders supported confirmation of the Plan. Finally, the parties most affected by the Plan and by the efforts of the Unofficial Committee and Milbank – the creditors of Bradlees Stores, as well as the Debtor's other creditors – voted overwhelming in favor of the Plan. Cf. Richton International, 15 B.R. at 856 (noting "not only the absence of objection to [the applicant's] application but rather a warm recommendation by the Debtors and the Creditors' Committee that it be allowed.")

WHEREFORE, Milbank respectfully requests that this Court enter an order (1) allowing the Unofficial Committee, and directing the Reorganized Bradlees Stores to make payment to Milbank, of (a) compensation in the amount of \$804,248.75, and (b) reimbursement of expenses in the amount of \$39,186.76; and (2) granting such other and further relief as is just and proper.

Dated: New York, New York
March 19, 1999

MILBANK, TWEED, HADLEY & McCLOY LLP

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