

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Hearing Date: July 14, 2011
Hearing Time: 10:00 a.m.

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In re :
BORDERS GROUP, INC., et al., :
Debtors. : Jointly Administered
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OBJECTION OF THE UNITED STATES TRUSTEE TO FIRST INTERIM APPLICATIONS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES

Tracy Hope Davis, the United States Trustee for Region 2 (the "United States Trustee"), files this Objection to the first interim applications for compensation and reimbursement of expenses submitted in these cases for the period of February 16, 2011 through April 30, 2011:

Professional	Fees	Expenses
Kasowitz Benson Torres & Friedman Counsel to Debtors	\$1,911,021.04	\$46,516.40
Mercer (US) Inc., Compensation Consultant to Debtors	\$97,226.58	\$17,402.02
Jefferies & Company, Inc. Financial Advisor to Debtors	\$441,889.88	\$17,615.94
DJM Realty Services, LLC Real Estate Advisors to Debtors	\$151,612.90	\$13,397.61
Garden City Group, Inc. Administrative Agent for Debtors	\$89,245.49	\$2,246.69
Dickinson Wright PLLC Special Counsel to Debtors	\$265,917.75	\$3,786.81
Deloitte Tax, LLP Tax Advisors to Debtors	\$305,527.75	\$5,185.52
Deloitte Consulting, LLP Consultants to Debtors	\$621,856.25	\$21,694.18

Deloitte & Touche LLP Accountants to Debtors	\$316,685.00	\$46,424.35
Lowenstein Sandler, PC Counsel to Committee	\$838,348.00	\$14,734.78
Baker & McKenzie Corporate Counsel to Debtors	\$226,495.44	\$3,602.99
Ernst & Young, LLP Accountants, Tax Advisor and Auditor to Debtors	\$424,464.10	\$8,569.16
BDO USA,LLP Financial Advisors to Committee	\$1,197,903.75	\$32,267.69

The United States Trustee makes the following comments and objections to the requests for compensation and reimbursement of expenses in the amounts sought for the reasons set forth below.

Background

General Background

1. On February 16, 2011 (the "Petition Date"), Borders Group, Inc. and certain of its affiliates (the "Debtors") commenced voluntary cases under chapter 11 of the Bankruptcy Code. ECF No. 1. The Debtors operate 642 book, music and movie superstores and mall based book stores. See Rule 1007-2 Declaration of Scott Henry at ¶ 7, ECF No. 20. The Debtors' chapter 11 cases have been consolidated, for procedural purposes only, and are being jointly administered under Federal Rule of Bankruptcy Procedure 1015(b), pursuant to an order of the Court. ECF No. 45.

2. On February 24, 2011, the United States Trustee appointed an official committee of unsecured creditors (the

"Committee"). ECF No. 156. The Committee has retained Lowenstein Sandler PC as counsel. ECF No. 557.

Monthly Fee Statements

3. On March 15, 2011, the Court entered an Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals (the "Monthly Compensation Order"). ECF No. 385. According to the Monthly Compensation Order, professionals in these cases may be paid 80% of their fees and 100% of their expenses on a monthly basis by filing a monthly fee statement with the Court and serving the statement on certain parties. Id. If a party in interest has an objection to the compensation sought, such party shall file with the Court a written objection to the compensation in question. Id. at ¶ 2(d). If an objection is filed, the Debtor cannot make payment on the compensation at issue until the Court enters an order permitting such payment. Id. at ¶ 2(f).

5. On April 29, 2011, the United States Trustee filed an objection to the first monthly fee statements submitted by the professionals in this case. ECF No. 744.

6. On May 31, 2011, the United States Trustee filed an objection to the second monthly fee statements submitted by the professionals in this case. ECF No. 945.

7. As more fully set forth below, with the exception of Mercer (US) Inc., the issues raised by the United States

Trustee in her monthly fee statement objections have been resolved.

Store Closings

8. On the Petition Date, the Debtors filed an emergency motion seeking authorization to close approximately 200 of their 642 stores (the "Emergency Motion"). Docket No. 7. By order entered February 18, 2011, the Court granted the Emergency Motion. Docket No. 91.

9. On March 25, 2011, the Debtors filed a Notice of Designation for the closing of an additional 25 stores pursuant to the Emergency Motion. Docket No. 473.

10. On June 9, 2011, the Debtors filed a motion seeking authority to conduct store closing sales for an additional 51 stores. ECF No. 999. A hearing on this motion is scheduled for June 20, 2011.

Operating Reports

11. The Statement of Operations attached to the Debtors' operating reports list losses of over \$180 million. Specifically, the Debtors lost \$28.3 million, \$24.2 million and \$131.5 million from operations for February, March and April, respectively. ECF. Nos. 752 and 883.

Plan and Disclosure Statement

12. As of the date hereof, the Debtors have not filed a plan or a disclosure statement.

General Standards

Bankruptcy Code Section 330(a)(1) provides that:

After notice to the parties in interest and the United States trustee and a hearing, and subject to section 326, 328, and 329, the court may award to a trustee, ... an examiner, ... or a professional person employed under section 327 or 1103 -

- (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, ... or attorney and by any paraprofessional person employed by any such person; and
- (B) reimbursement for actual, necessary expenses.

11 U.S.C. § 330(a)(1)(A) and (B).

To determine reasonableness, Section 330(a)(3) of the Bankruptcy Code instructs that:

. . . the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including -

- a. the time spent on such services;
- b. the rates charged for such services;
- c. whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
- d. whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
- e. with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
- f. whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. § 330(a)(3).

Each applicant bears the burden of proof for its claim for compensation. Howard & Zukin Capital v. High River Ltd. P'ship, No. 05 Civ. 5726 (BSJ), 2007 WL 1217268, at *2 (S.D.N.Y. Apr. 24, 2007); Zeisler & Zeisler, P.C. v. Prudential Ins. Co. (In re JLM, Inc.), 210 B.R. 19, 24 (B.A.P. 2d Cir. 1997); In re Northwest Airlines Corp., 382 B.R. 632, 645 (Bankr. S.D.N.Y. 2008) (citations omitted); In re Keene Corp., 205 B.R. 690, 695 (Bankr. S.D.N.Y. 1997). The failure of an applicant to sustain the burden of proof as to the reasonableness of the compensation may result in the denial of the request for compensation. In re Beverly Mfg. Corp., 841 F.2d 365 (11th Cir. 1988).

Additionally, only documented expenses that are actual and necessary are reimbursable. 11 U.S.C. § 330(a)(1)(B). Professionals must furnish enough specificity to establish whether a given expense was both actual and necessary. In re Korea Chosun Daily Times, 337 B.R. 758, 769 (Bankr. E.D.N.Y. 2005) (quoting In re S.T.N. Enters., Inc., 70 B.R. 823, 834 (Bankr. D. Vt. 1987)); see also In re Fibermark, Inc., 349 B.R. 385, 395 (Bankr. D. Vt. 2006) (in order to be compensated from the estate, the professional must demonstrate, "not just recite - that . . . the expenses sought to be reimbursed are actual and necessary and that no other reasonable, less expensive alternatives were

available."). Expenses are actual if they are incurred and not based on a formula or pro rata calculation. Id. at 400. Moreover, they are necessary if they were reasonably needed to accomplish proper representation of the client. Korea Chosun, 337 B.R. at 769 (quoting In re Pacific Express, Inc., 56 B.R. 859, 865 (Bankr. E.D. Cal. 1985)).

The Court has an independent burden to review fee applications "lest overreaching ... professionals drain [the estate] of wealth which by right should inure to the benefit of unsecured creditors." Keene Corp., 205 B.R. at 695 (quoting In re Busy Beaver Bldg. Ctrs., Inc., 19 F.3d 833, 844 (3d Cir. 1994)).

Further, the Bankruptcy Court has the authority to reduce fees or expenses when they are disproportionate to the benefit to the estate, even if it already has approved the professional's retention under Sections 327 and 328 of the Bankruptcy Code. In re Taxman Clothing Co., 49 F.3d 310, 316 (7th Cir. 1995); see also, Zolfo, Cooper & Co. v. Sunbeam-Oster Co., Inc., 50 F.3d 253, 262-63 (3d Cir. 1995) (affirming lower courts' denial of improperly documented and inadequately detailed expenses).

Fees paid pursuant to the Monthly Compensation Order, regardless of whether an objection is filed or not, are subject to re-examination and adjustment at the time a

professional files its fee application. See Monthly Compensation Order at ¶ 2(i).

Objections

All Applicants: Percentage Fee Reduction

The United States Trustee respectfully requests a percent fee reduction (colloquially known as a "hold back") of the requested fees. As noted above, the Debtors have incurred losses of over \$180 million. In addition, a plan and disclosure statement have not yet been filed. Consequently, the ultimate benefit to the estates for the services rendered by the professionals simply cannot be assessed at this time. Because those results still are unknown, the imposition of a percentage interim hold back is appropriate. In re Child World, Inc., 185 B.R. 14, 18 (Bankr. S.D.N.Y. 1995) (hold backs, while not mandated by statute, are commonly used by courts to moderate potentially excessive interim allowances and to offer an incentive for timely resolution of the case); see also In re Bank of New England Corp., 134 B.R. 450, 458-59 (Bankr D. Mass. 1991) (because of the difficulty in determining whether services were actual and necessary when reviewing interim applications, bankruptcy courts routinely require percentage reductions until the end of the case), affirmed, 142 B.R. 584 (D. Mass. 1992).

Mercer (US) Inc.

Legal Expenses: Mercer (US) Inc. ("Mercer") seeks \$16,496.35 for the reimbursement of its counsel fees. See Mercer First and Second Monthly Fee Statements at ECF Nos. 666 and 885. Mercer, however, fails to provide any authority for this position. For an attorney to be paid from a debtor's estate, that attorney must be retained under section 327 of the Bankruptcy Code. See In re Crafts Retail Holding Corp., 378 B.R. 44 (Bankr. E.D.N.Y. 2007) (financial advisor precluded, as a matter of law, from being paid the fees of its attorney as a reimbursement of expenses); In re Cenargo Intern., PLC, 294 B.R. 571 (Bankr. S.D.N.Y. 2003) (fees of barristers that debtor's attorney used to assist in English administration proceedings could not be compensated where barristers retention was not approved by the bankruptcy court); see also Drexel Burham Lambert Group, 133 B.R. at 27 (Bankr. S.D.N.Y. 1991) (fees to negotiate a retention are part of an investment banker's overhead and are more than adequately covered by a retention fee).

Aside from Sections 503(b)(4) and 506(b) of the Bankruptcy Code, the United States Trustee knows of no other provision of the Bankruptcy Code that authorizes the award of fees and expenses to non-retained professionals. See Lamie vs. U.S. Trustee, 540 U.S. 526 (2004) ("A debtor's attorney not engaged as provided by §327 is simply

not included within the class of persons eligible for compensation."). Moreover, the reimbursement of fees and expenses for retained professionals is governed by section 330 which, generally speaking, focuses on reasonableness and benefit to the estate of the professionals' services. In re Lederman Enter., Inc., 997 F.2d 1321, 1323 (10th Cir. 1993). Said differently, an application for compensation and reimbursement of expenses must demonstrate that the professional's services were necessary and made a beneficial contribution to the estate or its creditors. In re Engel, 124 F.3d 567, 573 (3d Cir. 1997); see also Fibermark, 349 B.R. at 396 (Bankruptcy professionals should be compensated "commensurate with their expertise and the benefit their efforts yield to the estate."). In the case of the payment of a professionals' counsel fees and disbursements, there is no direct benefit for the services provided by such counsel directly to the Debtors's estates - the only benefit is to Mercer. Moreover, such counsel's legal advice to, and on behalf of, Mercer interests may at times even be contrary or adverse to the interests of the Debtors.

The Debtors should not be obligated to pay for services that do not benefit the Debtors' estates and that are solely a cost of Mercer of doing business and being retained as a professional. Such legal services should be

regarded simply as Mercer's "overhead." Accordingly, the requests for legal fees should not be paid.

All Other Applicants

Except for the United States Trustee's request for a hold-back, the United States Trustee does not object to the allowance of interim fees and expenses in the amounts sought.

WHEREFORE, pursuant to the Monthly Compensation Order, no compensation to which the United States Trustee has objected may be paid without a further order by this Court.

Dated: New York, New York
June 20, 2011

Respectfully submitted,

TRACY HOPE DAVIS
UNITED STATES TRUSTEE

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