IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
BOOMERANG TUBE, LLC, a Delaware limited liability company, *et al*.,	:	Case No. 15-11247 (MFW)
Debtors.[1]	:	(Jointly Administered)
	:	**Re: D.I. 271, 273, 314, 315, 339**

SUPPLEMENTAL BRIEF IN SUPPORT OF (I) THE APPLICATION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS PURSUANT TO 11 U.S.C. §§ 328(A), 504, AND 1103(A); FED. R. BANKR. P. 2014, 2016, AND 5002; AND DEL. BANKR. L.R. 2014-1 FOR AN ORDER AUTHORIZING RETENTION AND EMPLOYMENT OF MORRIS, NICHOLS, ARSHT & TUNNELL LLP AS CO-COUNSEL FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS *NUNC PRO TUNC* TO JUNE 19, 2015; AND (II) THE APPLICATION FOR ORDER AUTHORIZING THE RETENTION OF BROWN RUDNICK LLP AS CO-COUNSEL FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF BOOMERANG TUBE, LLC, *NUNC PRO TUNC* TO JUNE 19, 2015

The Official Committee of Unsecured Creditors (the "Committee") of the above-captioned debtors and debtors in possession (the "Debtors") hereby files this supplemental brief (the "Supplement") (A) in support of its applications (the "Applications") for entry of orders authorizing the retention and employment of Brown Rudnick LLP (D.I. 271) ("Brown Rudnick") and Morris, Nichols, Arsht & Tunnell LLP (D.I. 273) ("Morris Nichols," and with Brown Rudnick, the "Firms") as counsel to the Committee *nunc pro tunc* to June 19, 2015, pursuant to sections 328(a), 504, and 1103(a) of title 11 of the United States Code (as amended, the "Bankruptcy Code"); Rules 2014, 2016, and 5002 of the Federal Rules of Bankruptcy Procedure

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Boomerang Tube, LLC (9415); BTCSP, LLC (7632); and BT Financing, Inc. (6671). The location of the Debtors' corporate headquarters is 14567 North Outer Forty, Suite 500, Chesterfield, Missouri 63017.

(the "Bankruptcy Rules"); and Rule 2014-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), in response to the objections to the Applications (D.I. 314, 315) (collectively, the "Objection") filed by the Office of the United States Trustee (the "U.S. Trustee"), and in support of the Committee's omnibus reply (D.I. 339) (the "Reply"); and (B) to address questions raised by the Court at the hearing on the Applications held on August 11, 2015 (the "Hearing").[2] In further support of the Applications, the Committee respectfully states as follows:

SUPPLEMENT[3]

1. At the Hearing, the Court questioned the Firms about whether it was an established practice for attorneys to obtain payment for their fees and expenses incurred in defending fee applications. *Aug. 11, 2015 Hr'g Tr.* at 21:1-24. At the conclusion of the Hearing, the Court permitted the Firms to submit a supplemental brief identifying cases or materials evidencing this practice. *Id*. at 48:15-24. This Supplement identifies the established practice in this Circuit and others pursuant to which (a) estate professionals were reimbursed their fees and expenses incurred in defending their fee applications; and (b) attorneys are entitled to recover the costs of collecting their fees outside of chapter 11.

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2 Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Applications, the Objection or the Reply.

3 This issue is also currently the subject of a contested matter in the bankruptcy cases captioned *In re Northshore Mainland Services Inc., et al.*, Case No. 15-11402 (KJC), in which counsel to the official committee of unsecured creditors seeks approval of similar Fee Defense Provisions pursuant to section 328(a) (Case. No. 15-11402; D.I. 284, 390) and to which the U.S. Trustee has objected (Case. No. 15-11402; D.I. 356). At a hearing in those cases held on August 17, 2015, Judge Carey reserved judgment and requested additional briefing on the dispute, including inviting each party to solicit the submission of amicus briefs in support of its position.

2. Awards of attorneys' fees and expenses for the successful defense of fee applications have been approved by bankruptcy courts for years—the earliest reported case having been decided in 1984. *See In re Bible Deliverance Evangelistic Church*, 39 B.R. 768 (Bankr. E.D. Pa. 1984). In fact, this Court approved "fees sought by the Committee's professionals for defending the Objection to their fee requests" in *In re 14605, Inc.* *See* 2007 WL 2745709, *10 (Bankr. D. Del. Sept. 19, 2007) (MFW). In that decision, this Court abided by the United States District Court for the District of Delaware's ruling in *In re Worldwide Direct Inc*., in which Judge Jordan held that "requiring counsel who has successfully defended a fee claim to bear the costs of that defense is no different than cutting counsel's rate or denying compensability on an earlier fee application. *The economic effect is precisely contrary to the Third Circuit's instruction that bankruptcy professionals are to stand on an equal footing with their non-bankruptcy counterparts*." 334 B.R. 108, 112 (D. Del. 2005) (emphasis added). In reaching this holding, Judge Jordan noted that awarding such fees allows for "reasonable compensation for professionals" which is, itself, "a benefit to the estate." *See id.*

3. The District of Delaware was not alone in this view. Numerous other courts around the country have awarded attorneys' fees and expenses for the successful defense of fee applications as reasonable. Jurisdictions that have awarded such fees and expenses in bankruptcy cases include:

a. California. *See In re GFI Commercial Mortg. LLP*, 2013 WL 4647300 (N.D. Cal. Aug. 29, 2013); *In re DIMAS, LLC*, 357 B.R. 563 (Bankr. N.D. Cal. 2006), *aff'd in part, rev'd in part*, 2009 WL 7809032 (B.A.P. 9th Cir. Feb. 25, 2009); *In re Merced Falls Ranch, LLC*, 2013 WL 3155448 (Bankr. E.D. Cal. June 20, 2013); *In re Shalan Enters., LLC*, 2012 WL 1345328 (Bankr. C.D. Cal. Apr. 17, 2012); *In re Schneider*, 2008 WL 4447092 (Bankr. N.D. Cal. Sept. 26, 2008); *In re Buckridge*, 367 B.R. 191 (Bankr. C.D. Cal.

2007); *In re Walters*, 2006 WL 6589027 (Bankr. S.D. Cal. May 30, 2006).

b. Colorado. *In re Chavez*, 157 B.R. 30, 33 (D. Colo.) *aff'd*, 13 F.3d 404 (10th Cir. 1993).

c. Connecticut. *See In re Ahead Commc'ns Sys., Inc.*, 2006 WL 2711752 (Bankr. D. Conn. Sept. 21, 2006).

d. Georgia. *See In re Concrete Prods., Inc.*, 1993 WL 13726054 (Bankr. S.D. Ga. July 27, 1993).

e. Hawaii. *See In re Kahuku Hosp.*, 2011 WL 5884144 (Bankr. D. Haw. Nov. 23, 2011).

f. Illinois. *See In re Churchfield Mgmt. & Inv. Corp.*, 98 B.R. 838 (Bankr. N.D. Ill. 1989); *In re Chicago Lutheran Hosp. Ass'n*, 89 B.R. 719 (Bankr. N.D. Ill. 1988).

g. Kentucky. *See Big Rivers Elec. Corp. v. Schilling (In re Big Rivers Elec. Corp.)*, 252 B.R. 670 (W.D. Ky. 2000); *In re Atwell*, 148 B.R. 483 (Bankr. W.D. Ky. 1993).

h. Massachusetts. *See In re Lupo*, 2012 WL 1682571 (Bankr. D. Mass. May 14, 2012).

i. Michigan. *See In re Wiczorek*, 2013 WL 1120019 (E.D. Mich. Mar. 17, 2013); *Boyd v. Engman*, 404 B.R. 467 (W.D. Mich. 2009); *In re Moss*, 320 B.R. 143 (Bankr. E.D. Mich. 2005).

j. New Mexico. *See In re First State Bancorporation*, 2014 WL 1203141 (Bankr. D.N.M. Mar. 24, 2014).

k. New York. *See In re Quigley Co., Inc*., 500 B.R. 347 (Bankr. S.D.N.Y. 2013); *In re CCT Commc'ns, Inc*., 2010 WL 3386947 (Bankr. S.D.N.Y. Aug. 24, 2010).

l. North Carolina. *See In re Downs & Assocs., Ltd.*, 2002 WL 32139302 (Bankr. W.D.N.C. Dec. 11, 2002).

m. Oklahoma. *See In re Millennium Multiple Emp'r Welfare Benefit Plan*, 470 B.R. 203 (Bankr. W.D. Okla. 2012).

n. Oregon. *See In re Smith*, 2008 WL 2852263 (Bankr. D. Or. July 23, 2008).

o. Pennsylvania. *See In re Bible Deliverance Evangelistic Church*, 39 B.R. 768 (Bankr. E.D. Pa. 1984).

p. Utah. *See In re Ricci Inv. Co., Inc*., 217 B.R. 901 (D. Utah 1998); *In re CF & I Fabricators of Utah, Inc*., 131 B.R. 474 (Bankr. D. Utah 1991).

q. Vermont. *See In re S.T.N. Enters. Inc.*, 70 B.R. 823 (Bankr. D. Vt. 1987).

r. Virginia. *See Goodbar v. Beskin*, 2013 WL 1249124 (W.D. Va. Mar. 26, 2013); *Nunley v. Jessee*, 92 B.R. 152 (W.D. Va. 1988).

s. Wisconsin. *See In re Hutter Constr. Co.*, 126 B.R. 1005 (Bankr. E.D. Wis. 1991).

4. Simply stated, it is historically common, and expected, in this industry for all bankruptcy professionals, *including attorneys*, to receive reasonable fees for matters related to successfully litigating an objection to a fee application. This established practice in the bankruptcy marketplace is still recognized by the United States Trustee's own fee guidelines, even after *ASARCO*. Section B(2)(g) of *Appendix B–Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330 for Attorneys in Larger Chapter 11 Cases* ("Appendix B"),[4] provides the following regarding fees for successful defense of fee applications:

> *Contesting or litigating fee objections:* Whether the fee application seeks compensation for time spent explaining or defending monthly invoices or fee applications that would normally not be compensable outside of bankruptcy. Most are not compensable because professionals typically do not charge clients for time spent explaining or defending a bill. The USTP's position is that awarding compensation for matters related to a fee application after its initial preparation is generally inappropriate, unless those activities fall within a judicial exception applicable within the district (***such as litigating an objection to the application where the applicant substantially prevails***). Thus, the United States Trustee may object to time spent explaining the fees, negotiating objections, and litigating contested fee matters that are properly characterized as work that is for the benefit of the professional and not the estate.

Appendix B § B(2)(g) (emphasis added).

5. Although *ASARCO* held that section 330(a) of the Bankruptcy Code does not authorize fees for successfully defending a fee application, the Supreme Court never considered whether a contract approved pursuant to section 328(a) of the Bankruptcy Code

[4] Attached hereto as Ex. 1.

would allow bankruptcy professionals to continue to receive these market terms. *See generally*, *Reply* ¶¶ 3, 12-13, 24. Furthermore, the Supreme Court never held that such terms are not "reasonable" as used in the Bankruptcy Code.[5] As the aforementioned cases demonstrate, such terms are a common market practice in bankruptcy.

6. Any absence of cases approving indemnification for attorneys under section 328(a) in the past is not indicative of such terms not being market. Rather, the lack of such indemnification terms stems from the fact that, in most jurisdictions, it was simply unnecessary for such terms to be included separately since attorneys obtained them in connection with their retentions and fee applications under sections 327(a) and 330(a).

7. Even though it was generally unnecessary to do so, prior to *ASARCO*, bankruptcy courts approved attorneys' engagement letters that allowed the recovery of fees for successfully defending fee applications or otherwise permitting the attorney to charge the estate for the costs of collecting its fees. *See, e.g.*, *In re Potter*, 377 B.R. 305, 308 (Bankr. D.N.M. 2007);[6] Order Authorizing Legal Representative for Future Claimants to Retain and Employ

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[5] Any reliance on *ASARCO* for the argument that it found fee shifting unreasonable is undermined by the majority opinion. *ASARCO*, 135 S. Ct. at 2167 n.3 ("The dissent's focus on reasonable compensation is therefore a red herring. [citation omitted.] The question is not whether an award for fee-defense work would be "reasonable," but whether such work is compensable in the first place."). The Supreme Court never made any findings or holdings concerning the reasonableness of reimbursements for fee-defense work; the Supreme Court simply found them not to be authorized by section 330(a).

[6] In *Potter*, the bankruptcy court approved the trustee's counsel's employment under section 328(a) with the following indemnification provision, over the objection of a creditor:

> *Reimbursement and Indemnity of Defense Attorney Fees and Costs*. The estate shall reimburse, indemnify, and hold the Firm harmless from and against all attorney fees and costs (whether for work performed by the Firm, to be compensated as set forth in paragraph 3, or incurred by the Firm to a third party law firm) incurred in defending against any actions

Stutzman, Bromberg, Esserman & Plifka, a Professional Corporation as Bankruptcy Counsel as of the Petition Date, *In re T H Agriculture & Nutrition, LLC*, No. 08-14692 (REG) (Bankr. S.D.N.Y. Dec. 18, 2008), D.I. 151 (approving an application [D.I. 22] that provides indemnification for the attorneys of the future claimants' representative);[7] Order Authorizing Employment and Retention of Arent Fox PLLC as Counsel for the Debtors, *240 Church Street Operating Company II, LLC*, No. 04-14388 (RDD) (Bankr. S.D.N.Y. July 30, 2004), D.I. 62 (approving a retention application with an engagement agreement [D.I. 2] that provides "the Client also will be responsible for the collection costs, including reasonable attorneys' fees.").[8]

8. This established practice is not surprising because a very similar provision is commonly found in engagement letters outside of bankruptcy—permitting an attorney to charge its client with the reasonable costs of collection in any fee dispute in which the attorney is the prevailing party. This term of an attorney's engagement letter has been endorsed in jurisdictions around the country, including:[9]

> brought against the Firm by any third party in connection with the Firm's performance of its work set forth above, including appeals, if the Firm is the substantially prevailing party in such action(s).

Potter, 377 B.R. at 306-8 (emphasis in original). The court found it reasonable because, among other things, the provision was limited to third parties and that the law firm needed to be the "substantially prevailing party." *Id*. at 308. The court in *Potter* additionally notes that another attorney in the bankruptcy case was retained with a similar provision. *Id*. Although the court did mention retaining the right to review any resulting fees under section 330, *id*., such review is no different than that commonly employed with the standard indemnification provisions received by financial advisors and investment bankers, including Lazard in these bankruptcy cases, *Lazard Order* ¶ 8 (allowing the U.S. Trustee to challenge any and all fees under a section 330 reasonableness standard).

7 Attached hereto as Ex. 2.

8 Attached hereto as Ex. 3.

9 *See also* American College of Trust and Estate Counsel Foundation, *Engagement Letters A Guide for Practitioners* at 22, 32, 40, 48, 56, 74, 82, 89, 97 (2d Ed. 2007) (providing

a. California. *Calvo Fisher & Jacob LLP v. Lujan*, 184 Cal. Rptr. 3d 225 (Cal. Ct. App. 2015); *Lockton v. O'Rourke*, 109 Cal. Rptr. 392 (Cal. Ct. App. 2010).

b. Delaware. *Opinion 2009-2 of the Delaware State Bar Association Committee on Professional Ethics* ("The Committee sees no legal impediment to a fee shifting provision in an engagement or retainer letter. Further, the Committee is of the opinion that there is no professional ethical impediment to a valid fee shifting provision in the client agreement.") at 4.[10]

c. District of Columbia. *Opinion 310 of the District Of Columbia's Bar Legal Ethics Committee*, http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion310.cfin (permitting engagement letters with costs of collection provisions).[11]

d. Florida. *See Carey Rodriguez Greenberg & Paul, LLP v. Arminak*, 583 F. Supp. 2d 1288 (S.D. Fla. 2008); *Gossett & Gossett, PA v. Mervolion*, 941 So. 2d 1207 (Fla. Dist. Ct. App. 2006); *Berryer v. Hertz*, 522 So. 2d 510 (Fla. Dist. Ct. App. 1988).

e. Georgia. *See Burds v. Hipes*, 763 S.E.2d 887 (Ga. Ct. App. 2014).

f. Illinois. *Timothy Whelan Law Associates, Ltd. v. Kruppe*, 947 N.E.2d 366, 370 (Ill. App. Ct. 2011).

g. Michigan. *Payne Broder & Fossee, P.C., v. Shefman*, 2014 WL 3612699 (Mich. Ct. App. July 22, 2014).

h. New York. Order Authorizing Employment and Retention of Arent Fox PLLC as Counsel for the Debtors, *240 Church Street Operating Co. II, LLC*, No. 04-14388 (RDD) (Bankr. S.D.N.Y. July 30, 2004), D.I. 62, *supra*.

i. Tennessee. *King & Ballow v. MaineToday Media, Inc.*, 2012 WL 4192522 (M.D. Tenn. Sept. 19, 2012).

j. Virginia. *Virginia Legal Ethics Opinion No. 1667* (permits engagement letters with costs of collection provisions).[12]

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various suggested form engagement letters that provide for the client bearing the costs of collections).

[10] Attached hereto as Ex. 4.

[11] Attached hereto as Ex. 5.

[12] Attached hereto as Ex. 6.

k. Washington. *Leen v. Demopolis*, 815 P.2d 269, 276 (Wash. Ct. App. 1991).

9. The market practices listed above, when analyzed under the applicable factors set forth in Judge Carey's decision in *In re Insilco Technologies, Inc.*, weigh in favor of finding the Fee Defense Provisions reasonable under section 328(a) because, among other things: (a) receiving fees and costs for prevailing in a fee dispute reflects the normal and historic business terms in the marketplace (both inside and outside of bankruptcy); (b) the Committee and the Firms are sophisticated business entities with equal bargaining power who engaged in arm's length negotiations; and (c) the retention is in the best interest of the estate because it will allow for "reasonable compensation for professionals," *Worldwide Direct*, 334 B.R. at 112. *See In re Insilco Technologies, Inc.*, 291 B.R. 628, 634 (Bankr. D. Del. 2003) (listing various factors used to determine the reasonableness of a term or condition to be approved under section 328(a)).

10. Thus, the proposed Fee Defense Provisions are reasonable and market-based. For the purposes of section 328(a) of the Bankruptcy Code, the Fee Defense Provisions are analogous to the indemnification provisions routinely approved by this Court and others around the country and are the equivalent of the standard "costs of collection" terms found in engagement letters throughout the county outside of bankruptcy. The Supreme Court's majority opinion in *ASARCO* only dealt with the proper interpretation of section 330 of the Bankruptcy Code and did not make any broad policy pronouncement about the American Rule and the Bankruptcy Code or otherwise alter the application of section 328(a). For all of the reasons set forth herein, the Reply, and as stated at the hearing, the Objection should be overruled and the Applications, with the Fee Defense Provisions, should be approved.

Dated: August 17, 2015
Wilmington, Delaware

MORRIS NICHOLS ARSHT & TUNNELL LLP

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