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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re

**BORDERS GROUP, INC., *et al.*,¹

Debtors.**

Chapter 11

**Case No. 11-10614 (MG)

(Jointly Administered)**

**RESPONSE OF MERCER (US) INC. TO THE U.S. TRUSTEE'S OBJECTION
TO THE FIRST INTERIM APPLICATION FOR COMPENSATION FOR
SERVICES RENDERED AND REIMBURSEMENT OF EXPENSES
AS COMPENSATION CONSULTANT TO THE DEBTORS FOR
THE PERIOD FROM FEBRUARY 16, 2011 THROUGH APRIL 30, 2011**

Mercer (US) Inc. ("*Mercer*"), compensation consultant for Borders Group, Inc. and its affiliated debtors and debtors-in-possession in the above-captioned chapter 11 cases (collectively, "*Borders*" or the "*Debtors*"), by and through its undersigned counsel, hereby submits this response (the "*Response*") to the objection (the "*Objection*") of the Office of the U.S. Trustee (the "*U.S. Trustee*") to Mercer's first interim fee application for compensation for services rendered and reimbursement of expenses for the period from February 16, 2011 through April 30, 2011 dated June 14, 2011 [Docket No. 1043] (the "*First Interim Fee Application*"). In support of this Response, Mercer respectfully represents as follows:

¹ The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Borders Group, Inc. (4588); Borders International Services, Inc. (5075); Borders, Inc. (4285); Borders Direct, LLC (0084); Borders Properties, Inc. (7978); Borders Online, Inc. (8425); Borders Online, LLC (8996); and BGP (UK) Limited.

PRELIMINARY STATEMENT

The only issue before the Court is whether Mercer may recover less than \$16,500 in outside counsel fees, when reimbursement of those expenses was an express material term of the engagement letter between Mercer and Borders, as reviewed and approved by this Court, after extensive comments, revisions and approval from the U.S. Trustee and the Official Committee of Unsecured Creditors (the “*Committee*”). The reasonableness of those fees is not disputed; the U.S. Trustee objects only to Mercer’s ability to assert its contractual right of reimbursement – a right that this Court has given consistently to professionals like Mercer. These key facts, which Mercer believes are fatal to the U.S. Trustee’s position, are not mentioned in the Objection. It is no surprise, then, that Mercer’s request for this reasonable reimbursement is also supported by Borders.

The U.S. Trustee also fails to justify why this Court should rewrite its own orders, particularly given the high legal standard for such an extraordinary action under governing law and in light of the dozens of cases before this Court that have approved similar reimbursement rights for section 327(a) professionals. Finally, as demonstrated below, the U.S. Trustee’s position – if accepted by this Court – will have the perverse effect of increasing administrative costs on these estates by forcing Mercer to rely on a higher-cost solution to the matter, which cannot possibly be in the best interests of Borders and its creditors, or otherwise contemplated under the Bankruptcy Code. For these reasons, the U.S. Trustee’s objection should be denied and Mercer’s First Interim Fee Application should be approved in full.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

On February 16, 2011 (the “*Petition Date*”), each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “*Bankruptcy Code*”). Prior to the *Petition Date*, Mercer provided human resources consulting services to Borders on a

variety of business aspects, including medical, dental and retirement benefit administration services. Based upon Mercer's prior experience with Borders and its reputation as a respected compensation consultant in other complex chapter 11 cases, the Debtors sought to retain Mercer as a compensation consultant in these cases pursuant to section 327(a) of the Bankruptcy Code. Accordingly, on March 24, 2011 the Debtors filed their *Application for of the Debtors for an Order Authorizing and Approving the Employment and Retention of Mercer (US) Inc. as Compensation Consultant to the Debtors Nunc Pro Tunc to the Petition Date* [Docket No. 467] (the "327(a) Application").

Prior to the hearing on the 327(a) Application, Mercer and the Debtors worked to resolve several relatively minor concerns of the U.S. Trustee and the Committee to the 327(a) Application and the proposed terms of Mercer's retention. The U.S. Trustee focused on certain indemnification provisions of the retention agreement, while the Committee sought to eliminate terms governing limitation of liabilities and to ensure its involvement in negotiations over any expansion to the scope of Mercer's retention and in any disputes between Mercer and the Debtors. The Committee also sought to limit fees to be earned by Mercer with respect to evaluating compensation paid to the Debtors' board of directors.

Mercer and the Debtors successfully resolved the limited concerns of the U.S. Trustee and the Committee to the 327(a) Application, and on April 7, 2011, this Court entered an order authorizing the Debtors' retention and employment of Mercer as compensation consultant to the Debtors *nunc pro tunc* to February 16, 2011 [Docket No. 560] (the "*Retention Order*"). Pursuant to the Retention Order, Mercer was retained as compensation specialists to the Debtors on the terms set forth in Mercer's February 11, 2011 engagement letter [see Retention Application at

Docket No. 467, Exhibit B] (the “*Engagement Letter*”), subject only to the limited modifications set forth therein.²

As agreed with the Debtors and approved by this Court, the Engagement Letter provides that Mercer shall be entitled to reimbursement from the Debtors for its reasonable out-of-pocket expenses “including legal fees associated with [its] retention as a professional and subsequent fee application[s] with the US bankruptcy court” (the “*Reimbursement Right*”). See Engagement Letter at pp. 2-3. Indeed, this material term is standard for Mercer when retained as a section 327(a) professional in complex chapter 11 cases. See e.g., *In re R.H. Donnelley Corporation, et al.*, Case No. 09-11833 (KG) (Bankr. D. Del.) and *In re Neenah Enterprises, Inc., et al.*, Case No. 10-103640 (MFW) (Bankr. D. Del.).³

In compliance with the interim compensation procedures order entered in these cases, Mercer submitted monthly fee statements (the “*Monthly Fee Statements*”) on March 20 and April 20, 2011 and filed its First Interim Fee Application with this Court on June 14, 2011. The U.S. Trustee objected to both Monthly Fee Statements, as well as the First Interim Fee Application. Except for the dispute concerning reimbursement of Mercer’s legal fees, the parties have resolved all other objections of the U.S. Trustee to the First Interim Fee Application.

THE U.S. TRUSTEE’S OBJECTION SHOULD BE OVERRULED

I. The U.S. Trustee’s Objection Represents An Untimely, Improper and Unfounded Collateral Attack On Mercer’s Retention and Its Previously Approved Engagement Letter.

In its Objection, the U.S. Trustee does not question the reasonableness of fees sought to be reimbursed to Mercer in its First Interim Fee Application; rather, it objects to the Reimbursement Right itself, notwithstanding that this material term was (i) expressly negotiated

² A copy of the engagement letter is attached hereto as Exhibit 1.

³ Copies of Mercer’s engagement letters and retention orders from these cases are attached hereto as Group Exhibit 2.

between the parties and clearly stated in the Engagement Letter, (ii) subject to scrutiny and comment by the U.S. Trustee and the Committee as part of the overall 327(a) Application filed with this Court on notice to creditors and parties-in-interest, and (iii) ultimately approved by this Court with the Retention Order.

Applicable law precludes the U.S. Trustee from now raising this challenge. While section 328(a) of the Bankruptcy Code sets forth certain limitations on the compensation allowable to section 327(a) professional persons, it also severely restricts circumstances under which the Court can modify the terms of a previously-approved retention agreement. *In re XO Comm., Inc.*, 323 B.R. 330, 339 (Bankr. S.D.N.Y. 2005) (citing 11 U.S.C. § 328). Generally, a court may not revisit the reasonableness of a fee arrangement that has been approved unless it determines that the terms and conditions proved to be “improvident” at the time they were approved in light of then-unforeseen circumstances. *Id.*

Under applicable law, “improvidence” includes inadequate representation, resolution at an unexpectedly early stage of the proceedings, or that the results obtained were disappointing. *See In re Benassi*, 72 B.R. 44, 48-49 (D. Minn. 1987) (cited by *In re Yablon*, 136 B.R. 88, 92 (Bankr. S.D.N.Y. 1992)). Simply put, a finding of improvidence pursuant to section 328 is a very high standard, and therefore, courts rarely disturb the original terms and conditions of a professional’s employment. *XO Comm.*, 323 B.R. at 339.

In this case, the U.S. Trustee makes no reference to any improvident acts by Mercer or any other subsequent circumstance that would warrant stripping the Reimbursement Right from the Engagement Letter. Instead, the U.S. Trustee relies on a mere belief that court-retained 327(a) professionals should never receive Reimbursement Rights or similar terms. Accordingly, the U.S. Trustee’s attempt to *per se* disallow reimbursement of legal fees fails to meet the

improvidence standards required under section 328(a) and thus represents an impermissible collateral attack on the Retention Order entered on April 7, 2011.⁴

The Retention Order does state that the U.S. Trustee and the Committee “shall retain all rights to object to Mercer’s fees and expenses,” but this reservation can only be interpreted to preserve challenges to the *reasonableness* of Mercer’s fees and expenses, not to allow the U.S. Trustee to revisit the terms of the Engagement Letter, let alone a material term such as the Reimbursement Right, without satisfying the improvidence standard of *XO Comm.* To interpret the reservation of rights more broadly renders the Retention Order and the Engagement Letter meaningless and vitiates applicable law. This Court should not sanction the U.S. Trustee’s attempt to circumvent applicable law by limiting the *type* of expenses that Mercer can seek in these cases months after such terms were approved by this Court.

Curiously, the U.S. Trustee did not raise any issue with the Reimbursement Right to Mercer prior to entry of the Retention Order. Raising the issue now – after Borders and Mercer have agreed on pricing and all other material terms of the engagement (including, most notably, the Reimbursement Right), and after such terms have been approved by this Court – stands to result in substantial prejudice to Mercer. This unfortunate reality is especially true in this case, given the modest size of the overall engagement to Mercer and relatively significant administrative costs for Mercer in being retained as a 327(a) professional and complying with

⁴ Bankruptcy courts in this jurisdiction and elsewhere generally do not allow a party to assert an argument that represents a collateral attack on a previously entered order. *See e.g., In re Spiegel Inc.*, 2006 WL 2577825, *13 (Bankr. S.D.N.Y. Aug. 16, 2006) (finding that a party’s attempt to challenge plan release and injunction provisions in a confirmation order that has become final and nonappealable constituted an improper collateral attack on the confirmation order); *In re Emons Industries, Inc.*, 220 B.R. 182, 194 (Bankr. S.D.N.Y. 1998) (disallowing claimants’ collateral attack on a confirmation order by seeking payment in full on their claims in violation of the discharge and injunction provisions of a final and nonappealable confirmation order); *In re Sudano*, 391 B.R. 678, 690-91 (Bankr. E.D.N.Y. 2008) (stating that a motion seeking, *inter alia*, forfeiture of payment to trustee and counsel constituted an impermissible collateral attack on final orders, including awards of compensation to the trustee and counsel); *In re Earned Capital Corp.*, 293 B.R. 362, 371 (Bankr. W.D. Pa. 2008) (stating that a shareholder’s attempt to pursue a debtors’ accountant for negligence claims constituted collateral attacks on the order approving the accountant’s application for compensation and the order confirming the debtors’ plan).

applicable law.⁵ Consequently, the U.S. Trustee's attempt to strike the Reimbursement Right from the Engagement Letter at this juncture stands to turn the entire engagement for Mercer on its head. At a minimum, Mercer should have been afforded the opportunity to make an informed decision whether to proceed with this particular engagement on the U.S. Trustee's "terms" prior to entry of the Retention Order. Mercer should not now be prejudiced by this Court after performing the most valuable component of its services for these estates at the highest caliber and without any issue whatsoever.

II. The Reimbursement Right Is Permissible and Appropriate As a Matter of Law.

The U.S. Trustee submits that Mercer cannot be reimbursed for its outside legal fees notwithstanding the court-approved Reimbursement Right in the Engagement Letter because (a) Mercer's outside legal counsel, Freeborn & Peters LLP ("*F&P*"), has not itself been retained as a 327(a) professional by this Court, and (b) F&P's services do not directly benefit the estate and, thus, may not be reimbursed pursuant to section 330 of the Bankruptcy Code.

The U.S. Trustee's legal conclusions are incorrect as a matter of law and practice in this District and should be rejected by this Court. In fact, in dozens of cases before the Southern District, bankruptcy judges have routinely approved Reimbursement Rights similar to that approved by this Court for Mercer.⁶ Most recently, in the bankruptcy cases of *Sbarro, Inc.*

⁵ Mercer's modest involvement in these cases stands in marked contrast to investment banking firms that typically earn over seven figures on a successful section 363 transaction.

⁶ See e.g., *In re MSR Resort Golf Course, LLC*, Case No. 11-10372 (SHL) (Bankr. S.D.N.Y. Mar. 10, 2011) [docket no. 139] (Houlihan Lokey); *In re RHI Entertainment, Inc.*, Case No. 10-16536 (SMB) (Bankr. S.D.N.Y. Jan. 11, 2011) [docket no. 136] (Rothschild); *In re Vertis Holdings, Inc.*, Case No. 10-16170 (ALG) (Bankr. S.D.N.Y. Dec. 16, 2010) [docket no. 128] (Perella); *In re Boston Generating, LLC*, Case No. 10-14419 (SCC) (Bankr. S.D.N.Y. Nov. 18, 2010) [docket no. 476] (JP Morgan); *In re The Weck Corp.*, Case No. 10-14349 (AJG) (Bankr. S.D.N.Y. Sept. 1, 2010) [docket nos. 88, 146] (Triton); *In re Citadel Broad. Co.*, Case No. 09-17442 (BRL) (Bankr. S.D.N.Y. Apr. 12, 2010) [docket no. 271] (Miller Buckfire); *In re Fairpoint Commc'ns*, Case No. 09-16335 (BRL) (Bankr. S.D.N.Y. Jan. 11, 2010) [docket no. 328] (Rothschild); *In re Motors Liquidation Co.*, Case No. 09-50026 (REG) (Bankr. S.D.N.Y. Oct. 28, 2009) [docket no. 4304] (Evercore); *In re Lear Corp.*, Case No. 09-14326 (ALG) (Bankr. S.D.N.Y. Aug. 25, 2009) [docket no. 501] (Miller Buckfire); *In re Extended Stay, Inc.*, Case No. 09-13764 (JMP) (Bankr. S.D.N.Y. July 23, 2009) [docket no. 206] (Lazard); *In re U.S. Shipping Partners L.P.*, Case No. 09-12711 (RDD) (Bankr. S.D.N.Y. July 16, 2009) [docket no. 284] (Greenhill); *In re Ion Media Networks, Inc.*, Case No. 09-13125 (JMP) (Bankr. S.D.N.Y. July 13, 2009) [docket no. 154] (Moelis); *In re Chemtura Corp.*, Case No.

currently pending in this District, the court upheld the rights of retained professionals to recover their outside counsel's fees and expenses pursuant to court-approved retention orders. *In re Sbarro, Inc., et al.*, Bankr. S.D.N.Y. 11-11527 (SCC), Transcript from May 3, 2011 Hearing, [Docket No. 175].⁷

In *Sbarro*, the U.S. Trustee argued that “the reimbursement of legal fees should not be permitted because for an attorney to be paid, they need to be retained in the bankruptcy case.” *Id.* at 53. In rendering her decision to approve the reimbursement of the professional's legal expenses, Judge Chapman articulated that such fees are not overhead. *Id.* at 52 (“But I disagree with your view of overhead. I think overhead is paying for the lights, paying for the air

09-11233 (REG) (Bankr. S.D.N.Y. June 23, 2009) [docket no. 641] (Lazard); *In re Metaldyne Corp.*, Case No. 09-13412 (MG) (Bankr. S.D.N.Y. June 22, 2009) [docket no. 278] (Lazard); *In re Mark IV Industries, Inc.*, Case No. 09-12795 (SMB) (Bankr. S.D.N.Y. May 27, 2009) [docket no. 167] (Houlihan Lokey); *In re General Growth Properties, Inc.*, Case No. 09-11977 (ALG) (Bankr. S.D.N.Y. May 26, 2009) [docket no. 602] (Miller Buckfire); *In re Journal Register Co.*, Case No. 09-10769 (ALG) (Bankr. S.D.N.Y. Apr. 20, 2009) [docket no. 246] (Lazard); *In re Bearingpoint, Inc.*, Case No. 09-10691 (REG) (Bankr. S.D.N.Y. Apr. 17, 2009) [docket no. 473] (Greenhill); *In re Charter Commc'ns, Inc.*, Case No. 09-11435 (JMP) (Bankr. S.D.N.Y. Apr. 15, 2009) [docket no. 183] (Lazard); *In re Tronox, Inc.*, Case No. 09-10156 (ALG) (Bankr. S.D.N.Y. Apr. 7, 2009) [docket no. 339] (Rothschild); *In re Lyondell Chemical Co.*, Case No. 09-10023 (REG) (Bankr. S.D.N.Y. Feb. 25, 2009) [docket no. 956] (Evercore); *In re Lenox Sales, Inc.*, Case No. 08-14679 (ALG) (Bankr. S.D.N.Y. Feb. 11, 2009) [docket no. 286] (Berenson); *In re Bally Total Fitness*, Case No. 08-14818 (BRL) (Bankr. S.D.N.Y. Jan. 28, 2009) [docket no. 546] (Houlihan); *In re Lehman Brothers Holdings, Inc.*, Case No. 08-13555 (JMP) (Bankr. S.D.N.Y. Dec. 17, 2008) [docket no. 2275] (Lazard); *In re Wellman, Inc.*, Case No. 08-10595 (SMB) (Bankr. S.D.N.Y. Apr. 2, 2008) [docket no. 162] (Lazard); *In re PRC, LLC*, Case No. 08-10239 (MG) (Bankr. S.D.N.Y. February 27, 2008) [docket no. 184] (Evercore); *In re Dunmore Homes, Inc.*, Case No. 07-13533 (MG) (Bankr. S.D.N.Y. Dec. 20, 2007) [docket no. 177] (Alvarez & Marsal); *In re Ritchie Risk-Linked Strategies Trading (Ireland), Ltd.*, Case No. 07-11906 (BRL) (Bankr. S.D.N.Y. July 26, 2007) [docket no. 49] (Houlihan Lokey); *In re M. Fabrikant and Sons, Inc.*, Case No. 06-12737 (SMB) (Bankr. S.D.N.Y. May 24, 2007) [docket no. 310] (Peter J. Solomon Co.); *In re Lionel L.L.C.*, Case No. 04-17324 (BRL) (Bankr. S.D.N.Y. Oct. 11, 2006) [docket no. 484] (Houlihan); *In re Oneida Ltd.*, Case No. 06-10489 (ALG) (Bankr. S.D.N.Y. May 2, 2006) [docket no. 205] (Credit Suisse); *In re Calpine Corp.*, Case No. 05-60200 (BRL) (Bankr. S.D.N.Y. May 2, 2006) [docket no. 1370] (Lazard); *In re Dana Corp.*, Case No. 06-10354 (BRL) (Bankr. S.D.N.Y. Mar. 29, 2006) [docket no. 741] (Miller Buckfire); *In re Coram Capital LLC*, Case No. 05-60169 (REG) (Bankr. S.D.N.Y. Jan. 18, 2006) [docket no. 92] (Gordian Group); *In re Refco, Inc.*, Case No. 05-60006 (RDD) (Bankr. S.D.N.Y. Dec. 21, 2005) [docket no. 880] (Greenhill); *In re DPH Holdings Corp.*, Case No. 05-44481 (RDD) (Bankr. S.D.N.Y. Nov. 30, 2005) [docket no. 1363] (Rothschild); *In re Levitz Home Furnishings, Inc.*, Case No. 05-45189 (BRL) (Bankr. S.D.N.Y. Nov. 22, 2005) [docket no. 307] (Blackstone); *In re Tower Automotive, Inc.*, Case No. 05-10578 (ALG) (Bankr. S.D.N.Y. June 15, 2005) [docket no. 595] (Lazard).

⁷ A copy of the transcript from the hearing in the *Sbarro* cases is attached hereto as Exhibit 3.

conditioning, paying for the administrative staff. I don't think that paying Debevoise to help Rothschild get retained is overhead."').⁸

The Court ultimately approved reimbursement of the professional's fees, but subject to the submission of detailed time records to assess whether such legal fees are reasonable. *Id.* at 67. By contrast, no party in this case (including even the U.S. Trustee) has raised any objection to the reasonableness of Mercer's expenses request for outside legal counsel in these cases. In fact, no such objection exists to the modest fees and expenses incurred by Mercer to be properly retained and paid for its exemplary services in these cases.

Similarly, in *Warren Electric Group*, the bankruptcy court approved an expense reimbursement for the debtors' financial advisor for outside counsel fees on in its final fee application over the committee's objection. *In re Warren Electric Group, Ltd.*, Case No. 02-21659 (Bankr. S.D. Tex.). In its defense, the financial advisor cited *Max Rouse & Sons, Inc. v. Specialty Plywood, Inc. (In re Specialty Plywood)*, 160 B.R. 627 (B.A.P. 9th Cir. 1993) for the proposition that such expenses may be reimbursable. The financial advisor further reasoned:

The Committee maintains that BGL's legal efforts to comply with section 327 of the Code demonstrate an "adverse interest" to the estate for which BGL cannot be reimbursed for its expenses. (Objection, at ¶ 20). By this same logic, the expenses incurred by all of the Debtor's professionals (including the Committee) that are related to being retained by this Court are not reimbursable expenses. That cannot be the proper result.

The Court ultimately held that the financial advisor's outside counsel fees were properly reimbursable expenses and approved the final fee application in full.

Accordingly, although "there is no provision in the Code for a professional appointed pursuant to Section 327 to seek appointment of another professional to represent its interests . . . [however] to expect . . . a non-attorney professional, to either accept representation from counsel

⁸ Perhaps the costs of using Mercer's in-house legal counsel could be considered overhead under Judge Chapman's interpretation, but Mercer is not seeking any reimbursement for the costs associated with its in-house legal department that also devoted resources to Mercer's retention in these cases.

who may suffer a conflict of interest or absorb the cost of representation itself is fundamentally unfair. This is especially true in light of the engagement agreement with specifically provided for reimbursement of such fees.” *In re Geneva Steel*, 258 B.R. 799, 803 (Bankr. D. Utah 2001).

III. The Cases Cited by the U.S. Trustee Are Inapposite.

In support of the Objection, the U.S. Trustee cites a host of cases, which neither individually nor collectively prohibit the reimbursement of Mercer’s outside counsel expenses under the Retention Order. To the contrary, a further reading of each of these opinions indicates that their holdings, while topically relevant, are not controlling.

The U.S. Trustee cites *Cenargo*, which pertains to a request for payment of fees to the debtor’s barristers used in English legal proceedings. *In re Cenargo Intern., PLC*, 294 B.R. 571, 606 (Bankr. S.D.N.Y. 2003). The opinion is void of any reference to the Court’s approval of the reimbursement of fees to the English barristers in their retention application. *See Id.* Instead, the Court largely based its decision not to award the reimbursement of fees “because the Joint Administrators have assured the Court that the barristers may apply in England to be compensated for such work, which application the Joint Administrators will support. The English Court, therefore, is in the best position to review these fees.” *See Id.* at 606. Unlike *Cenargo*, this Court is not only the proper venue to review Mercer’s legal expenses, but also the only venue.

In *Drexel Burnham*, the Court provides a thorough and detailed analysis of professional fees before deciding that “indemnification agreements are inappropriate.” *In re Drexel Burnham Lambert Group*, 133 B.R. 13, 27 (Bankr. S.D.N.Y. 1991). In dicta, the Court adds, indemnification agreements, “like professional fees to negotiate a retention, are part of an investment banker’s overhead, usually more than adequately covered by a retention fee.” *Id.* Contrary to the factual circumstances in *Drexel Burnham*, this Court is not faced with an

indemnification provision and there is no “retention fee” that would cover reimbursement of Mercer’s outside counsel expenses.

Although not cited in the Objection, the U.S. Trustee’s prior objection to Mercer’s Monthly Fee Statements referenced Judge Lifland’s holding in *In re Blockbuster Inc., et al.*, Case No. 10-14997 (BRL) (Bankr. S.D.N.Y.). In *Blockbuster*, the Court’s decision not to allow an investment banker to recover legal expenses was addressed at the time of the investment banker’s retention. This distinction is imperative because, unlike *Blockbuster*, Mercer’s Reimbursement Right was not objected to (despite the U.S. Trustee having ample opportunity to do so), and was ultimately approved under the Retention Order. Additionally, *Blockbuster* concerned a different type of professional – an investment banker – which would likely have a “retention fee” that would “more than adequately cover” the investment banker’s legal fees. See *Drexel Burnham*, 133 B.R. at 27. Here, Mercer has no such retention fee and its expected compensation in these cases is nowhere near the level typically paid to investment bankers, thereby making the Reimbursement Right a crucial piece of Mercer’s previously approved engagement.

In another case cited in the U.S. Trustee’s Objection, *Crafts Retail*, the Court never approved the professional’s request for reimbursement of legal fees. *In re Crafts Retail Holding Corp.*, 378 B.R. 44, 50 (Bankr. E.D.N.Y. 2007). Unlike the present case, the Court found that “there never was a valid agreement between the Debtors and DPS for reimbursement of attorney fees” due to provisions the Court added to the retention order, which limited the approval of the engagement letter. *Id.* at 50. Here, however, the Retention Order did not restrict the Reimbursement Right but, rather, simply stated “[s]ubject to the terms of this Order, the Engagement Letters are approved.” Retention Order, ¶ 3. The Order did not modify, limit or

deny the Reimbursement Right, and therefore, the Reimbursement Right is in full force and effect.

In *Lamie v. U.S. Trustee*, the Supreme Court found that following the conversion of a chapter 11 bankruptcy to chapter 7, the debtor's former attorney was not retained and therefore any services subsequent to the conversion were non-compensable. 540 U.S. 526, 534 (2004). As with the other cases cited by the U.S. Trustee, the *Lamie* case does not involve a court-approved retention agreement authorizing the reimbursement of legal expenses, as is the case here. Moreover, unlike in *Lamie*, Mercer's retention has been approved by this Court.

The U.S. Trustee cites to several additional cases in an effort to convince the Court that any legal services required by Mercer to execute its duties under the Court approved retention agreement did not benefit the Debtors' estates. In *Lederman*, the Tenth Circuit Court of Appeals addressed whether a professional's services are compensable when the services are rendered "in bad faith and without justification," thereby providing no benefit to the estate. *In re Lederman Enterprises, Inc.*, 997 F.2d 1321 (10th Cir. 1993). The factual scenario in *Lederman* diverges from that in the present case so greatly that the mere citation seems out of place in the U.S. Trustee's Objection, as there have been no allegations of bad faith or wrongdoing on Mercer's part.

As with *Lederman*, the facts and legal conclusions of *Engel*, cited by the U.S. Trustee, are not relevant to this Case. In *Engel*, an attorney retained under section 327 of the Bankruptcy Code was denied compensation from the debtor's bankruptcy estate for his failure to prove that the services rendered provided a benefit to the estate under section 330. 124 F.3d 567 (3d Cir. 1997). The movant in *Engel* provided criminal defense services to the debtor, which had no bearing on the debtor's estate. *Id.* Additionally, when the issue was first raised, "the bankruptcy court warned that criminal defense services would not be payable from the estate." In the

present case, Mercer’s retention and fee applications were central to its ability to render services for Borders, as the filing of such pleadings is mandated by the Bankruptcy Code. Additionally, unlike the movant in *Engel*, Mercer received no warning from the Court – or the U.S. Trustee, for that matter – that the retention agreement was potentially invalid.

Finally, the U.S. Trustee also relies on *In re Fibermark, Inc.* to contend that “an application for compensation and reimbursement of expenses must demonstrate that a professional’s services were necessary and made a beneficial contribution to the estate or its creditors.” *In re Fibermark, Inc.*, 349 B.R. 385, 396 (Bankr. D. Vt. 2006). In *Fibermark*, the court underscores the importance of compensating professionals in bankruptcy cases in order “to encourage competent and experienced professionals to continue to participate in chapter 11 cases.” *Id.* at 395-96. More importantly, the court in *Fibermark* notes that “[r]easonable time spent preparing a fee application is compensable . . . Accordingly, more junior level associates, where available, or administrative staff should be utilized to assist in the preparation of fee applications where appropriate.” *Id.* at 397. As discussed in detail in Section IV *infra*, Mercer utilized a cost-effective and Court-sanctioned method in preparing its retention and fee applications.

IV. Sustaining the Objection Would Actually Increase Costs to the Estates.

Perhaps contrary to the U.S. Trustee’s intention, disallowing the Reimbursement Right would actually *increase* costs to the estates, as Mercer would have no choice but to utilize the Debtors’ professionals to prepare and file subsequent fee applications – professionals with rates significantly greater than those of F&P, a Chicago law firm with bankruptcy attorneys licensed to practice before this District.

The following summarizes the time spent by Mercer's outside national bankruptcy counsel, F&P, which performed legal services for which Mercer seeks reimbursement under the First Interim Fee Application:

<u>Professional</u>	<u>Position</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Hammer, Aaron L.	Senior Partner	11.7	\$562.50	\$6,581.25
Eggert, Devon J.	Senior Associate	20.8	\$279.00	\$5,803.20
Brandess, Michael A.	Junior Associate	4.7	\$225.00	\$1,057.50
Sheldon, Kathryn C.	Paralegal	15.3	\$198.00	\$3,029.40
TOTALS:		52.5		\$16,471.35
BLENDED RATE:				\$313.74

By contrast, the following represents the cost to the Debtors' estates if, absent the Reimbursement Right, Mercer would have relied upon the Debtors' bankruptcy counsel, Kasowitz Benson Torres & Friedman LLP ("*Kasowitz*"), for support, assuming the same number of hours would be incurred to perform the various necessary tasks.⁹

<u>Position</u>	<u>Approximate Hourly Rates</u>	<u>Medium of Hourly Rates</u>	<u>Estimated Hours</u>	<u>Comparable Cost</u>
Senior Partner	\$775 - \$950	\$826.50	11.7	\$9,670.05
Senior Associate	\$360 - \$525	\$442.50	20.8	\$9,204.00
Junior Associate	\$325 - \$350	\$337.50	4.7	\$1,586.25
Paralegal	\$165 - \$195	\$180.00	15.3	\$2,754.00
TOTALS:			52.5	\$23,214.30
BLENDED RATE:				\$442.18

The foregoing demonstrates that the decision of the Debtors in granting Mercer its Reimbursement Right likely resulted in at least \$6,500 in net savings to the Debtors' estates thus

⁹ Here, Mercer assumes that it would take Kasowitz the same amount of time for services spent by F&P. This assumption is generous under the circumstances, as F&P has represented Mercer in dozens of similar engagements across the country, and therefore, F&P has substantial prior experience with Mercer's financial and accounting systems and in preparing Mercer's retention and fee applications. Such familiarity likely resulted in additional efficiencies for the Debtors' estates.

far, as the rates of F&P are materially lower than those of Kasowitz at almost every level.¹⁰ Future savings to the estates will be eliminated if the Engagement Letter is altered, as Mercer will be required to rely on Kasowitz, whose billing rates average over \$100.00 more per hour, to prepare and file all subsequent applications for compensation. Accordingly, and perhaps contrary to the U.S. Trustee's intention, this Court will add administrative cost on these estates by striking the Reimbursement Right.

CONCLUSION

Based upon the foregoing, Mercer submits that the U.S. Trustee's Objection should be overruled and respectfully requests that this Court grant the First Interim Fee Application in full.

Dated: July 8, 2011
Chicago, Illinois

MERCER (US) INC.

By: /s/ Aaron L. Hammer
One of Its Attorneys

Aaron L. Hammer, Esq.
(ahammer@freebornpeters.com)
Devon J. Eggert, Esq.
(deggert@freebornpeters.com)
Freeborn & Peters, LLP
311 S. Wacker Drive, Ste. 3000
Chicago, Illinois 60606
Telephone: (312) 360-6000
Facsimile: (312) 360-6995

¹⁰ Further note that F&P provides Mercer with a 10% across-the-board discount to its standard, non-bankruptcy rates, given the significant number of matters in which it represents Mercer throughout the country. F&P also has lower overhead than Kasowitz due to F&P's Chicago base. As such, the fact that Kasowitz has higher rates should not be construed as a belief by Mercer that Borders is overpaying for its representation in these cases. To the contrary, Mercer submits that Kasowitz and the other professionals in these cases have been highly effective and efficient. Mercer merely highlights the differences to illustrate the Debtors' sound business judgment in granting Mercer the Reimbursement Right, as opposed to relying on its own professionals to support Mercer in its capacity as a 327(a) professional.

EXHIBIT 1

MERCER

John Dempsey

Partner

155 North Wacker Drive, Suite 1500

Chicago, IL 60606

+1 312 917 0609

john.dempsey@mercerc.com

www.mercer.com

February 1, 2011

Confidential

Rosalind Thompson
SVP, Human Resources
Borders Group, Inc.
100 Phoenix Drive
Ann Arbor, MI 48108

Subject: Contingency Planning – Compensation

Dear Rosalind:

This letter follows up on our recent discussion about Borders Group, Inc.'s ("Borders" or "the Company") need for a compensation consultant to advise on the development of a market competitive compensation program to create an alignment of interests between key employees and the Company's financial stakeholders.

Context and Objective

Borders is seeking to restructure its balance sheet and its operations to maintain solvency, potentially through a traditional bankruptcy. You need to be prepared with an understanding of the typical market practices associated with the various restructuring alternatives under consideration. In the near term, the company is also seeking compensation plan designs that will keep people focused on maximizing value for stakeholders during the coming months as the recapitalization is negotiated and implemented.

Workplan and Fee Estimate

Our typical approach is to provide high-level market information on common practices in bankruptcy as soon as practicable following our engagement and then to partner with our client to develop a program that makes sense in the given situation. We will assess the proposal in comparison to market pay levels over the following weeks. Our workplan envisions assisting borders with a package for your compensation committee this week. See Exhibit B for additional information on the work plan and fee estimate. Our proposed workplan envisions five steps:

- 1) *Discovery:* Mercer familiarizing itself with your current compensation programs and situation

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Page 2
February 1, 2011
Rosalind Thompson
Borders Group, Inc.

- 2) *Summary of Market Practices*: Mercer will provide information on typical restructuring practices. This presentation will include recommendations for any immediate changes to the compensation programs based on our discovery and market practices.
- 3) *Key Employee Compensation Analysis*: Industry compensation benchmarking (to the extent that up-to-date information is not available from your compensation committee's consultant or otherwise).
- 4) *Develop straw model compensation program*: Anticipating a traditional bankruptcy.
- 5) *Approval process*: presentation to the Compensation Committee if needed

The fees associated with the above work plan range from \$86,000 to \$90,000. It is difficult to estimate the charges associated with the process of negotiating with creditors and bankruptcy court approval. We typically charge on a time and expenses basis for this work. Our standard hourly rates are as follows:

Skill Sets	Hourly Rate Range in US dollars
Research	\$50 to \$150
Analyst	\$150 to \$300
Associate	\$250 to \$400
Sr. Associate	\$350 to \$550
Principal	\$500 to \$700
Partner	\$700 to \$950

John Dempsey's billing rate is \$735 per hour. Mercer records time in quarter hour increments. In addition to such compensation, we also bill for necessary travel and other expenses related to the services requested, including legal fees associated with our

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Page 3
February 1, 2011
Rosalind Thompson
Borders Group, Inc.

retention as a professional and subsequent fee application with the US bankruptcy court if required.

Given the company's potential insolvency, Mercer would need to be paid in advance of each step prior to initiating work, until a bankruptcy filing or recapitalization.

Staffing

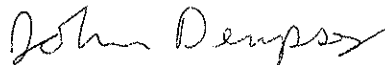
I will be responsible for the work to be completed. I have very extensive experience advising organizations undergoing periods of recapitalization. My professional biography is attached. I will be assisted by an experienced team of Mercer consultants.

Qualifications

Mercer has extensive experience developing compensation programs for organizations transitioning through bankruptcy that align the interests of management and directors with the new financial stakeholders. John Dempsey has worked with a host of companies on projects of this kind, including Aleris, Tribune, Nortel, Masonite, Fairpoint, Caraustar, RH Donnelley / Dex One, Idearc / SuperMedia, Dana, Owens Corning, Kaiser Aluminum, and Solutia. Mercer has the requisite database of practices among organizations emerging from bankruptcy covering both short and long-term incentive for management and also for directors. My summary professional biography is attached as Exhibit A.

Rosalind, we are very interested in working with you on this matter. We trust this proposal reflects our discussion and enthusiasm for the project. Please treat this letter as a draft and let us know if you have suggestions to refine it.

Sincerely,



John Dempsey
Partner

Copy:
Holly O'Dell

MERCER

EXHIBIT A

John Dempsey Credentials

PRESENT RESPONSIBILITIES

John is a Partner based in Mercer's Chicago office. He has had extensive experience advising organizations undergoing major financial transitions including bankruptcies, IPOs, LBOs, and acquisitions on compensation issues. John designs annual and multi-year incentive programs, change in control arrangements, and employment agreements.

EXPERIENCE

John's recent bankruptcy related clients include Nortel Networks, Tribune Company, Aleris, Charter Communications, Masonite, CIT Group, Capmark, Fairpoint, Caraustar, Adelphia Communications (Creditors' Committee), RH Donnelley, Freedom Communications, Stallion, Dana, Owens Corning, Kaiser Aluminum, Solutia, Olgebay Norton, Citation, Internet, Venture Industries, Alterra, EaglePicher, Allied Holdings, Mesaba Aviation, and FLAG Telecom. In addition, John has worked with numerous clients seeking to avoid bankruptcy. He has also worked on restructuring issues with Georgia Gulf, ABN AMRO, US Foodservice, Barrick Gold, Manulife, CareMark Rx, Archipelago, and Sky Financial.

John published an article entitled *Bankruptcy Blues: Retaining Key Employees During a Financial Crisis* with Michael Siebenhaar in the February 2002 issue of Workspan, and an update *The New Challenge of Chapter 11* with Elizabeth Stephens in August 2008. He is frequently quoted on issues relating to effective transitional compensation practices in such publications as HR Magazine, Cox News, and Atlanta Journal Constitution. In addition, he has been quoted in the Dallas Morning News, the Chicago Tribune, and the Milwaukee Journal Sentinel.

He has presented at the National Meeting of the Conference Board, the National Association of Stock Plan Professionals, and the National Center for Employee Ownership.

John has testified as an expert in connection with a renewal of the KERP of Owens Corning on September 8, 2004, the approval of Citation Corporation's KERP on November 4, 2004, the approval of Internet Corporation's KERP on December 22, 2004, the approval of Venture Industries' KERP on March 10, 2005, the approval of Allied Holdings KERP on October 11, 2005, Nortel Networks KEIP & KERP on February 5, 2009 and Tribune in connection with their Management Incentive Plan on September 25, 2009

In addition, John's testimony was proffered and accepted in connection with the approval of EaglePicher's KERP on August 9, 2005.

EDUCATION

John joined Mercer in 1985 following his graduation from Yale University and has worked out of the firm's offices in Chicago, Cleveland and London. He was awarded an MBA in 1992 from The Ohio State University, where he earned academic and leadership honors.

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EXHIBIT B

Overview, Timing and Fees	Mercer Responsibilities	Borders Responsibilities
1) Discovery and review of current situation <i>Timing:</i> Week 1 <i>Fees:</i> \$5,000	Review current compensation programs, 2011 business plan and restructuring plans (to the extent available); Higher end of the fee range includes a site visit and executive interviews to review current talent challenges	Provide information regarding <ul style="list-style-type: none"> ▪ Key executive roles and responsibilities ▪ Current compensation programs ▪ Review and confirm peer group selection ▪ 2011 business plan ▪ Restructuring plans (if available) ▪ Executive team time for interviews (if needed)
2) Summary of restructuring related market practices <i>Timing:</i> Week 1 <i>Fees:</i> \$20,000	Provide general information on market compensation practices among distressed companies and traditional bankruptcies, including restructuring incentives, Preliminary plan design proposals for any immediate changes to the compensation programs that Mercer recommends (higher end of the fee range would include the plan design recommendations)	Review presentation and discuss implications for Borders
3) Identify immediate actions (prior to bankruptcy) <i>Timing:</i> Week 1 <i>Fees:</i> \$15,000	Prepare materials for board package covering ordinary course programs and retention strategy prior to bankruptcy	
4) Key Employee Compensation Analysis <i>Timing:</i> Weeks 1-3 <i>Fees:</i> \$15,000	Compensation benchmarking for approximately 16 key management employees based on a peer group proxy analysis, industry-specific survey benchmarks and inclusion in the straw-model outlined in step 2 (to the extent Borders already has this information, it may not be necessary for Mercer to generate this information over again and the cost would be at the low end of the fee range)	Same as in step 2; for the low end, Mercer would need to review a peer group proxy analysis, market pricing, and dilution analysis
5) Develop straw model compensation program <i>Timing:</i> Weeks 1 through 6 <i>Fees:</i> \$30,000	Program will be based on restructuring market practices (outlined in week 1) and Key Employee Compensation Analysis. Analysis of comparables will include dilution resulting from equity incentive plans, and total compensation benchmarking (salary, annual incentives, long-term incentives, and employment agreements). Assumes one report with two drafts and two conference calls to review (additional calls and drafts may result in out of scope fees)	Review overall design and provide feedback
6) Approval Process <i>Timing:</i> Weeks 6-8 <i>Fees:</i> \$1,000 to \$5,000	Review proposed plan designs with management and the Board of Directors; higher end fee includes creating a separate report for the Board	Conference calls held with <ul style="list-style-type: none"> ▪ Management ▪ Board of Directors
Total Estimated Fees: \$86,000 to \$90,000		

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Statement of Work ("SOW")

The objective of this Statement of Work ("SOW") is to confirm the scope of our work and the compensation for this project. This SOW is subject to the terms and conditions contained in the existing engagement letter with us and/or our Affiliate(s). All capitalized terms not defined in this SOW shall have the meanings ascribed to them in our existing engagement letter.

Project Details

1. Project name: **Compensation Contingency Planning**
2. Description of Mercer responsibilities: **Per Exhibit B of 2/1/11 letter**
3. Description of client responsibilities: **Per Exhibit B of 2/1/11 letter**
4. Period of time over which work will be performed: **The SOW will be effective through the later of 3/30/2012 or the completion of a recapitalization of Border's balance sheet**
5. Compensation/fees: **Per February 1 letter**

Fee Structure

Our compensation for the services will be professional fees in the amount of \$86,000 to 90,000 and based on the terms of the February 1 2011 letter.

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Additional Terms

1. We have adopted Global Business Standards for executive remuneration assignments, a copy of which is attached hereto as Exhibit A. To the extent that the scope of the executive remuneration Services provided by us encompasses matters under the direct responsibility of your board of directors or a committee of the board of directors, then any findings or recommendations can be attributed to us by you only if a Mercer consultant attends the presentation of the recommendations to the board of directors or committee thereof and is available to respond to questions.
2. To the extent you disclose any information in a governmental or regulatory filing about us relating to our provision of advice and counsel regarding the Services or executive remuneration matters, including in order to satisfy any legal requirements to disclose our identity, the particulars of the mandate for which we have been retained, or any other work that we performed for you, you agree that our identification and any description of our mandate or our work for you will be subject to our prior review and you shall ensure that our reasonably requested modifications are made to such identification and/or description.
3. You will indemnify Mercer and its Affiliates and our and their directors, officers, stockholders and employees (collectively, "Indemnified Persons") from and against all Losses and to pay Mercer's standard rates for professional time spent (including for preparing, defending or giving testimony or furnishing documents) in connection with actual or threatened actions, proceedings or investigations by any party other than you, whether or not Mercer is a party, relating to the Services or any matter relating to the Services. However, you will not be liable under this indemnity to an Indemnified Person to the extent any Losses sustained by such Indemnified Person are finally determined to have resulted primarily from the negligence or conduct in bad faith of such Indemnified Person.
4. Mercer (and its Affiliates) may provide advice or other services or products to the Board of Directors of the Company or a committee thereof or to other clients in the same business sector as the Company, which could potentially lead to a conflict of interest.
5. Without limiting the generality of Section 2 of our engagement letter, you will inform us at the commencement of our work under each SOW (and thereafter in the event of any change) as to whether or not you or any of your Affiliates are subject to any restrictions or obligations directly relevant to the Services as a result of or in connection with having received any federal financial assistance in connection with any federal law or program, including, but not limited to, the American Recovery and Reinvestment Act of 2009 and the Emergency Economic Stabilization Act of 2008, including the Troubled Assets Relief Program. In the event that you or your Affiliates are subject to such restrictions or obligations, you will also promptly describe such restrictions and obligations to us in writing in reasonable detail and

MERCER

make an expert (including internal or external counsel) available to us for additional clarification that we reasonably request regarding the analysis or interpretation of any such restrictions or obligations. You agree that we will be entitled to rely on, and have no liability for, the accuracy and completeness of the information, analysis or interpretation that is provided to us in connection with the foregoing.

[Remainder of this page left blank intentionally]

MERCER

We appreciate your business and look forward to working with you on this engagement.
Please acknowledge your agreement to the terms contained herein by signing below.

Mercer (US) Inc.

By: John Dempsey

Name: John Dempsey
(Please Print)

Date: 02/01/2011

Title: Partner

ACCEPTED AND AGREED

By: _____

Name: _____
(Please Print)

Date: _____

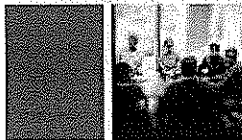
Title: _____

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Exhibit A

MERCER



Executive Remuneration Solutions Global Business Standards

Mercer is committed to providing objective advice to all of our clients. Ensuring the objectivity of consulting advice on executive remuneration is a corporate governance issue around the globe and is critical to our role as a trusted advisor to our clients. Accordingly, Mercer has adopted these Global Business Standards for its Executive Remuneration Solutions to manage potential conflicts of interest and to preserve the integrity of our advice. Our Executive Remuneration Solutions encompass all forms of remuneration (cash, equity, benefits and perquisites) for executives as well as for members of organizations' governing boards. The Global Business Standards address how we (i) manage the executive remuneration consulting relationship, (ii) ensure the quality of executive remuneration consulting services and (iii) structure our business to manage potential conflicts of interest.

Managing the relationship

A clearly defined client relationship provides the foundation for ensuring the objectivity and integrity of our advice. At the beginning of each engagement, our consultants establish with clients a clear mutual understanding of our role and client reporting relationship, premised on our commitment to providing objective advice.

An engagement letter documents the key elements of the assignment and relationship: roles, responsibilities, scope of services, fees, timeframe and client reporting relationships including how and to whom information and recommendations are communicated. The engagement letter also sets out the parties' expectations regarding certain disclosures, such as information about other services provided by Mercer to the client.

Ensuring the quality of our advice

Mercer is committed to providing the highest quality advice to our clients. To ensure that our professional standards are upheld, executive remuneration consulting services are performed only under the direction of a human capital business principal. All consulting advice is peer reviewed pursuant to Mercer's global professional standards before it is rendered. In addition, the structure of ongoing executive remuneration consulting relationships is subject to annual review to ensure that it continues to best serve the interests of the client and properly preserves the objectivity of our advice.

Structuring our business

The structure of our business not only facilitates the seamless exchange of our best thinking but also demonstrates to employees and clients the integrity of our advice. Our human capital business is accountable for all of Mercer's executive remuneration consultants. Our human capital business leaders – not client relationship managers – evaluate performance and determine remuneration for all executive remuneration consultants. Consultants are not compensated based upon client revenue from other lines of business or other MMC companies other than to the extent that all employees of MMC benefit from the overall success of MMC and its subsidiaries.

Mercer's human capital business leadership requires our consultants to seek guidance from them whenever there is any question that our objectivity or integrity is at risk of being compromised. Consultants may discontinue executive remuneration consulting relationships where apparent or actual conflicts that would impact the quality or objectivity of our advice cannot be resolved to both our clients' and our satisfaction.

GROUP EXHIBIT 2

John Dempsey
Principal

10 South Wacker Drive, Suite 1700
Chicago, IL 60606
312 902 7745 Fax 312 902 7826
john.dempsey@mercer.com
www.mercer.com

August 5, 2009

Gretchen Zech
Senior Vice President, Human Resources
R.H. Donnelley Corporation
1001 Winstead Drive
Cary, NC 27513

Subject: Management Equity Incentive Plan

Dear Gretchen:

Thank you for taking time to discuss the services Mercer (US) Inc. ("Mercer") can provide as an outside compensation advisor to R.H. Donnelley Corporation ("Donnelley" or "You" or "the Company"), with respect to its recapitalization-related compensation programs. Mercer is pleased to assist your company during this difficult time with the creation of a market competitive, motivational compensation program, subject to the terms of this Project Initiation Form ("PIF") (which PIF is subject to the terms and conditions contained in that certain Master Service Agreement for Consulting Services dated October 28, 2009 between the parties (the "Master Agreement")). All capitalized terms not defined in this PIF shall have the meanings ascribed to them in the Master Agreement.

This PIF is to confirm the scope of our work and the compensation for the project described below. The objective of the project is for Mercer to analyze proposed equity arrangements and develop an equity incentive program that will align the interests of the Company, its key employees, and creditors and provide a total compensation package that is competitive and appropriate under the circumstances, including in connection with the pending chapter 11 case of the Company before the United States Bankruptcy Court for the District of Delaware (the "Chapter 11 Case").

Project Details

Project Name: Emergence Equity Plan

Description of Mercer Responsibilities:

- Provide to the Company a summary of restructuring-related market practices among pre-packaged and traditional chapter 11 bankruptcies, including share reserves, timing and magnitude of initial equity awards, and other relevant information.

Page 2
August 5, 2009
Gretchen Zech
R.H. Donnelley Corporation

- Provide the Company with industry comparables on total compensation and long-term incentives; Mercer will review and, as much as possible, rely on prior work to avoid any unnecessary duplication.
- Develop a straw-model equity program based on competitive practice and taking into account the Company's current compensation program and business objectives.
- Develop in partnership with Donnelley a plan design for review by and submission to the Company's Compensation and Benefits Committee ("Committee"). Mercer also will provide information to you for your submission to the Committee and its advisors to support its assessment of the proposal.
- Participate in discussions between Donnelley and creditor constituencies, including without limitation by presenting and explaining the purposes and terms of the proposed plan design and supplying follow-up information (including the results of Mercer's analysis of such plan) upon request.
- If requested, provide truthful expert witness testimony regarding its analyses, assessments, conclusions and recommendations, as applicable, including without limitation at any deposition or hearing held in connection with Donnelley's restructuring plan confirmation or in connection with proceedings to approve the plan(s) designed as part of this PIF or any awards thereunder.
- Perform other bankruptcy-related compensation benchmarking, analysis and plan design as mutually agreed by the Company and Mercer.

Description of Donnelley's Responsibilities: Donnelley will provide information requested by Mercer on the data request form [verify] to be delivered separately, and review Mercer reports and discuss implications for Donnelley.

Period of time over which work will be performed: Mercer will provide agreed upon deliverables to be completed during the course of the Chapter 11 Case.

Fee Structure

Pricing will be based on of the number of hours required for providing the services/deliverables above to Donnelley by the completion dates estimated as well as a one-time charge of \$15,000 for access to Mercer's proprietary bankruptcy database. The fees will be based on actual hours worked, billed in quarter hour increments.¹

¹ A professional's hourly rate may vary slightly due to rounding in Mercer's accounting process which is Mercer's ordinary and customary billing practice.

Page 3
August 5, 2009
Gretchen Zech
R.H. Donnelley Corporation

Skill Sets	Hourly Rate Range in US dollars
Analyst	\$225
Associate	\$250 to \$300
Sr. Associate	\$350 to \$450
Principal	\$500 to \$700
Principal (specialist)	\$700 to \$800

In addition to such compensation, we also bill for our reasonable and necessary travel and other expenses related to the services requested including legal fees associated with our retention as a professional, preparing subsequent fee applications and otherwise related to the Chapter 11 Case.

Staffing

I will be responsible for the work to be completed. I have extensive experience advising organizations undergoing periods of recapitalization. I will be assisted by other Mercer professionals.

Additional Terms

1. We have adopted Global Business Standards for executive remuneration assignments, a copy of which is attached hereto as Exhibit A. To the extent that the scope of the executive remuneration Services provided by us encompasses matters under the direct responsibility of your board of directors or a committee of the board of directors, then any

Page 4
August 5, 2009
Gretchen Zech
R.H. Donnelley Corporation

findings or recommendations can be attributed to us by you only if a Mercer consultant attends the presentation of the recommendations to the board of directors or committee thereof and is available to respond to questions.

2. To the extent you disclose any information in a governmental or regulatory filing about us relating to our provision of advice and counsel regarding the Services or executive remuneration matters, including in order to satisfy any legal requirements to disclose our identity, the particulars of the mandate for which we have been retained, or any other work that we performed for you, you agree that our identification and any description of our mandate or our work for you will be subject to our prior review and you shall ensure that our reasonably requested modifications are made to such identification and/or description (to the extent permitted by applicable law).
3. Donnelley will indemnify Mercer and its Affiliates and our and their directors, officers, stockholders and employees (collectively, "Indemnified Persons") from and against all Losses and to pay Mercer's standard rates for professional time spent (including for preparing, defending or giving testimony or furnishing documents) in connection with actual or threatened actions, proceedings or investigations by any party other than Donnelley, whether or not Mercer is a party, relating to the Services or any matter relating to the Services. However, Donnelley will not be liable under this indemnity to an Indemnified Person to the extent any Losses sustained by such Indemnified Person are finally determined to have resulted primarily from the negligence or conduct in bad faith of such Indemnified Person. This indemnity shall not, and under no circumstance shall be deemed to, affect or impair any party's rights or remedies under any pre-petition agreement between the parties, including, without limitation, the Master Agreement.
4. Mercer (and its Affiliates) may provide advice or other services or products to the Board of Directors of the Company or a committee thereof or to other clients in the same business sector as the Company. The Company expressly acknowledges and consents to such representation so long as it is unrelated to this engagement.

We appreciate your business and look forward to working with you on this engagement. Please acknowledge your agreement to the terms contained herein by signing below.

Page 5
August 5, 2009
Gretchen Zech
R.H. Donnelley Corporation

Mercer (US) Inc.

By: John Dempsey

Name: John Dempsey
(Please Print)

Date: 8/13/09

Title: Principal

ACCEPTED AND AGREED

RH Donnelley

By: Gretchen Zech

Name: Gretchen Zech
(Please Print)

Date: 8/11/09

Title: Senior Vice President, HR

MERCER

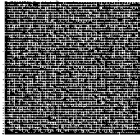


MARSH MERCER KROLL
GUY CARPENTER OLIVER WYMAN

Exhibit A

MERCER

MARSH MERCER KROLL
GUY CARPENTER OLIVER WYMAN



Executive Remuneration Services Global Business Standards

Mercer is committed to providing objective advice to all of our clients. Ensuring the objectivity of consulting advice on executive remuneration is a corporate governance issue around the globe and is critical to our role as a trusted advisor to our clients. Accordingly, Mercer has adapted these Global Business Standards for its Executive Remuneration Services to manage potential conflicts of interest and to preserve the integrity of our advice. Our Executive Remuneration Services encompass all forms of remuneration (cash, equity, benefits and perquisites) for executives as well as for members of organizations' governing boards. The Global Business Standards address how we (i) manage the executive remuneration consulting relationship, (ii) ensure the quality of executive remuneration consulting services and (iii) structure our business to manage potential conflicts of interest.

Managing the relationship

A clearly defined client relationship provides the foundation for ensuring the objectivity and integrity of our advice. At the beginning of each engagement, our consultants establish with clients a clear mutual understanding of our role and client reporting relationship, premised on our commitment to providing objective advice.

An engagement letter documents the key elements of the assignment and relationship: roles, responsibilities, scope of services, fees, timelines and client reporting relationships including how and to whom information and recommendations are communicated. The engagement letter also sets out the parties' expectations regarding certain disclosures, such as information about other services provided by Mercer to the client.

Ensuring the quality of our advice

Mercer is committed to providing the highest quality advice to our clients. To ensure that our professional standards are upheld, executive remuneration consulting services are performed only under the direction of a Human Capital business principal. All consulting advice is peer reviewed pursuant to Mercer's global professional standards before it is rendered. In addition, the structure of ongoing executive remuneration consulting relationships is subject to annual review to ensure that it continues to best serve the interests of the client and properly preserves the objectivity of our advice.

Structuring our business

The structure of our business not only facilitates the seamless exchange of our best thinking but also demonstrates to employees and clients the integrity of our advice. Our Human Capital business is accountable for all of Mercer's executive remuneration consulting. Our Human Capital business leaders – not client relationship managers – evaluate performance and determine remuneration for all executive remuneration consultants. Consultants are not compensated based upon client revenue from other lines of business or other MMC companies other than to the extent that all employees of MMC benefit from the overall success of MMC and its subsidiaries.

Mercer's Human Capital business leadership requires our consultants to seek guidance from them whenever there is any question that our objectivity or integrity is at risk of being compromised. Consultants may discontinue executive remuneration consulting relationships where apparent or actual conflicts that would impact the quality or objectivity of our advice cannot be resolved to both our clients' and our satisfaction.

00662 HC

Consulting, Outsourcing, Investments,

Consulting, Outsourcing, Investments.

MERCER



MARSH MERCER KROLL
GUY CARPENTER OLIVER WYMAN

October 28, 2008

R.H. Donnelley, Inc.
1001 Winstead Drive
Cary, NC 27513

Subject: Master Service Agreement for Consulting Services

We are very pleased to have the opportunity to work with you and R.H. Donnelley Inc. (RHD) in managing your benefits programs. We value our partnership with RHD greatly and recognize the importance of the responsibility we share.

Our initial Master Service Agreement with RHD has expired. We offer the attached Master Service Agreement for your review and consideration. We welcome your feedback and hope to work towards a mutually acceptable agreement.

We will continue to send separate Project Initiation Forms (PIF) or engagement letters for each separate project. We use PIF and engagement letter synonymously. The PIFs spell out the scope of services, estimated fees, staffing, and timing for the different project activities. This Master Service Agreement effective as of September 26, 2008 is intended cover the terms and conditions governing our working relationship with RHD.

Terms and Conditions Governing Engagement

Our performance of the Services shall be subject to the following terms:

1. Payment Terms:

- A. We will perform the Services in consideration of your payment of our compensation. Our compensation for the Services, such as professional fees, commissions or other amounts payable to us ("Compensation") will be set forth in the applicable Project Initiation Form (PIF) or as otherwise agreed. In addition to our Compensation, we will also bill monthly, at cost, for our reasonable expenses, except as otherwise provided in an applicable PIF. You will be responsible for any sales, value added taxes or similar taxes related to the performance or receipt of the Services, including those taxes assessed by authorities subsequent to payment for the Services. Unless otherwise provided in this Agreement, any references herein to this "Agreement" shall mean and include all applicable PIFs established by us pursuant to this Agreement.
- B. Invoices are due and payable within thirty (30) days of the date of the invoice. If any invoice is not timely paid, we may exercise our right to claim interest for late payment as permitted by applicable law, but not to exceed the lesser of the prime rate for Citibank, N.A., or its successor plus 1%, as published in the New York edition of The Wall Street Journal or the amount permitted by law on invoiced amounts not disputed in good faith by you. If any undisputed invoice or undisputed portion thereof remains

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unpaid for longer than ninety (90) days from the date of the invoice, we may either suspend the provision of the Services until payment is received, or terminate this Agreement and/or any PIF effective thirty (30) days from your receipt of our termination notice, unless we receive payment of the undisputed invoice or amount within thirty (30) days of your receipt of our termination notice.

- C. If we become involved (whether or not as a party) in a dispute (including audits or investigations) between you and a third party (including a governmental entity), or if we are asked to preserve records relating to the Services or this Agreement beyond the scope of Services described in the applicable PIF, these additional services will be documented in a PIF. If no PIF or other agreement is reached on these additional services, you agree to pay us at our then commercially reasonable rates for all our time spent, and will reimburse us for all reasonable expenses incurred by us, in connection with such dispute or documentation preservation request. We will reimburse such payments to the extent such dispute is finally determined to have resulted from our failure to perform our obligations to you under this Agreement, negligence, conduct in bad faith or fraud.

2. Scope of Agreement and Quality of Services:

- A. You have entered into this Agreement on behalf of yourself and your Affiliates and your Affiliates may purchase Services hereunder pursuant to a PIF. Upon the execution of a PIF by your Affiliate and us, your Affiliate will be bound by the terms and conditions of this Agreement for purposes of such PIF only. All references in this Agreement to "you" shall, unless the context requires otherwise, mean your Affiliate that purchases Services as described in this paragraph. If more than one of your Affiliates purchases Services under any PIF, their obligations and liabilities shall be several, not joint.
- B. This Agreement neither authorizes us to provide nor commits you to order or accept any Services not specified in an applicable PIF. Unless we receive written authorization, or with respect to Services less than \$5000, an e-mail with confirmation of receipt, to provide Services to you from an Assistant Vice President or higher position in your or your Affiliate's organization, you shall have no obligation to accept or pay for Services that are not set forth in a PIF. Your engagement of us under this Agreement is non-exclusive and shall not limit your right to engage third parties (including, without limitation, other vendors and/or independent contractors) to render services of any nature to you.
- C. We will perform the Services in accordance with the specifications set forth in this Agreement. Our personnel and the personnel retained by any of our subcontractors will have the requisite experience, expertise, skills, knowledge, training and education to perform Services in a professional manner and in accordance with the terms of this Agreement.

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- D. We will comply with all laws, orders, codes and regulations applicable to our performance of this Agreement.
- E. We may subcontract with any of our Affiliates upon reasonable prior written notice to you, and we may subcontract with third parties with your prior written consent, which consent shall not be unreasonably withheld or delayed. In connection therewith, we will cause our subcontractors to execute a written confidentiality agreement consistent with the terms of this Agreement governing our use and confidential treatment of your Confidential Information. We will require any approved subcontractor to comply with the applicable terms of this Agreement. We will remain fully liable for the work performed by, and for the negligent or wrongful acts or omissions of, any of our subcontractors.

3. Instructions; Provision of Information and Assistance:

- A. You will provide all necessary and reasonably requested information, direction and cooperation to enable us to provide the Services, and any direction (whether verbal or written) shall be effective if contained expressly in the applicable PIF or if received (whether verbally or in writing) from a person known to us or reasonably believed by us to be authorized to act on your behalf. You agree that we shall use all information and data supplied by you or on your behalf without independently verifying the accuracy, completeness or timeliness of it. Notwithstanding the foregoing, if the information provided is on its face inaccurate or incomplete, we will advise you of such inaccuracy or incompleteness, and you agree to promptly correct, such inaccuracy or incompleteness. We will not be responsible for any delays or liability arising from any omissions or inaccuracies in such information or data or your failure to provide such information or data in a timely manner, or if you do not provide adequate access to your employees, agents or other representatives as reasonably necessary for us to perform the Services. We will be entitled to charge you a reasonable and customary fee in respect of any additional work carried out as a result of our reasonable reliance on the information or data you provide to us.

4. Confidential Information; Data:

- A. Each of us is likely to disclose information ("Disclosing Party") to the other ("Receiving Party") from time to time in the course of the provision of the Services, which is marked or designated as confidential or proprietary at or prior to disclosure or which would appear to a reasonably prudent person to be confidential and/or proprietary in nature ("Confidential Information"). The Receiving Party will not disclose such Confidential Information to any person other than in connection with the provision of the Services or as otherwise provided for in this Agreement. This restriction does not apply to information that (i) the Receiving Party must disclose pursuant to applicable law or legal process, (ii) is either already in the public domain or enters the public domain through no fault of the Receiving Party, (iii) is available to the Receiving Party from a third party who, to the Receiving Party's knowledge, is not under any non-disclosure obligation to the Disclosing Party, or (iv) is

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independently developed by or for the Receiving Party without reference to any Confidential Information of the Disclosing Party.

- B. Notwithstanding subparagraph (a), you agree that we will be entitled to disclose information, including Confidential Information, relating to the Services or you to regulators having jurisdiction over our business. We will take all reasonable and appropriate steps to limit any further disclosure of your Confidential Information provided to our regulators, including without limitation seeking, at your expense, protective orders limiting the further disclosure of your Confidential Information to others. You also agree that, notwithstanding any other provision in this Agreement, we may include the identities of those persons who are identified by you as contact persons for you and information about the terms of this Agreement, the Services and the Compensation in our internal client management, financial and conflict checking databases. We agree that you will be entitled to disclose information, including Confidential Information, relating to the Services or us to regulators having jurisdiction over your business or as otherwise required by applicable law or your financing agreements. You will take all reasonable and appropriate steps to limit any further disclosure of our Confidential Information provided to your regulators or others (as permitted hereby), including without limitation seeking protective orders (at our expense) limiting the further disclosure of our Confidential Information to others.
- C. Except to the extent prohibited by applicable law, you hereby grant us a perpetual, non-exclusive, royalty-free, and limited license to copy, modify and use in aggregate form only any information and data supplied by you or on your behalf so that we may create analytical trend data (in anonymous form) and in order to improve the quality of our advice to all of our clients. We will not disclose any information in a manner which allows particular clients or individuals to be identified. Notwithstanding the foregoing, you agree that your trade name may appear in a list of participating organizations for reports containing such analytical trend data, provided that our use of your trade name will not imply an endorsement of us or our products or services by you. We will not publish your trademarks or service marks or your copyrighted materials without your prior, written consent, which you may withhold at your discretion. Nothing in this Agreement grants us a license to the use of your trademarks, service marks, domain names, copyrights or other intellectual property owned or licensed by you.
- D. Our respective obligations under Section 3A. shall survive for a period of five (5) years from the date of termination of this Agreement or for such longer period as is required by law, except that any trade secrets disclosed to the Receiving Party shall be maintained in confidence in perpetuity or until such time as they are no longer reasonably considered to be trade secrets by the Disclosing Party.
- E. We may retain your information in paper or imaged format and we may destroy paper copies if we retain digital images thereof. Upon the termination of this Agreement, we will return all of your Confidential Information (including all copies

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thereof, whether in paper or electronic format) to you or destroy such Confidential Information in accordance with your written direction, except we shall be permitted to retain and use your Confidential Information in accordance with, and subject to the limitations of, the limited license granted to us pursuant to Subsection C above. Notwithstanding the foregoing, we will be entitled to retain a copy of your Confidential Information solely for archival purposes and to defend our work product and we may, in accordance with legal, disaster recovery and record retention requirements store copies of Confidential Information in archival format (e.g. tape backups), which may not be returned or destroyed. Such archival copies are subject to the confidentiality obligations set forth herein.

5. Personal Information:

A. Each of us and our respective Affiliates (as defined below) will comply with our respective obligations arising from data protection and privacy laws in effect from time to time to the extent applicable to this Agreement and the Services. This includes, without limitation, (i) the obligation, if any, of you or your Affiliates, to obtain any required consent(s) in respect of the transfer of information to us by you or any third party relating to an identified or identifiable individual that is subject to applicable data protection, privacy or other similar laws ("Personal Information"), (ii) any obligation with respect to the creation or collection of additional Personal Information by us, and (iii) any obligation with respect to the use, disclosure and transfer by us of Personal Information as necessary to perform the Services or as expressly permitted under this Agreement. Subject to Section 3C, any use or processing by us of Personal Information supplied by or on your behalf in connection with the Services shall be done solely on your behalf. We shall handle such Personal Information in accordance with your reasonable instructions as may be provided from time to time in the applicable PIF or as reasonably necessary for the purpose of providing the Services and shall not handle such Personal Information in a manner inconsistent with the terms of this Agreement. We also confirm that we have taken customary and appropriate technical and organizational measures intended to prevent the unauthorized or unlawful access to, or processing of, Personal Information and the accidental loss or destruction of, or damage to, Personal Information. For purposes of this Agreement, "Affiliates" means, with respect to either party, any entity directly or indirectly controlling, controlled by or under common control with such party.

6. Ownership and Use of Work; Intellectual Property:

A. To the extent materials or other work product are prepared by us specifically and exclusively for you pursuant to this Agreement (the "Work"), such materials and work product shall be a work for hire and owned exclusively by you. We hereby assign ownership (including the copyright) in these materials and work product to you and agree to take such action, at your expense, as is reasonably necessary to give effect to this assignment and vest ownership in you. We will retain all copyright, patent and other intellectual property rights in the methodologies, methods of analysis, ideas, concepts, know-how, models, tools, techniques, skills, knowledge and experience

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owned or possessed by us before the commencement of, or developed or acquired by us during or after, the performance of the Services, including without limitation, all systems, software, specifications, documentation and other materials created, owned or licensed and used by us or our Affiliates or subcontractors in the course of providing the Services (the "Intellectual Property"), and we shall not be restricted in any way with respect thereto. To the extent any Work incorporates any Intellectual Property, we hereby grant you a royalty free, non-exclusive, non-transferable and limited license to use such Intellectual Property solely for purposes of utilizing the Work internally in accordance with the terms of this Agreement, provided your internal use of the Work pursuant to this license includes your right to employ your agents and contractors in connection with such use.

- B. Unless we provide our prior written consent, which we will not withhold unreasonably, you will not use, in a manner other than as mutually contemplated when we were first retained by you to perform the applicable Services, or disclose to any third party, other than your attorneys, accountants or financial advisors with a need to know, or as otherwise permitted by this Agreement, any Work or Intellectual Property or other material supplied by us under this Agreement, and you shall be responsible for, and we shall have no liability with respect to, modifications made by any person other than us to the Work, Intellectual Property or other work product provided to you by us, except with respect to modifications performed by our subcontractors or Affiliates at our request. You will indemnify, defend and hold us and our Affiliates harmless in respect of any Loss (as defined in Section 7) incurred by us as a result of your breach of this obligation or any modifications made by any person other than us or by our subcontractors or Affiliates to the Work, Intellectual Property or other work product provided to you by us pursuant to this Agreement.
- C. We represent and warrant to you that we have all necessary right, title and interest to license our Intellectual Property to you for the purpose contemplated in this Agreement and that your use of our Intellectual Property in compliance with this Agreement will not infringe on the rights of other parties, including without limitation their intellectual property rights. We will indemnify, defend and hold you and your Affiliates harmless in respect of any Loss (as defined in Section 7) incurred by you as a result of this representation and warranty being inaccurate or untrue.

7. No solicitation.

- A. During the term of this Agreement and for a period of one (1) year thereafter, neither party to this Agreement or its Affiliates or subcontractors will engage in any effort to solicit for employment or employ any employee of the other party or its Affiliates directly involved in the performance of the respective party's obligations under this Agreement or otherwise induce, or cause any third party to induce, any employee of the other party or its Affiliates directly involved in the performance of the respective party's obligations under this Agreement to terminate such employment, unless the other party has consented to such solicitation or inducement in a writing signed by an officer of the other party; provided, however, that a party shall not be prohibited from

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employing such person who contacts the party on its own initiative without any encouragement or invitation by the party or in response to a general solicitation contained in a newspaper or other periodical or a general solicitation by a placement agency, or whose employment or engagement with the other party has been terminated for at least a period of 90 days prior to the hiring or engagement of that person by a party.

8. Dispute Resolution:

- A. Before commencing any action or proceeding with respect to any dispute between us arising out of or relating to this Agreement, the parties shall first attempt to settle the dispute through consultation and negotiation in good faith and in a spirit of mutual cooperation. If the dispute is not resolved within five (5) business days, either of us may elect to escalate the resolution of such dispute by submitting the dispute in writing to senior executives from each of us who will promptly meet and confer in an effort to resolve the dispute. Each party will identify such senior executive by notice to the other party, and each party may change its senior executive at any time thereafter by notice. Any mutually agreed decisions of the senior executives will be final and binding on both parties. In the event the senior executives are unable to resolve any dispute within thirty (30) days after submission to them, either party may then refer such dispute to mediation by a mutually acceptable mediator to be chosen by both parties within forty-five (45) days after written notice by either party demanding mediation. Neither party may unreasonably withhold, delay or condition consent to the selection of a mediator. All communications and discussions in furtherance of this paragraph shall be treated as confidential settlement negotiations that are not subject to disclosure to any third party. The costs of the mediator shall be shared equally, but each party shall pay its own attorney's fees,
- B. Any dispute that is not resolved within three (3) months of the date of the initial demand for mediation by one of the parties may then be submitted to a court of competent jurisdiction. To facilitate an expeditious and economical judicial resolution of such dispute, each party shall waive and not demand a trial by jury, and each party agrees not to include any employee, officer, director or trustee of the other as a party in any action, proceeding or counterclaim relating to such dispute. Nothing in this Section 6 will prevent either of us from resorting to judicial proceedings at any time if interim relief from a court is necessary to prevent serious and irreparable injury or damage to that party or to others. Except to the extent prohibited under applicable law, any claim, action or proceeding against a party or any of its Affiliates will be barred unless the other party initiates the dispute resolution procedures set forth in Section 6 within three years of first discovering the act, error or omission that is the basis for such claim.

9. Limitation of Liability:

- A. Except to the extent a Loss (as defined below) sustained by you is finally determined to have resulted from our failure to perform our obligations under this Agreement or from the performance failures, negligence, fraud or bad faith conduct by us or any

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officer, director, or employee, subcontractor of ours or our Affiliates or any other party performing the Services at our direction and in our control ("Mercer Party"), neither we nor any Mercer Party shall be liable to you in connection with the Services, this Agreement or the act or omissions of any third party.

- B. In no event shall our liability or the liability of our Affiliates with respect to each PIF, in the aggregate, to you, your Affiliates, your officers or directors or those of your Affiliates for any and all Losses arising in connection with or resulting from the Services provided under such PIF, exceed the greater of two times our Compensation under the applicable PIF related to the Services giving rise to such Loss or One Million Dollars (\$1,000,000). In no event shall either party or its Affiliates be liable in connection with this Agreement or the Services for any loss of profit or incidental, consequential, special, indirect, punitive or similar damages. Each of the parties acknowledges that the Compensation for the Services to be provided under this Agreement and the applicable PIF reflects the allocation of risk set forth in this Section 7.
- C. Nothing in this Section 7 limiting the liability of a party shall apply to (i) any liability that has been finally determined to have arisen from the conduct in bad faith or fraud on the part of such party, (ii) limit either party's obligation to indemnify the other party for breaches of the obligation of confidentiality or infringement as provided in this Agreement, or (iii) the extent such limitation of liability is not permissible under applicable law, including laws that may hold parties liable for certain acts of good faith.
- D. For purposes of this Agreement "Loss" means damages, claims, liabilities, losses, awards, judgments, penalties, interest, costs and expenses, including reasonable attorneys' fees. For the avoidance of doubt, with respect to each, applicable PIF, multiple claims arising out of or based upon the same act, error or omission, or series of continuous, interrelated or repeated acts, errors or omissions shall be considered a single Loss.

10. Insurance:

- A. We will procure and maintain, and will require our subcontractors and agents to procure and maintain, from a company authorized to do business in the jurisdiction in which the Services are provided, insurance of at least the following types and amounts:
- B. Commercial General Liability Insurance with a for bodily injury and property damage as follows: (i) \$2,000,000 each occurrence; (ii) \$5,000,000 General Aggregate; and (iii) \$2,000,000 Products and Completed Operations Aggregate.
- C. Workers Compensation and Employer's Liability Insurance which affords protection under the Workers Compensation laws of the applicable state or other jurisdiction as follows: (i) Workers Compensation - Statutory Limit; (ii) Employer's Liability -

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\$1,000,000 Per Accident, \$1,000,000 Disease policy limit, and \$1,000,000 Disease each employee.

- D. Excess Liability Insurance with a limit of liability of \$5,000,000.
- E. Errors and Omissions Liability to include contractual liability for claims arising out of our negligent acts, errors or omissions with a limit of liability of \$10,000,000 per claim and annual aggregate.
- F. The above insurance coverages/limits may be achieved through use of one or more umbrella policies. We will submit to you to the attention of your Manager, Risk Management, at the address provided for notice, certificates of insurance evidencing that the specified types and amounts of insurance required above are in full force. All certificates shall include a clause obligating the insurer to endeavor give you not less than thirty (30) days written notice of any material change, or intent not to renew such insurance.
- G. You, your parent, subsidiaries, affiliates officials and employees are to be covered as additional insureds under our Commercial General Liability policy as respects your vicarious liability arising out of our performance of the Services under this Agreement.
- H. For any claims related to the Services, our insurance coverage shall be primary insurance as respects you, your parent, subsidiaries, affiliates, officials and employees with respect to claims arising solely and directly from our provision of the Services.
- I. If any of the aforementioned insurance policies are written on a claims-made basis, we will endeavor to maintain continuous coverage or an extended discovery period for a period of two (2) years beginning from the time the work under this Agreement has been completed
- J. If any of our subcontractors or other agents fail to meet these insurance types or limits, we will promptly notify you and take such other action as you may reasonably find acceptable.

11. Unforeseen Events:

- A. Neither party shall be liable for delays or failures in performance of obligations under this Agreement, other than failure to make payments hereunder when due, resulting from events beyond its reasonable control, including without limitation "acts of God," fire, flood, riots, new laws which prevent the carrying out of the Services, the results of terrorist activity, failures of third party suppliers, and electronic and other power failures. In the event such an unforeseen event prevents a party's performance of its obligations hereunder, the parties agree to use their commercially reasonable efforts to modify this Agreement, the applicable PIF(s) and/or the Services as reasonably necessary to enable substantial performance of this Agreement.

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12. Duration and Termination of this Agreement:

- A. This Agreement will continue until terminated as provided in this Section, except as provided otherwise in a PIF. This Agreement and any PIF may be terminated (i) by either party upon one hundred eighty (180) days' prior written notice to the other party, unless otherwise specified in an applicable PIF, (ii) by either party upon a material breach by the other party, which breach is not cured within thirty (30) days after receipt of written notice thereof, or (iii) for nonpayment of undisputed invoices by you as provided under Section 1. After the termination of this Agreement, Sections [discuss and finalize once the section numbers are revised] will survive in full force and effect. Any termination of this Agreement shall not relieve you or your Affiliates of their obligations to pay for Services rendered and expenses incurred by us or our Affiliates up to and including the effective date of such termination, and such termination may require you to pay termination fees to the extent provided in a PIF. Notwithstanding the foregoing, to the extent that the parties agree that Mercer shall continue to provide Services after the effective date of termination of this Agreement or any PIF, the terms and conditions of this Agreement and the applicable PIF shall survive until such Services are completed or the parties agree that the Services shall no longer be provided.
- B. Upon termination or expiration of this Agreement, you may notify us that you desire a Transition Period and subject to our mutual agreement, we will provide services over a mutually agreed Transition Period. In the event you and we are unable to reach an agreement on the scope and cost of these transition services or the length of the Transition Period, you may require us to provide commercially reasonable transition services at our commercially reasonable rates for a period of up to three (3) months from the effective date of the termination or expiration of this Agreement. During the Transition Period, the parties will continue to be bound by and perform in accordance with this Agreement, and we will assist you in the orderly and efficient transition of Services to you or a third party designated by you. If you initially designate a Transition Period of less than three (3) months, you may extend the Transition Period prior to its expiration upon five business (5) days' advance notice to us, so long as the total Transition Period does not exceed three (3) months. Within thirty (30) days of the end of the Transition Period, we will invoice you for any final amounts due under this Agreement.
- C. Termination of this Agreement is without prejudice to any other right or remedy of the parties. Termination of this Agreement for any cause does not release either party from any liability which, at the time of termination, has already accrued to the other party, or which may accrue in respect of any act or omission prior to termination or from any obligation which is expressly stated to survive the termination.

13. Additional Terms;

- A. **Service-Specific Terms** – The Service-Specific Terms set forth in Schedule A hereto shall apply to the extent applicable to the Services specified in a PIF and shall

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be deemed to be incorporated by reference into such PIF.

- B. **Notices** – All notices required by this Agreement shall be provided in writing and transmitted by U.S. Mail, return receipt requested, confirmed facsimile transmission, or confirmed email transmission to the following addresses (or such other address(s) as specified from time-to-time pursuant to a notice delivered in accordance herewith):

If to R.H. Donnelley:

Donna Tikkanen Davis
HR Generalist Executive
1001 Winstead Dr.
Cary, NC 27513
Phone:
Fax:
Email:

With a copy to:

Mark Hianik
Senior Vice President and
General Counsel
1001 Winstead Dr.
Cary, NC 27513
Phone:
Fax:
Email:

If to Mercer:

Benny R. Yeargan
100 N. Tryon Street, Suite 3400
Charlotte, N.C. 28202
Phone: 704-805-7426
Fax: 704-805-7410
Email: benny.yeargan@mercer.com

A notice will be effective upon receipt.

- C. **No Third Party Beneficiaries** – Neither this Agreement nor the provision of the Services is intended to confer any right or benefit on any third party, other than the Affiliates of each party that execute a PIF, and, in such event, solely as set forth in such PIF and this Agreement.
- D. **No Publicity** – You agree not to refer to us or attribute any information to us in the press for advertising or promotional purposes, or for the purpose of informing or influencing any other party, including the investment community, without our prior written consent. We agree not to refer to you or attribute any information to you in the press for advertising or for promotional purposes or for the purpose of informing or influencing any other party, including the investment community, without your prior written consent, provided that we may include your trade name in our representative client listing and as provided in Section 3 C. Notwithstanding the foregoing, each party shall have the right to disclose the existence and subject matter of this Agreement and the nature of the relationship between them established by this

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Agreement in its regulatory filings and any other disclosure required by applicable regulation or law.

- E. **Waiver** – The failure by either party to insist upon strict performance of any provision of this Agreement shall in no way constitute a waiver of rights under this Agreement, at law or in equity.
- F. **Disclaimer of Implied Warranties** – Except as expressly set forth in this Agreement, each party disclaims any warranty, express or implied, including but not limited to any implied warranty of merchantability and fitness for a particular purpose.
- G. **Entire Agreement, Amendment, Assignment** – This Agreement (including any PIF and the Services-Specific Terms as set forth in Schedule A, as applicable to certain Services and any schedules or exhibits attached hereunder) sets forth the entire agreement between the parties relating to its subject matter and supersedes and replaces any existing agreement or undertaking, both written and oral, between the parties relating thereto. Except with respect to a change in address for notices, this Agreement shall not be amended except by a written document executed by both of us. In the event of any inconsistency between the terms of a PIF and those in the Agreement, the provisions contained in this Agreement shall prevail. Neither of us may assign this Agreement without the prior written consent of the other, except that either of us may assign this Agreement to an Affiliate with reasonable prior written notice to the other party.
- H. **Governing Law and Jurisdiction** – This Agreement and all PIFs issued hereunder will be governed by, and interpreted in accordance with, the laws of the State of New York.
- I. **Severability** – If any provision of this Agreement (or any portion thereof) is determined to be invalid or unenforceable, the remaining provisions of this Agreement shall not be affected by such determination and shall remain binding upon the parties.
- J. **Advice on Legal Matters** – We are not engaged in the practice of law and the Services provided hereunder, which may include commenting on legal issues or drafting documents which could constitute legal advice, do not constitute and are not a substitute for legal advice. Accordingly, we recommend that you secure the advice of competent legal counsel with respect to any legal matters related to the Services or otherwise.
- K. **Counterparts** – This Agreement may be executed and delivered (including by facsimile or a scanned PDF version) in one or more counterparts, each of which when executed shall be deemed an original, but all of which taken together shall constitute one and the same agreement.

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MERCER (US) INC.
MERCER INVESTMENT CONSULTING, INC.
MERCER HEALTH & BENEFITS LLC,
in each case, solely in connection with the Services it
provides pursuant to a PIF

By: Benny Yeargan
Name: Benny Yeargan
(Please Print)

Date: October 28, 2008

Title: Worldwide Partner

ACCEPTED AND AGREED
R.H. Donnelley, Inc.

By: Donna Tikkonen Davis
Name: Donna Tikkonen Davis
(Please Print)

Date: October 30, 2008

Title: HR Operations Executive

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SCHEDULE A

THE FOLLOWING ADDITIONAL TERMS SHALL APPLY TO THE EXTENT APPLICABLE TO THE SERVICES PROVIDED PURSUANT TO THIS AGREEMENT:

FOR HEALTH & BENEFITS SERVICES:

1. We do not act on behalf of any insurer or other service provider, are not bound to utilize any particular insurer or service provider, and do not have the authority to make binding commitments on behalf of any insurer or service provider. In addition, we do not guarantee or make any representation or warranty that coverage or service can be placed on terms acceptable to you. We are not responsible for the solvency or ability to pay claims of any insurance carrier or for the solvency or ability of any service provider to provide service. Insurance carriers or service providers with which your other risk or insurance coverage or other business is placed will be deemed acceptable to you, in the absence of contrary instructions from you.
2. You understand that the failure to provide, or cause to provide, complete, accurate, up-to-date, and timely documentation and information to us, an insurer, or other service provider, whether intentional or by error, could result in impairment or voiding of coverage or service. You agree to review all policies, endorsements and program agreements delivered to you by us and will advise us of anything which you believe is not in accordance with the negotiated coverage and terms within sixty (60) days following receipt.
3. You expressly acknowledge that, with respect to the provision of the Services, we are not, nor are any of our Affiliates or subcontractors, an administrator" within the meaning under applicable law, including the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), nor, with respect to the provision of the Services, are we or any of our Affiliates or subcontractors a "fiduciary" within the meaning under applicable law or ERISA, unless provided otherwise herein or required by applicable law.
4. Title V of the Gramm-Leach-Bliley Act and related state laws and regulations establish limitations on the use and distribution of non-public information collected by financial institutions from their customers and consumers. Our insurance-related work qualifies us as a financial institution under this Act. Our Privacy Policy Notice is available at www.mercer.com/transparency. At this web address, you will also find information regarding Marsh & McLennan Companies, Inc. and its subsidiaries' equity interests in certain insurers and contractual arrangements with certain insurers and wholesale brokers.

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John Dempsey
Principal

10 South Wacker Drive, Suite 1700
Chicago, IL 60606
312 902 7745 Fax 312 902 7626
john.dempsey@mercer.com
www.mercer.com

December 1, 2009

Jeffrey Marshall
Chairman, Compensation Committee
Neenah Foundry Company
2121 Brooks Ave.
Neenah, WI 54956

Subject: Executive Compensation

Dear Mr. Marshall,

Thank you for taking time to discuss the services Mercer can provide Neenah Foundry Company. ("Neenah" or "You" or "the Company"), with respect to recapitalization related compensation programs. Mercer is excited to assist your company during this difficult time with the creation of a market competitive, motivational compensation program. This letter summarizes the services we propose to deliver. I have also included a draft engagement letter, and my professional biography.

The purpose of the project is to develop an executive compensation program that would be appropriate and motivational during the restructuring period and upon completion, whether through a Chapter 11 filing or not. The compensation review will include but not be limited to: cash-based short-term incentives, new equity participation arrangements, and post bankruptcy employment security arrangements.

Work plan, Timing and Fees

The table below presents a phased approach to the project that could allow you to take the project in steps if preferred. The approximate timing of each step is described, assuming the project is managed on a fast track. Alternatively, certain steps could be deferred to later dates.

Overview, Timing and Fees	Mercer Responsibilities	Neenah Responsibilities
1) Summary of restructuring related market practices <i>Timing:</i> Week 1 <i>Fees:</i> \$15,000	Provide general information on market compensation practices among pre-packaged and traditional bankruptcies, including share reserves, restructuring incentives, and employment security arrangements	Review presentation and discuss implications for Neenah

MERCER

MARSH MERCER KROLL
GUY CARPENTER OLIVER WYMAN

John Dempsey
Principal

10 South Wacker Drive, Suite 1700
Chicago, IL 60606
312 902 7745 Fax 312 902 7626
john.dempsey@mercer.com
www.mercer.com

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December 1, 2009
Jeffrey Marshall
Neenah Foundry Company

Overview, Timing and Fees	Mercer Responsibilities	Neenah Responsibilities
2) Key Employee Compensation Analysis <i>Timing:</i> Weeks 1-3 <i>Fees:</i> \$10,000	Compensation benchmarking for approximately six key management employees based on industry specific survey data, and inclusion in the straw-model outlined in step 2	Same as in step 2
3) Develop straw-model compensation program <i>Timing:</i> Weeks 2 through 4 <i>Fees:</i> \$30,000	Program will be based on restructuring market practices (outlined in week 1) and data collected from industry specific proxy data available to Mercer. Analysis of comparables will include dilution resulting from equity incentive plans, and total compensation benchmarking (salary, annual incentives, long-term incentives, and employment agreements). Assumes one report with two drafts and two conference calls to review (additional calls and drafts may result in out of scope fees)	Provide information regarding <ul style="list-style-type: none"> Key executive roles and responsibilities Current compensation programs Review and confirm peer group selection Review overall design and provide feedback
4) Approval Process <i>Timing:</i> Weeks 3-4 <i>Fees:</i> \$1,000 to \$5,000	Review proposed plan designs with management and the Board of Directors; higher end fee includes creating a separate report for the Board	Conference calls held with <ul style="list-style-type: none"> Management; Board of Directors
5) Review with Creditors <i>Timing:</i> Weeks 4-5 <i>Fees:</i> \$1,000 to \$5,000	Review proposed plan design with representatives of the Creditors; higher end fee includes creating a separate report for Creditors/Committees	Organize call; review revised report if needed
Total Estimated Fees: \$52,000 to \$60,000		

It difficult to estimate the cost of iterations of our design that can result from negotiations with creditors. While Mercer has much experience with this process and can anticipate many requests in advance, there are sometimes additional research requests made by Creditors and their advisors. We charge for the resulting work based on our customary billable rates. We record time in quarter hour increments.

Given the company's potential insolvency, Mercer would need to be paid in advance of each step (as they begin), until the recapitalization.

Staffing

I will be responsible for the work to be completed. I have very extensive experience advising organizations undergoing periods of recapitalization. I have worked closely with Sidley

MERCER

MMC MARSH MERCER KROLL
GUY CARPENTER OLIVER WYMAN

John Dempsey
Principal

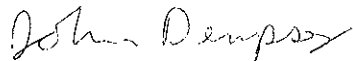
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December 1, 2009
Jeffrey Marshall
Neenah Foundry Company

Austin and Rothschild on previous matters and am confident we can partner effectively. My professional biography is attached. I will be assisted by my team in Chicago. Marcia Long will be responsible for the project day-to-day. I will, however, be involved in key meetings.

Mr. Marshall, we are very interested in working with you on this matter. We trust this proposal reflects our discussion, and enthusiasm for the project. Please treat this letter as a draft and let us know if you have suggestions to refine it.

Sincerely,



John Dempsey
Principal

Copy:
Marcia Long

July 12, 2009

Jeffrey Marshall
Chairman, Compensation Committee
Neenah Foundry Company
2121 Brooks Ave.
Neenah, WI 54956

Subject: Executive Compensation

Dear Mr. Marshall

Subject: Engagement Letter Agreement

We are delighted to have the opportunity to work with the Compensation Committee of the Board of Directors ("you" or "Committee") of Neenah Foundry Company. ("Company"). The purpose of this letter of engagement ("Agreement") is to set forth the terms governing the services provided to you ("Services") by Mercer (US) Inc. ("Mercer" or "we").

Statements of Work

Each statement of work ("SOW") attached hereto must specify at a minimum: (1) our respective responsibilities with respect to the Services; (2) the information and data we will need in order to perform the Services; (3) any time constraints on the performance of the Services; and (4) the compensation we will receive for performing the Services. To the extent a SOW has been delivered to and accepted by you prior to the execution of this Agreement, such SOW shall be subject to the terms of this Agreement. For purposes of this Agreement, the term "Agreement" shall include any SOWs.

Terms and Conditions Governing Engagement

Our performance of the Services (whether provided pursuant to a written SOW or not) are subject to the following terms:

1. Payment Terms

- A. We will perform the Services in consideration of you paying, or causing to be paid, our compensation. Our compensation for the Services, such as professional fees, commissions or other amounts payable to us ("Compensation") will be set forth in the applicable SOW or as otherwise agreed. In addition to our Compensation, we also bill for necessary travel and other expenses related to the services requested including legal fees associated with our retention as a professional, preparing subsequent fee applications and otherwise related to the Chapter 11 Case. You will be responsible for paying, or cause us to be paid, any sales, value added taxes or similar taxes related to the performance or receipt of the Services, including those taxes assessed by authorities subsequent to payment for the Services.

- B. Invoices are due and payable prior to beginning each work step, until the recapitalization is completed, and within thirty (30) days of the date of the invoice. If any invoice is not timely paid, we may exercise our right to claim interest for late payment as permitted by applicable law. If any invoice remains unpaid for longer than ninety (90) days from the date of the invoice, we may either suspend the provision of the Services until payment is received, or terminate this Agreement and/or any SOW with immediate effect.
- C. If we become involved (whether or not as a party) in a dispute (including audits or investigations) between you or the Company, on the one hand, and a third party (including a governmental entity), on the other hand, or if we are asked to preserve records relating to the Services, including where Mercer is requested to preserve documents, electronically stored information, back-up tapes, or other media beyond its standard recycling or retention period or this Agreement beyond the scope of Services described in the applicable SOW, these additional services will be documented in a SOW. If no SOW or other agreement is reached on these additional services, you agree to pay us, or cause us to be paid, at our then current standard rates for all our time spent, and will reimburse us, or cause us to be reimbursed, for all reasonable expenses incurred by us, in connection with such dispute or such documentation preservation request. We will reimburse such payments in the event and to the extent such dispute is finally determined by a court to have resulted primarily from our negligence, conduct in bad faith or fraud.

2. Global Business Standards; Relationships with Committee and Management.

We have adopted Global Business Standards for executive remuneration assignments, a copy of which is attached as Exhibit A.

Mercer is being retained by the Committee to provide advice and counsel to the Committee as specified in this Agreement and in any SOW. In our capacity as consultants to the Committee, we will report directly to the Committee chair and that the Committee will approve the scope of our work and our fees. Although it is essential that our executive remuneration consultant's primary relationship be with the Committee, we believe we can best meet our commitments to the Committee by working with the Company's management as well. By working for the Committee while working with management, we ensure that our advice and recommendations reinforce the Company's business strategy, economics, organization and management style.

In order for Mercer to provide effective advice to the Committee as described above, we intend to involve management as follows, unless we receive instructions from you to do otherwise:

- Mercer may interview selected executives in order to learn business and HR strategy as well as the Company's culture, philosophy and practices, all of which provide necessary context for the evaluation, design and implementation of executive remuneration programs.

- Mercer will request that management provide compensation and benefits data along with financial projections and other relevant operational data that is not otherwise readily available from public sources.
- Mercer will work with management to ensure we understand the scope of the various executive jobs so that our benchmarking is accurate.
- With approval of the Committee chair, we will check our factual and data analyses with management to ensure that they are accurate.
- We will review a draft report with the Committee chair and such management team members as you direct. This enables each of us to surface any issues, identify any areas where further research or analysis may need to be completed, discuss any changes to the compensation program and perhaps refine recommendations before finalizing the report for the Committee presentation.

Our primary contact for data and information at the Company will be Robert Ostendorf or his/her designee. In order to complete this project we will need compensation and benefits data on the covered executives. We will forward an electronic data request under separate cover to Robert Ostendorf to obtain this information.

3. Instructions; Provision of Information and Assistance.

You will provide, or cause us to be provided, all necessary and reasonably requested information, direction and cooperation to enable us to provide the Services, and any direction (whether verbal or written) shall be effective if contained expressly in the applicable SOW or if received (whether verbally or in writing) from a person known to us or reasonably believed by us to be authorized to act on your or the Company's behalf. You agree that we shall use all information and data supplied by you or on your behalf without independently verifying the accuracy, completeness or timeliness of it. We will not be responsible for any delays or liability arising from missing, delayed, incomplete, inaccurate or outdated information and data, or if you do not provide adequate access to members of the Committee or cause to be provided adequate access to employees of the Company and other persons (including third parties such as advisors), agents or other representatives necessary for us to perform the Services. We will be entitled to charge you in respect of any additional work carried out as a result.

4. Confidential Information; Data.

- A. Each of us is likely to disclose information ("Disclosing Party") to the other ("Receiving Party") from time to time in the course of the provision of the Services, which is marked or designated as confidential or proprietary at or prior to disclosure or which would appear to a reasonably prudent person to be confidential and/or proprietary in nature ("Confidential Information"). The Receiving Party will not disclose such Confidential Information to any person other than in connection with the provision of the Services or as otherwise provided for in this Agreement. This restriction does not apply to information that (i) the Receiving Party must disclose by law or legal process, (ii) is either already in the public domain or enters the public domain through no fault of the Receiving Party, (iii) is available to the Receiving Party from a third party who, to the Receiving Party's knowledge, is not under any non-disclosure obligation to the Disclosing Party, or (iv) is independently developed

by or for the Receiving Party without reference to any Confidential Information of the Disclosing Party.

- B. Notwithstanding Section 4(a), you agree that we will be entitled to disclose information, including Confidential Information, relating to the Services, the Committee or the Company to regulators having jurisdiction over our business. You also agree that, notwithstanding any other provision in this Agreement, we may include the identities of those persons who are identified by you as contact persons for you and information about the terms of this Agreement, the Services and the Compensation in our internal client management, financial and conflict checking databases.
- C. You and the Company hereby grant us a perpetual, non-exclusive, royalty-free license to copy, modify and use any information and data supplied by you or on your behalf so that we may create reports, including but not limited to compensation and benefits surveys, job position benchmarks, role profiles, best practices and trends, and use such reports to improve the quality of our advice to our clients generally. We will not disclose any information or data in a manner which allows particular clients' or individuals' information or data to be identified. Notwithstanding the foregoing, we may include the Company's name in a list of participating organizations for reports or surveys containing such information or data.
- D. Our respective obligations under Section 4(a) shall survive for a period of five (5) years from the date of termination of this Agreement or for such longer period as is required by law, except that any trade secrets disclosed to the Receiving Party shall be maintained in confidence in perpetuity or until such time as they are no longer reasonably considered to be trade secrets by the Disclosing Party.
- E. Notwithstanding anything to the contrary in this Agreement, but subject to the terms and conditions of Section 4, we may (i) retain copies of Confidential Information that is required to be retained by law or regulation, (ii) retain copies of our work product that contain Confidential Information for archival purposes or to defend our work product and (iii) in accordance with legal, disaster recovery and records retention requirements, store such copies and derivative works in an archival format (e.g. tape backups), which may not be returned or destroyed. We may retain your or the Company's information in paper or imaged format and we may destroy paper copies if we retain digital images thereof.

5. Personal Information.

Each of us and our respective Affiliates (as defined below) will comply with our respective obligations arising from data protection and privacy laws in effect from time to time to the extent applicable to this Agreement and the Services. This includes, without limitation, (i) the obligation, if any, of the Committee, the Company or any of its Affiliates, to obtain any required consent(s) in respect of the transfer of information to us by you, the Company, any of its Affiliates or any third party relating to an identified or identifiable individual that is subject to applicable data protection, privacy or other similar laws ("Personal Information"), (ii) any obligation with respect to the creation or collection of additional Personal Information by us, and (iii) any obligation with respect to the use, disclosure and transfer by us of Personal Information as necessary to perform the Services or as expressly permitted under this Agreement. Subject to Section 4(c), any use or processing by us of Personal

Information supplied by or on your behalf in connection with the Services shall be done solely on your behalf. We shall handle such Personal Information in accordance with your reasonable instructions as may be provided from time to time in the applicable SOW or as reasonably necessary for the purpose of providing the Services and shall not handle such Personal Information in a manner inconsistent with the terms of this Agreement. We also confirm that we have taken appropriate technical and organizational measures intended to prevent the unauthorized or unlawful processing of Personal Information and the accidental loss or destruction of, or damage to, Personal Information. For purposes of this Agreement, "Affiliates" means, with respect to either party, any entity directly or indirectly controlling, controlled by or under common control with such party.

6. Disclosure in Governmental Filings.

To the extent that you, the Company or any of its Affiliates disclose any information in a governmental or regulatory filing about us relating to our provision of advice and counsel regarding the Services or executive remuneration matters, including in order to satisfy any legal requirements to disclose our identity, the particulars of the mandate for which we have been retained, or any other work that we performed for you, the Company or any of its Affiliates, you and the Company agree that our identification and any description of our mandate or our work for you or the Company will be subject to our prior review and you and the Company shall ensure that our reasonably requested modifications are made to such identification and/or description.

7. Potential Conflicts of Interest.

In engaging Mercer as a consultant to the Committee, the Committee and the Company agree that Mercer (and its Affiliates) shall not be restricted in any respect from providing advice or other services or products to the Company or to other clients in the same business sector as the Company, which could potentially lead to a conflict of interest.

Mercer shall annually disclose to the Committee any services it provides to the Company in the U.S. and the fees received for those services and, upon request, shall provide information regarding services provided by Mercer outside the United States as well as services provided by its Affiliates.

During the 12 months ended October 31, 2009, Mercer has not provided services to the Company: Upon request, we will provide you with information regarding the nature of services provided by Mercer outside the United States and Canada and services provided by other MMC companies.

8. Ownership and Use of Work; Intellectual Property.

- A. All materials prepared by us specifically and exclusively for you pursuant to this Agreement (the "Work") shall be owned exclusively by you or the Company. Notwithstanding anything to the contrary set forth in this Agreement, we will retain all copyright, patent and other intellectual property rights in the methodologies, methods of analysis, ideas, concepts, know-how, models, tools, techniques, skills, knowledge and experience owned or possessed by us before the commencement of, or developed or acquired by us during or after, the performance of the Services, including without limitation, all systems, software, specifications, documentation and

other materials created, owned or licensed and used by us or our Affiliates or subcontractors in the course of providing the Services (the "Intellectual Property"), and we shall not be restricted in any way with respect thereto. To the extent any Work incorporates any Intellectual Property, we hereby grant you and the Company a non-exclusive, non-transferable right to use such Intellectual Property solely for purposes of utilizing the Work internally in accordance with the terms of this Agreement.

- B. Unless we provide our prior written consent, neither you nor the Company will use, in a manner other than as mutually contemplated when we were first retained by you to perform the applicable Services, or disclose to any third party, other than your attorneys, accountants or financial advisors with a need to know, any Work or Intellectual Property or other material supplied by us under this Agreement, and you and the Company shall be responsible for, and we shall have no liability with respect to, modifications made by any person other than us to the Work, Intellectual Property or other work product provided to you by us. You and the Company will indemnify, defend and hold us and our Affiliates harmless in respect of any Loss (as defined in Section 10) incurred by us as a result of your or the Company's breach of this obligation or any modifications made by any person other than us to the Work, Intellectual Property or other work product provided to you by us.

9. Dispute Resolution.

- A. Before commencing any action or proceeding with respect to any dispute between us arising out of or relating to this Agreement, the parties shall first attempt to settle the dispute through consultation and negotiation in good faith and in a spirit of mutual cooperation. If the dispute is not resolved within five (5) business days, either of us may elect to escalate the resolution of such dispute by submitting the dispute in writing to a panel of one senior executive of Mercer and one member of the Committee, who will promptly meet and confer in an effort to resolve the dispute. Each party will identify such senior executive or member of the Committee, as applicable, by notice to the other party, and each party may change its senior executive or member of the Committee, as applicable, at any time thereafter by notice. Any mutually agreed decisions of the panel will be final and binding on both parties. In the event the panel is unable to resolve any dispute within thirty (30) days after submission to them, either party may then refer such dispute to mediation by a mutually acceptable mediator to be chosen by both parties within forty-five (45) days after written notice by either party demanding mediation. Neither party may unreasonably withhold, delay or condition consent to the selection of a mediator. All communications and discussions in furtherance of this paragraph shall be treated as confidential settlement negotiations that are not subject to disclosure to any third party. The costs of the mediator shall be shared equally, but each party shall pay, or cause to be paid, its own attorney's fees.
- B. Any dispute that is not resolved within six (6) months of the date of the initial demand for mediation by one of the parties may then be submitted to a court of competent jurisdiction. Nothing in this Section 9 will prevent either of us from resorting to judicial proceedings at any time if interim relief from a court is necessary to prevent serious and irreparable injury or damage to that party or to others.

- C. EXCEPT TO THE EXTENT PROHIBITED UNDER APPLICABLE LAW, ANY CLAIM, ACTION OR PROCEEDING AGAINST A PARTY OR ANY OF ITS AFFILIATES WILL BE BARRED UNLESS THE OTHER PARTY INITIATES THE DISPUTE RESOLUTION PROCEDURES SET FORTH IN THIS SECTION 9 WITHIN ONE YEAR OF FIRST DISCOVERING THE ACT, ERROR OR OMISSION THAT IS THE BASIS FOR SUCH CLAIM.

10. Limitation of Liability.

- A. The aggregate liability of Mercer, our Affiliates and any officer, director or employee of ours and our Affiliates ("Mercer Parties") to you, your Affiliates, your officers, directors or employees or those of your Affiliates and any third party (including any benefit plan, its fiduciaries or any plan sponsor) for any and all Losses arising out of or relating to the provision of Services by any of the Mercer Parties shall not exceed the greater of one times the Compensation for the Services giving rise to such Loss and \$100,000. Mercer shall have no liability for the acts or omissions of any third party (other than our subcontractors).
- B. In no event shall either party or its Affiliates be liable in connection with this Agreement or the Services for any loss of profit or incidental, consequential, special, indirect, punitive or similar damages. The provisions of this Section 10 shall apply to the fullest extent permitted by law. Nothing in this Section 10 limiting the liability of a party shall apply to any liability that has been finally determined by a court to have been caused by the fraud of such party.
- C. For purposes of this Agreement "Loss" means damages, claims, liabilities, losses, awards, judgments, penalties, interest, costs and expenses, including reasonable attorneys' fees whether arising in tort, contract or otherwise. For the avoidance of doubt, multiple claims arising out of or based upon the same act, error or omission, or series of continuous, interrelated or repeated acts, errors or omissions shall be considered a single Loss.
- D. Each of the parties acknowledges that the Compensation for the Services to be provided under this Agreement and the applicable SOW reflects the allocation of risk set forth in this Section 10.

11. Unforeseen Events.

Neither party shall be liable for delays or failures in performance of obligations under this Agreement, other than failure to make payments hereunder when due, resulting from events beyond its reasonable control, including without limitation "acts of God," fire, flood, riots, new laws which prevent the carrying out of the Services, the results of terrorist activity, failures of third party suppliers, and electronic and other power failures.

12. Duration and Termination of this Agreement.

This Agreement will continue until terminated as provided in this Section, except as provided otherwise in a SOW. This Agreement and any SOW may be terminated (i) by either party upon ninety (90) days' prior written notice to the other party, (ii) by either party upon material breach by the other party, which breach is not cured within thirty (30) days after receipt of written notice thereof, or (iii) immediately by us for non-payment of invoices by you as provided under Section 1. After the termination of this Agreement, Sections 4, 5, 6, 8, 9, 10,

12 and 13 will survive in full force and effect. Any termination of this Agreement shall not relieve you, the Company or its Affiliates of their obligations to pay for Services rendered and expenses incurred by us or our Affiliates up to and including the effective date of such termination, and such termination may require you to pay, or cause to be paid, termination fees to the extent provided in a SOW. Notwithstanding the foregoing, to the extent that the parties agree that Mercer shall continue to provide Services after the effective date of termination of this Agreement or any SOW, the terms and conditions of this Agreement and the applicable SOW shall survive until such Services are completed or the parties agree that the Services shall no longer be provided.

13. Additional Terms

- A. **Terms Incorporated by Reference.** The terms set forth in a SOW shall be deemed to be incorporated by reference into this Agreement for purposes of that SOW.
- B. **Notices.** Any notice that is to be given by one party to the other under this Agreement will be given in writing and delivered to John Dempsey at 10 South Wacker Drive, Chicago, IL 60606 with a copy to Legal Department, Mercer, 1166 Avenue of the Americas, New York, NY 10036 if to Mercer or Bob Ostendorf at 2121 Brooks Ave. Neenah, WI 54956 if to Committee, or any other address specified by notice subsequently by one party to the other. A notice will be effective upon receipt.
- C. **No Third Party Beneficiaries.** Neither this Agreement nor the provision of the Services is intended to confer any right or benefit on any third party, other than the Affiliates of each party that execute a SOW, and, in such event, solely as set forth in such SOW and this Agreement.
- D. **No Publicity.** You and the Company agree not to refer to us or attribute any information to us in the press, for advertising or promotional purposes, or for the purpose of informing or influencing any other party, including the investment community, without our prior written consent. We agree not to refer to you or the Company in the press or for promotional purposes without your prior written consent, provided that we may include your and the Company's name in our representative client listing and as provided in Section 4(c).
- E. **Waiver.** The failure by either party to insist upon strict performance of any provision of this Agreement shall in no way constitute a waiver of rights under this Agreement, at law or in equity.
- F. **WAIVER OF JURY TRIAL** - EACH PARTY, ON BEHALF OF ITSELF AND ITS AFFILIATES, TO THE FULLEST EXTENT PERMITTED BY LAW, KNOWINGLY, VOLUNTARILY, AND INTENTIONALLY WAIVES ITS RIGHT TO A TRIAL BY JURY IN ANY ACTION OR OTHER LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY SERVICES PROVIDED BY MERCER OR ITS AFFILIATES. THE WAIVER APPLIES TO ANY ACTION OR LEGAL PROCEEDING, WHETHER SOUNDING IN CONTRACT, TORT OR OTHERWISE. EACH PARTY AGREES NOT TO INCLUDE ANY EMPLOYEE, OFFICER, DIRECTOR OR TRUSTEE OF THE OTHER AS A PARTY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM RELATING TO SUCH DISPUTE.

- G. **Warranties of Mercer.** Except as expressly set forth in this Agreement, we expressly disclaim any warranty, express or implied, including but not limited to any implied warranty of merchantability and fitness for a particular purpose.
- H. **Entire Agreement, Amendment, Assignment, Subcontracting.** This Agreement (including any SOW and any schedules or exhibits attached hereunder) merges and supersedes all prior or contemporaneous understandings, agreements, negotiations and discussions, whether oral or written, between the parties concerning the Services and constitutes the entire agreement between the parties with regard to the Services. The parties have not relied upon any promises, representations, warranties, agreements, covenants or undertakings, other than those expressly set forth in this Agreement. Except with respect to a change in address for notices, this Agreement shall not be amended except by a written document executed by both of us. In the event of any inconsistency between the terms of a SOW and those in the Agreement, the provisions contained in this Agreement shall prevail unless the SOW specifically amends a term contained herein. Neither of us may assign this Agreement without the prior written consent of the other, except that we may assign this Agreement to an Affiliate with reasonable prior written notice to you. We may subcontract with any of our Affiliates upon reasonable prior written notice to you, and we may subcontract with third parties with your prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed.
- I. **Governing Law and Jurisdiction.** Unless otherwise provided in a SOW, this Agreement and all SOWs issued hereunder will be governed by, and interpreted in accordance with, the law of the State of New York and will be subject to the exclusive jurisdiction of the courts located in the State of New York.
- J. **Severability.** It is the intent of the parties that the provisions of this Agreement shall be enforced to the fullest extent permitted by applicable law. To the extent that the terms set forth in this Agreement or any word, phrase, clause or sentence is found to be illegal or unenforceable for any reason, such word, phrase, clause or sentence shall be modified, deleted or interpreted in such a manner so as to afford the party for whose benefit it was intended the fullest benefit commensurate with making this Agreement as modified, enforceable and the balance of this Agreement shall not be affected thereby, the balance being construed as severable and independent.
- K. **Advice on Legal Matters.** We are not engaged in the practice of law and the Services provided hereunder, which may include commenting on legal issues or drafting documents, do not constitute and are not a substitute for legal advice. Accordingly, we recommend that you secure the advice of competent legal counsel with respect to any legal matters related to the Services or otherwise.
- L. **Counterparts.** This Agreement may be executed and delivered (including by facsimile or a scanned PDF version) in one or more counterparts, each of which when executed shall be deemed an original, but all of which taken together shall constitute one and the same agreement.

[Remainder of this page left blank intentionally]

If you have any questions about these terms and conditions, please do not hesitate to call me. If not, please indicate your agreement to the terms of this Agreement by signing the enclosed copy of this Agreement and SOW, if applicable, and returning it to us.

Mercer (US) Inc.

By: John Dempsey

Name: John Dempsey
(Please Print)

Date: Dec 1/2009

Title: Principal

ACCEPTED AND AGREED

Committee Chair

By: Jeffrey G. Marshall

Name: JEFFREY G MARSHALL
(Please Print)

Date: Dec 5/2009

Title: CHAIRMAN COMP COMM

Neenah Foundry

ACKNOWLEDGED AND AGREED

Company

By: Robert E. Ostendorf Jr

Name: ROBERT E. OSTENDORF JR
(Please Print)

Date: Dec 7 2009

Title: CEO/PRESIDENT

Exhibit A



Executive Remuneration Services Global Business Standards

[illegible]

Measuring our relationships

As already mentioned, the first step in the process for the local authorities is to identify the responsibility and integrate it into the plan. At the beginning of the planning process, the local authorities should identify the responsibility and the other strategic responsibilities that are related to the planning process, such as the commitment of the private and public sectors.

[illegible]

ensuring the quality of our advice.

[illegible]

Marketing objectives:

[illegible]

When a cell is exposed to a high concentration of a particular ion, it is possible that the cell will respond by increasing its permeability to that ion. This is a form of homeostasis, and it is a response that is not unique to living cells. For example, a cell exposed to a high concentration of a particular ion may respond by increasing its permeability to that ion, thereby allowing the ion to leave the cell and return to its normal concentration. This is a form of homeostasis, and it is a response that is not unique to living cells.

John Dempsey Credentials

PRESENT RESPONSIBILITIES

John is a Principal based in Mercer's Chicago office. He has had extensive experience advising organizations undergoing major financial transitions including bankruptcies, IPOs, LBOs, and acquisitions on compensation issues. John designs annual and multi-year incentive programs, change in control arrangements, and employment agreements.

EXPERIENCE

John's recent bankruptcy related clients include Nortel Networks, Tribune Company, Aleris, Charter Communications, Masonite, CIT Group, Capmark, Fairpoint, Caraustar, Adelphia Communications (Creditors' Committee), RH Donnelley, Freedom Communications, Stallion, Dana, Owens Corning, Kaiser Aluminum, Solutia, Olgebay Norton, Citation, Intermet, Venture Industries, Alterra, EaglePicher, Allied Holdings, Mesaba Aviation, and FLAG Telecom. In addition, John has worked with numerous clients seeking to avoid bankruptcy. He has also worked on restructuring issues with Georgia Gulf, ABN AMRO, US Foodservice, Barrick Gold, Manulife, CareMark Rx, Archipelago, and Sky Financial.

John published an article entitled *Bankruptcy Blues: Retaining Key Employees During a Financial Crisis* with Michael Siebenhaar in the February 2002 issue of Workspan, and an update *The New Challenge of Chapter 11* with Elizabeth Stephens in August 2008. He is frequently quoted on issues relating to effective transitional compensation practices in such publications as HR Magazine, Cox News, and Atlanta Journal Constitution. In addition, he has been quoted in the Dallas Morning News, the Chicago Tribune, and the Milwaukee Journal Sentinel.

He has presented at the National Meeting of the Conference Board, the National Association of Stock Plan Professionals, and the National Center for Employee Ownership.

John has testified as an expert in connection with a renewal of the KERP of Owens Corning on September 8, 2004, the approval of Citation Corporation's KERP on November 4, 2004, the approval of Intermet Corporation's KERP on December 22, 2004, the approval of Venture Industries' KERP on March 10, 2005, the approval of Allied Holdings KERP on October 11, 2005, Nortel Networks KEIP & KERP on February 5, 2009 and Tribune in connection with their Management Incentive Plan on September 25, 2009.

In addition, John's testimony was proffered and accepted in connection with the approval of EaglePicher's KERP on August 9, 2005.

EXHIBIT 3

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 11-11527 (SCC)

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In the Matter of:

SBARRO, INC., et al.,

Debtors.

- - - - -x

U.S. Bankruptcy Court
One Bowling Green
New York, New York

May 3, 2011
2:04 PM

B E F O R E:
HON. SHELLEY C. CHAPMAN
U.S. BANKRUPTCY JUDGE

1
2 HEARING re Debtors' Motion for Entry of Interim and Final
3 Orders (I) Authorizing the Debtors to Obtain Postpetition
4 Financing and to Use Cash Collateral, (II) Granting Adequate
5 Protection to Prepetition Secured Lenders, (III) Scheduling A
6 Final Hearing, and (IV) Granting Related Relief.

7
8 HEARING re Debtors' Motion for Entry of Interim and Final
9 Orders Authorizing, but Not Directing, Debtors to Pay Certain
10 Prepetition Claims of Critical Vendors, Lien Claimants and
11 Claims Pursuant to the Perishable Agricultural Commodities Act
12 and Certain Related Relief.

13
14 HEARING re Debtors' Motion for Entry of Interim and Final
15 Orders Authorizing, but Not Directing, Debtors to (A) Pay
16 Certain Prepetition Wages and Reimbursable Employee Expenses,
17 (B) Pay and Honor Employee Medical and Other Benefits and (C)
18 Continue Employee Benefits Programs.

19
20 HEARING re Debtors' Motion for Entry of Interim and Final
21 Orders Authorizing the Debtors to Maintain, Administer, Modify
22 and Renew Customer Programs, Promotions and Practices and to
23 Honor Obligations Related Thereto.

1
2 HEARING re Debtors' Motion for Entry of Interim and Final
3 Orders Authorizing the Debtors to (A) Continue Using Their
4 Existing Cash Management System, Bank Accounts and Business
5 Forms, (B) Continue Intercompany Transactions and (C) Provide
6 Postpetition Intercompany Claims Administrative Expense
7 Priority.

8
9 HEARING re Debtors' Motion for Entry of Interim and Final
10 Orders Authorizing the Debtors to Pay Taxes and Fees.

11
12 HEARING re Debtors' Motion for Entry of an Order Establishing
13 Certain Notice, Case Management and Administrative Procedures.

14
15 HEARING re Debtors' Motion for Entry of an Order Determining
16 Adequate Assurance of Payment for Future Utility Services.

17
18 HEARING re Debtors' Motion for Entry of an Order Authorizing
19 the Debtors to Continue Prepetition Insurance Coverage and
20 Related Practices.

21
22 HEARING re Debtors' Motion for Entry of an Order Establishing
23 Procedures for Interim Compensation and Reimbursement of
24 Expenses for Professionals.

1
2 HEARING re Debtors' Motion for Entry of an Order Authorizing
3 the Retention and Compensation of Certain Professionals
4 Utilized in the Ordinary Course of Business.

5
6 HEARING re and Retention of Epiq Bankruptcy Solutions, LLC as
7 Administrative Agent for the Debtors and Debtors in Possession
8 Nunc Pro Tunc to the Petition Date.

9
10 HEARING re Debtors' Application for Entry of an Order
11 Authorizing the Employment and Retention of Pricewaterhouse-
12 Coopers LLP as Bankruptcy Consultants, Independent Auditors,
13 Tax Consultants and International Tax Advisors to the Debtors
14 Nunc Pro Tunc to the Petition Date.

15
16 HEARING re Debtors' Application for Entry of an Order
17 Authorizing the Retention and Employment of Curtis, Mallet-
18 Prevost, Colt & Mosle LLP as Conflicts Counsel for the Debtors
19 and Debtors in Possession Nunc Pro Tunc to the Petition Date.

20
21 HEARING re Application for an Order Authorizing the Retention
22 Of Cadwalader, Wickersham & Taft LLP as Counsel to the
23 Restructuring Committee of Sbarro, Inc.'s Board of Directors
24 Pursuant to 11 U.S.C. Section 327(a) Nunc Pro Tunc to the
25 Petition Date.

1
2 HEARING re Debtors' Application for Entry of an Order
3 Authorizing the Retention and Employment of Marotta Gund Budd &
4 Dzera, LLC as Special Financial Advisor for the Debtors and
5 Debtors in Possession Nunc Pro Tunc to the Petition Date.

6
7 HEARING re Debtors' Application for Entry of an Order
8 Authorizing the Employment and Retention of Steinberg, Fineo,
9 Berger & Fischhoff, P.C. as Special Counsel with Respect to
10 General Business Matters of the Debtors and Debtors in
11 Possession Pursuant to Section 327(e) of the Bankruptcy Code
12 Effective Nunc Pro Tunc to the Petition Date.

13
14 HEARING re Debtors' Application for Entry of an Order
15 Authorizing the Retention and Employment of Kirkland & Ellis
16 LLP as Attorneys for the Debtors and Debtors in Possession Nunc
17 Pro Tunc to the Petition Date.

18
19 HEARING re Debtors' Application for Entry of an Order
20 Authorizing the Retention and Employment of Rothschild Inc. as
21 Financial Advisor and Investment Banker for the Debtors and
22 Debtors in Possession Nunc Pro Tunc to the Petition Date.

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25 Transcribed by: Penina Wolicki

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A P P E A R A N C E S :

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U.S. DEPARTMENT OF JUSTICE

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ALSO PRESENT: (TELEPHONICALLY)

PETER GRUSZKA, Chicago Fundamental Investment

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P R O C E E D I N G S

THE COURT: All right. Ms. Greenblatt? No? Okay.

MR. SASSOWER: Good afternoon, Your Honor. Edward Sassower of Kirkland & Ellis, on behalf of the debtors.

THE COURT: All right. I have one person on the phone, Peter Gruszka from Chicago Fundamental Investment on listen-only.

All right.

MR. SASSOWER: Your Honor, joining me in the courtroom today are my colleagues Nicole Greenblatt, who is suffering from a terrible cold, so she will not be speaking today, and Paul Wierbicki.

THE COURT: You have to stop working her that hard.

MR. SASSOWER: Exactly. Yeah. And Paul Wierbicki, who is going to --

THE COURT: Okay, great.

MR. SASSOWER: -- be speaking for an extra amount.

And also in the courtroom with me today is Nicky McGrane, the debtors' chief executive officer, and --

THE COURT: Okay.

MR. SASSOWER: -- and the first-day declarant.

THE COURT: All right.

MR. SASSOWER: And Carolyn Spatafora, the debtors' CFO.

THE COURT: Okay.

1 MR. SASSOWER: And Tony Missano, president of business
2 development and our declarant for the critical vendor motion.

3 THE COURT: All right. And I see Mr. Hazan has joined
4 us.

5 MR. SASSOWER: Yes.

6 THE COURT: How are you?

7 MR. HAZAN: Good afternoon, Your Honor. Scott Hazan,
8 together with my partner Jenette Barrow and my colleague
9 Jessica Ward, from Otterbourg, Steindler, Houston & Rosen,
10 P.C., proposed counsel to the official committee.

11 THE COURT: Okay.

12 MS. GASPARINI: Good afternoon, Your Honor.
13 Elisabetta Gasparini, on behalf of the Office of the United
14 States Trustee.

15 THE COURT: All right. Hello, Ms. Gasparini.

16 All right. I'm ready when you are.

17 MR. SASSOWER: Okay. Did you want to take other
18 appearances, or me to mention the other attorneys?

19 THE COURT: No, let's just start.

20 MR. SASSOWER: Let's get into it?

21 THE COURT: Yep.

22 MR. SASSOWER: Okay. Your Honor, today we are seeking
23 entry of final orders with respect to typical first and second-
24 day motions. And I am pleased to report that we have an almost
25 entirely uncontested hearing, other than a limited objection to

1 Rothschild's retention application.

2 The U.S. Trustee and the committee have commented on
3 all of the orders. And we've made certain changes and we have
4 black-lines and revised orders to hand up to you. We greatly
5 appreciate the cooperation of the Office of the United States
6 Trustee and our newly appointed creditor's committee counsel.
7 And we've been working very well with each other and been able
8 to resolve almost all of our issues.

9 THE COURT: Great. All right.

10 MR. SASSOWER: Your Honor, just before I get into the
11 agenda, I wanted to give a brief case update.

12 First, the interim relief that Your Honor entered at
13 the first-day hearing has allowed the debtors to stabilize
14 their operations in Chapter 11. We're working well with
15 vendors. We've only utilized approximately 720,000 of the 1.2
16 million dollar critical vendor bucket to secure go-forward
17 trade with Vistar, the debtors' primary wholesale distributor
18 and other critical vendors.

19 The debtors have also performed well operationally
20 during the first few weeks of the case. The debtors are
21 finalizing their April financial data, but anticipate that
22 same-store sales in April exceeded 5 percent when the budget
23 had projected 0.55 percent. So sales are ahead of budget.
24 However some of these gains have been offset by increased
25 costs. Costs are also up.

1 THE COURT: So is that an indication of the return of
2 traffic in the malls, largely?

3 MR. SASSOWER: We think so.

4 THE COURT: Okay.

5 MR. SASSOWER: We expect sales to continue to
6 increase.

7 THE COURT: Okay.

8 MR. SASSOWER: Your Honor, on April 12, 2011, the
9 Office of the United States Trustee held an organizational
10 meeting and appointed a statutory creditors' committee which
11 included five members: two of the debtors' largest landlords,
12 Simon Properties and General Growth Properties; and two of the
13 debtors' key suppliers, Vistar and Pepsi; and Bank of New York
14 as indenture trustee. And the committee, as you noted,
15 selected Otterbourg. Mr. Hazan and Ms. Barrow-Bosshart are in
16 the courtroom today, and Mr. Posner is also on this matter. He
17 is unable to be here today. And they also selected Mesirow as
18 financial advisor.

19 I'm sure Mr. Hazan will want to say a few words, but
20 I'll finish my remarks and then I'll maybe cede the podium to
21 him --

22 THE COURT: Okay.

23 MR. SASSOWER: -- before we get into the agenda.

24 The debtors, as I noted, have been working closely
25 with the committee, and we're pleased that we've been able to

1 resolve almost all of their issues with respect to the first
2 and second-day relief.

3 Your Honor, the plan support agreement provides for
4 certain milestones. Under the plan support agreement, we need
5 to file a plan and disclosure statement by May 14th. And we
6 need to seek approval of the equity commitment agreement by May
7 19th. And then there are some additional milestones regarding
8 the disclosure statement and the plan. In order to comply with
9 the May 19th equity commitment agreement milestone, we would
10 need to file a motion to approve the equity commitment
11 agreement by tomorrow in order to have it heard on full notice
12 at the May 18th hearing, which is the only hearing in this case
13 before May 19th.

14 Before you check your calendar, over the past few days
15 we've been in discussions with the plan sponsors and the
16 creditors' committee and the first lien lenders regarding
17 whether we should modify the milestones or other aspects of the
18 plan support agreement and equity commitment agreement in light
19 of several developments.

20 First, during the pre-petition period, when we were
21 negotiating the plan support agreement, Rothschild conducted a
22 marketing process to, among other things, market test the plan
23 support agreement. Rothschild contacted ninety-five of the
24 most likely potential purchasers. Twelve of those parties
25 signed nondisclosure agreements and we received only one

1 nonbinding indication of interest from a foreign strategic.

2 After the debtors filed for Chapter 11 this foreign
3 strategic buyer made a revised indication of interest. As a
4 result, the debtors' restructuring committee of independent
5 directors decided to engage this party and facilitate their due
6 diligence, and that process is currently ongoing.

7 Second, all the parties in the case have been very
8 focused on liquidity and leverage and want to make sure that
9 the debtors emerge from Chapter 11 with an appropriate capital
10 structure and sufficient liquidity. To that end, the debtors
11 are working to refresh their numbers based on first quarter
12 results.

13 In light of these two developments, over the past few
14 weeks, and more so over the past few days, the debtors, as I
15 said, have been in discussions with the plan sponsors and the
16 creditors' committee and the first lien lenders discussing
17 whether they should revise the plan milestone as necessary to
18 allow the debtors to continue working on this alternative plan
19 structures, including this potential offer from a foreign
20 strategic, and also whether we should increase the thirty
21 million dollar equity commitment that's currently contemplated
22 by the PSA to further enhance the debtors' liquidity upon
23 emergence. And these discussions are ongoing.

24 It's quite fluid. What we're going to do tomorrow, I
25 don't know yet. Maybe we'll be in a position to file something

1 that's revised as appropriate. Maybe we'll need to file
2 something later in the week and we'll file a motion on
3 shortened notice in order to make the May 18th hearing. And I
4 look forward to advising you further when I know more.

5 THE COURT: I'm trying to think how I can say this.
6 Isn't it possible that your decision could affect what happens
7 with this foreign strategic?

8 MR. SASSOWER: No. I think we are, at this point,
9 contemplating a dual path. So we want to give this foreign
10 strategic sufficient time to do the due diligence and find out
11 if their bid is real and what value that bid is at. And we
12 want to be in a position to compare that to the deal
13 contemplated by the PSA.

14 On the other hand, we don't want to lose the deal
15 contemplated by the PSA. So we're working with the committee
16 and the lenders to try to come up with a compromise that
17 everyone's happy with, that enables us to keep the option of
18 the PSA alive, while allowing us to explore this foreign
19 strategic bid and see if it's real.

20 THE COURT: All right. And when you talk about
21 getting the equity commitment approved, are you filing
22 specifically to approve the equity commitment, or more
23 generally to approve the PSA?

24 MR. SASSOWER: Just the equity commitment. And what
25 is really the cost of that agreement, is essentially, at this

1 point, professional fees.

2 THE COURT: Okay.

3 MR. SASSOWER: So, if you recall, initially, the PSA
4 had a one million dollar breakup fee. That was pushed to the
5 end of the case and it's paid in equity only if we do the deal.
6 So that commitment agreement or breakup fee is no longer really
7 an issue. The issue is the reimbursement of the expenses of
8 professional fees of the plan sponsors.

9 I think the plan sponsors are eager to have those fees
10 start to be reimbursed and would like for those -- for that
11 expense reimbursement to start happening after the May 18th
12 hearing. So we're trying to contemplate structures that allow
13 us to keep -- to be able to pay those fees, which we view as a
14 pretty low cost, in order to keep this thirty -- potentially
15 more than thirty -- equity commitment in place while not
16 upsetting the other parties in the case and not starting World
17 War III. Because what we don't want to see happen is a lot of
18 litigation and discovery and unnecessary restructuring costs
19 that this case can ill afford, over really what is just an
20 expense reimbursement agreement at this point.

21 THE COURT: Well, you just exactly what my next
22 sentence was going to be. And you indicated that you're
23 working with all the constituencies, and it would be
24 unfortunate to have a litigation war just generally, but given
25 the current posture, so --

1 MR. SASSOWER: Yes.

2 THE COURT: -- I'll just wait to hear from you.

3 MR. SASSOWER: Yes. I think our -- as debtors, what
4 we've been trying to do in this case is first and foremost try
5 to build consensus and get a deal done. But secondly, while
6 that deal is coming together, we're trying to keep all the
7 parties in their respective corners and litigation to a
8 minimum, and restructuring costs to a minimum, until we can see
9 if a deal is possible.

10 It could be that deal is not possible and we'll need
11 to have a confirmation -- contested confirmation battle in this
12 case. That's not where we want to be, but that may be where we
13 end up. But we don't to run up a lot of litigation and
14 restructuring costs until we know that's an absolute certainty.

15 THE COURT: Okay. All right. Mr. Hazan is there
16 anything you want to add?

17 MR. HAZAN: Just a little bit, Your Honor. Good
18 afternoon. Scott Hazan, again, Your Honor. And I appreciate
19 Mr. Sassower's introduction of our recent arrival on the scene
20 and our client's recent arrival. Just a few observations.

21 We had our first meeting last week of the committee.
22 All of the executives -- excuse me, two of the three executives
23 that were identified here were present. The third was not and
24 I was not. But my partners were. I am advised it was a very
25 productive meeting, and the company and its professionals are

1 very professional in what they have presented; and they have
2 presented an extensive amount of data. It just so happens the
3 lead partner at Mesirow is in court, and we're advised that
4 they're getting the kind of cooperation that Your Honor would
5 expect from a debtor.

6 The committee has already started formulating views on
7 the exit strategy. Considering the makeup of the committee,
8 which, as noted by Mr. Sassower, includes two landlords and two
9 key vendors plus the trustee, is supportive of the outline of
10 the concept: emerge; emerge quickly; emerge relatively intact.
11 There are no apparent plans on massive store closings. We're
12 not going to be Blockbuster and Borders. And we're not going
13 to be Innkeepers. Because they've already learned that lesson
14 in front of Your Honor and others, and they're acting
15 appropriately.

16 THE COURT: You're reading my mind a little, right?

17 MR. HAZAN: It's not hard. But, as part of that
18 support for the plan concept, they're not yet signing up on the
19 plan, not so much because the distributions for the general
20 unsecured creditors are too low, too high, is the porridge just
21 right; but rather, they're trying to get their arms around, is
22 this the right exit strategy; is that foreign entity a better
23 exit strategy? And yes, we have had discussions about possibly
24 improving the liquidity of the company. Because if there was
25 anything that was a key concern to the creditors' committee, it

1 was the viability of the company.

2 They do not want a Chapter 22. They are concerned
3 about the lev -- the debt that is proposed to survive this
4 bankruptcy. The lenders, who are going to be that debt are
5 concerned about the level of the debt that they're being asked
6 to accept under this plan. And so liquidity is a key issue.
7 And we have a committee meeting tomorrow morning, telephonic,
8 where we're going to address some suggested approaches by the
9 debtor to address those revisions which they have mentioned to
10 you.

11 We certainly don't want -- and certainly Mr.
12 Sassower's made it clear that they do not want -- to obstruct
13 the dual track. And whether there is that singular buyer or
14 multiple buyers, we certainly don't want to prematurely shut
15 off any opportunities for third-party interest, and we'll be
16 talking to the committee about that tomorrow.

17 With respect to the matters on the agenda, as Mr.
18 Sassower noted, we're in agreement on everything except one
19 aspect of Rothschild, which Your Honor will hear. It's not the
20 make or break of the case. But it's important. And that
21 includes the DIP facility, where we're resolved.

22 And though it's -- I may not even stand up later,
23 we've done a very careful look-see on the Kirkland & Ellis
24 retention. We asked a lot of questions of Kirkland & Ellis;
25 the U.S. Trustee was concerned about Kirkland & Ellis; and

1 though this is not necessarily the poster child for facts for a
2 debtor counsel, because they have a history with players in the
3 case, we ultimately satisfied ourselves that the prophylactics
4 that had been put in place a while back whereby experienced
5 counsel recognizing that if they were ever going to take this
6 engagement before Your Honor, they better put in place those
7 prophylactics, and we were satisfied that that they worked.

8 THE COURT: All right.

9 MR. HAZAN: With that, I'll be seated subject to
10 questions.

11 THE COURT: There are -- the size of this binder
12 reflects, among other things, that there are a lot of
13 professionals in this case -- a lot of professionals. And I'm
14 really going to expect everybody to be on their toes about not
15 duplicating efforts. This was something that I'll say later.
16 But it is striking how many professionals --

17 MR. HAZAN: On the debtors' side. For now, though you
18 don't have our applications, for now there's one law firm and
19 one financial advisory firm.

20 THE COURT: No, I was talking about -- I was talking
21 about the debtors.

22 MR. HAZAN: And we --

23 THE COURT: This is not an indication that I have a
24 concern. I do have a concern, but it's not based on something
25 that I've seen. It's just there are a lot of professionals,

1 and I do expect there to be a high degree of cooperation and
2 nonduplication.

3 MR. HAZAN: We had the same concern, and we questioned
4 why you needed a PWC and a Marotta Gund. We questioned why you
5 need -- first of all is K&E appropriate? Then why do you need
6 K&E and Cadwalader? We questioned. And the answer is not a
7 perfect world. Every case is a different of facts. But we
8 ultimately signed off on it.

9 THE COURT: All right.

10 MR. HAZAN: Thank you, Your Honor.

11 THE COURT: Thank you.

12 MR. WIERBICKI: Good afternoon, Your Honor.

13 THE COURT: Good afternoon.

14 MR. WIERBICKI: Paul Wierbicki of Kirkland & Ellis on
15 behalf of Sbarro Incorporated and its affiliated debtors. Your
16 Honor, if I may, I'll just jump right into the agenda.

17 THE COURT: Please.

18 MR. WIERBICKI: The first item on the agenda is the
19 debtors' motion to approve their post-petition financing,
20 continue to use the cash collateral and related relief on a
21 final basis. The Court entered the interim order at the first-
22 day hearing, granting the debtors immediate access to sixteen
23 and a half million dollars in post-petition financing, which
24 financing the debtors closed on April 6th.

25 The facts supporting the financing and the debtors'

1 cash collateral and liquidity needs, as well as their marketing
2 efforts, are set forth in the declaration of Mr. Neil Augustine
3 of Rothschild and were also placed on the record at the first-
4 day hearing in these cases.

5 Since that time the debtors have worked with their
6 various constituents to come to the proposed final order which
7 we filed with the Court last Friday. In addition to certain
8 cleanup changes necessary to reflect this is a final rather
9 than interim order, the changes fell under a few general
10 categories which I will highlight for the record. And as the
11 committee noted, there was agreement here amongst the
12 creditors' committee and the DIP lenders' counsel, certain
13 landlord counsels, as well as the debtors.

14 There are two primary or -- actually three or four
15 primary buckets of changes, the first of which was landlord-
16 specific changes, one of which is to clarify that to the extent
17 of the pre-petition liens, the pre-petition lenders' collateral
18 does not include liens on the leases. To the extent the
19 underlying -- however, with respect to the liens securing the
20 DIP and the adequate protection obligations, they do have liens
21 on leases, except with respect to those leases set forth on
22 Schedule A, to which they only get leases (sic) to the extent
23 the leases allow; however they do have a lien on the prices of
24 those leases.

25 Another change that was negotiated was with respect to

1 use and occupancy rights upon a default under the DIP and
2 acceleration of the loans, paragraph -- this is set forth in
3 paragraph 20 of the order, primarily, which generally provides
4 that the applicable financing agents have lease designation
5 rights at the time of an event of default and acceleration, and
6 they may demand the debtors immediately seek to assume and
7 assign certain relevant leases to the agent.

8 However, paragraph 20(b) allows the DIP agent, upon an
9 event of default, to occupy any premises, but provides that
10 with respect to the leases set forth in Schedule A, prior to
11 the assumption and assignment of those leases, the DIP agent
12 shall not use the premises other than in a manner consistent
13 with its existing rights and the landlord's rights under
14 applicable nonbankruptcy law, written agreement with the
15 landlord, or as otherwise provided in the bankruptcy court
16 order.

17 The second set of changes relates to the protections
18 for the creditors' committee and third-party investigation and
19 other rights in the order. A set of these changes was made to
20 paragraph 15 in the order. Pursuant to paragraph 15(c), the
21 creditors' committee is able to seek to recharacterize any
22 interest fee or expense payments as principal payments, if
23 liens to the first lien lenders are successfully challenged and
24 invalidated.

25 Paragraph 15(e) makes clear that proceeds from asset

1 sales that are to be used to repay the second lien debt are
2 subject to any order or judgment that may be entered for
3 preference, fraudulent conveyance or other avoidance actions.
4 More generally speaking, there are no liens on avoidance
5 actions or proceeds recovered from the lenders.

6 The creditors' committee, also on paragraph 22, has
7 the right to request standing on an expedited basis. And
8 nothing in the DIP order limits any parties' abilities to bring
9 claims against the second lien agent and lenders. The
10 committee's investigation budget has been increased from 50,000
11 to 150,000, as well as the committee has information rights
12 regarding financial and periodic reporting provided to the pre-
13 petition and DIP lenders.

14 One additional point is that the milestones with
15 respect to filing the plan and obtaining an order approving the
16 disclosure statement are to be extended by thirty days,
17 respectively. So that now the plan needs to be filed within
18 ninety days from the petition date as opposed to the previous
19 sixty. And the disclosure statement and order entered in 120
20 days from the petition date, as opposed to the previous 90.

21 In addition, the paragraph granting affirmative rights
22 to the first lien lenders to credit bid has been removed from
23 the proposed final order.

24 The final -- the debtors believe that the final DIP
25 order provides them with the necessary liquidity during these

1 cases and full access to the thirty-five million post-petition
2 financing, as well as adequate protection for the pre-petition
3 lenders, and we would request that the proposed order be
4 approved.

5 THE COURT: In light of the dual track and the
6 possibility of going down a different track than the PSA
7 contemplates, does that ninety days give you enough time, and
8 are you confident that if you had to push, you would get the
9 cooperation of the DIP lender?

10 MR. SASSOWER: Yes, Your Honor. The PSA milestones
11 are much tighter --

12 THE COURT: Yes.

13 MR. SASSOWER: -- than the DIP milestones.

14 THE COURT: Right.

15 MR. SASSOWER: The DIP lender has been very
16 cooperative on pushing out the milestones, and I -- we do think
17 that ninety days should be sufficient. And we're also
18 confident that if they're not, Mr. Graulich is going to give us
19 whatever we want.

20 THE COURT: Okay.

21 MR. GRAULICH: You had me until the very last
22 statement. Timothy Graulich of Davis, Polk & Wardwell, on
23 behalf of Cantor Fitzgerald, as pre-petition agent and DIP
24 agent. I can -- and I did have a couple of comments that I
25 wanted to make in --

1 THE COURT: Okay.

2 MR. GRAULICH: -- respect -- I don't know if it would
3 be appropriate to say it now or wait until -- if there was any
4 more on the presentation. But on this point in particular, we
5 were concerned, as I think the creditors' committee was
6 concerned, about the sort of speed of the case. You know, by
7 the same token, this is not a case that would be well-served to
8 stay in bankruptcy for a protracted period of time. But given
9 the uncertainty around liquidity, the concerns about the
10 leverage on the company, and the possibility that there may be
11 an entity out there that could solve most of the problems, we
12 did think it would appropriate to push out the milestones under
13 the DIP.

14 So right now, a plan and disclosure statement would
15 not need to be filed until July, under this.

16 THE COURT: Right.

17 MR. GRAULICH: And certainly, we would be as
18 reasonable, later, as we are now, with respect to giving more
19 time, if the circumstances suggested it was appropriate.

20 THE COURT: All right. All right.

21 All right, does anyone else -- was that the end of
22 your presentation?

23 MR. WIERBICKI: That was the end of my presentation.

24 THE COURT: All right. Does anyone else wish to be
25 heard?

1 MR. GRAULICH: If I may be heard --

2 THE COURT: Yes.

3 MR. GRAULICH: -- generally?

4 THE COURT: Certainly.

5 MR. GRAULICH: I can do it right here?

6 THE COURT: You can stay there.

7 MR. GRAULICH: Okay. Great. So I just wanted to make
8 three quick points. One I've already made with respect to the
9 milestones, which is that the company -- that the senior
10 lenders here do have a concern about not moving too quickly and
11 maybe forcing parties to a litigation stance before it is clear
12 that that's actually what would be necessary.

13 Then, I just wanted to say with broad brush, with
14 respect to the -- basically the two baskets of changes to the
15 order, I think that's also consistent with our view that we
16 should try to minimize litigation as much as possible.

17 With respect to the landlord issues, these are issues
18 that may well be litigated -- appropriate to be litigated in a
19 different type of case, but given the size of the DIP and the
20 size of the company, the liquidity of the company, we thought
21 that this was a package of relief that was appropriate under
22 the circumstances. To be sure, in a different type of case
23 with a larger DIP, where the value of the leases may be more
24 important to provide value to the DIP lender, it may have been
25 appropriate under those circumstances. But given the

1 circumstances here, we thought it would be appropriate to try
2 and resolve this on a consensual basis.

3 And similarly with respect to the modifications that
4 we made in connection with discussions with the creditors'
5 committee, the one that I would just want to note is of a
6 similar vein. We had, in our interim order, a finding -- a
7 provision that would deal with the Philadelphia Newspaper issue
8 that we made clear that for the purposes of this case, as an
9 additional inducement to make the DIP that the pre-petition
10 lenders would have the ability to have -- the ability to make a
11 credit bid, either in a 363 situation or in a plan situation.

12 Again, given the fact that while we certainly aren't
13 on board with the plan as described in the plan support
14 agreement, considering the fact that it does not provide for
15 credit bidding in any event, the fact is, is that it seemed
16 premature to try and litigate an issue that may not, in fact,
17 become relevant in this case. So I just wanted to be clear
18 that its removal from the order wasn't any type of concession
19 by the pre-petition lenders that they don't have the right to
20 credit bid -- indeed they believe they do -- they just did not
21 believe it would be appropriate to try to litigate this now,
22 particularly in light of the fact that there is no plan that
23 provides for credit bidding on the horizon.

24 THE COURT: All right. Thank you.

25 MR. GRAULICH: Thank you, Your Honor.

1 MS. BARROW-BOSSHART: Good afternoon, Your Honor.
2 Jenette Barrow-Bosshart, of Otterbourg, Steindler, Houston &
3 Rosen, P.C. on behalf of the committee.

4 We appreciate the efforts of the debtors'
5 professionals and the first lien lenders and second lien
6 lenders and obviously the DIP lenders in reaching this
7 consensual resolution. As Mr. Graulich had indicated, some of
8 the provisions that were deleted or not inserted in the manner
9 that perhaps the committee would have wanted, were done so
10 because of the determination that, in fact, it may be
11 premature. If the issues are ripe later, we can all argue
12 about it if it comes to pass.

13 That issue -- credit bidding was one the committee
14 felt strongly about. We asked that it be deleted, and we
15 appreciate that it was. There were other provisions that we
16 had asked for but didn't insist upon for the same reason,
17 especially with respect to the second lien debt, although we
18 both stepped back from positions we had wanted.

19 But I do want to point out, Your Honor, one or two
20 things that were not mentioned in the prior presentations with
21 respect to the milestones. Only the first two milestones with
22 respect to the filing of the plan and the approval of the
23 disclosure statement and the hearing on the disclosure
24 statement are being moved the thirty days. The outside dates
25 have not changed, and that's in recognition by everybody of the

1 need for speed.

2 Hopefully, if things slipped a little bit, everybody
3 will agree to further extensions, but we're hoping there won't
4 be slippage.

5 THE COURT: But we can you get from -- if you got to
6 disclosure statement, we can get you from disclosure statement
7 to confirmation in fifty days. That's plenty of time.

8 MS. BARROW-BOSSHART: Yes, Your Honor.

9 THE COURT: I think.

10 MS. BARROW-BOSSHART: And to use a phrase that the
11 counsel for the DIP agents used, there's a little bit of an
12 accordion in the middle, and we're stretching the accordion
13 out.

14 THE COURT: Exactly. Okay.

15 MS. BARROW-BOSSHART: With respect to the adequate
16 protection liens that are being granted, there are no longer
17 going to be a grant (sic) upon thirty-five percent of the stock
18 of the foreign subsidiaries. There no longer will be a lien
19 on, as you heard, certain of the leases. There will be super-
20 priority claims attaching to those proceeds, but at least the
21 liens themselves won't be there. The same thing with avoidance
22 actions. There will be no lien on the avoidance action. There
23 will be a no-recourse to the proceeds or to the -- and no lien
24 on the proceeds to the extent of any recoveries against the
25 specific pre-petition lender, if any.

1 And in addition, Your Honor, similar to the deletion
2 of the 364(e) protections that initially were going to both the
3 DIP lenders and the pre-petition first lien lenders, those have
4 been deleted with respect to the pre-petition first lien
5 lenders. There also will be a very specific limitation on the
6 stipulations and admissions that are the subject of the
7 challenge period, and now are specifically limited paragraph 6
8 of the final order, whereas before it was including but not
9 limited those in paragraph 6. It seemed vague. We didn't
10 really know what it was that was being stipulated or not.

11 And I think that pretty much covers. There were a
12 couple of notice provisions that weren't mentioned that were
13 changed. And there were -- an extension of the use of cash
14 collateral after notice, from five days to seven. It doesn't
15 sound like a big change, however, it actually is, because the
16 DIP notice was seven days. So you could have been caught in a
17 situation where there's no use of cash collateral but no
18 ability by anybody to do anything else.

19 And I think that pretty much covers it. But if you
20 have any questions, Your Honor --

21 THE COURT: All right. Have you had an opportunity to
22 review the revised order, and it reflects all of these changes?

23 MS. BARROW-BOSSHART: Yes, Your Honor.

24 THE COURT: All right. Does anyone else wish to be
25 heard with respect to the final DIP order?

1 All right. I'll approve it subject to my having a
2 chance to review the final order as revised.

3 MR. WIERBICKI: Thank you, Your Honor.

4 The next item on the agenda is the debtors' motion for
5 authority to pay certain critical vendor, lien and PACA claims
6 on a final basis. As was noted previously, at the first-day
7 hearing, the debtors did obtain authority to pay up to 1.2
8 million of critical vendor claims as well as 25,000 in lien
9 claims and pay PACA claims in the ordinary course.

10 Since then, the debtors have judiciously used this
11 relief in an effort to stabilize their trade in the post-
12 petition period. And as Mr. Sassower mentioned, they've only
13 spent 720,000 of the 1.2 million allocated to critical vendor
14 claims, in exchange for which the debtors have received certain
15 favorable trade terms.

16 Additionally, on April 19th, the debtors filed a
17 supplemental request with respect to their critical vendor
18 motion, noting that they had -- we had inadvertently
19 overestimated the amount of PACA claims versus critical vendor
20 claims. And so whereas in the initial motion we'd asked for
21 final relief for critical vendor claims up to 4.7 million, it's
22 actually 5.2 million. It was a 500,000 dollar overestimation
23 of the PACA claims. We did preview this with the committee,
24 who has indicated they don't object to this revision. And it
25 is also in accordance with our DIP budget.

1 Additionally, as reflected in the proposed order that
2 was attached to the supplemental request, the creditors'
3 committee will receive advance notice and approval of any
4 critical vendor claims the debtors propose to pay, to the
5 extent the final order is entered.

6 So we'd ask that to ensure our continued supply on
7 normalized trade terms, and pursuant to the facts and the
8 importance of our trade as set forth in the first-day hearing
9 as well as the declaration of Anthony Missano, the debtors'
10 president of business development, that was entered into the
11 record at the first-day hearing, that the motion be granted on
12 a final basis.

13 THE COURT: All right. The only question I have is,
14 you said you've spent 720 of the 1.2 million. Given where you
15 are in the case now, do you still anticipate having to spend a
16 lot more? Are there still critical vendors out there?

17 MR. WIERBICKI: Sorry about that. I just wanted to
18 get the facts. We are in the process of negotiating trade
19 agreements --

20 THE COURT: Okay.

21 MR. WIERBICKI: -- with a number of other vendors --

22 THE COURT: Okay.

23 MR. WIERBICKI: -- that just haven't been finalized as
24 of today. But we would -- you know, are seeking to finalize
25 those to ensure favorable trade terms going forward in the

1 case.

2 THE COURT: All right. Does anyone else wish to be
3 heard with respect to the critical vendor motion? Mr. Hazan,
4 you're okay with this one?

5 MR. HAZAN: We are. As commented, as we do in most
6 cases, we requested a procedure for professional-eyes-only,
7 where the financial advisors of the committee sign off on the
8 appropriateness --

9 THE COURT: Okay.

10 MR. HAZAN: -- of the critical vendor treatment.

11 THE COURT: All right. I'll enter this order.

12 MR. WIERBICKI: Thank you, Your Honor. The next order
13 on the agenda is the debtors' request for entry of a final
14 order to pay and honor certain of their pre-petition employee
15 wage and benefit claims. This is just essentially, bringing to
16 a final basis what was granted in the interim order.

17 There are three changes that we made to the order at
18 the request of the U.S. Trustee and the creditors' committee.
19 One was to clarify that there be no bonus or severance pay to
20 any insiders pursuant to this order. Another was clarifying
21 language regarding the 11,725 cap, that except for certain
22 field level employees, all pre-petition compensation is subject
23 to that cap. And with respect to any program in the motion
24 where the debtors stated that they believed that as of the
25 petition date, no amounts were outstanding, to the extent we

1 later learn that amounts were outstanding, we seek to pay
2 those. We will give notice to the creditors' committee of
3 that.

4 THE COURT: Anyone have anything on this motion?

5 All right, I'll approve it.

6 MR. WIERBICKI: Thank you, Your Honor. The next
7 motion is the debtors' motion seeking a final order authorizing
8 them to maintain and administer their customer programs, which,
9 as noted at the first-day hearing, include customer gift card
10 programs, certain discounts and promotional programs. There
11 are no changes that were made to the final order filed with the
12 motion, and we ask that the relief be granted.

13 THE COURT: All right. Anyone want to be heard on
14 this motion?

15 All right. I'll approve this one as well.

16 MR. WIERBICKI: Thank you. The next motion is the
17 debtors' motion for entry of a final order to continue to use
18 their cash management system and existing bank accounts. Only
19 one change to the proposed final order, which is, the
20 creditors' committee requested that we provide three days'
21 advance notice before transferring any funds from a debtor to
22 one of our joint ventures. And we included that provision in
23 the proposed final order. In order to be able to effectively
24 track our cash flows and maintain our cash system, we'd ask
25 that the order be entered.

1 THE COURT: All right. Anyone wish to be heard on
2 this one?

3 All right. I'll approve this one.

4 MR. WIERBICKI: Thank you, Your Honor. The next is
5 the debtors' motion seeking entry of a final order allowing the
6 debtors to remit and pay certain taxes and fees. The only
7 change to the proposed order was that we agreed with the
8 creditors' committee, that if the debtors proceed to pay taxes
9 that would be entitled to priority under Section 507, we will
10 provide advance notice to the creditors' committee of that.

11 THE COURT: All right. I'll enter this order.

12 MR. WIERBICKI: Thank you, Your Honor. The next
13 motion is the debtors' request for authority to establish
14 notice, case management, and administrative procedures. These
15 are consistent with the local rules and procedures approved in
16 other cases. We did get two omnibus hearing dates in June-
17 July, from your chambers, of June 2nd and July 12th, as well as
18 clarified that the objection deadline is seven days before the
19 hearing, consistent with --

20 THE COURT: All right. On that -- on the question of
21 dates, with significant matters where you need additional days,
22 just call us. You don't have to be bound by the omnibus dates.
23 So don't let the dates that we have given you for general
24 calendar matters drive your process. When you get to the point
25 where you know what you want to do, call us and we'll obviously

1 do our best to accommodate you.

2 The only thing that generally is nonnegotiable are our
3 Chapter 13 days, which we only have five left, so -- but who's
4 counting?

5 MR. WIERBICKI: We greatly appreciate it, Your Honor.
6 And we will. Thank you so much.

7 THE COURT: All right. Other than that observation,
8 I'll enter this order.

9 MR. WIERBICKI: Thank you, Your Honor. The next
10 motion is the debtors' motion seeking entry of an order
11 determining adequate assurance payment for future utility
12 services and establishing procedures for additional adequate
13 assurance requests.

14 As noted in the motion, the debtors have funded in a
15 segregated account, 240,000 dollars, which represents
16 approximately two weeks of utility services, as adequate
17 assurance. That funding was made on April 21st. In addition,
18 the motion sets forth certain procedures by which the utilities
19 can come back to us if they have additional adequate assurance
20 requests.

21 There were two objections filed to the motion, one by
22 Alabama Power Company and another, which was a group of about
23 twenty utilities. I'm happy to report that we were able to
24 resolve those by giving them a month's worth of deposit with a
25 credit of that two weeks. So the two weeks that was already in

1 the segregated account was credited towards the month.

2 THE COURT: Okay.

3 MR. WIERBICKI: With that, we'd ask the Court to
4 approve the motion.

5 THE COURT: All right. I'll approve the utilities
6 motion.

7 MR. WIERBICKI: Thank you, Your Honor. The next
8 motion is the debtors' motion seeking entry of an order
9 authorizing debtors to continue their pre-petition insurance
10 coverage and practices. The debtors maintain approximately
11 fourteen policies and use the services of the insurance broker
12 Wells Fargo Insurance. The debtors believe they are current on
13 all amounts outstanding, and would ask that they be able to
14 continue their insurance programs.

15 THE COURT: All right. Anyone wish to be heard on the
16 insurance motion?

17 All right. That's approved.

18 MR. WIERBICKI: Thank you, Your Honor. The next
19 motion is the debtors' motion requesting approval of certain
20 interim compensation procedures for retained professionals.
21 These procedures follow the court's General Order M-412, and
22 are consistent with procedures approved in other Southern
23 District of New York cases, and we'd ask that they be approved.

24 THE COURT: All right. This is fine and I'll approve
25 it. One observation regarding fees. I made my comment before.

1 When you get to your fee applications, we've been working on
2 forms to assist the clerk's office and the reporting that they
3 have to do to Washington regarding fees requested and fees paid
4 in Chapter 11 cases. So as and when we get to that point in
5 four to six months or whenever, just make a mental note to
6 check with us to see what the latest form of those schedules
7 and other reporting requirements are.

8 MR. WIERBICKI: We will do so, Your Honor. Thank you.

9 THE COURT: All right. I'll enter that order. And
10 that brings us to retentions?

11 MR. WIERBICKI: I believe that's correct, yes. The
12 next motion is the debtors' motion requesting authority to
13 continue employing certain ordinary-course professionals. We
14 did make some changes to the proposed order at the request of
15 the United States Trustee, the first of which is that each
16 ordinary-course professional must file their declaration of
17 disinterestedness within either twenty days from the date of
18 entry of the order to twenty days from the date of hire. And
19 as well, the monthly cap has been lowered to 40,000, and
20 there's now a case cap of 300,000.

21 THE COURT: Okay. All right. I'll approve this.

22 MR. HAZAN: Your honor, just there's a note on that --

23 THE COURT: Yes.

24 MR. HAZAN: -- though it's not an objection at all.

25 Is the reduction in caps were at the committee's request,

1 consistent with Your Honor's observation earlier on trying to
2 maintain a closer look-see and a lower budget on outside
3 ordinary-course professionals.

4 THE COURT: Okay. Thank you.

5 MR. WIERBICKI: Thank you, Your Honor. The next item
6 on the agenda is the retention of Epiq Bankruptcy Solutions to
7 provide certain services that were not covered in their initial
8 retention. These relate to solicitation, balloting, and
9 certain data room and call center services that they provided.
10 It used to be contained in the first-day applications, and now
11 they're on separate applications.

12 THE COURT: Right.

13 MR. WIERBICKI: This retention application, along with
14 all the other retention applications, was filed on April 14th
15 to allow us to work with the United States Trustee's Office and
16 incorporate their comments. And other than Rothschild, we've
17 been able to resolve their concerns.

18 THE COURT: Okay. All right. I'll approve the Epiq
19 order.

20 MR. WIERBICKI: Thank you, Your Honor. The next
21 matter on the agenda is the retention application of
22 PricewaterhouseCoopers who act as bankruptcy consultants, tax
23 advisors and auditors for the debtors. The debtors chose
24 Pricewaterhouse in light of their extensive experience with the
25 debtors more generally. As with the Epiq retention, the order

1 here was negotiated and commented upon with the United States
2 Trustee's Office.

3 THE COURT: All right. Does anyone have anything with
4 respect to the retention of PWC?

5 MS. GASPARINI: Your Honor, I'll speak now for all the
6 applications --

7 THE COURT: Okay.

8 MS. GASPARINI: -- and then I'll speak to Rothschild
9 in a minute.

10 THE COURT: All right.

11 MS. GASPARINI: But I just wanted to make a statement
12 for the record. Our office has vetted all retention
13 applications very closely. We did share Your Honor's concern
14 with respect to duplication and the number of professionals
15 retained in these cases. And going through the comments, we
16 made sure that the services that each professional is to
17 provide were specified in the order. And our office is
18 certainly going to closely scrutinize the fee applications to
19 make sure that these services are indeed what is going to be
20 provided.

21 And we also made sure that each order did state that
22 the work is not going to be duplicative of another
23 professional. So we certainly second Your Honor's concerns and
24 certainly reserve all our rights with respect to duplication
25 when it comes to fee application time.

1 THE COURT: Right. I mean, just by dint of everyone
2 understandably wanting to keep track of what's happening in the
3 case, you could have a status call when you have groups and
4 groups of professionals on the phone. So it's proper for them
5 to be keeping track of things. The left hand needs to know
6 what the right hand is doing, but that quickly, quickly begins
7 to add up.

8 So I would just ask -- I echo that concern again, and
9 I would just ask that you also attempt to limit the number of
10 professionals from each firm that does various tasks. I'm not
11 going to tell you how to run your case, but I think you know
12 what I'm talking about.

13 MS. BARROW-BOSSHART: Your Honor, Jenette Barrow-
14 Bosshart on behalf of the committee. With respect to PWC, the
15 committee did also have some concerns with respect to PWC
16 performing services related to schedules and statements. We
17 thought that perhaps they weren't best utilized for that
18 purpose; that perhaps Epiq could have done those services and
19 that perhaps their normal hourly rate was too high to be
20 billing for that.

21 However we -- after probing the issue and speaking
22 with PWC and debtors' counsel on the matter, we were convinced
23 that it was appropriate under these circumstances for two
24 reasons. PWC indicated that they would not be doing the actual
25 preparation of the schedules themselves, but rather supervising

1 them. And two --

2 THE COURT: Supervising personnel at the company?

3 MS. BARROW-BOSSHART: That's my understanding.

4 THE COURT: Okay.

5 MS. BARROW-BOSSHART: And two, that they were --
6 although they're charging the normal hourly rate for the
7 schedules and statements, they are giving an overall fifteen
8 percent discount on audit services, which is really a much more
9 lucrative area. So we were convinced that it was appropriate
10 under the circumstances.

11 THE COURT: All right. I appreciate that. All right.
12 With that, I'll approve PWC's retention.

13 MR. WIERBICKI: Thank you, Your Honor. The next item
14 is the retention application of Curtis Mallet to act as
15 conflicts counsel in these cases. The debtors seek to employ
16 Curtis to handle matters that are not appropriately handled by
17 Kirkland or to which Kirkland has actual or potential conflict
18 of interest.

19 Again, as with the other retentions, the order was
20 negotiated with and incorporates comments from the United
21 States Trustee's Office.

22 THE COURT: All right. Anyone wish to be heard with
23 respect to Curtis Mallet?

24 All right. I'll approve their retention.

25 MR. WIERBICKI: Thank you, Your Honor. The next item

1 is the retention application to employ Cadwalader as counsel to
2 the restructuring committee. Given that certain of the
3 directors are MidOcean members, a restructuring committee of
4 disinterested directors has been formed here, and Cadwalader
5 provides advice to them. And again the application was vetted
6 with the United States Trustee and incorporates her comments.

7 THE COURT: All right. Anyone wish to be heard with
8 respect to Cadwalader?

9 All right, I'll approve their retention.

10 MR. WIERBICKI: Thank you, Your Honor. The next item
11 is the debtors application to employ Marotta Gund as special
12 financial advisors to assist the debtors in managing their
13 thirteen-week cash flow and the DIP budgeting requirements,
14 preparing liquidation and best interests analysis. This, along
15 with the other retentions, was also discussed with the United
16 States Trustee and incorporates many changes that she -- all of
17 the changes she requested, and it's significantly different
18 from where we started from, to address many of the concerns
19 that the U.S. Trustee has raised and you have raised as well.

20 THE COURT: All right. Anyone wish to be heard on
21 this application?

22 All right, I'll approve it.

23 MR. WIERBICKI: Thank you, Your Honor. The next item
24 is the debtors' application to employ the Steinberg Fineo firm
25 with respect to certain general business matters. The

1 Steinberg firm served in the capacity of acting general counsel
2 of the debtors since 2007, as well as served with respect to
3 litigation matters.

4 At the request of the United States Trustee, we filed
5 a supplemental declaration on April 26th that provided
6 additional description of the services that the Steinberg firm
7 provides, particularly with respect to the litigation matters,
8 and noted -- attached an exhibit of the current litigation
9 matters in which they are involved. And with respect to any
10 new matters the debtors will come on notice of presentment
11 requesting supplemental application for those matters.

12 We've asked that the application be approved.

13 THE COURT: All right. This one actually looked like
14 it would be a savings in terms of not bringing someone else up
15 to speed and lower hourly rates. I'll approve this
16 application.

17 MR. WIERBICKI: Thank you, Your Honor. And with that,
18 I'll turn the last two items back over to Mr. Sassower.

19 THE COURT: Okay.

20 MR. WIERBICKI: Thank you.

21 THE COURT: Thank you.

22 MR. SASSOWER: For the record, Edward Sassower of
23 Kirkland, on behalf of the debtors. Your Honor, the next item
24 on the agenda is Kirkland's retention application. You've
25 heard a bit about that already.

1 As you know, Kirkland represented MidOcean --
2 represents MidOcean on matters unrelated to the debtors, and
3 represented MidOcean in connection with its acquisition of
4 Sbarro. We've had extensive conversations and inquiries from
5 the Office of the United States Trustee and the committee. And
6 those parties, as every other party in the case, has gotten
7 comfortable that we have all of the proper procedures and
8 prophylactic measures in the case. And I think also, the
9 parties in the case have observed our behavior in the case and
10 have gotten comfortable that we are doing all the right things,
11 and keeping us in place in this case is what's in the best
12 interests of all parties.

13 So, unless Your Honor has questions or comments --

14 THE COURT: Well, I think I'll pick up on a theme of
15 what Mr. Graulich said with respect to certain changes that
16 were agreed to in the context of the DIP. Every case turns on
17 its own facts. And the fact that everybody has gotten
18 comfortable with this constellation of facts in this case, is
19 fine with me. It may not necessarily be the case in some other
20 case, given the prior relationships. But I thought about this
21 a lot, and I am comfortable, particularly since you all are
22 comfortable.

23 Had somebody had a serious objection, I think we'd
24 have a different conversation. But I'm prepared to move
25 forward, so I'll approve the retention.

1 MR. SASSOWER: Thank you, Your Honor.

2 THE COURT: All right.

3 MR. SASSOWER: Your Honor, the last item on the agenda
4 is Rothschild's retention application.

5 THE COURT: Okay.

6 MR. SASSOWER: There are limited objections from the
7 Office of the United States Trustee and the creditors'
8 committee regarding the reimbursement of professional fees.
9 That's the only --

10 THE COURT: That's the only open issue? Not --

11 MR. SASSOWER: -- that's the only open issue.

12 THE COURT: -- not the other two issues that were in
13 the committee's objection?

14 MR. HAZAN: Your Honor, Scott Hazan again. That is
15 correct. We agreed with the revised proposed language on
16 transaction.

17 THE COURT: Okay.

18 MR. HAZAN: We accepted the entitlement on a credit
19 bid.

20 THE COURT: Credit bid.

21 MR. HAZAN: And we --

22 THE COURT: The third one was --

23 MR. HAZAN: -- accepted --

24 THE COURT: -- the carveout.

25 MR. HAZAN: -- the carveout, though in every case, we

1 are concerned with the magnitude of the fees the investment
2 bankers and how they can absorb the whole carveout. But again,
3 on the facts of this case, we accepted that.

4 THE COURT: Okay. Then we're just talking about
5 reimbursement of expenses?

6 MR. SASSOWER: Correct. We're talking about that one
7 discrete issue.

8 Your Honor, Rothschild is represented by Richard Hahn
9 of Debevoise, who is here.

10 THE COURT: All right.

11 MR. SASSOWER: I'll just say a couple remarks on the
12 debtors' behalf, and then I'll cede the podium to --

13 THE COURT: Okay.

14 MR. SASSOWER: -- the objectors. And then --

15 THE COURT: All right.

16 MR. SASSOWER: -- they'll be followed by Mr. Hahn.

17 THE COURT: All right. So the goal is to spend more
18 fees discussing this issue now than are at issue under the
19 reimbursement. Just to put a fine point on it.

20 MR. SASSOWER: With that, I'll be extremely brief.

21 THE COURT: Good.

22 MR. SASSOWER: I'll just say, in one sentence or less.
23 The debtors believe that -- the debtors understood that this
24 provision was in there when they negotiated the retention
25 application and we think this provision is consistent with past

1 practice and precedent and market. And we're supportive of it.
2 We also understand --

3 THE COURT: Let me ask you a question, though. And
4 maybe this is more appropriate -- I'd like to know what the
5 underlying facts are. Looking at the provision in the
6 engagement letter -- let's see if I can find it again,
7 Expenses, section 6 -- I had a little bit of a hard time with
8 the language.

9 MR. SASSOWER: Yes.

10 THE COURT: And I just wanted to understand, is there
11 a request to pay pre-petition counsel fees for Rothschild?

12 MR. HAHN: No, Your Honor.

13 THE COURT: There's not, right?

14 MR. HAHN: No.

15 THE COURT: Because the engagement letter was
16 obviously entered into pre-petition. And it therefore
17 contemplated the scenario of there being such expenses pre-
18 petition. But you're not asking me --

19 MR. HAHN: This relates entirely to fees accruing
20 post-petition.

21 THE COURT: All right. And the ask is really for the
22 fees in getting Rothschild retained and -- in other words,
23 we're not looking at a shadow set of lawyers here, correct?

24 MR. HAHN: That's correct, Your Honor. The fees
25 typically arise --

1 THE COURT: Why don't -- identify yourself for the
2 record.

3 MR. HAHN: Certainly, Your Honor. Richard Hahn of
4 Debevoise & Plimpton for Rothschild, Inc.

5 In our experience, Your Honor, the fees arise in two
6 circumstances; first as I think Your Honor was suggesting, in
7 connection with retention and compensation. If there are
8 objections, as there are here, Rothschild turns to counsel to
9 assist them.

10 THE COURT: Right.

11 MR. HAHN: If there are no objections, there's no
12 outside counsel, no fees.

13 And picking up on Your Honor's earlier points, the
14 provision only applies to documented and reasonable fees.
15 We're perfectly happy to let people after the fees are incurred
16 and reimbursement is sought, to review and challenge the
17 appropriate -- the reasonableness, rather than dealing with
18 this in the abstract.

19 The second area where this sometimes comes up is in
20 cases that are litigious. It's -- for better or worse, it's
21 sometimes a common tactic for those challenging the debtors'
22 motions or plan to seek discovery from the debtors' financial
23 advisors through depositions, document production. Often the
24 debtors' counsel handles that. On occasion they have turned to
25 Rothschild and said we're overburdened, could your counsel

1 handle it, or we see a divergence of interests here on a
2 particular issue. There's an accusation that's been made about
3 particular behavior. You should get your counsel involved.

4 And in those limited circumstances, we sometimes -- for fees --

5 THE COURT: All right. Well, the latter, to the
6 extent that there's an accusation or something in which
7 Rothschild needs its interests protected, that's one category,
8 and I can understand that. But if they're overburdened, that's
9 not okay with me for them to call you. They've got a bunch of
10 other lawyers. They can call Curtis Mallet, they can unpack
11 some other lawyers. But it's not okay with me for Rothschild
12 to turn to counsel to, in essence, be rendering services to the
13 estate on a non-retained basis.

14 And I don't think that's what your --

15 MR. HAHN: No, Your Honor.

16 THE COURT: -- I don't think that's what contemplated
17 here.

18 MR. HAHN: No. And I don't think that's, frankly,
19 what's at dispute with the U.S. Trustee. I think the dispute
20 relates to the fees associated with retention and compensation.

21 THE COURT: Okay. All right. I think -- okay, thank
22 you.

23 Ms. Gasparini?

24 MS. GASPARINI: Thank you, Your Honor.

25 THE COURT: Before you start, not to cut you off at

1 the pass. And you can make your full remarks. But I disagree
2 with your view of overhead. I think overhead is paying for the
3 lights, paying for the air conditioning, paying for the
4 administrative staff. I don't think that paying Debevoise to
5 help Rothschild get retained is overhead.

6 You know, I suppose you could say -- you know, you
7 could look at the fees that they're going to receive under the
8 case and say, why do they need an extra 14,000 dollars. But
9 that's a different issue. So I look at it somewhat
10 differently. I think that it's not what I view as overhead,
11 and therefore I disagree with that piece of your argument.

12 MS. GASPARINI: Sure, Your Honor. I'll get to that in
13 one minute.

14 THE COURT: Okay.

15 MS. GASPARINI: But just to start out, we're not
16 disputing the fact that Rothschild should not be retained under
17 Section 328.

18 THE COURT: Right.

19 MS. GASPARINI: We're just disputing the fact of
20 whether or not the provision regarding the reimbursement of
21 their professional fees, whether or not that is a reasonable
22 provision. And the burden of proof rests on the applicant to
23 come forth and prove that it is such a reasonable provision.

24 We did argue -- we made three main arguments, and I
25 won't dwell too much on it, as they are set forth in our paper.

1 But I'll also rebut to some of the arguments that were raised
2 in the reply papers.

3 One of the arguments that we made is that the
4 reimbursement for legal fees should not be permitted because
5 for an attorney to be paid, they need to be retained in the
6 bankruptcy case. The second one is that the reimbursement of
7 fees and expenses usually focuses on whether or not they fall
8 within the provisions of 330, whether they're reasonable and
9 whether they provide --

10 THE COURT: Right.

11 MS. GASPARINI: -- a benefit to the estate. And here
12 we don't see any reason why they -- we don't view them as
13 providing any benefit. As a matter of fact, the only benefit
14 that Debevoise's services provide is to Rothschild.

15 With respect to overhead, I understand Your Honor's
16 concern, and the interpretation of the U.S. Trustee Guidelines
17 how "overhead" is defined therein. So maybe it's not in the
18 same category as word processing or rent or renting space for
19 files. But we see it as the cost of doing business -- for
20 Rothschild to do business. And when we use the term "overhead"
21 that is what we're referring to.

22 I'd like to respond to some of the arguments that
23 Rothschild made in its reply papers. With respect to the fact
24 that legal fees for financial advisors have been approved many
25 times in the past, that may be the case, Your Honor, but I

1 would like to point out one thing. Our office may not -- this
2 may have been -- evolved into a more recent position with
3 respect to the 328 retentions. But that does not mean that in
4 the past we have not objected to the reimbursement of legal
5 fees at fee application time.

6 We now view it as let's argue about it now. Let's not
7 defer the issue to a fee application time, because we view it
8 as a provision that's not reasonable under the retention
9 standards of 328. So once again, a lot of the cases that they
10 cite, doesn't mean that we didn't object to such fees to the
11 extent that they were sought at fee application time. It was
12 just a matter of when they were argued.

13 The Blockbuster case has been cited, both in our
14 papers and in the reply papers. The same issue did come up
15 before Judge Lifland, and Rothschild was, indeed, the financial
16 advisors who was being retained by the debtors. We objected to
17 the same provision which was I think almost -- very similar, if
18 not identical, in the engagement letter. And Judge Lifland did
19 find that Rothschild should not be reimbursed for any charges
20 for its counsel.

21 THE COURT: But weren't the facts in Blockbuster
22 different from the facts here with respect to the amount of
23 fees at issue?

24 MS. GASPARINI: I don't think so, Your Honor. I think
25 that they -- basically the provision in the engagement letter

1 did seek reimbursement for both any fees related to the
2 engagement as well as fee applications and that's what we
3 objected to. We actually objected to any legal fees, and the
4 judge basically entered an order saying that they should not
5 seek reimbursement for any legal fees of Debevoise or, you
6 know, legal counsel that they retained.

7 Rothschild does cite in its reply papers -- they say
8 that "in Blockbuster itself Judge Lifland permitted
9 reimbursement of legal expenses with respect to three
10 professionals." And I'm not sure that's entirely true. In
11 Deloitte -- Deloitte Tax, which is one of the retention
12 applications that they cite in their reply papers, there's a
13 specific provision in the order that says -- in the order
14 signed by Judge Lifland that says, " Deloitte Tax shall not be
15 entitled to reimbursement by the debtors for any fees,
16 disbursements or other charges to Deloitte Tax's attorneys
17 other than those incurred in connection with the request of
18 Deloitte Tax of payment for indemnity."

19 So Your Honor, we're not here to discuss that they
20 should not be entitled to legal fees related to
21 indemnification. That's part of the Blackstone protocol. And
22 there's a provision in the proposed order, paragraph 12, that
23 does allow that, that does allow for Rothschild to be
24 reimbursed for legal fees related to indemnification as
25 provided for in the engagement letter.

1 With respect to Alvarez & Marsal, in Blockbuster, in
2 that order that was approved by the Court there's a provision
3 that says, "Notwithstanding anything to the contrary in the
4 engagement letter or the application, A&M shall be entitled to
5 seek and obtain payment of its reasonable attorneys' fees only
6 upon its prior application to this Court pursuant to sections
7 330 and 331 of the Bankruptcy Code, provided however, the U.S.
8 Trustee retains all rights to object to any attorneys' fees
9 sought, including the right to assert that such fees are not
10 permitted." So Judge Lifland did not allow for these fees; we
11 just carved it out as part of the negotiations with respect to
12 other terms and issues we had with respect to that retention
13 application.

14 And same thing for Retail Resource. The order was
15 actually silent with respect to legal fees. I was not the
16 attorney -- the trial attorney on that case, but sometimes it's
17 not addressed because we are told that they don't have outside
18 counsel so the issue is moot; there is no issue with respect to
19 legal fees.

20 THE COURT: Let's stop and talk about some of these
21 issues.

22 MS. GASPARINI: Sure.

23 THE COURT: I mean, first of all, with respect to the
24 requirement of complying with 327, for a retained professional
25 on the case the U.S. Trustee has a legitimate concern that

1 there be the appropriate level of disinterestedness --

2 MS. GASPARINI: Correct.

3 THE COURT: -- right? So with respect to a
4 professional who's providing limited services to a financial
5 advisory firm, they are rendering service to Rothschild in this
6 case, and I don't think the same requirement of
7 disinterestedness really pertains. But that being said, they
8 are conferring a benefit on the estate because they're enabling
9 the estate to retain Rothschild.

10 One could say -- I suppose you could argue back and
11 say, well, they could go out and get a financial advisor who
12 doesn't want to charge through their legal fees. But I would
13 suggest to you that you then would have a situation where they
14 might be able to find someone, but that to me would seem to be
15 the tail wagging the dog for such a small amount of money and I
16 do think a debtor should be given deference for their choice of
17 professionals.

18 And secondly -- and this might be very cynical -- but
19 if the standard fee structure for a financial advisor or
20 investment banker for a large debtor is 150,000 dollars a month
21 for the first six months and the credit back and all of those
22 other bells and whistles, don't you think that if I don't -- if
23 we weren't to approve their attorneys' fees coming in, that
24 that first month would simply kick up by 25,000 dollars. And
25 then we are going to have a retention that includes that

1 amount, and then I'm not even going to have the ability to look
2 at the fees.

3 Now if I were to approve this, they're going to come
4 in, they're going to have to submit their fees for approval and
5 I would have the ability to look at the expenses that they're
6 asking reimbursement for. You'd have the opportunity to
7 object. Isn't that a better outcome?

8 MS. GASPARINI: Well, Your Honor, we think, number
9 one, going back -- and I know Your Honor may not view it the
10 same, but we view it as part of doing business. With respect
11 to -- and I think that it may have been argued in their papers,
12 if I understood them correctly --

13 THE COURT: Well, let me -- let's pause of that one
14 and we now will exceed the hourly rate of what's at issue here
15 but here we are. For example, the other professionals in the
16 room whose applications I'm approving, they get to bill for
17 being here, right?

18 MS. GASPARINI: Yes.

19 THE COURT: So why -- you could take the position that
20 that's a cost of doing business, that's a cost of Kirkland &
21 Ellis being retained. Why should the be entitled to get fees
22 for fees?

23 MS. GASPARINI: Sure.

24 THE COURT: Right? And we do limit, on a percentage
25 basis or on some kind of a, you know, amorphous reasonable

1 standard, the amount of fees that professionals get for fees.
2 Right? We're not going to allow them to bill for certain
3 things, entering their time on their time sheets, for example.
4 But we do allow them to get paid for getting paid. So that, to
5 me, seems to be a disparity that doesn't make a whole lot of
6 sense in terms of your argument that it's a cost of doing
7 business.

8 MS. GASPARINI: But the way I view it is this, and I
9 think they raised it in their papers, that 330(a)(6) even
10 allows for you to get reimbursed -- for a professional to get
11 reimbursed for fees related to preparation of fee applications.
12 And as long as they're reasonable, for example, our office
13 doesn't usually object as long as they're reasonable; we may
14 have other grounds for objection.

15 But for example, for K&E to seek reimbursement with
16 respect to entering into retention, you know, dealing with
17 their engagement, retention papers or dealing with filing fee
18 applications. We wouldn't even have an objection, once again,
19 to the extent that the fees are reasonable, for somebody in-
20 house at Rothschild to seek reimbursement for their fees
21 related to their retention application or fee applications. We
22 see that -- as long, once again, as they're reasonable, I think
23 they're allowed for under the Code.

24 But it's when that -- those services are outsourced to
25 a third party that I think that's when the line crosses to the

1 unreasonableness. And the reason being, we're dealing here
2 with financial advisors that get paid usually a monthly fee
3 that either gets credited at the end or does not get credited,
4 but then there's a success fee. So a lot of times financial
5 advisors are the highest paid professional in a case, and it's
6 not in their incentive to keep it in-house because that brings
7 down, technically -- you know, eats into their success fees.
8 But having said that, usually at the end of the case they are
9 the highest paid professionals on a blended hourly rate
10 account, and so it isn't their incentive to outsource their
11 services, and that is what, in our view, crosses the line to
12 the unreasonableness.

13 THE COURT: All right. I hear you but I disagree with
14 you, notwithstanding what Judge Lifland did in Blockbuster.

15 Mr. Hazan, I don't know if you want to continue the
16 objection, but I'm happy to hear you.

17 MR. HAZAN: I would like to, briefly, Your Honor.

18 THE COURT: Okay.

19 MS. GASPARINI: Sure. If I may make two more
20 statements --

21 THE COURT: Okay.

22 MS. GASPARINI: -- in reply to the papers that were --

23 THE COURT: And when you're done I want to say one
24 more thing. Go ahead.

25 MS. GASPARINI: Sure. I think there was a statement

1 in the reply papers that the U.S. Trustee's position is
2 contrary to the Blackstone protocol, and once again, that is
3 not what we're saying. As a matter of fact, paragraph 12 does
4 say that to the extent that the fees are with respect to
5 indemnification --

6 THE COURT: Right.

7 MS. GASPARINI: -- that they are certainly provided
8 for.

9 THE COURT: Okay.

10 MS. GASPARINI: And the other thing that I wanted to
11 state for the record is that the same issue came up during --
12 in Marotta Gund's engagement letter they do seek fees related
13 to their counsel and they did agree not to seek legal fees with
14 respect to the retentions as well as the fee applications.

15 THE COURT: All right, thank you.

16 MS. GASPARINI: Thank you.

17 MR. HAZAN: Your Honor, Scott Hazan from Otterbourg
18 again. A couple of preliminary comments. Certainly this issue
19 on legal fees is a small issue, and Your Honor may recall when
20 I stood up here at the very outset I said there was remaining
21 issue; this case will not rise or fall on the issue.

22 Two, Rothschild is an excellent firm. Mr. Augustine,
23 Mr. Douton and Mr. Resnick are superior investment bankers.
24 And Mesirow Financial, our financial advisors, have reviewed
25 the reasonableness of the totality of fees and were satisfied

1 that they were getting well paid but market rate. We tried a
2 variety of solutions to solve the problem so we wouldn't have
3 to be here.

4 The committee has already, I think, Your Honor,
5 demonstrated to you, we look at fees, whether it was the
6 ordinary course professional where we reduced the caps and
7 other items of a similar note. Every case does stand on its
8 own facts, and our experience differs from whatever experience
9 Mr. Hahn may suggest to you and has already suggested to you,
10 and our experience suggests not in every case do the investment
11 bankers get, seek, or seek and then waive the fees for their
12 counsel.

13 Mr. Hahn commented that there will be an opportunity
14 to review the fees, they'll be documented, subject to
15 objection. That was one of the proposals we made. I don't see
16 that anywhere in any of the pleadings in terms of a process --

17 THE COURT: But of course they will because they have
18 to apply for their fees. So --

19 MR. HAZAN: They do not apply for their fees.
20 Rothschild applies for the fees.

21 THE COURT: Rothschild. No --

22 MR. HAZAN: They could have a single-line entry: our
23 legal expense is twenty-two dollars or twenty-two million
24 dollars.

25 THE COURT: Well, no, but we're not going to do it

1 that way.

2 MR. HAZAN: Okay, good.

3 THE COURT: I'll ask to see details.

4 MR. HAHN: Your Honor, the engagement letter says they
5 must be documented and reasonable. It is Rothschild's practice
6 and I --

7 THE COURT: We can't record you unless you're at the
8 microphone.

9 MR. HAHN: I'm sorry.

10 THE COURT: Could you repeat that?

11 MR. HAHN: The engagement letter says that the fees
12 must be documented and reasonable.

13 THE COURT: That's what I --

14 MR. HAHN: And it is our practice and I commit to you
15 here that the detail will be provided in connection with
16 Rothschild's applications and subject to the review of people
17 who want to challenge the reasonableness of it, they will be
18 able to.

19 MR. HAZAN: And Your Honor, this is a 328 retention,
20 so what is the basis and authority for the challenge? Our
21 rights under 330 reserve as to those expense items.

22 MR. HAHN: The reasonableness requirement is embedded
23 in the engagement letter. It's not imposed by the statute,
24 so --

25 THE COURT: And it will be imposed by me.

1 MR. HAHN: Okay.

2 MR. HAZAN: And really the thrust of this, Your Honor,
3 to conclude -- because if there is a process we have come a
4 long way -- is that it wasn't an objection on our part if
5 discovery is taken of Rothschild in a way that is appropriate
6 by outside counsel because we didn't get into a litigation to
7 make a lot of noise about that. But it was our problem for
8 them to have outside counsel prepare an application to be
9 hired, to prepare monthly statements and expend money for what
10 we consider -- put aside overhead; we can debate that until the
11 cows come home -- something that you just don't need an estate
12 to bear the expense of.

13 In our committee cases, for which we do most secured
14 lending and committee work, the advisors to the committee --
15 Mr. Lang (ph.) is in court; he's prepared his own paperwork.
16 We don't prepare it for him. Now, is every financial firm of
17 the same note? No. But most that we deal with will prepare
18 their own.

19 So our major thrust was there are certain things that
20 the estate should not bear, whether it's the retention, the
21 monthlies, the interims, the finals. And there are certain
22 things the estate properly ought to bear: discovery and the
23 like. And we tried to find a happy middle ground but were not
24 successful.

25 And so we would ask Your Honor to limit the places

1 where they might seek it, from the mundane to the not so
2 mundane. And when Your Honor decides against that, because
3 Your Honor has already very much indicated her view on this, we
4 certainly would ask you --

5 THE COURT: When you say the mundane to the not so
6 mundane --

7 MR. HAHN: So the two examples being --

8 THE COURT: Go ahead.

9 MR. HAHN: -- who prepared the retention papers, the
10 application in support, the affidavit, who prepared them and
11 who has to pay for them? In our view, outside counsel for the
12 investment banker should not be charging the estate. Counsel
13 for the debtor often does it. Counsel for the debtor often
14 stands up and defends these applications, and you don't need
15 counsel for the investment banker.

16 THE COURT: But if they did that then they would ask
17 for their fees in doing it.

18 MR. HAZAN: Correct, but they're already here. He
19 doesn't have to be here. Okay? And I say that respectfully --
20 as well as his colleague who is here.

21 THE COURT: Not personally.

22 MR. HAZAN: Right, it's not personal, believe me.

23 THE COURT: Right.

24 MR. HAZAN: That's in respect to --

25 THE COURT: No, I didn't say personable, I said

1 personal.

2 MR. HAZAN: Right. And --

3 THE COURT: No, but let's pause on this because if
4 someone from Kirkland had done their work to get Rothschild
5 retained, that attorney at Kirkland would put in for that. So
6 that's a person billing. The person billing to get Rothschild
7 retained is from Debevoise. The only difference between those
8 two people in the generic sense is that Debevoise is not
9 itself, as of today or ever, a retained professional in this
10 case. Right?

11 MR. HAZAN: Yes, but Your Honor commented earlier, you
12 have a gaggle of professionals --

13 THE COURT: Right.

14 MR. HAZAN: -- you get on calls, you have multiple
15 teams.

16 THE COURT: Agreed.

17 MR. HAZAN: You know and I know there's an extra cost
18 being borne. And we simply suggested that the administrative
19 kind of costs not be borne by the estate. That was our major
20 thrust and we do it every case. Sometimes we success. More
21 often than not it's resolved and Your Honor doesn't have to
22 hear it. That was our position here. That is our position
23 here.

24 There were discussions on capping it, however those
25 didn't work. And our view, Your Honor, is you retained

1 Rothschild. We support that. The structure is fine. You
2 somehow limit that which could be charged, and at worst, that
3 which you've already made clear -- but that's at worst -- we
4 have a clear process to determine reasonableness --

5 THE COURT: All right.

6 MR. HAZAN: -- and a full opportunity --

7 THE COURT: Well, I think that -- I'm going to approve
8 their retention application. I'm going to approve of including
9 the provision in the engagement letter that allows for the
10 reimbursement of fees but subject to what I've already stated,
11 which is that when it's fee application time I'll expect to see
12 the detail with respect to the fees and expenses expended by
13 any outside lawyer that Rothschild retains, Debevoise or
14 whoever.

15 And I reserve all of my rights to come to the view
16 that those expenses are not reasonable, excessive, et cetera,
17 and I think that that -- it doesn't really push the entire
18 issue to the end of the day so much as reaffirm kind of the
19 basic rules of engagement is that everybody has to keep their
20 eye on the ball and not be charging this estate for things that
21 it ought not be charged for.

22 MR. HAZAN: Just one point of clarification. You said
23 you reserved all of your rights. Your rights are always
24 reserved. Did Your Honor mean to say that all rights of the
25 committee and the U.S. Trustee, as an example, with respect

1 to -- and the debtor, for that matter --

2 THE COURT: I think Mr. Hahn didn't disagree.

3 MR. HAHN: All parties have a right to object to
4 reasonableness of fees.

5 THE COURT: If your fee -- I mean, now we've spent an
6 hour and a half of quality time together, but you know, if you
7 put in 50,000 dollar for getting Rothschild retained I'm
8 probably not going to be that happy about it. So --

9 MR. HAHN: Understood, Your Honor.

10 THE COURT: All right? With all due respect to my
11 esteemed colleague two doors down the hall, I think we'll do it
12 that way in this case.

13 And I will say, with all due respect for the Office of
14 the United States Trustee, I do think that it would be helpful
15 to the bar if the United States Trustee, when there is a change
16 in position or even a perceived change in position from what's
17 perceived to be a practice that's generally available in cases
18 and done in cases, that there be a discussion. I think it's
19 important that professionals know what's coming and what they
20 can expect. And if there are changes in policy, which is her
21 purview to change policies, that it would be a good thing that
22 there would be a discussion with the bar so that the members of
23 the bar can understand where the Office of the United States
24 Trustee is coming from. But that's just my view.

25 MR. HAHN: Your Honor, we did agree to make one change

1 to the form of order submitted with respect to the definition
2 of transaction at the request of Mr. Hazan. With your
3 permission I can bring up a clean and blackline version.

4 THE COURT: All right. Is that only with respect to
5 the credit bid --

6 MR. HAHN: No, this would be --

7 THE COURT: -- issue?

8 MR. HAZAN: This is a --

9 THE COURT: No, the transaction.

10 MR. HAHN: -- the liquidation.

11 THE COURT: Okay.

12 MR. HAHN: Yeah.

13 MR. HAZAN: And Your Honor, we don't need to have the
14 order changed to reflect what Your Honor said. We're satisfied
15 at the record.

16 THE COURT: All right. But the transaction issue,
17 that's in the event of a liquidation?

18 MR. HAHN: Correct, Your Honor.

19 THE COURT: Right? Okay.

20 Do we have a disk, if we're handling this one
21 differently from the others?

22 MR. HAHN: I'm afraid we don't have a disk. I have
23 hard copies, if that's okay.

24 THE COURT: All right. Well, you'll have to either
25 get us a disk or e-mail us --

1 MR. HAHN: All right.

2 THE COURT: -- a clean copy.

3 MR. HAHN: I'll do that.

4 THE COURT: And then I'll assume I'll get either a
5 folder of disks or an e-mail from Kirkland with all the other
6 orders.

7 MR. SASSOWER: Yeah.

8 THE COURT: All right. I appreciate the arguments.
9 Anything else, Mr. Sassower?

10 MR. SASSOWER: No, Your Honor. That's all we had for
11 you today.

12 THE COURT: All right. So let us know how you come
13 out with respect to scheduling the next hearing in the case,
14 and as I said, we're more than happy to try to accommodate you
15 outside of omnibus hearing dates.

16 MR. SASSOWER: Thank you very much, Your Honor.

17 THE COURT: All right. Thank you, folks. Have a good
18 day.

19 IN UNISON: Thank you.

20 (Whereupon these proceedings were concluded at 3:26 p.m.)
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22
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25

I N D E X

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1	RULINGS (CONT'D)		
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3	Debtors' MGDB retention application approved.	44	22
4	Debtors' SFB&F retention application	45	15
5	approved.		
6	Debtors' Kirkland & Ellis retention	46	25
7	application approved.		
8	Debtors' retention application of	67	7
9	Rothschild, Inc. approved; reimbursement fees		
10	will be subject to court approval		
11			
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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a true and accurate record of the proceedings.

Penina
Wolicki

Digitally signed by Penina Wolicki
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Date: May 6, 2011